CA on appeal from Commercial Court (Mr Justice Rix) before Staughton LJ; Auld LJ; Sir John Balcombe : 18th November 1997.

**LORD JUSTICE STAUGHTON:**

1. For the reasons that have been handed down this appeal will be dismissed.

2. Despite the title to these proceedings, Arcadia Petroleum Ltd are the party claiming a remedy. They were charterers of a vessel called EURUS and Claimants in an arbitration, where they were awarded (by a majority) $681,934.05 and interest at 5½ per cent. Whether that sum was technically debt or damages was part of the issue which the arbitrators decided. The Respondents in the arbitration, Total Transport Corporation, were disponent owners of the EURUS. I shall call them the Owners.

3. On appeal Rix J, set aside the award and dismissed the Charterers' claim. They now appeal to this Court.

4. The contract was a voyage charterparty dated 17th January 1992; It provided for the carriage of a minimum quantity of 122,000 metric tons of crude oil from one safe port Nigeria, in the Charterers' option, to one or two safe ports in a number of different ranges, again in Charterers' option. The freight was to be calculated under the New Worldwide Tanker Nominal Freight Scale, which no doubt has regard to the particular ports chosen for loading and discharge.

5. The critical clause in the contract was this, which I reproduce exactly as written:

   ***"36. ADHERENCE TO VOYAGE INSTRUCTIONS***

   *Owners shall be responsible for any time, costs, delays or loss suffered by Charterers due to failure to comply fully with Charterers voyage instructions. Owners shall be responsible for any time, costs, delay or loss associated with vessel loading cargo quantity in excess of voyage orders. Additionally, Charterers shall not be responsible for any deadfreight for Owner's failure to lift minimum quantity specified in voyage orders.*

   *Provided such instructions are in accordance with the Charter Party and custom of the trade*

   *If a discrepancy arises at loading terminal, Master is to contact Charterers at once concerning said discrepancy, before loading to clarify situation. Terminal orders shall never supersede Charterer's voyage instructions. Delays if any are to be for Charterers account".*

6. The explanation for this layout is that the clause in the original form was part of a group of 47 known as the Scanport Clauses. The parties evidently agreed that they should be incorporated in the Charterparty with some amendments; and for one reason or another showed both the original and the amended versions in their contract. That to my mind resolves conclusively the old question as to whether we can look at deletions for the purpose of interpreting the Contract. Indeed it is not disputed that we can.

7. The Charterers' case was that the Owners, in breach of contract, did not comply with the instructions which the Charterers gave. Their loss was claimed either as damages or as money payable under a contractual indemnity, that is to say clause 36. This claim for damages failed before the arbitrators because it was too remote; they found that the loss was not foreseeable. But the claim for an indemnity succeeded, by a majority comprising Mr Christopher Moss and Mr Mark Hamsher. Mr Alexander Kazantzis would have rejected the claim on the ground that the Charterers' instructions were not "in accordance with the custom of the trade", as required by clause 36.

8. The claim for damages, as opposed to an indemnity, was not renewed in this Court.

**The Facts**

9. The Charterers had a long term contract for the supply of oil by the Nigerian National Petroleum Corporation. The pricing mechanism of the contract provided: *"All crude oil liftings shall be paid for at the Price applicable as at the date on the Bill of Lading upon presentation by the Seller of the documents ...."*

10. In the ordinary way, a bill of lading is dated when the last of the cargo (or perhaps the last of the cargo to which it relates) is put on board.

11. On 23rd January 1992 the Charterers nominated the EURUS to lift a cargo under the supply contract, for loading between 29th and 31st January, with an ETA of 31st January at the port of Forcados. Then on 23rd January the Nigerian Corporation announced their prices for February. They were lower than the January prices, and so it was in the interest of the Charterers that the vessel should not complete loading before 1st February. On the following day the Charterers sent these orders to the Owners:

    *"A) Vessel to load at Forcados where to tender N.O.R. 1100 hrs local 31st earlies[t]. Charterers note that should vessel arrive earlier they are liable from commencement of laycan 0600 31st. Vessel to tender actual NOR to Charterers via broker. Then above NOR to terminal with copy to Charterers*".

12. N.O.R. is, of course, notice of readiness; and "laycan" referred to (i) the date before which the vessel should not tender such notice, and (ii) the date after which the Charterers would be entitled to cancel if notice had not been tendered. In both cases the date was 31st January 1992. Clause 42 of the Scanport clauses provided:

    *"42. Vessel not to tender Notice of Readiness or proceed to berth prior 0001 hours on first layday unless otherwise instructed to do so by Charterer. Laytime shall not commence before 0600 hours local time on the commencing date specified in Part I (B), unless with Charterer's sanction. If the vessel has not given Notice of Readiness to load, by 1600 hours local time on the cancelling date specified in Part I (B), Charterer shall have the option of cancelling this Charter Party within 24 hours".*

13. Following the orders quoted above, there was some dispute between the parties as to whether time would count from 0001 on 31st, as from 0600 (assuming that the vessel had by then arrived at Forcados). The Charterers argued, correctly, that 0600 was the appropriate moment for time to begin to count; and the Owners agreed. They sent this telex on 27th January to the Charterers:

***"Re NOR:***

*Owners confirm Vessel will tender theoretical NOR through brokers Shipmar and to Braemar and that real NOR will be tendered to terminal and agents in Forcados on 31st Jan 1100. Laytime to begin at 0601 thereafter and notwithstanding real NOR time. Likewise no further 6 hours NOR time will be due after 1100 and Charterers hereby accept theoretical NOR given thru brokers as valid which pse confirm.*

*Master instructed accordingly".*

14. The Charterers' orders, accepted by the Owners, were thus that the Owners might tender notice of readiness to them at 0001 on 31st January, and if they did so time would count from 0600 on that day; but they were to tender a second notice of readiness to the terminal operators (who were a joint venture of Shell and the Nigerian Corporation) at 1100. The word "thereafter" is somewhat confusing.

15. The Master complied with those orders in their literal sense. He sent a notice of readiness to the Charterers at 0001. At 0030 the EURUS left the anchorage, and reached her berth at 0300. Loading commenced at 0636. The Master gave notice of readiness to the terminal operators at 1100.

16. What the Master, being Spanish as we were told, may not have understood was the true impact of the Charterers' orders. The arbitrators' finding on that was as follows:

*"38. We were satisfied that in the shipping industry in general and in Nigeria in particular a notice of readiness amounts to a declaration of a readiness and a willingness to berth and be loaded. Properly understood an instruction not to tender a notice of readiness before a certain time and date amounts to an instruction not to present or berth for loading prior to that time. .....We were satisfied that the only reasonable interpretation of Arcadia's voyage instructions was that the vessel should not have presented for loading prior to 1100 hours local time on 31st January, 1992".*

**A Parenthesis**

17. I would regard it as open to question whether the Charterers were entitled to give those orders, either in their literal sense or with the addition of the arbitrators' interpretation. The Charterparty certainly contemplates that the Charterers may give some orders, such as the nomination of loading and discharging ports, the quantity of cargo, and whether it shall comprise one or two grades of oil. There is also an express term (Scanport clause 6) allowing the Charterers to divert the vessel during the voyage - at their expense. No doubt on many occasions a shipowner will be prepared to acquiesce in an order which the Charterer could not otherwise insist upon, provided that the shipowner is recompensed. But this was a voyage charterparty, not a timecharter. The Owners contracted for a voyage that was more or less defined in return for the freight specified. I can think of quite a number of reasons why in other circumstances they might not have wished to accept the Charterers' orders - delay to their next engagement, for example, or imminent bad weather on the voyage, war, or political interference.

18. The problem does not arise in the present case, and has not been argued before us. The Owner acquiesced in the orders that were given; and it was not argued before the arbitrators that the orders were unlawful, save in the narrow point that they were not in accordance with the custom of the trade (clause 36), as to which Mr Kazantzis dissented. No doubt the parties had regard to the decision of Steyn J in ***Novorossisk Shipping Co v. Neopetro Co Ltd*** (1990) 1 Ll.R.425. Leave to appeal was refused in that case on the ground that the point was "not realistically arguable" and a certificate under section 1 of the Arbitration Act 1979 was also refused. I wish only to say that, not having heard argument on the point, I would not lend the authority to this Court to that decision.

**The Facts continued**

19. It is not altogether clear how the vessel came to reach the berth. That would necessarily have required the Master's co-operation. Once the vessel was on the berth, the terminal operators would have insisted that loading begin. I infer that from the Arbitrators' findings:

*"40. Although there was no evidence as to precisely when the Master advised the terminal that he was presenting for loading and was ready to move to the SBM, he must have done so at the latest at about midnight, shortly before the "EURUS" left the anchorage for the SBM number one at 0030 hours on 31st January, 1992. There was nothing in the documents or in the Master's written statement to suggest that the vessel had been compelled to berth by the terminal or had somehow been drawn into the berthing procedure without having indicated a readiness to berth. Common sense and Captain Hage's evidence indicated that the terminal would not have allowed the vessel to move from the anchorage and berth at the SBM unless it had called her in after an indication that she was ready to move in and berth".*

20. Evidently the Arbitrators distinguished between a Notice of Readiness and "an indication that she was ready". It was not argued that they were wrong to do so.

21. In the afternoon of 31st January a message reached the Owners from the Charterers, asking the Owners to slow down the loading in order to ensure that the vessel received a 1st February bill of lading. The Owners sent this message to the Master: *"We understand with brokers that Arcadia wishes loading to be completed on 1st Feb rather than 31 Jan pm and that vessel will make all reasonable efforts consistent with loading Master/terminal approval/requirement to please Arcadia in this respect. This should satisfy everybody*".

22. There was no suggestion at that stage that the critical time was anything other than 0001 on 1st February. The Master then advised that he expected to complete loading at 0130 on that day; and in fact he did. Neither he nor the Owners had any reason to suppose that it was necessary to prolong loading (if he could) until later that morning.

23. Thereupon the terminal operators presented a bill of lading to the Master for signature. It contained the following wording:

*"Dated at (port) Forcados the 31st day January 1992 .....*

*Master*

*This lifting was completed before 0800 hours on 01/02/92".*

24. It is very arguable that the bill of lading did not tell a lie about itself. The Master asked the Owners for instructions. Later, at their behest and after noting a Protest, the Master signed the bill of lading, and the vessel sailed on her voyage.

25. The explanation for the form of the bill of lading tendered by the terminal operators was - *"a rule laid down by the Department of Petroleum Resources of the Ministry of Petroleum Resources in Lagos under which if loading was completed prior to 8 a.m. on the first day of a new month, the bill of lading should be dated the last day of the old month*".

26. The rule had been in force for some eighteen or twenty years; it was designed to enable the Department of Petroleum Resources to carry out an audit of stock at the end of each month without doing so outside working hours. (A somewhat similar system was unsuccessfully contended for in a banking dispute, ***Momm v. Barclays Bank International Ltd*** (1977) QB 790.) The supply contract between the Charterers and the Nigerian Corporation was governed by Nigerian law. No doubt the 8 am rule would be regarded as part of that contract. The Charterparty, on the other hand, was governed by English law. But the Arbitrators found that, if the Master had refused to sign the bills of lading as tendered, he might ultimately have risked being put in jail, and the vessel would not have been cleared for sailing.

27. The Arbitrators further found that, if the vessel had presented herself for loading only at 1100 hrs on 31st January, then loading would have extended beyond 0800 hrs on 1st February. It would follow that the Charterers would have had to pay the lower, February, price to the Nigerian Corporation. In the event, with the bill of lading which they did receive, they were obliged to pay the January price, which cost them the additional sum of $681,934.05.

28. There is also a finding that the Charterers did not know of the 8 a.m. rule. Nor did the Owners. There is this finding of the Arbitrators: *"We were satisfied that the 8 a.m. rule which can lead to the "backdating" of bills of lading under certain circumstances is long established and universally applied in Nigeria, it is extremely unusual. Indeed, it was not suggested that a similar procedure is followed anywhere else in the world and we have not previously heard of such a procedure, never mind experienced it. The parties did not and could not foresee that a procedural peculiarity that is apparently unique to Nigeria would lead to the January rather than to the February contract price being paid*".

29. However the Arbitrators held, apparently as a matter of law, that the existence of the 8 a.m. rule, which had existed for 18 or 20 years, could not be an effective or intervening cause of the Charterers' loss. They further found that the cause of Arcadia's loss was the Master's failure to comply with the Charterers' instructions.

**Issue (1) & (2): the meaning of clause 36 .**

30. The case for the Charterers was that clause 36 was an indemnity clause, although damages were an alternative remedy. In its role as an indemnity clause it required proof that the loss was caused by failure to obey the Charterers' orders, but not that the loss should be within the reasonable contemplation of the parties . That was the route which the arbitrators adopted.

31. Mr Rainey for the Charterers treated this part of the case as raising two questions; and the judge did the same. As formulated by Mr Rainey they were as follows:

**Issue (1) :** Is clause 36 an indemnity provision, that is, a clause which defines what one party can recover from the other in stipulated circumstances?

**Issue (2 ):** If it is an indemnity provision, is the clause confined to reasonably foreseeable loss?

32. For my part I prefer to treat the problem as one question of interpretation of the contract: does the clause provide that the Charterers can recover even if the loss suffered was not within the reasonable contemplation of the parties?

33. There is a risk of confusion in this field if one does not define one's terms. For example, the word *"remoteness*" is often used to refer both to causation and to the question whether loss was foreseeable or within the reasonable contemplation of the parties. It was so used by Rix J in the present case at (1996) 2 Ll.R.423, following McGregor on Damages (1988) para.131. Without entering upon the rights and wrongs of the matter, I propose to use remoteness to describe only the issue whether loss is outside the scope of recovery because it was not within the reasonable contemplation of the parties.

34. The word "*indemnity*" is likewise used in two senses. It may mean simply damages awarded for tort or breach of contract. I suspect that Donaldson J was using the word in that sense in ***A/B Helsingfors Steamship Co Ltd v.***

***Rederiaktiebolaget Rex*** (1969) 2 Ll.R.52 at p.60, where he said of clause 13 in the Baltime charter: *"The indemnity afforded by this clause is clearly wide enough to cover loss incurred by a reasonable settlement ....."*

I shall refer to other cases on that clause later.

35. Alternatively the word "*indemnity*" may refer to all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the parties. There is precious little authority to support such a meaning, but I do not doubt that the word is often used in that sense. For present purposes I adopt that meaning, to point the contrast between the indemnity which the Charterers claim and the right to damages which the Owners say is provided by clause 36.

36. I embark upon the problem by considering the language of Clause 36 and the purpose which it was intended to fulfil. Only after that do I turn to some of the cases which were cited on different wording. None of them use the same words, but they do give some idea of a trend in the business of chartering ships.

37. Before the arbitrators it was common ground that clause 36 contained an implied term requiring the Owners to comply with the Charterers' voyage instructions. For my part I consider that there was such a term without clause 36. On the face of the charterparty the Charterers have an option to nominate the loading port, the discharging port(s) and the quantity and grades of cargo. If the Charterers have that right the Owners must have a corresponding duty to obey. The extent of the Charterers' right to give other orders is not clear to me; but whatever it is, the Owners must again have a duty to obey. The words: *"provided such instructions are in accordance with the charterparty and custom of the trade*" (where "and" may possibly have been intended to mean "or") show that clause 36 was not intended to increase the scope of the Charterers' right to give orders.

38. Any implied term derived from clause 36 would therefore be surplusage. That in itself is of no consequence. But if as the Owners contend the words: *"any time, costs, delays or loss suffered by the Charterers*" are limited both as to causation and remoteness, they too are surplusage. They merely reflect the right to recover damages.

39. It is well-established law that the presumption against surplusage is of little value in the interpretation of commercial contracts. See ***Royal Greek Government v. Minister of Transport*** (1949) 83 Ll.R.228 by Devlin J at p.235: *"A charter-party is built up of clauses generally agreed in the trade; and when they are added to or varied from time to time, as not infrequently they are, I doubt that the commercial draftsmen pay much attention to overlapping or that they are afraid of repetition. Secondly, the argument based on superfluity, which, as has often been said, is of little value in the construction of commercial documents, is hardly applicable at all to Clause 13. Whatever construction is put upon Clause 9, the second part of Clause 13 is, from a lawyer's point of view, superfluous. All that it is saying legally is that the charterer is responsible for breach of the charter-party or for negligence*".

40. The same judge returned to the topic in ***Chandris v. Isbrandtsen - Moller Co. Inc*** (1951) 1 KB 240 at p.245, referring to the ejusdem generis rule: *"Moreover, the main argument of construction which justifies the application of the rule does not apply in commercial documents. It is that if the general words have an unrestricted meaning the enumerated items are surplusage. The presumption against surplusage is of little value in ascertaining the intention of the parties to commercial documents, as many great commercial judges have recognized."*

41. That the draftsman of the contract in this case was no lawyer, or at any rate no Chancery lawyer, is evident from the original form of clause 36 in the Scanport clauses with the wording which I have shown as deleted. On any view the second and third sentences are surplusage. And if further evidence were needed the use of - *"delays, delay, delays*" and "*voyage instructions, voyage orders, voyage orders, voyage instructions*" tells us that the clauses was not drafted by a lawyer and very probably not by one person at one time.

42. Despite Mr Rainey's repeated emphasis on the form of the clause, I do not see that it helps one way or the other. The Owners are to be responsible for time, costs, delays or loss suffered: *"due to failure to comply"*.

43. It is accepted that these words import a test of causation. Whether they also import a test of remoteness seems to me, on the wording and form of this clause alone, an open question. It is noticeable that the Charterers' present argument, that remoteness is irrelevant, was advanced for the first time only on the eve of the arbitration.

44. As to the purpose of the clause, I cannot see why the parties would have wished to provide that, for some breaches of contract by the Owners, the Charterers' loss would be recoverable whether or not it was within the reasonable contemplation of the parties, whilst for all other breaches the ordinary rule as to damages in a contract case would apply. There would be some sense in applying a different regime where one party, of his own choice, has the right to adopt a different mode of performance which may cause additional expense or loss to the other. That was a point which the judge took into account. As he pointed out, such a regime was specified in clause 4 of the Scanport clauses: *"Discharge port shown in Bill of Lading not to constitute a declaration of discharge port and Charterers to have right to order vessel to any port within terms of the Charter Party. Charterers hereby indemnify Owners against claims brought by holders of Bill of Lading against Owners by reason of change of destination.*"

45. There the word "indemnify" is used in what might be regarded as its primary meaning, to compensate one person in respect of his liability to another. In the ordinary way this liability must be well-founded; or at least there must have been a reasonable settlement. By contrast the present clause is, on the Charterers argument, concerned only with a remedy for one type of breach of contract, whilst all other breaches are dealt with under the common law.

46. There is, as it seems to me, a long history of charterparty clauses dealing with the liability of one party or the other for what would without the clause in question still be a breach of contract. To the lawyer this is surplusage; but to commercial men it is a way of making sure that there has been no mistake or misunderstanding, and to emphasize their rights and liabilities. Many years ago there used to be a clause in popular use which provided what the penalty for breach of the charterparty should be. See Scrutton on Charterparties (20th edn) p.387: *"In many charters there appears a clause in some such terms as "Penalty for non-performance of this agreement estimated amount of freight." Such a clause is inoperative, and is neglected by the court. It is also well-established, although on general principles less obvious, that it is equally a penalty clause and inoperative (rather than being a valid limitation clause) if in the form, "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight." In past editions of this work, it has been said to be "a mystery why the clause survives, except upon the supposition that chartering brokers regard it as a piece of sacred ritual*".

47. Such a clause is to be found in a specimen charterparty in the First Edition of Scrutton of 1886 p.270 (in particular in the copy given by Scrutton to F.D. Mackinnon, and now in the Inner Temple library). There is footnote reference to ***Harrison v. Wright (***1811) 13 East 343, as well as later cases, in the 20th edition Cooke & Others on Voyage Charters p.442 quotes at the head of a chapter clause 12 of the Gencon charter in its 1876 version: *"Indemnity for non-performance of this charterparty, proved damages, not exceeding estimated amount of freight.*"

Thereafter the text states: *"The remedy to which the innocent party most commonly resorts in the event of a breach of the charter is a claim for damages, and this is frequently the only remedy available. The basic principle which lies behind an award of damages is indemnity or restitutio in integrum ...."*

This is plainly an example of the first meaning of the word indemnity which I have mentioned.

48. This ancient habit of making express provision as to breach and remedy has continued, and notably in the Baltime and Gencon charters. They were, or appeared to be, the forms of contract most commonly used fifty years ago. In the ***Royal Greek Government*** case Devlin J. had to deal with a clause which was in fact part of clause 13 of the Baltime charter (although incorporated into the Anglo Greek Agreement 1941): *"The charterer to be responsible for loss or damage caused to the vessel or to the owners by goods being loaded contrary to the terms of the charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants.*"

49. Devlin J., in the passage already quoted from page 235 of his judgment, held that this part of the clause was "*from a lawyer's point of view, superfluous.*"

50. So too in ***Tor Line A.B. v. Alltrans Group of Canada*** (1984) 1 Ll. R. 123 at p.128 Lord Roskill said - *"I doubt whether the fourth sentence of clause 13 imposes greater liabilities than would in any event fall upon the charterers either under the charter or at common law.*" The sentence referred to was the same as that which I have quoted from the judgment of Devlin J.

51. The Gencon owners' responsibility clause was analysed by Diplock J. in ***Louis Dreyfus et Cie v. Parnaso Cia Naviera S.A.*** (1959) 1 QB 498, on appeal (1960) 2 QB 49. Whilst it is not all surplusage by any means, it again illustrates the practice of drawing together some matters for which one or other party is to be "*responsible*".

52. In the present case clause 36 begins "*Owners shall be responsible ...*" Mr Jacobs for the owners observed that the same or similar words were to be found in the Baltime clause considered by Devlin J. and Lord Roskill, yet nobody suggested that they afforded an indemnity as opposed to the ordinary remedy in damages. Indeed Lord Roskill said in relation to an earlier part of the clause (at page 127): *"For those matters the owners expressly accept "responsibility", that is "legal liability*".

53. My Lords, it follows that the first sentence only deals with those matters for which liability will be accepted. It does not, expressly at least, deal with those other matters for which liability is to be excluded. If cl. 13 finished at the end of the first sentence, in my view the owners would not have protected themselves against *"responsibility*", that is "*legal liability",* for other types of delay or for other physical loss or damage due to causes other than those to which I have already referred. This further protection is therefore sought in the second sentence."

54. One should not in my opinion place too much weight on the coincidence that the words "shall be responsible" appear also in this case; to do so would be contrary to my view that charterparties are not generally drafted with the degree of consistency to be expected from skilled lawyers. But I do attach importance to the habit of repeating or emphasising matters of responsibility in the context of damages for breach of contract, even when it is unnecessary to do so.

55. Direct authority on the interpretation of a clause in a charterparty as providing for an indemnity is sparse indeed. The Charterers relied on ***Mediterranean Freight Services Ltd v. B.P. Oil International Ltd.*** (1994) 2 Ll. R. 506. That was a decision on Article 4 rule 6 of the Hague Rules, which deals with dangerous goods. It provides - *"... the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment* " if there has not been informed consent to the shipment of the goods. There were two relevant issues of law: first, whether Article 4 rule 6 provided an exclusive remedy, so as to oust the parties' rights at common law; secondly, whether unseaworthiness of the vessel arising from a breach of contract by the owners overrode their rights under the clause. So far as I can detect there was no contest in the Court of Appeal as to whether the remedy provided by Article 4 rule 6 did or did not apply to loss which was not within the reasonable contemplation of the parties. Nevertheless Mr Rainey relies on the fact that Judge Diamond QC, at first instance,

on at least three occasions referred to the rule as providing an indemnity: see (1993) 1 Ll. R. 257 at pp. 268, 286 and 287.

56. Mr Rainey also referred us to a passage in the judgment of Hirst LJ at page 514, column 1. The incidence of quotations in Lloyd's Reports is not always easy to detect at a glance; but that passage is in fact a quotation from Judge Diamond without comment. Hirst LJ at p.518, when considering two earlier cases, referred to "*the party indemnified*" and "*his indemnity*". Hoffmann LJ likewise referred "*an indemnity clause*" at p.821. Hirst LJ said this at p.519: *"The inclusion of the words "directly or indirectly" in art. IV, r. 6 does not in any view alter the position, even assuming (as I am inclined to do) that Mr Boyd is right in his submission that those words relate to causation not foreseability, despite the contrast with the York-Antwerp Rules. These two adverbs are of nothing like sufficient strength to fall within Lord Morton's first exception in* ***Canada Steamships*** ."

57. Hoffmann LJ at p.522 said this of the words "*directly or indirectly*": *"It seems to me, however, that in their natural meaning they do refer to causation. If so, their effect may be to make the shipper liable not only in cases like the present, where (if the explosive gases had been wholly derived from the fuel oil) one would say that the shipment of dangerous cargo caused the damages, notwithstanding that ignition was provided by the static electricity and the act of the surveyor (compare* ***Philco Radio v. Spurling*** *, [1949] All E.R. 882) but also in cases in which one would ordinarily say that the shipment had merely provided an occasion for something else to cause the damage, e.g. if the gas had been deliberately ignited by an arsonist or the explosion caused by some highly abnormal accident. If this is the effect of the words, they obviously also exclude the* ***Hadley v. Baxendale*** *limitation as well. But even construed in this sense, they do not in my judgment assist the owners.*"

58. I do not see that either Lord Justice was expressing any view as to whether, without the words directly or indirectly, the clause provided a remedy for loss which was not within the reasonable contemplation of the parties.

59. The authority which comes nearest to being directly in point is ***The Walumba (Owners) v. Australian Coastal Shipping Commission*** (1965) 1 Ll. R. 121. It was concerned with a clause from the United Kingdom Standard Towage Conditions, which were held to form part of the contract between the owners of the tug WALUMBA and the owners of a vessel which she went to assist when aground off the coast of Australia. The clause provided:

> *"3. The Tugowner shall not, whilst towing, bear or be liable for damages of any description done ... to the tug ... or for loss of the tug ... or for any personal injury or loss of life, arising from any cause, including negligence at any time of the ... tug, its machinery, boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed, or otherwise, and the Hirer shall pay for all loss or damage and personal injury or loss of life, and shall also indemnify the Tugowner against all consequences thereof ..."*

60. Instead of rescuing the other vessel, the WALUMBA herself became in a situation of peril, and had to be salved by a pilot boat, which was awarded £10,000 for its services. In the High Court of Australia Kitto J. said this: *"The question, therefore, is whether a salvage liability incurred in such circumstances as those of the present case should be considered to have been outside the reasonable contemplation of the parties as consequences of damage to the tug; and that depends on the view a business or seafaring man would take "without too microscopic analysis but on a broad view": per Lord Wright in* ***Yorkshire Dale Steamship Company, Ltd. V. Minister of War Transport*** *, [1942] A.C. 691 at p.706; (1942) 73 Ll. L. Rep. 1, at p.10.*"

61. That passage provides some very modest support for the Owners in the present case, as Kitto J. regarded an obligation to indemnify as not extending to consequences outside the reasonable contemplation of the parties. By contrast the Charterers rely on the judgment of Barwick CJ and Tiernan, Menzies and Owen JJ, where no mention is made of that suggested limitation, although it had been that subject of argument at any rate in the Court below. That case too is in my opinion of little assistance in solving the present problem. The situation there was more akin to one where a party is allowed to adopt an alternative method of performance, on terms that he shall be recompensed for additional loss and expense, as mentioned above in connection with clause 4 of the Scanport clauses. The WALUMBA was not obliged to help the other vessel, which was aground and therefore sooner or later likely to be in peril. The WANGARA herself was embarking on a hazardous operation for modest reward. She might be expected to require a complete indemnity in case of misfortune. See the analysis of the case by Lord Denning MR in ***Australian Coastal Shipping Commission v. Green*** (1971) 1 QB 456 at pp. 480-481.

62. Of the text-books Halsbury's Laws of England (4th edn) vol. 20 para 345 says this: *"The extent of a person's liability under an indemnity depends on the nature and terms of the contract, and each case must be governed, in general, by its own facts and circumstances. A clause will not indemnify a person against damage caused by his negligence, where it also indemnifies against damage otherwise arising, unless it is clearly expressed to have such an effect.*"

I readily accept the first part of that passage as an accurate statement of the law. By contrast I do not accept that there is any fixed rule such as is suggested in Cooke & Others as Voyage Charters at p.407:

**"Difference between damages and contractual indemnity .** *The main importance of ascertaining whether the charterer has committed a breach of contract in presenting the bill of lading is in determining whether the captain is obliged to sign it (see page 393). Once he has signed, it will usually make no practical difference whether the claim for indemnity arises by way of damages for breach or under an express or implied undertaking to indemnify; and there are many cases where the shipowner could put his claim on either basis: see* ***The Caroline P.*** *[1984] 2 Lloyd's Rep. 466. There are, however, some differences which may be significant.*

**Causation and remoteness** . A claim for damages is subject to the ordinary rules of remoteness discussed below under clause 12. A claim for indemnity is not subject to the same rules, but there must be an unbroken chain of causation between the signing of the bill of lading and the loss. "

No authority is cited for the proposition that remoteness is always irrelevant to an indemnity obligation.

63. I remain of the view that it was not the intention of the parties to provide, by clause 36, that a particular kind of breach of contract by the Owners should attract liability even for unforseeable consequences, whilst in the case of all other breaches of contract the ordinary rule of remoteness would apply. I cannot extract that from the wording of the clause; and even if it were arguably there, we are now enjoined to have regard to the purpose or aim of contractual provisions as well as to the actual words used: see ***Investors Compensation Scheme Ltd v. West Brunswick Building Society ,*** 19th June 1997 (unreported) by Lord Hoffmann. I would therefore uphold the decision of Rix J. on issues (1) and (2).

**Issues (3) and (4): causation .**

64. The conclusion that I have already reached is enough to require the Charterers' claim and this appeal to be dismissed. Nevertheless I express relatively briefly my views on the two remaining issues.

65. The arbitrators found that the Charterers' loss in having to pay the January price for their oil was *"attributable to the combination of the specific terms of the contract with NNPC and the unusual if not unique 8 a.m. rule that is applied in Nigeria*."

66. However they concluded that as a matter of law an event occurring before the wrongful act could not be the cause of loss. Hence they were obliged to rule out the 8 a.m. rule as the cause of the Charterers' loss. The only other possible candidate, in the arbitrators' view, was the Master's failure to obey the Charterers' orders; and that appeared to be accepted before us.

67. The Owners say that the arbitrators were wrong to exclude the 8 a.m. rule as a possible cause of the loss, since there is no rule of law that events antecedent to the unlawful act must be disregarded. That is the first issue on the topic of causation.

68. The arbitrators with commendable scholarship had regard to what I might call the Oxford school of jurisprudence, that is to say the writings of McGregor (15th edn) and of Hart & Honoré (2nd edn). The former says in paragraph 141 in connection with tort: *"The general rule is, it is submitted, that where the third factor in the situation, be it act, event or state of affairs, has already occurred at the time of the wrongful act, the law will hold the wrongful act to be the cause of the damage in the absence of subsequent intervening factors, even although the third factor be improbable, abnormal, and unforeseeable*."

Contract is dealt with in para. 233: *"As with tort, it seems that a state of affairs existing at the time of the breach of contract will not negative causal connection*."

69. Hart & Honoré deal with the topic in detail. In connection with tort they say (at p. 172): *"Coexisting circumstances and intervening events. If a contingency is, on account of its abnormality, to negative causal connection it must be an event and one later in time than, or possibly simultaneous with, the wrongful act. But a state of the person or thing affected existing at the time of the wrongful act (a ´circumstance'), however abnormal, does not negative causal connection*."

There is then reference to the eggshell skull cases, and the authors write (p. 173): *"How far the principle extends beyond physical and emotional susceptibilities of the victim has not been much explored by the courts*."

Later they write (p. 316): *"In contract, as in tort, coexisting circumstances do not negative causal connection*."

I readily acknowledge that I have presented only the briefest summary of their views.

70. It is common to refer to a chain of causation between the wrongful act and the plaintiff's loss, and to an intervening act which may or may not break the chain. If that is always the appropriate metaphor, of course it must follow that an event occurring before the wrongful act cannot break the chain. It is as simple as that. But I for my part do not accept that the chain metaphor is an appropriate one for causation in contract. Instead one has to ask whether in common sense the wrongful act was a cause of the plaintiff's loss, or whether something else was.

71. That I would regard as settled law. The latest authority on the topic is, I believe, ***Galoo Ltd v. Bright Grahame Murray*** (1994) 1 WLR 1360. There Glidewell LJ referred to Chitty on Contracts (26th edn) para 1785, ***Monarch Steamship Co. Ltd v. Karlshamns Oljefahiker*** (1949) AC 196 and ***Quinn v. Burch Brothers*** (1966) 2 QB 370, and concluded (at p. 1374: *"The text in* ***Quinn v. Burch Brothers ...*** *still leaves the question to be answered "How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?"*

72. The answer in my judgment is supplied by the Australian decisions to which I have referred, which I hold to represent the law of England as well as of Australia, in relation to a breach of a duty imposed on a defendant whether by contract or in tort in a situation analogous to breach of contract. The answer in the end is *"By the application of the court's common sense"."*

73. That has been the appropriate test, in my judgment, at least since ***Yorkshire Dale Steamship Co. Ltd v. Minister of War Transport (***1942) AC 691 - see Lord Wright at p. 706.

74. Common sense is not fettered by rules of law. It seems very likely that the arbitrators, whose trade is supposed to be common sense, would have regarded the 8 a.m. rule as a serious candidate for the cause of the Charterers' loss, had they not been persuaded that the law did not allow them to reach such a conclusion.

75. Hart & Honoré cite the eggshell skull cases, the rule that a wrongdoer takes his victim as he finds him, as an example of their general principle; and they suggest that there is a similar rule for inanimate objects. I am not persuaded that there is such a general principle. It seems to me at least as likely that the eggshell skull cases are a separate category where the law allows compensation as a matter of policy, and not an example of a general principle.

76. Mr Jacobs cited a number of cases where a pre-existing event appeared to be regarded as a relevant cause. I need not consider them in detail, since I do not reach a final conclusion on this point. But my inclination is to hold that pre-existing events are not outlawed as a cause of the plaintiffs' loss.

77. It follows that, if I had not held that clause 36 did not give the Charterers the remedy of an indemnity which the arbitrators awarded them, it would be necessary to remit the award. That is because, as all are agreed, clause 36 in any event requires the test of causation to be satisfied; and the arbitrators regarded themselves as precluded from considering a relevant cause, that is to say the pre-existing 8.0 a.m. rule.

78. It would then be for the arbitrators to decide, unhampered by any rule of law, which was the relevant cause out of (i) the master's failure to obey orders, and (ii) the 8 a.m. rule. As I understand the situation, there is no longer any other candidate.

79. At that stage the Owners argue that foreseeability, while not the test of causation in contract, is nevertheless a significant element in it; and it is found that the effect of the 8.0 a.m. rule was not foreseeable. (I calculate, without much confidence, that the odds against any particular cargo of oil falling foul of the rule in a Nigerian port are 90 to 1 against). If they are right in that argument, what follows? I suppose it is said that the master's failure to obey orders cannot have been a cause of the Charterers' loss, because the 8 a.m. rule was not foreseeable. Therefore, the only other candidate, the 8 a.m. rule itself, must be the cause of the loss.

80. I regard that argument as suspect. But I need not decide it, and I am not inclined to do so except to the extent of the point of law involved. This is whether foreseeability is indeed relevant to causation in contract. In my opinion it is: see the judgment of Salmon LJ in ***Quinn's case*** at p. 394: *"Although the foreseeability test is a handmaiden of the law, it is by no means a maid-of-all-work. To my mind, it cannot serve as the true criterion when the question is, how was the damage caused? It may be a useful guide, but it is by no means the true criterion.*" See also Treitel, the Law of Contract (9th edn) p. 880.

81. For the reasons given earlier, I would dismiss this appeal.

**LORD JUSTICE AULD**:

82. I agree.

**SIR JOHN BALCOMBE**:

83. *"The object of all construction of the terms of a written agreement is to discover therefrom the intention of the parties to the agreement. The rules which govern the construction of contracts are the same at law and in equity, for simple contracts and for specialties"* - see Chitty on Contracts (27th ed.) para. 12-039. To the last sentence I would add "and for charterparties", since I know of no principle which requires the terms of charterparties to be construed in a manner different to the terms of other commercial contracts.

84. So I approach the construction of Clause 36 in the present case by reference to the language used in the context of the charterparty as a whole. Clause 36 is set out in the judgment of Staughton L.J. and I need not repeat it. The first point I would make about the Clause is that it contains no express obligation upon the Owners to comply with the Charterers' voyage instructions. Before the arbitrators it was common ground that Clause 36 contained an implied term to that effect, and Rix J. came to the same conclusion - see [1996] 2 LL.R. at p.421. I agree with Staughton L.J. that the words "*provided such instructions are in accordance with the charterparty and the custom of the trade"* shows that Clause 36 was not intended to increase the scope of the Charterers' right to give orders and the extent of that right must be found elsewhere in the charterparty.

85. So the issue on this appeal turns on the meaning of the *words "loss suffered by Charterers due to [Owners] failure to comply fully with Charterers voyage instructions."* If such a failure were a breach of the Owners' contractual obligations, then any loss attributable to that breach would be recoverable as damages for breach of contract, subject to the rules as to remoteness of damage. An award of damages for breach of contract is intended to place the plaintiff, so far as money can do it, in the same position as he would have been if the contract had been performed - see Chitty para. 26-001; McGregor on Damages (15th ed.) para.11. However *"This purpose, if relentlessly pursued, would provide [the plaintiff] with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,*

> *(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.*
>
> *(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties ----"*

per Asquith L.J. giving the judgement of the court in ***Victoria Laundry v Newman*** [1949] 2 K.B. 520 at p.539.

86. I can see no justification for imputing to the parties to the Charterparty an intention by Clause 36 to give to the Charterers a measure of recompense greater than that to which they could be entitled under the general principles mentioned above, and to require the Owners to provide the Charterers "*with a complete indemnity for all loss de facto resulting from* "[*the Owners' failure to comply fully with Charterers voyage instructions*]" *however improbable, however unpredictable*." The word *"indemnity*" is not used in the Clause and the context is not such as would lead one to expect an intention to provide for an indemnity. Why should the parties have intended that this particular breach of contract alone should entitle Charterers to an indemnity? For the reasons given by Staughton L.J., which I need not repeat, the presumption against surplusage is of little value in the interpretation of commercial contracts, and without that presumption I can see no basis upon which to construe the words of Clause 36 as giving Charterers the right to an indemnity for loss resulting from one particular breach of contract.

87. I therefore agree with Staughton L.J. that upon its true construction Clause 36 does not entitle Charterers to recover loss which the Arbitrators have found was not within the reasonable contemplation of the parties.

88. For these reasons I, too, would dismiss this appeal.

**ORDER**: Appeal dismissed with costs. Leave to Appeal refused. (Order not part of approved judgment)

MR R JACOBS (Instructed by Holman Fenwick & William, London EC3N 3AL) appeared on behalf of the Applicant/Respondent
MR S RAINEY (Instructed by Clifford Chance, London EC1A 4JJ) appeared on behalf of the Respondent/Appellant