CA on appeal from Commercial Court (Mr Justice Cooke) before the MR; Longmore LJ; Lawrnece Collins LJ. 23rd May 2008

Lord Justice Longmore:

Introduction

1. Time charters for the carriage of specific cargoes (such as oils or other fuels) traditionally have clauses whereby shipowners undertake that the vessel will, at the time of delivery under the charter party, be fit to carry those products, that the vessel will be in every way fit for her service and have on board any necessary documents required to enable her to perform the charter service. There will then be an obligation that during the service the Owner will maintain the vessel in her contractual condition or restore the vessel to that condition. Sometimes there will be a further obligation that the vessel will comply with international conventions and regulations. This may be important as far as pollution conventions and regulations are concerned since the national and international community is becoming increasingly vigilant to prevent or minimize pollution from spillages of oil and other potentially polluting cargoes.

2. Since 1973 the Inter-Governmental Maritime Consultative Organisation ("IMCO" or, as it has been called since 1982, "IMO") has been concerned to minimise occurrences and consequences of pollution and, under its auspices, the Marine Pollution ("MARPOL") Convention has introduced internationally recognised regulations covering the prevention of pollution of the marine environment by ships. Before 1973 most ships were "single-skinned" or "single-hulled" and, in the event of collision or grounding, pollution from the content of ruptured tanks could easily occur. The parties to the MARPOL Convention have gradually been requiring improvements of the design of tanker vessels. The first improvement was that, as from 1973, segregated ballast tanks were required for new buildings of over 70,000 metric tons deadweight and the 1978 MARPOL Convention extended that to new buildings of over 20,000 metric tons. The next development was the requirement that segregated ballast tanks ("SBT's") should be fitted alongside the vessel in "wing tanks" while oil was carried in the central tanks of the vessel. These vessels were called double-sided vessels. The class description of these vessels was "SBT/PL" (Segregated Ballast Tanks/Protected Location). The final logical step was to require the cargo tanks to be completely protected not only at the sides of the vessel but also in relation to her bottom. These vessels are called "double-hulled" since they are effectively constructed as two hulls one inside the other. Amendments to the MARPOL Convention to secure this end were adopted in March 1992 and came into force in July 1993 by Regulation 13F of Annex 1 of the MARPOL Convention. They applied to new tankers delivered on or after 6th July 1996 and existing tankers were required to comply with Regulation 13F not later than 30 years after the vessel had been delivered by the builder to its original owner.

3. Some countries introduced these new regulations sooner than required by the Convention itself. Thus after the EXXON VALDEZ incident in Alaska, the United States promoted the use of double-hulled tankers in US waters by the Oil Pollution Act 1990. After 100 miles of Atlantic coastline had been polluted by the ERIKA in December 1999, the European Union decided that as from 21st October 2003 there should be an absolute bar on carriage of heavy grades of oil between EU ports and terminals on vessels that did not have a double hull as defined in regulations 13F, 13G and 13H of the MARPOL Convention, other than on certain ice-strengthened vessels. This was achieved by EU Regulation 417/2002 of 18th February 2002 as amended by EU Regulation 1726/2003. IMO likewise decided to accelerate the phasing-out of single hull tankers and by Annex 2 of MARPOL adopted "Amendments to Annex 1 of MARPOL 73/78" which contained a regulation (Regulation 13H) to that effect in December 2003, to come into force on 5th April 2005. This meant that only double-hulled vessels could carry fuel oil cargoes after that date. There were, however, exemptions from that regime contained in Regulation 13H(5), (6) and (7).

4. The charterparties at issue in the present case were made on 30th May 2003 (the "ELLI") and 10th August 2004 (the "FRIXOS"). The ELLI charter was originally for six months but extended to December 2004 and then, by Addendum No. 2 made on 10th August 2004, to 30th September 2006 plus 90 days in Charterers' option. On the same day the FRIXOS was fixed for two years plus 30 days in Charterers' option. Neither vessel was double-hulled; both vessels were treated by the parties as double-sided although that was not strictly accurate because two slop tanks (aft of the cargo tanks on each side of the vessels) were partly protected (to the extent of 2.6 meters of the vessels' overall length of just under 250 meters) not by ballast tanks but by bunker fuel tanks. These slop tanks sometimes carried cargo and were sometimes used to receive cargo residues before such residues were pumped ashore. To this small extent, therefore, the vessels were not strictly speaking, double-sided.

5. The critical question on this appeal is whether the fact that the vessels did not comply with the new provisions of the MARPOL Convention for double-hulled vessels means that the Owners were in breach of charter after 5th April 2005. That, of course depends on the terms of the charter parties, the relevant clauses of which are identical.

The Terms of the Charter

6. The charters were on the Shelltime 4 form and their essential terms were as follows:-

"1. At the date of delivery of the vessel under this charter

(a) ….

(b) She shall be in every way fit to carry crude and/or dirty petroleum products always within vessels natural segregation, excluding lubes/casingheads/cbfs

(c) She shall be tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment (including but not limited to hull stress calculator and radar) in a good and efficient state …

…

(g) she shall have on board all certificates, documents and equipment required from time to time by any applicable law to enable her to perform the charter service without delay

(h) she shall comply with the description in Form B appended hereto, provided however that if there is any conflict between the provisions of Form B and any other provision, including this Clause 1, of this charter such other provision shall govern …

3. (i) Throughout the charter service Owners shall, whenever the passage of time, wear and tear or any event (whether or not coming within Clause 27 hereof) requires steps to be taken to maintain or restore the conditions stipulated in Clauses 1 and 2(a), exercise due diligence so to maintain and restore the vessel.

…

(iii) If the Owners are in breach of their obligations under Clause 3(i) Charterers may so notify Owners in writing: and if, after the expiry of 30 days following the receipt by Owners of any such notice, Owners have failed to demonstrate to Charterers' reasonable satisfaction the exercise of due diligence as required in Clause 3(i), the vessel shall be off-hire, and no further hire payments shall be due, until Owners have so demonstrated that they are exercising such due diligence.

4. Owners agree to let and Charterers agree to hire the vessel for a period of 6 months …. commencing from the time and date of delivery of the vessel, for the purpose of carrying all lawful merchandise crude and/or dirty petroleum products including fuel oil, lswr, cbfs, condensate, etc, maximum three grades within vessels natural segregation. …. in any part of the world, as Charterers shall direct, subject to the limits of the current British Institute Warranties limits and any subsequent amendments thereof.

…

39. Owners warrant they are members of ITOPF.

SPECIAL PROVISIONS:

1. LOA: 229.732 M
SLOPS: 3465 CBM
DOUBLE SIDE: YES
SBT: YES

…

4. TRADING WORLDWIDE ALWAYS WITHIN BRITISH INSTITUTE WARRANTY LIMITS INCLUDING US ..

…

52. <u>ELIGIBILITY & COMPLIANCE</u>

Owners warrant that the vessel is in all respects eligible under application (sic) conventions, laws and regulations for trading to and from the ports and places specified in Clause 4 of the Charter Party and that she shall have on board for inspection by the authorities all certificates, records, compliance letters and other documents required for such services, including, but not limited to, a U.S. Coast Guard Certificate of Financial Responsibility (Oil pollution) and the certificate required by Article VII of International Convention on Civil Liability for Oil Pollution Damage of 1969, as amended.

Owners further warrant that the vessel does, and will, fully comply with all applicable conventions, laws, regulations and ordinances of any international, national, state or local government entity having jurisdiction including, but not limited to, the U.S. Port and Tanker Safety Act, as amended, the U.S. Federal Water Pollution Control Act, as amended, MARPOL 1973/1978 as amended and extended and SOLAS 1974/1978/1983 as amended and extended and OPA 1990.

In the interest of safety, the Owners will recommend that the Master observes the recommendations as to traffic separation and routing which are issued from time to time by the International Maritime Organisation (IMO) or as promulgated by the state of the flag of the vessel or the state in which the effective management of the vessel is exercised.

Any delays, losses, expenses or damages arising as a result of failure to comply with this Clause shall be for the Owners' account and the Charterers shall not be liable for any delay caused by the vessel's failure to comply with the foregoing warranties."

7. It may be noted from this lengthy (but necessary) recitation of the charter terms that the traditional seaworthiness obligation that the vessel "be tight staunch strong and in every way fitted for the service" (as contained in clause 1(c)) is buttressed by further obligations

i) that the vessel is fit to carry dirty petroleum products such as fuel oil (clause 1(b));

ii) that the vessel have on board certificates and documents required by any applicable law (clause 1(g)); and

iii) that the vessel will comply with all applicable conventions including, specifically the MARPOL convention (clause 52).

MARPOL

8. It is now necessary to set out the terms of MARPOL Regulation 13H(5) and (6) which exempted certain vessels from the need to be double-hulled as from 5th April 2005.

"(5) In the case of an oil tanker of 5,000 tons deadweight and above, carrying heavy grade oil as cargo fitted with only double bottoms or doublesides not used for the carriage of oil and extending to the entire cargo tank length or double hull spaces which are not used for the carriage of oil and extend to the entire cargo tank length …. the Administration may allow continued operation of such a ship beyond the date specified in paragraph (4) of this regulation [5th April 2005], provided that:

(a) the ship was in service on 4th December 2003;

(b) the Administration is satisfied by verification of the official records that the ship complied with the conditions specified above;

(c) the conditions of the ship specified above remain unchanged; and

(d) such continued operation does not go beyond the date on which the ship reaches 25 years after the date of its delivery.

(6) (a) The Administration may allow continued operation of an oil tanker of 5,000 tons deadweight and above, carrying crude oil having a density at 15°C higher than 900 kg/m³ but lower than 945 kg/ m³, beyond the date specified in paragraph (4)(a) of this regulation, if satisfactory results of the Condition Assessment Scheme referred to in Regulation 13G(6) warrant that, in the opinion of the Administration, the ship is fit to continue such operation, having regard to the size, age, operational area and structural conditions of the ship and provided that the operation shall not go beyond the date on which the ship reaches 25 years after the date of its delivery."

9. Even if these exemptions applied, Regulation 13H(8)(b) allowed a party to the Convention to deny entry of oil tankers, operated in accordance with the exemptions of paragraphs 5 or 6 of the Regulations, into ports or onshore terminals under its jurisdiction. Whilst, in the period leading up to the Regulations, there was uncertainty as to how the Regulations would operate and what attitude different states might have to them, the general feeling appears to have been that most countries east of Suez would not deny entry to oil tankers, to which the exemptions of Regulation 13H(5) and (6) had been applied by the "Administration" of the State of the Flag of the vessel in question. In the case of the ELLI and the FRIXOS, the relevant flag state was Liberia.

10. Owners could not, of course, rely on the exemption contained in Regulation 13H(6) since that only applied to the carriage of crude oil. The problem with regard to the Regulation 13H(5) exemption, was that although the ELLI and the FRIXOS were fitted with "double-sides not used for the carriage of oil", those double-sides were not double-sides "extending to the entire cargo tank length". As I have already indicated, a small part of the slop tanks was protected by bunker tanks on the outside, as opposed to ballast tanks. Although bunker tanks per se did not give rise to a problem under the Regulations, the wording of the exemption, if strictly applied, required any cargo tank (including slop tanks) to be surrounded by spaces "not used for the carriage of oil". The presence of the bunker tanks therefore meant that the vessels did not comply with the requirements of the exemption. They did not have double bottoms; nor were they fully double-sided.

The Issue

11. After December 2003 when Regulation 13H was adopted there was great uncertainty as to how the Regulation and its exemptions would be interpreted. Both Owners and Charterers considered that the vessel was double-sided and the judge has held that there was no breach of the charter description that the vessel was double-sided. To the extent that they considered the matter, they therefore hoped that there would be no difficulty in obtaining the necessary exemption. At the time when the charter for the FRIXOS and the addendum to the ELLI were signed in August 2004 no regulatory body had considered whether the double-sided requirement in Regulation 13H(5) meant that the vessel had to be completely double-sided. There came a time however when Owners (as recorded in paragraph 36 of the judgment below) did seek clarification from Lloyd's Register and on 15th February 2005 Lloyd's responded saying that the vessels were "single hulled tankers provided with Protectively Located Segregated Ballast" and that they would be prohibited from carrying heavy grade oil after 5th April 2005. They added that it might be possible to re-designate the slop tanks as void spaces but that structural modification should not be undertaken without reference to them. It was known that Liberia (the law of the vessel's flag) would follow whatever Lloyd's said in this respect (Judgment para. 22).

12. From this time onwards, Owners became (to put it at its lowest) extremely guarded in their communications with the Charterers and, on at least two occasions, the vessels did in fact carry fuel oil without any exemption pursuant to sub-charters which had been made by the Charterers. But it was not long before it became apparent that the vessels could not carry fuel oil under the new MARPOL regulations. The result of this was that the vessels could no longer carry fuel oil but only crude oil and other similar low grade products. The vessels found it difficult to obtain contracts and, although the vessels were not redelivered to Owners but retained doing this less attractive and less lucrative work, the Charterers withheld that part of the hire which had been agreed to be calculated by reference to profits made on carrying cargoes pursuant to the charters. Owners then claimed that hire and Charterers defended that claim and made a counterclaim for loss of profit on the basis that Owners were obliged to provide vessels fit for the carriage of fuel oil and had not done so. Cooke J. upheld Charterers' contentions [2008] 1 Lloyds Rep 262 and the Owners now appeal to this court with the permission of Rix LJ.

The Judgment

13. The judge (para. 28) found no less than sixteen separate facts or sets of facts as being the relevant background to the making of the FRIXOS charter and the addendum to the ELLI charter on 10th August 2004. He then said that it was not easy to draw a line between physical fitness and legal fitness of a vessel to carry her cargo and that it

was impossible to say that clause 3 of the charters (which cross-referred to clause 1) was limited to the maintenance or restoration of the vessel as a physical entity alone (paras 46-47). Owners' argument that clauses 1(b) and (c) related only to the physical condition had to be rejected; so did the argument that clause 1(g) only referred to certificates and documents which related to the physical condition of the vessel (para. 51). Once Owners had failed to obtain an exemption under Regulation 13H because their argument that the vessels were double-sided had failed, they became bound to carry out the necessary physical work to make them double-sided and thus fit to carry fuel oil. Only when they did so, did the Owners get the benefit of being able to hire out a tanker capable of carrying both fuel oil and crude oil at a rate higher than they would obtain for a vessel carrying crude oil only (para. 62). Owners were, therefore, in breach of both charters as from the date when that work should have been done namely 23rd and 30th August 2005 (paras 72 and 78). He awarded damages accordingly (paras 89 and 121) and no issue arises on this appeal as to quantum.

Owners' Submissions

14. Mr Kealey QC for the Owners essentially repeated the submissions which the Owners had made to the judge. He adopted and sought to emphasise the fact that the judge had held that it was no breach of charter to describe the vessels as double-sided. If that was so then, he said, Charterers had to make the best of the vessel which they had chartered, complying as she did with her contractual description. He cited Hobhouse J in ***The Derby*** [1984] 1 Lloyds Rep 635, 641 to the effect that the practical exercise of a charterer's options must depend to some extent on the description of the vessel he is chartering. He further submitted that there was no warrant for extending the concept of fitness in clause 1(b) and (c) of the charters beyond the concept of physical fitness to a concept of legal fitness. For this purpose he relied on ***The Madeleine*** [1967] 2 Lloyds Rep 224 and ***The Derby*** in the Court of Appeal [1985] 2 Lloyds Rep 325. He further emphasised that the clause 1 obligations only related to the time of delivery of the vessels under their charters and the obligation of clause 3 was only to exercise due diligence to maintain the vessels in or restore them to the same (physical) condition as that in which they were at the time of delivery. If as a result of some supervening event the vessels became legally unable to carry fuel oil once the charters had begun, that did not mean that the vessels had to be reconstructed to a physical state in which they had not been (and did not need to be) at the time when the vessels were delivered. He also complained that, although the judge had isolated 16 sets of facts, as part of the background to the charters, he did not thereafter refer to them in coming to his conclusions. Particular reliance was placed on the facts (para 28(ii) and (iii)) that both Owners and Charterers knew at the time of contracting that single hull tankers could not trade to EU waters after 21st October 2003 and that (for much the same reason) it was doubtful whether the vessels could be traded to the United States, yet clause 4 of the charter entitled the charterers to order the vessels to ports in both those areas. Emphasis was further put on the facts (para 28(xii) and (xiii)) that both parties regarded the vessels as double-sided and that, although there was considerable uncertainty about how the new Regulation 13H(5) would be interpreted, there was a common view that the chartered vessels would be considered to be double-sided and would obtain the necessary dispensation.

Background facts

15. I take this last complaint first. The fact that the judge did not feel it necessary to refer specifically to the background facts when he came to his decision on the construction of these charter parties does not mean he did not have them in mind. The real difficulty is that none of the matters on which Owners have sought to rely take them very far on what is largely a question of construing the printed terms of a well-known and standard form of charter. There is a limit to which the background (or matrix) against which the parties contracted can affect the proper construction of such a contract. Shelltime 4 has been used in the trade for many years. As its name indicated it, no doubt, emanated originally from Shell but since Shell have always had ships which they have let out to charterers as well as chartering ships themselves from independent owners, one cannot assume that the standard form will favour either owners or charterers if a doubt or difficulty arises about its meaning. So pervasive a standard form is it, that it has achieved the accolade of being one of the four standard time charters around which Messrs. Wilford Coghlin and Kimball's book on Time Charters creates its commentary (the others being the New York Produce Form, the Baltime Form and the STB form). In these circumstances, facts peculiar to the background of the making of the particular charters are not likely to carry much weight against the actual words used in the charter.

16. Likewise generalized assertions to the effect that an Owner never takes any part of the commercial risk of a vessel chartered out under a time charter and that the risk of commercial viability for the vessel has always fallen upon the time charterer (Owners' skeleton para. 35) or that capital improvement to the vessel cannot be maintenance or restoration within clause 3 of the charters (Owners' skeleton paras 68 and 70, citing United States arbitration awards) are no more than general statements. Sometimes (perhaps often) they will be correct but sometimes they may have to give way to the words actually used in the charter.

Previous authority

17. The authorities do not, on analysis, yield any principle of law that the terms of a time charter as to fitness to carry the cargo or seaworthiness relate only to the physical condition of the vessel and can never embrace legal fitness to carry the cargo. There are a number of cases where the seaworthiness obligation has been held to include the provision of appropriate documents. As long ago as 1816 it was held in Levy v Casterton (1816) 4 Camp. 389 that a ship's bill of health had to be provided at the beginning of a voyage from England to Sardinia if that was a requirement (or at any rate a known requirement) of Sardinian law. The result was that the shipowner was liable for delay caused by the want of such a document.

18. ***The Madeleine*** (1967) concerned the absence of a deratting certificate on delivery of a vessel under a Baltime form of charter party for 3 months at the port of Calcutta. Because the port health officer had refused a deratting certificate and ordered the vessel's holds to be fumigated, four days delay ensued in the course of which the charterers purported to cancel the vessel as not being ready for delivery under clause 1 of the charter which required her to be

"in every way fitted for ordinary cargo service."

The umpire had found that after fumigation the bodies of 8 rats were found on board and he said that discovery of such a small number of rats indicated that the vessel was unlikely to have been so badly infested with rats as to render her physically unfit. He went on to hold that the vessel was in every way fitted for ordinary cargo service and that the charterers accordingly had no right to cancel. That was held to be wrong as a matter of law by Roskill J who said (page 241)

"There was here an express warranty of seaworthiness and unless the ship was timeously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel."

That is a clear authority that documents required by law may have to exist before a vessel is fit for cargo service and does not support any proposition that seaworthiness obligations extend only to the physical state of the vessel. Although it may be said that the vessel was unseaworthy because she needed fumigation rather than because she lacked a certificate that she was free of rats, that was not how Ruskill J expressed himself; moreover the date when it was held that the vessel was ready for cargo service was 12th May 1957 when the deratting certificate was issued, not 11th May when the fumigation occurred and the rats expired.

19. ***The Derby*** was a case where time was lost because the vessel had not been vetted by the ITF and given a blue card to that effect. That resulted in delay at the discharge port in Portugal where stevedores were induced to cease discharging the ship until the ITF's demands were met. The arbitrator had held that the vessel was not in every way fitted for the service as required by line 22 of the New York Produce Exchange standard form of time charter but Mr Kealey (acting for Owners then as now) persuaded both Hobhouse J and the Court of Appeal that the arbitrator was wrong. Hobhouse J [1984] 1 Lloyds Rep 635 held that, while the seaworthiness obligation included the legality of the vessel and her documentation and the adequacy and competency of the crew, it did not extend to characteristics of the crew which did not affect their ability to preserve the safety of the vessel and her cargo. In the Court of Appeal Kerr LJ (with whom Croom-Johnson LJ and Sir Denys Buckley agreed) accepted (page 331) that the words "in every way fitted for the service" in their context related primarily to the physical state of the vessel. But he said that the words had a wider scope in at least two respects on the authorities, namely:-

i) the words required the provision of a sufficient and competent crew, ***Hong Kong Fir v Kawasaki Kisen Kaisha*** [1962] 2 QB 26;

ii) the words also required the vessel to carry documents relating to her "seaworthiness or fitness to perform the service for which the charter provides", ***Madeleine*** and ***Levy v Costerton.***

Kerr LJ said that such documents could include certificates bearing upon the seaworthiness of the vessel and added:-

"The nature of such certificates may vary according to the requirements of the law of the vessel's flag or the laws or regulations in force in the countries to which the vessel may be ordered, or which may lawfully be required by the authorities exercising administrative or other functions in the vessel's ports of call pursuant to the laws there in force. Documents falling within this category, which have been considered in the authorities, are certificates concerning the satisfactory state of the vessel which is in some respect related to her physical condition, and accordingly to her seaworthiness. Their purpose is to provide documentary evidence for the authorities at the vessel's ports of call on matters which would otherwise require some physical inspection of the vessel, and possibly remedial measures – such as fumigation – before the vessel will be accepted as seaworthy in the relevant respect. The nature of description of such certificates, which may accordingly be required to be carried on board to render the vessel seaworthy, must depend on the circumstances and would no doubt raise issues of fact in individual cases. But I do not see any basis for holding that such certificates can properly be held to include documents other than those which may be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's ports of call. An I.T.F. blue card does not fall within this category, and I can therefore see no reason for including it within the scope of the words in line 22, even in their extended sense as indicated above."

It was thus clear that documents required by an officious outside body could not be regarded as documents relating to the seaworthiness of the vessel but documents required by a relevant law such as that of the vessel's flag or of any port to which the vessel might be ordered to go could fall within the category of documents relating to seaworthiness and thus be required before the Owners could be said to have fulfilled their obligations. It was all a question of fact; to which one might add it would also be a question of construing the individual charterparties.

20. So it becomes necessary to return to the terms of the contract as they apply to the facts of this case.

Discussion

21. I say at once that there would be much to be said for Mr Kealey's argument if the only relevant clauses were 1(b) and 1(c). That is because the obligations there set out apply only at the time of delivery. They are primarily obligations which relate to the physical condition of the vessels although there would no doubt be an obligation to

have available relevant documents relating to the physical condition of the vessels, as they were at the time of delivery. It is difficult to say that obtaining a document which was not required at the time of delivery can be part of an obligation to "*maintain the vessel in or restore her to*" the condition in which she was at delivery. I express myself cautiously about this because it is to be noted that the obligations are not merely that the vessel be in every way fitted for the service (as was the case in ***The Derby***) but are expressed to be twofold obligations namely being "*fit to carry dirty petroleum products*" (clause 1(b)) and being in good order and condition and in every way fit for service (clause 1(c), being the equivalent of the clause construed in ***The Derby***). It would be quite possible to say that the prior obligation imposes a different obligation from that in the second obligation and that that prior obligation is that the vessel be legally fit to carry fuel oil and that, if she becomes unfit, the owners must under clause 3 restore her to that fitness even if it means that they have to do work on the vessel to restore her to that fitness.

22. That perhaps difficult question does not, however, have to be decided in this case because the matter is, in my view, put beyond doubt by clauses 1(g) and 52 of the charters.

23. The wording of clause 1(g) is, to say the least, curious. It begins with the words

"At the date of delivery of the vessel under this charter

(g) she shall have on board all certificates, documents … required from time to time by any applicable law to enable her to perform the charter service without delay."

In order to carry fuel oil, the vessels needed, as from April 2005, an exemption under Regulation 13H(5). That was a document required by law of the flag (Liberia). It was a document required at a particular time. The opening words of the clause, however, look to the time of delivery of the vessel under the charter, namely August 2004. There is thus an inconsistency between the opening words and the words "required from time to time" in the body of the clause. In my judgment, precedence should be given to the words in the body of (g) rather than the words in the introducing phrase on the basis that the "*particular should prevail over the general*" if that is an acceptable translation of well-known legal principle, "*Generalia non specialibus derogant*". This would be enough on its own to resolve the appeal in favour of the charterers.

24. The first two paragraphs of clause 52 lead to the same conclusion. Both paragraphs are relevant. The warranty in the first paragraph is not stated to be a warranty applicable only on delivery of the vessel under the charter and I would not construe it as such. The warranty is that

"the vessel is in all respects eligible under applic[able] conventions, laws and regulations for trading to and from the ports and places specified in clause 4 of the Charter Party"

And that "*she shall have on board for inspection by the authorities all certificates … and other documents required for such services …"*

The exemption required to enable the vessel to carry fuel oil was, after April 2005, a document required for the service of trading to the ports and places specified in clause 4 of the contract.

25. Mr Kealey made the point that this proves too much in that, even at delivery, the vessels could not trade to European ports or (probably) the USA without being granted a 13H(5) exemption and the parties cannot have intended the Owners to be in breach of the clause on the first day of the contractual service. He also pointed out that any particular country could, if it wished, refuse entry under the MARPOL Convention even if the vessel had the relevant exemption. Hong Kong and Australia apparently did just that on a regular basis, so those countries were effectively out of bounds as well. One feels, however, that, if a claim for breach had been made by Chaterers on the basis that the vessels could not, if ordered to proceed to, say, Rotterdam or Hong Kong, the case would have had an entirely different shape. As the judge records, it was always the parties' intention that vessels would trade from the Middle East to ports in India and South-East Asia (perhaps apart from Hong Kong). It is by no means clear that any claim formulated on the national basis supposed by Mr Kealey's argument would have succeeded.

26. One then comes to the further warranty contained in the second paragraph of clause 52. This is that:-

"the vessel does, and will, fully comply with all applicable conventions, laws, regulations and ordinances of any international … entity having jurisdiction including, but not limited to …. MARPOL 1973/1978 as amended and extended …"

This warranty explicitly applies to the future and expressly refers to the MARPOL Convention as amended and extended. Without the 13H(5) exemption the vessel did not, in my judgment, comply with the MARPOL Convention because she was designated fit to carry dirty petroleum products but could not do so unless she had the relevant exemption for double-sided vessels. The vessels were unable to obtain that exemption and there was thus on any view a breach of clause 52 even if there was no breach of the other clauses of the charter parties.

27. Mr Kealey submitted that this conclusion entailed the absurd result that in or before April 2005 Owners would have to take the vessels out of service and rebuild them. On the facts of this case that is something of an overstatement. Lloyd's solution to the problem was that the slop tanks should become void spaces. No doubt that would involve a measure of construction work to shut off the pipes that introduced the slops into the slop tanks or to seal off the tanks in some other way. To call that a rebuilding is hardly fair. No doubt problematic situations can be posed e.g. that a particular South East Asian country suddenly required all fuel oil carrying vessels to be double-hulled but the possibility of such scenario cannot, in my view, be allowed to deflect one from the proper

construction of these particular charter parties in the light of the events that have actually occurred. The doctrine of frustration is, in theory, available if events occur which render the contracts radically different from what the parties contemplated at the outset. One recognises that that is a very long long-stop but it is, at least there for cases very different from this.

Conclusion

28. I would therefore uphold the judge's order and dismiss this appeal.

Lord Justice Lawrence Collins:

29. I agree.

Master of the Rolls:

30. I also agree.

Mr Gavin Kealey QC & Mr Timothy Hill (instructed by Stephenson Harwood) for the Appellants
Mr Nicholas Hamblen QC & Mr Malcolm Jarvis (instructed by Clyde & Co LLP) for the Respondent