CA on appeal from Commercial Court (Mr Justice Tuckey) before Evans LJ; Henry LJ; Chadwick LJ. 24th July 1998.

LORD JUSTICE EVANS:

1. Between August 1992 and early January 1993 the m.v. Nour carried a part cargo of Peruvian fishmeal by a circuitous route from Callao in Peru to Kaohsiung in Taiwan and discharged it there. The direct voyage would have taken about two months. In fact, the vessel deviated some 1500 miles southwards to load further part cargoes of fish meal at two Chilean ports for discharge at Surabaya, Jakarta and Bangkok. She discharged these other cargoes first, and finally the Peruvian fishmeal at Kaohsiung where she arrived on 26 November. The total length of the voyage was more than 14000 miles, against some 9000 by the direct route.

2. Signs of overheating and fires in parts of the Peruvian fishmeal first became apparent at the second discharge port, Jakarta, almost exactly two months after shipment. From then until final discharge was completed at Kaohsiung on 2 January 1993 there were continuous problems with heating and fires in parts of this cargo. These were contained by battening down the cargo spaces, injecting CO2 and flooding the tank tops. Inevitably, there was damage to the cargo and delay in completing its discharge. The cause of the damage and delay is in issue.

3. The cargo receivers arrested the vessel on 9 December and proceedings in which the shipowners are defendants are pending in Taiwan.

4. In this action, the plaintiffs, Islamic Investment Company 1 S.A., are the shipowners, the defendants Transorient Shipping Ltd were time-charterers for the period of the voyage in question, and Alfred C. Toepfer International gmbh, who were voyage sub-charterers under a charter on Gencon form dated 7 July 1992, are the third party. I shall call them the shipowners, time-charterers and charterers respectively. The shipowners claim hire under the time-charter or an indemnity from the time-charterers in respect of the period during which the vessel was delayed by these cargo problems. The time-charterers claim damages from the charterers for breach of the voyage sub-charter, sufficient to indemnify them against their liability to the shipowners under the time-charter. There are also claims for declarations in respect of the shipowners' exposure to claims by the Taiwanese Receivers in the pending court proceedings there.

5. The learned judge Mr Justice Tuckey after a full trial of these issues in the Commercial Court in 1996 held that the cargo of Peruvian fishmeal as shipped did not conform with the charterers' obligations under the voyage sub-charterparty and that the time-charterers are entitled to recover the damages which they claim for the consequences of that breach. He also held that there was a breach of the voyage sub-charterparty, for which the time-charterers as disponent owners were liable to the charterers, by reason of the vessel's deviation from the contractual route which extended the period of the voyage by about one month. But he also held that a total of three months was no longer than the voyage might have taken if the time-charterers as disponent owners had made permitted use of the liberty to deviate, for example by loading and discharging other part-cargoes at other ports which were on or near the direct route.

6. The charterers now appeal, ably represented by Mr David Mildon. Through him they accept the judges's finding that the Peruvian fishmeal which they shipped did not comply with their obligations under the voyage charterer, but they challenge his finding that their breach caused the over-heating of the cargo and the consequent damages and delay. They say that the same losses would have occurred, even if goods had been shipped in accordance with their contractual obligations. The central issue, therefore, is whether fishmeal which complied with the contractual description would have survived a voyage, which was itself within the scope of the voyage sub-charterparty, without suffering the kind of damage which in fact occurred. Mr Mildon submits that there was no evidence to justify the judge's conclusion that all of the cargo heating was attributable to the charterers' breach.

7. Although discharge was completed on 2 January 1993, it was not until 9 January that the arrest was lifted and the vessel became free to sail. The time-charter was for the period of the trip, rather than for a fixed period of time, and so the time-charterers had no further involvement with the vessel when the voyage was complete. They withheld hire for the period by which the voyage was extended by reason of the problems with the Peruvian cargo, and there is a subsidiary issue as to whether or not the vessel was then off-hire under the time-charter.

8. A further subsidiary issue is whether the seven days from 2 January until 9 January, during which the vessel remained under arrest although discharge was complete, was caused not by the problems with the cargo but by the shipowners' unreasonable delay in negotiating the terms for her release.

Facts

9. These were expressed clearly and economically by the judge and they can be summarised here. About 2000 tonnes of Peruvian fishmeal was loaded in the five lower holds of the vessel, a total of about 40,000 bags. Seven bills of lading were issued and the relevant pre-shipment survey reports and quality certificate were attached. The cargo was over-stowed by the Chilean cargo in each of the five holds. Temperature-measuring instruments called thermo-couples were installed in the Chilean cargo, but not in the Peruvian. The vessel called first at Surabaya and then at Jakarta where she arrived on 8 October. Early on 10 October the second mate noticed smoke coming from an air vent to hold no. 4. As soon as cargo discharge from the 'tween deck was completed, the hatch was battened down and CO2 was injected into the cargo in that hold. After calling at Singapore for bunkers, the vessel arrived at Bangkok on 24 January. Further trouble was experienced with the cargo in no. 4 hold and more CO2 was injected. On 29 October smoke was seen coming from hatch 2 starboard ventilator. The hatches were closed and CO2 was injected there. It is possible that the CO2 spread to hold no. 3. Hold no. 2 was flooded also, on the instructions of owner's superintendent, and when the vessel sailed from Bangkok all the holds

were sealed and injected with CO2. Holds 3 and 5 were flooded also. Discharge at Kaohsiung was prolonged by further difficulties with fire and heating damage found in the Peruvian cargo in four of the five holds, excluding hold 1, and by damage to the Chilean cargo caused not by self-heating but by the Peruvian cargo below it.

10. Under the heading "Fishmeal" the judge said this :-

"Peru and Chile are the largest producers of fishmeal. Toepfer are one of the biggest traders of fishmeal. To make the meal whole fish (usually sardines or anchovies) are cooked, pressed, dried and then milled. In this form there is a residual amount of highly unsaturated fat in the meal, which means that its molecules will react easily with the oxygen readily available in the atmosphere. Oxidation produces heat. Fish meal is a poor conductor of heat, so heat produced within a bag or stow is not dissipated.

An anti-oxidant .... suppresses oxidation, but, in the process, is used up. It is added in the last stage of production of the meal. To be effective it has to be properly mixed throughout the meal."

11. He then referred to evidence regarding the production processes including anti-oxidant treatment. He inferred from this evidence that when the cargo in this case was produced, methods of production and particularly the application of anti-oxidant still left a lot to be desired. The particular problem was that widely fluctuating levels of anti-oxidant were found which were attributed to the relatively unsophisticated way in which it was added to the meal.

12. It was common ground that the anti-oxidant is used up at an higher rate during the days immediately after production than during the following period. It was also accepted that the rate increases with temperature, perhaps to the extent that the rate at which the anti-oxidant depletes doubles with each 10° Centigrade rise in the temperature of the meal.

13. The quantities of anti-oxidant contained in the cargo were established by the Certificates attached to the bills of lading. They ranged from 102 ppm and 119 ppm. These quantities were accepted as average figures, but there was disagreement as to what the lowest figure for individual bags might be. The rate of depletion thereafter, and therefore the length of time for which some anti-oxidant would remain, was in dispute.

The voyage charterparty

14. The causation issue raised by the charterer's appeal is essentially a question of fact. The following clauses of the voyage charter dated Santiago, Chile, 7th July 1992 are relevant to it : -

"(Box)

10. Loading port or place

One safe berth Callao, Peru.

11. Discharging port or place

One safe berth Kaohsiung

12. Cargo 2000 metric tons, 5 per cent more or less, in Owners' option, bagged antioxidant treated fishmeal, as part cargo."

(Clause)

3. Deviation Clause

The vessel has liberty to call at any port or ports in any order, for any purpose, ...

18. DESCRIPTION OF VESSEL

M/V NOUR .....

15,088 metric tons deadweight ...

Smoke alarm and CO2 systems in holds

5 holds/5 hatches

27. IMO REGULATIONS

Owners guarantee vessel is CO2 fitted and in all respects suitable for the carriage of bagged Fishmeal, fishmeal must be shipped under deck and be loaded/stowed/discharged according to IMO and local regulations."

IMO Regulations

15. The relevant regulations are found in the International Maritime dangerous Goods Code (IMDG Code)(1992 edition). These, as the Foreword explains, are recommended to governments for adoption or for use as the basis for national regulations in pursuance of their obligations under SOLAS. The Foreword continues :-

"Observance of the Code harmonises the practices and procedures followed in the carriage of dangerous goods by sea ... The Code has undergone many changes, both in layout and content, in order to keep pace with the expansion and progress of industry .... The Organisation [is able] to respond promptly to transportation developments."

The general Introduction states "Transport by sea of dangerous goods is regulated in order reasonably to prevent injury to persons, or damage to the ship". Mr Mildon makes the point that there is no reference here to the risks of damage to other goods, or to the goods themselves.

"Clause 9 - Miscellaneous dangerous substances" includes an express listing of Fishmeal, which states inter alia : -

"Properties ...

Liable to heat spontaneously unless of low fat content or effectively anti-oxidant treated.

Observations

(a) Stabilization of fishmeal should be achieved to prevent spontaneous combustion : by effective application of between 400 and 1000 mg/kg. (ppm) ethoxyquin.... at time of production .... no longer than twelve months before shipment. Anti-oxidant remnant concentration should be not less than 100 mg/km (ppm) at time of shipment.

(b) Certificate from a recognised authority should state : ...

- *anti-oxidant concentration at time of shipment which must exceed 100 mg/kg (ppm)*

(c)

(d) At the time of lading, the temperature of the cargo should not exceed 35°C, or 5°C above ambient temperature, whichever is the higher

(e) Temperature readings .... during the voyage ....

(f) If the temperature of the cargo exceeds 55°C and continues to increase, ventilation to the hold should be restricted. If self-heating continues, then carbon dioxide or inert gas should be introduced."

Trial and judgment

16. The trial took place and judgment was given on the basis that these provisions of the IMDG Code represented the parties' obligations as shipper and carrier respectively. The principal issue raised by the charterers was that their cargo was not properly stowed and cared for during the voyage. Originally they said that the fishmeal was under-ventilated, but by amendment before trial they alleged that too much ventilation was permitted, both by leaving spaces in the stow and by ventilation which took place during the voyage. This case was supported by their expert witness, Dr Ayerst, who said that the fishmeal overheated because moist air at ambient temperatures was allowed access to it. This contention was decisively rejected by the judge, who preferred the evidence of the time charterers' and the shipowners' expert witnesses, principally Dr Kirman. He found that "the cause of its self-heating was inadequate treatment of the Peruvian fishmeal with anti-oxidant. It had not been effectively treated with anti-oxidant and, specifically, at the time of shipment, significant quantities of fishmeal did not have an anti-oxidant concentration of 100 ppm [as required by the IMO regulations], but something less than this."

17. One factor which influenced the judge was the random nature and comparatively limited extent of overheating and combustion within the stows. In my view. this finding of breach by the charterers, which is not challenged on appeal, was of the obligation to ship goods which complied with the IMO Regulations. The relevant parts of the regulations could properly be regarded as or as equivalent to express terms of the charter.

Causation

18. The judge continued :- "*This inadequate ant-oxidant treatment was the sole cause of the self heating of the cargo ; ventilation and deviation did not cause or contribute to the problem.*"

19. The charterers appeal against this finding, not by reference to the judge's rejection of ventilation and deviation as further or alternative causes, which rejection they accept, but because his finding necessarily implies, they submit, that fishmeal which complied with the IMO regulations would not have overheated as this cargo did. The proper enquiry, therefore, is whether fishmeal with a remaining concentration of anti-oxidant of 100 ppm at the time of shipment would have over-heated or caught fire in the course of a voyage performed in accordance with the charter.

20. It is common ground that the figure of 100 ppm on shipment was the charterers' minimum obligation under the IMO Regulations and that their liability, if any, for the breach of contract which the judge found proved against them should be assessed against this figure. It should be noted, however, that the variable nature of the concentration throughout the stow and even in individual bags means that the average figure would have to be considerably greater than 100 pm if that was the minimum. The judge held, correctly in my view, that the regulations require the whole of the cargo to exceed the minimum, and he found that there was a breach because some relatively small quantities in different parts of the stow were below 100 p.p.m. at shipment. The charterers now accept that meaning of the regulations.

21. The question whether fishmeal with a minimum remaining 100 p.p.m. of anti-oxidant would have over-heated during the voyage which the vessel was to perform under this charterparty cannot be answered without specifying what the period of such a voyage would be. The actual voyage took four months, but that was extended by the overheating problem itself. The judge found that without that problem the voyage, including the wrongful deviation, would have been completed in about three months, and that a voyage lasting that long could be permitted by the liberty to deviate given by clause 3. Mr Mildon did not seek to challenge those findings and his submissions were made to us on the basis that the relevant period was three months.

22. So the issue became, was the judge entitled to find, as he did inferentially if not expressly, that fishmeal loaded at 100 ppm would not have overheated in the course of a voyage of that length. This assumes that the cargo was properly treated as, in the light of the judge's findings as to ventilation, this cargo was.

23. The judges conclusion was :-

"Toepfer's case is that the rate of depletion is approximately 60 ppm a month at 20°C. So, if the cargo had complied with the contract, it would have been at risk within two months. The fact that the temperatures on the voyage were more than 20°C cancels out any uncertainty there may be about the 60 ppm per month figure. This figure is based on some research done in Chile in 1987 and summarised in a graph.

Whilst Dr Kirman and Mr Southeard accepted this figure as a bench mark, they said that too mathematical an approach to the question was dangerous.

I agree. It seems to me that if Toepfer are right, the IMO Regulations are hopelessly wrong and almost every cargo on a trans-Pacific voyage would be at risk. The evidence of Dr Kirman was that a cargo of properly anti-oxidant treated fishmeal with a minimum concentration of 100 ppm at the time of shipment would transport satisfactorily on a voyage of 3 to 4 months. Mr Boffey had experience of such cargoes not self-heating on voyages in excess of 3 months. I accept Dr Kirman and Mr Boffey's evidence about this, which was not really disputed by Dr Ayerst, whose explanation for what happened depended upon his views about ventilation, of which, more soon."

24. Mr Mildon submits, first, that the burden of proof on this issue rests on the time-charterers as claimants, and secondly, that there was no evidence or insufficient evidence to support the judge's finding that a cargo with a minimum of 100 ppm on shipment would not over-heat in the course of a 3-month voyage, or even longer.

25. As regards the burden of proof, we were referred to ***A/S Rendal v. Arcos Ltd*** (1937) 58 Ll. L.R. 287 where the plaintiffs' vessel was damaged by ice as the result of the charterer's failure to provide ice-breaker assistance. The defendants alleged that the same damage would have been sustained by the ship even if they had provided ice-breaker assistance. The House of Lords held that the burden of proving this allegation rested on the defendants. In ***Davis v. Garrett*** 6 Bing. 716 Tindal C.J. laid down a general principle :-

"But we think the real answer to the objection, is that no wrongdoer can be allowed to apportion or qualify his own wrong ; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done."

26. It was held, in the words of Lord Wright, that the *"Defendant must show (if he can) that there must have been the same damage if the contract had not been broken"* (p.298). Mr Hamblen Q.C. relies upon this authority and submits that the charterers must prove that the same damage would have occurred if fishmeal conforming to the IMO Regulations had been shipped.

27. Mr Mildon, on the other hand, relies upon the judgments of Mocatta J. in ***Government of Ceylon v. Chandris*** [1965] 2 Lloyd's Rep. 204 and Steyn J. in ***The Panaghia Tinnou*** [1986] 2 Lloyd's Rep. 586. In those cases, the claimant was himself in breach of contract, as well as the defendant, and the evidence was such that "*part of the damage is shown to be due to a breach of contract by the claimants*" (per Mocatta J. at 216, quoted by Steyn J. at 592). In those circumstances, "*the claimant must show how much of the damage was caused otherwise than by his breach of contract, failing which he can recover nominal damages only*" (ibid.). Underlying these judgments, in my view, are the two propositions that the claimant must prove his loss and that where the loss has been caused in whole or in part by his own breach of contract as well as by the defendant's breach then he must prove for how much defendant was responsible. In the present case, therefore, Mr Mildon submits that the burden remains with the time-charterers of proving that fishmeal shipped in accordance with the charterers' minimum obligation, conforming with the IMO Regulations, would not have suffered damage from over-heating in the course of 3-month voyage.

28. I do not find it necessary to resolve this question of law in the present case. It arose in the two cases cited above because there were findings of fact by arbitrators which made it necessary to decide where the burden of proof lay. That is not the situation where the same tribunal is concerned with issues of fact as well as law. Then the question where the burden of proof lies is subsidiary to the relevant issue of fact. The burden of proof only becomes relevant if there is no evidence to justify a particular finding or if the decision maker finds the evidence evenly balanced and so cannot make a finding without establishing where the burden lies. Here, the judge has found that fishmeal complying with the IMO Regulations would not have suffered over-heating damage in the course of the relevant voyage. Mr Mildon attacks that finding on the ground that there was no evidence to support it. If that was the case, then the finding cannot stand. If there was evidence which justifies it, then the attack fails.

29. I come therefore to the central issue raised by the appeal. The judge referred, in the passage already quoted, to the IMO Regulations themselves ; to the evidence of Dr Kirman and Mr Boffey ; and to Dr Ayerst's apparent acceptance of their evidence on this topic. Mr Mildon takes each of these in turn and submits that none of them, on analysis, provides a sufficient basis for the judge's finding.

30. The first submission is that the IMO Regulations are not relevant to the question whether a fishmeal cargo can be carried to its destination without suffering damage itself or causing damage to other cargo. The stated objective, Mr Mildon submits, is to prevent injury to persons or damage to the ship. He says that the regulations provide a code which contemplates that over-heating may occur in the course of the voyage which the vessel's crew will be able to contain by the introduction as necessary of carbon dioxide or inert gas. No question therefore arises of risk to the ship or to the crew or any other person. Therefore, compliance with the regulations cannot be regarded as a form of undertaking that no over-heating will occur.

31. The breadth of this submission is somewhat surprising, more particularly when the need for regulation of this *"dangerous"* cargo arises from the fact that over-heating, if uncontrolled, will lead to combustion, fire and potential hazards to the safety of ship and crew. But in my view there is a short answer to the submission in the present case. The effect of clause 27, it seems to me, is to make compliance with the regulations a contractual undertaking, not necessarily limited to the reasons why the regulations were adopted by the IMO. By incorporating the regulations in their contract, the parties undertake to comply with certain requirements as to the shipment and handling of the goods.

32. In my judgment, the regulations are relevant to the factual issue which arises here. They are manifestly based on the accumulated experience of those involved in the relevant trades, and they are kept-up-to-date. The objection is raised that the regulations cannot be regarded as appropriate for all shipments and for all voyages, regardless of their circumstances and their estimated lengths. However, it seems to me that this objection also is answered by the fact that the parties to this charter agreed that the regulations should apply to this voyage. It was for them to say whether or not they were prepared to accept these requirements as applicable to the voyage which was required and permitted by the charterparty terms. Therefore, I would hold that the regulations themselves are some evidence, though of limited weight, that cargo which complied with the regulations was suitable for shipment and safe trouble-free carriage during this voyage. This is the corollary of the judge's suggestion that, if the charterers are right, then the regulations are "*hopelessly wrong*" and "*almost every cargo on a trans Pacific voyage would be at risk*".

33. Dr Kirman did express the opinion which the judge attributed to him. His Report includes "*It can be deduced that if, as per the recommendations in the schedule in the IMDG, all of the Peruvian meal at the time of loading had anti-oxidant concentrations of at least 100 ppm then it should have transported/stored satisfactorily for a minimum period of about 3 months and possibly substantially longer from the time when it was loaded*". He perhaps qualified this a few pages later in his Report by saying "*It seems reasonable to suppose that the ship would then have arrived at Kaohsiung and discharged all of the Peruvian cargo before any serious heating problems developed".* Mr Mildon submits that Dr Kirman may have been drawing a distinction between some over-heating, which might occur, "*and more serious"* heating from which problems could arise. However, his main attack on the judge's reliance upon this evidence is that it was effectively destroyed by certain answers which Dr Kirman gave in cross-examination.

34. He has a considerable experience as a scientist and expert witness and some practical experience of the fishmeal trade both in Chile and Peru. That was during the 1980's when persistent claims experience led to P. & I Club investigations being carried out there, with which Dr Kirman was familiar and in which he was involved. In cross-examination he was asked about a graph relating to Chilean fishmeal to which the judge referred. The graph shows readings which decline from 700 to about 400 ppm over a five-month period. This is more-or-less a straight-line depletion and so a monthly average of 60 ppm can be deduced from it. Dr Kirman was prepared to accept this, but he had had no knowledge of the experiments upon which it was based and the absolute figures are substantially different from those required by the IMO Regulations (400 ppm or more on production, 100 ppm or more on shipment). There was also evidence that Peruvian fishmeal declined very rapidly during a short period after production, which was not immediately consistent with the straight-line depletion shown by the graph. He was asked to agree that if the depletion rate was 60 ppm per month, then a cargo which contained no more than 100 ppm on shipment would be depleted to zero within less than two months and therefore would be at risk of over-heating for the whole of the last month of a 3-month voyage. When asked this question, Dr Kirman replied "*Under the premise that you have put to me, certainly, if you take these figures literally. 100 I think would be ....",* and he agreed that the cover would be "*pretty marginal .... come the end of two months*". A little later he was asked "if you take that bench mark, after two months there is no anti-oxidant left?" and he replied "Yes, but if you did that in this case .... " and he went on to talk of the difference with Chile and Peru.

35. In my judgment, nowhere in his evidence did Dr Kirman even come close to modifying, let alone changing, the opinion which he expressed in his Report. The fact that he accepted the 60 ppm figure as shown on the graph for Chilean fishmeal was not enough for the charterers' purpose. He had also to accept that it applied also to Peruvian fishmeal shipped with a content of 100 ppm. He did not accept this, and even if he accepted the figure as a bench mark, as the judge accepted that he did, it was not in relation to the particular cargo that was shipped on this voyage. As the judge found, he did not accept that there should be a mathematical approach.

36. I would go further, because it seems to me from another passage in his Report that Dr Kirman did not provide any scientific or technical basis for the view which he expressed, that fishmeal recording 100 ppm on shipment would survive a 3-month voyage. In the passage leading up to his conclusion, which I have quoted above, after referring to the high degree of variability about an average figure, he said this :-

"In my view, on the basis of my earlier comments .... , the anti-oxidant concentration in some bags of the Chancay cargo at the time of loading is likely to have been as likely as 70 ppm and indeed possibly less than this figure. It is also likely that the cargo which produced the first manifestations of serious heating about two months after loading was the cargo with the lowest residual anti-oxidant concentration at the time of loading".

37. The premise appears to be that cargo which developed serious over-heating after about two months is likely to have been as low as 70 ppm or possibly less at the time of shipment. This implies a monthly depletion rate of 35 ppm which is consistent with depletion to zero after about three months. But he nowhere seeks to justify the 35 ppm per month figure. It certainly is not based on any scientific experiment or calculation, so far as the evidence shows. I would be prepared to accept, therefore, that his conclusion is based, not upon his expert opinion but rather upon his knowledge derived from practical experience, which is to the effect that a 100 ppm cargo is likely to be satisfactory for the duration of a 3-month voyage. On analysis, therefore, I would hold that Dr Kirman's evidence on this point has some, but again limited, weight as evidence to that effect. It is not, strictly, opinion evidence given by him in his capacity as an expert witness.

38. This leads to the next witness referred to by the judge, Mr Boffey. He is immensely experienced both as a ship's officer and as a surveyor, now based in Hong Kong. His statement shows that he has long personal knowledge of fishmeal cargoes.

39. The statement was put in evidence under the Civil Evidence Act 1968 with the result that he was not available for cross-examination. Nevertheless, his statement contains clear and unqualified expressions of opinion, including the following :-

"I also believe that for such fishmeal an anti-oxidant remnant at the time of shipment of not less than 100 ppm is adequate, having been involved in cargoes which had an anti-oxidant remnant at the time of shipment of just over 100 ppm and which did not self-heat on voyages well in excess of three months".

40. Mr Mildon submitted that there was no clear evidence from his statement that cargoes which proved satisfactory on such voyages did not have a content of more than 100 ppm on shipment, but I must disagree, having regard in particular to the passage quoted above. Here, therefore, was direct support for the judge's view, although again of lesser weight than if the witness had been called for cross-examination.

41. Finally, there is the judge's reference to Dr Ayerst, the charterers' expert witness, having "*not really disputed*" this evidence. Mr Mildon submits, first, that the judge was wrong to place any weight on Dr Ayerst's views, having regard to his wholesale rejection of the case on ventilation which Dr Ayerst supported. Secondly, that Dr Ayerst did not accept the views as being accurate ; rather, he was prepared to accept them for the purposes of answering certain questions that he was asked in cross-examination. Without referring to the passages in any detail, it seems to me that Dr Ayerst went further than that, but only to the extent of indicating that he, as a scientist, was not prepared to differ from them. Since the basis of Dr Kirman's evidence, as I read it, was practical rather than scientific, I would not regard Dr Ayerst's evidence as having added more than a general endorsement, from a scientific point of view, based on his expert knowledge as a chemist and his practical experience of bulk cargoes generally. But to that very limited extent the judge was entitled to place some reliance upon it, notwithstanding his rejection of the same witness' evidence as regards ventilation.

42. For these reasons, it seems to me that Mr Mildon's submission that there was no evidence which justified the Judge's conclusion must fail. He referred to other evidence, including publications known as the Fishmeal Handbook and the Lloyd's Survey Handbook. These in my view give further support to the general proposition that in the trade in question, carrying Peruvian fishmeal on voyages of up to three month's duration, the figure of 100 ppm minimum given in the IMO Regulations is regarded as likely to prove sufficient for safe carriage, meaning that no "*serious*" problems or spontaneous combustion are expected to occur. They therefore give some additional support to the judge's finding.

43. For these reasons, I would hold that the charterers' appeal against the finding that their breach of contract was causative of the loss claimed by the time-charterers must fail. This makes it unnecessary to consider the time-charterers' contention, raised for the first time in the Amended Respondents' Notice, that there was in any event an implied obligation that the charterers would ship a cargo which was fit for carriage on a voyage lasting three months or more. Mr Hamblen submitted that such an obligation arises from the general principles discussed in ***Scrutton*** (20th ed.) Art. 53 p.105 and that the implication is not excluded by clause 27, which expressly incorporates the IMO Regulations. My provisional view is that, whilst the implied obligation may not be wholly excluded, nevertheless when the parties have expressly agreed to incorporate the IMO Regulations, then to the extent that the regulations impose precise obligations, for example with regard to anti-oxidant content and temperature at the time of shipment, thereby adopting them expressly for the purposes of the particular voyage, then it would be uncommercial and unsatisfactory if some other and different figures were held to be implied as a matter of law. However, I do not express this as a final view.

Arrest

44. The issue here is whether the charterers prove their allegation that there was unreasonable delay by the shipowners and their representatives, for which the time-charterers are responsible in relation to their damages claim under the voyage charter, in obtaining the release of the vessel from arrest. The judge held that the allegation was not proved. He said :-

"Toepfer say that no explanation had been given for the apparent failure to do anything to obtain the vessel's release following her arrest on 9 December, until early January 1993. Had they acted more promptly it could have been released by 2 January when cargo operations were completed.

I am not persuaded that this is the case. It is for Toepfer to establish that Trans Orient Owners acted unreasonably. the mere fact that the arrest was not lifted for a month with the Christmas and New Year period intervening, does not, in my judgment, establish a failure to mitigate."

45. Before us, Mr Mildon for the charterers does not rely merely on the fact that the arrest was not lifted until one month after it was imposed. We were referred by him and by Mr Priday, counsel for the shipowners, to correspondence which took place between Richard Butler's Hong Kong office, acting for the shipowners, and the Taiwanese lawyers instructed by them, and with those acting for the cargo interests. Richards Butler were already involved on 9 December, the date of the arrest. According to the shipowners' Taiwanese lawyers, on 14 December "*After negotiation, the cargo interest's lawyer verbally agreed with us to accept the letter of Undertaking issued by the owners' P. & I. Club*". A copy of the letter of Undertaking was not sent by Richards Butler from Hong Kong until 24 December. The negotiations which followed were interrupted by the Christmas and New Year and possibly by other public holidays, and it was not until 7 January that the wording was agreed. The arrest was lifted two days later. There is no explanation from the shipowners or their representatives why there was a ten-day delay in sending the draft letter, which is in standard form, from Hong Kong to Taiwan. The inference from the actual conduct of negotiations thereafter, which effectively took place between 30 December and 7 January,

is that the objections raised could have been dealt with before rather than after Christmas and New Year if the draft had been sent forward promptly, on or after 14 December.

46. Mr Priday submits that the judge's conclusion should not be disturbed. However, I for my part find that the ten-day delay between 14 and 24 December, coupled with the lack of any explanation for it, is clear evidence of unreasonable delay in making arrangements for the vessel's release. Had the draft letter been sent forward promptly, it seems to me, that the arrest would have been lifted on or before 2 January when discharge was complete. The value of the claim was sufficiently established by the sale of the damaged cargo by private auction on 18 December. There was no other reason for delay. It is unnecessary to consider the veiled suggestion that the shipowners and time-charterers saw it as being in their commercial interests to delay the release. That suggestion is not supported by the evidence we have seen.

47. For these reasons, I would allow the appeal to the limited extent of holding that the time-charterers are not entitled to recover damages for detention or delay in respect of any period after 2 January.

Cross-appeal

48. The shipowners and the time-charterers appeal against the judge's refusal to make a declaration in their favour, to the effect that the time-charterers and the charterers, respectively, are liable to indemnify them against the shipowners' liability, if any is established, to the Taiwanese receivers in the proceedings which are pending there, and against their costs of defending those proceedings. The judge relied upon two authorities, ***Trans Trust SBRL v. Danubian Trading*** [1952] 2 Q.B. 297 (see pages 303 and 307) and ***Denny v. Gooda Walker Ltd. (No.2)*** [1996] L.R.L.R.176. In the former, the Court said that a declaration of liability should not be made where there might be questions, for example, as to whether reasonable steps had been taken in mitigation of damage, upon which the defendants were entitled to be heard. This was confirmed by Phillips J. in ***Denny v. Good Walker*** in the rather different situation where plaintiffs were seeking a present award of damages assessed on an actuarial basis in respect of future losses which had not then been incurred. Here, the judge held *"Whilst finality in litigation should be achieved wherever possible and prima facie, in view of my findings, Toepfer will have to pay any successful Taiwanese claims, there is considerable uncertainty surrounding these proceedings and so, I think it would be sensible simply to give liberty to apply in relation to further losses, if and when these accrue".* He therefore gave judgment for damages in favour of the time-charterers with liberty to apply in those terms. The situation as between the shipowner and the time-charterers is different, because they have a claim for time-charter hire or a contractual right to indemnity, and not for damages, but for the same reasons he did not grant the shipowners a declaration either.

49. As between time-charterers and the charterers, Mr Hamblen did not advance separate submissions from those made by Mr Priday on behalf of the shipowners. Mr Priday's submissions were directed to the situation as between the ship owners and the time-charterers and therefore they did not apply directly to the time-charterers' claim. His submission, in essence, was that a declaration should now be made in terms which would obviate the need for the parties to return to Court each time that the shipowners pay or become liable to pay either a Taiwanese judgment or further sums on account of costs. He submitted that the two authorities referred to were concerned with a different situation, where third party claims were hypothetical or speculative, unlike the situation here where proceedings are already pending against the shipowners. He recognises that there might have to be scope for the time-charterers/charterers respectively to raise issues with regard to mitigation or remoteness, should they wish to do so, but he said that that possibility was itself remote. He submitted that the shipowners could give an undertaking to take all reasonable steps to defend the claims against them, so as to remove the possible objection that, if a declaration of liability was granted, then they might have no further incentive to reduce or avoid a liability which they could pass on in full to the other parties.

50. Without going into further detail, it seems to me that the judge was clearly right to refuse a declaration to the time-charterers for the reasons which he gave. As regards the shipowners, he was also correct to refuse a declaration in the terms which they sought, but this is without prejudice to their right to have judgment entered for them in terms equivalent to the judgment for damages to be assessed which he made in favour of the time-charterers. The terms of that judgment might depend upon whether the shipowners' claim is for hire or for an indemnity. It was accepted by Mr Hamblen and by Mr Mildon that, if an indemnity, then it will be for an amount equivalent to hire. In these circumstances, the question whether the vessel was off-hire or not, upon which both counsel addressed us, is of no practical relevance, and I express no view upon it.

Conclusion

51. For these reasons, I would dismiss the charterers' appeal save with regard to the period in respect of which damages may be claimed against them for detention or delay of the vessel. The period in my judgment should expire at midnight on 2 January 1993. The shipowners' and the time-charterers' cross-appeals should be dismissed.

LORD JUSTICE HENRY: I agree.

LORD JUSTICE CHADWICK: I also agree.

ORDER: The appeal by the Third Party is allowed to the extent stated in the judgment, i.e. damages against them are slightly reduced. Otherwise the Third Party's appeal is dismissed. The cross-appeal by the defendants against the Third Party is dismissed. The appeals by the time-charterers and cross-appeal by the shipowners are dismissed, subject to the outstanding issue as to the off hire. That issue is to treated as remaining alive and the

court will hand down a supplementary judgment. Final order left over until supplemental judgment handed down. (Order not part of approved judgment)

Friday 31st July, 1998

LORD JUSTICE EVANS:

1. It was submitted to us, when our judgments were handed down on 24 July, that I was wrong to say, as I did, that the question whether the vessel was off-hire until the time of her actual re-delivery under the time-charter on 9 January 1993, was of no practical relevance.

2. We have also received letters from counsel for all three parties, concerning that question and also whether the vessel was detained by reason of her arrest, not from 2 January when discharge was complete but only from 5 January, until when, it seems, the work of cleaning the holds etc. continued, thus prolonging the delay caused by the loading of a non-contractual cargo.

3. I shall deal with the second matter first. We were addressed throughout on the basis that the relevant period of detention which could be attributed to the arrest rather than to the shipment of non-contractual cargo was from 2-9 January, and that was the period referred to in Mr Priday's skeleton argument on behalf of the shipowners (para.3). Mr Priday did refer to the alternative date, 5 January, in his oral submissions, but not so as to identify this as a separate sub-issue, He was primarily concerned with the time charterers' allegations against his clients, and the voyage charterers' against the time charterers, both of which were treated as relating to the seven day period. We have made findings of fact to the effect that the vessel was detained after 2 January, not by the cargo breaches but by the shipowners' failure to act reasonably to obtain her release from arrest. I do not think it would be right to change those findings now.

4. I return therefore to the question of off-hire. There is a claim for hire, until redelivery on 9 January, but this is not referred to separately in the judge's judgment. It may be impliedly referred to in the Order which he made, because that is for the recovery of a liquidated sum (though even this could be attributed to the indemnity claim). There is, however an appeal by the time-charterers against the award of hire.

5. Mr Priday submits that hire continued to be payable until actual re-delivery on 9 January, subject to express provision for off-hire, and that none of the off-hire exceptions in clauses 70 and 15 apply. Mr Hamblen Q.C. relies primarily on clause 70. :-
".... should the vessel be seized or detained or arrested or delayed under legal procedure caused by creditors related to owners and/or the vessel, all time lost thereby be treated as off-hire until time of her release....".

6. The factual situation as we have found it was that from 2 January she was no longer detained in consequence of having loaded non-contractual cargo, but by the owner's representatives' failure to act reasonably to obtain her release from arrest. Mr Priday's submission that the detention continued to be caused by the loading of the cargo or the employment of the vessel does not take account of this fact.

7. I would hold that this period clearly was time lost by reason of the arrest of the vessel "by *creditors related to the Owners and/or the vessel"*. The arrest was by cargo receivers who asserted bill of lading claims. It therefore was within the off-hire provisions of clause 70. This achieves what would appear to be, in any event, a commonsense outcome, depriving the shipowners of hire during a period when the ship was detained by their representatives' failure to act with reasonable despatch to obtain the vessel's release.

8. For these reasons, in my judgment, the claim for hire fails with the claims for damages or an indemnity. The distinction is not of any practical relevance. The claim is different, but the defence in the same.

LORD JUSTICE HENRY: I agree.

LORD JUSTICE CHADWICK: I agree.

MR D MILDEN and MR V FLYNN (Instructed by Middleton Potts, London EC1A 7LD) appeared on behalf of the Appellant/Third Party
MR C PRIDAY and MISS S HEALY (Instructed by Richards Butler, London EC3A 7EE) appeared on behalf of the 1st Respondent/Plaintiff
MR N HAMBLEN QC and MISS S MASTERS (Instructed by Holman Fenwick & Willan, London EC3N 3AL) appeared on behalf of the 2nd Respondent/Defendant