Neutral Citation Number: [2019] EWHC [1001] (Comm)

Claim No.: CL-2017-000626

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 18 April 2019

Before:
STEPHEN HOFMEYR QC
(Sitting as a Judge of the High Court)

Between:

(1) APRILE S.PA.
(2) GLOBTAINER LOGISTIQUE SARL
(3) ALGERIAN QATARI STEEL S.P.A.
(4) DANIELI & C OFFICINE MECCANICHE S.P.A.
(5) AIG EUROPE LTD
(6) ASSICURAZIONI GENERALI S.PA.
(7) L'ALGÉRIENNE DES ASSURANCES 2A

Claimants

-and-

ELIN MARITIME LIMITED

Defendant

Max Davidson (instructed by Roose+Partners) for the Claimants

James Leabeater QC (instructed by Reed Smith) for the Defendant

---

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

STEPHEN HOFMEYR QC (Sitting as a Judge of the High Court):

A. Introduction

1. The Defendant, Elin Maritime Limited of the Marshall Islands ("**the Owner**"), is the owner of the motor vessel "*ELIN*" ("**the Vessel**").

2. By a non-negotiable bill of lading numbered EL1601LCBDJD01 issued at Bangkok, Thailand, on 10 June 2016 ("**the Bill of Lading**"), Sealite Shipping Co. Ltd., as agent for and on behalf of the Master, Captain Chagas Hector Beniga, for and on behalf of the Owner acknowledged shipment on board the Vessel of 201 packages of cargo (said to weigh 838.821,00 kgs and to measure 3,937.69 CMB) described as "IMPORTATION DES FOURNITURES ET EQUIPMENTS DU PROJECT DU COMPLEXE SIDERURGIQUE DE BALLARA PORTION OFF-SHORE" in apparent good order and condition for carriage from the port of Leam Chabang, Thailand, to the port of Djen-Djen, Algeria.

3. The Fourth Claimant, Danieli & C Officine Meccaniche S.P.A, (acting through the First Claimant, Aprile S.P.A.), the Second Claimant, Globtainer Logistique SARL, and the Third Claimant, Algerian Qatari Steel S.P.A, are named in the bill of lading as the shipper, the consignee and the notify address, respectively. The Fifth and/or Sixth and/or Seventh Claimants insured the cargo on the voyage. The Claimants are referred to collectively as "**the Cargo-interests**".

4. During the voyage, between around 2 and 6 July 2016, the Vessel encountered heavy seas and some of the cargo was lost and/or damaged. A part of the cargo which was lost and/or damaged was indisputably carried in the Vessel's holds. The damage to this cargo is not relevant for present purposes. There is a dispute as to whether the balance of the cargo which was lost and/or damaged was carried in the Vessel's holds or on deck. The Owner alleges that the balance of the cargo which was lost and/or damaged was carried on deck. The Cargo-interests do not admit that this was so. That dispute may need to be determined hereafter. However, for present purposes the parties have agreed that the

court must assume that the balance of the cargo which was lost and/or damaged was in fact carried on deck. For ease of reference, this cargo is referred to hereafter "**the deck cargo**".

5. The Cargo-interests' claim is brought in contract, tort and bailment. They allege that the loss of and/or damage to the deck cargo was caused by the Owner's breach of duty and/or the contract contained in or evidenced by the Bill of Lading. In particular, they allege that the Owner failed:

   (1) to deliver the deck cargo in the same good order in which it had been on shipment;

   (2) properly and carefully to load, stow, carry, care for and discharge the deck cargo in breach of contract and/or duty and in breach of Article III, Rule 2 of the Hague, alternatively Hague-Visby Rules;

   (3) properly to lash and/or stow the deck cargo sufficiently for the voyage; and/or

   (4) to exercise due diligence to make the ship seaworthy at the commencement of the voyage and, in particular, to make the ship and her holds fit for the reception, carriage and preservation of the deck cargo stowed in it.

6. The Owner denies liability on the ground, amongst others, that liability for the carriage of deck cargo was excluded by express terms in the Bill of Lading.

B. The preliminary issue

7. At a Case Management Conference in this matter held on 2 November 2018, Picken J ordered the trial of the following preliminary issue:

> "*Whether, on a true construction of* [the Bill of Lading], *the Defendant is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the Defendant's negligence.*"

8. The preliminary issue raises a point of construction of the Bill of Lading which the Cargo-interests invite me to answer in the negative. The Owner invites me to answer the preliminary issue in the affirmative.

C. The Bill of Lading

9. Page 1 of the Bill of Lading provides, *inter alia*, as follows:

> "*Conditions of Carriage*
>
> *(1) All terms and conditions, liberties and exceptions of this Contract, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.*
>
> *(2) General Paramount Clause*
>
> *(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading dated Brussels the 25th August 1924 as enacted in the country of shipment, shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall apply.*
>
> *(b) Trades where the Hague-Visby Rules apply.*
>
> *In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23 1968 – the Hague Visby Rules – apply compulsorily, the provisions of the respective legislation shall apply to this Bill of Lading.*
>
> *(c) The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into or after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals.*
>
> *...*
>
> *For particulars of cargo, freight, destination, etc., see overleaf.*"

10. On page 2, the Bill of Lading provides, *inter alia*, as follows:

> *"FREIGHT AS PER BOOKING NOTE*

> *(of which 70 pckgs as per attached list loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising)*
>
> *Freight payable as per CHARTER PARTY dated 2016 May 23rd*
>
> *SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge or so near thereto as she may safely get the goods described above.*
>
> *Weight, measure, quality, condition, contents and value unknown.*
>
> *IN WITNESS whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading Indicated below all of this tenor and date, any one of which being accomplished the others shall be void. …*"

11. Attached to the Bill of Lading is a list of 70 packages said to have been loaded on deck: 6 simply "*on deck*", 16 on hatch no. 2, 27 on hatch no. 3 and 21 on hatch no. 4.

12. The Cargo-interests allege that the Bill of Lading incorporated the germane terms of a charterparty dated 23 May 2016 ("**the Charterparty**"). The Owner does not accept that the Charterparty was the charterparty incorporated into the Bill of Lading or that the terms produced by the Cargo-interests are necessarily complete. However, for the purposes of the trial of the preliminary issue, the parties have agreed that the court must assume that the Bill of Lading incorporated the germane terms of the Charterparty in the form produced by the Cargo-interests.

13. The Charterparty provided, *inter alia*, as follows:

> "***Charterparty***
> *- LASHING/SECURING/DUNNAGE IF ANY, TO BE FOR OWNERS ACCOUNT AND*
> *ARRANGEMENT*
> *...*
> *- CONLINE BILLS 2000 FORM TO BE USED.*
> *…*
> *OTHERS AS PER CONLINE 2000.*"

14. The Cargo-interests allege, further, that the Charterparty incorporated the terms of "CONLINEBOOKING 2000", alternatively CONLINEBILL 2000.

15. CONLINEBOOKING 2000 provides, *inter alia*, as follows:

> "*3.* ***Liability for Carriage Between Port of Loading and Port of Discharge***.
>
> *(a) The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25th August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("The Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.*
> *When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or, if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract.*
> *The Protocol signed at Brussels on 21 December 1979 ("the SDR Protocol 1979") shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.*
> *The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or with respect to deck cargo and live animals.*
>
> *...*
>
> *9.* ***Loading and Discharging***.
>
> *(a) Loading and discharging of the cargo shall be arranged by the Carrier or his Agent.*
> *...*
>
> *16.* ***Stowage***
>
> *(a) The Carrier shall have the right to stow cargo by means of containers, trailers, transportable tanks, flats, pallets, or similar articles of transport used to consolidate goods.*"

16. The facts recorded above are derived from an "Agreed Statement of Facts for Preliminary Issue" and from the documents in the hearing bundle.

D. Assumptions

17. For the purposes of resolving the preliminary issue, the parties have agreed that the court should proceed on the basis of various assumptions. The agreed assumptions set out below.

18. First, neither the Hague Rules nor the Hague Visby Rules apply to packages stated in the Bill of Lading to have been loaded on deck, provided that they were in fact so loaded (which is not admitted by the Cargo-interests but assumed for the purposes of the determination of the preliminary issue). This conclusion follows from the terms of Articles I(c) and II of the Hague / Hague Visby Rules:

> "***Article I***
>
> *In this Convention/these Rules the following words are employed with the meanings set out below:*
>
> *…*
>
> *(c) "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.*
>
> *…*
>
> ***Article II***
>
> *Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.*"

19. At first blush, this conclusion may be thought to be somewhat surprising because it results in the carriage of deck cargo and under-deck cargo being governed by different regimes. On more mature reflection, however, the conclusion is not in fact surprising. It is not surprising because deck cargo has always been treated as being in a category of its own. This is a topic to which I will return at paragraphs 23 to 26 below.

20. Second, and as a consequence of the first, the Owner's obligations in respect of the deck cargo are those found in the terms of the Bill of Lading (including the Charterparty which is assumed to apply for the purposes of the preliminary issue) and terms (if any) implied at common law. The Hague/Hague Visby Rules have no application.

21. Third, at common law, in the absence of any express term to the contrary and subject to the proper construction of the relevant contract:

(1) There is likely to be an implied term in the contract of carriage that the ship will be seaworthy before and at the commencement of the voyage to undertake the contractual voyage. The implied term amounts to an "absolute" warranty of seaworthiness, not an obligation to use due diligence to make the vessel seaworthy.

(2) Further, it is arguable that the carrier is strictly liable to deliver the goods at destination in as good a condition as that in which they were when delivered to it, subject to the agreed exceptions and common law exceptions of the act of God or the Queen's enemies, inherent vice of the goods or jettison.

22. For the avoidance of doubt, the Owner contends that the default common law position set out above is of little or no relevance in construing its obligations in respect of the deck cargo under the Bill of Lading given the existence of the exclusion clause.

E. Deck cargo

23. The carriage of goods on the deck of a ship is inherently risky because the cargo is exposed to the elements and is subject to sea, spray and wind, as well as the additional risk of being washed or falling overboard. For this reason, as stated above, deck cargo has always been treated as being in a category of its own.

24. As a general rule, the deck of a ship is not a proper place for the stowage of cargo and a shipowner is therefore not entitled to stow goods on deck. Deck cargo is also in a special category in relation to claims for general average. Further, goods carried on deck and stated to be so carried in the bill of lading are not "*goods*" within the meaning of the Carriage of Goods by Sea Act 1971, the Hague Rules or the Hague Visby Rules. Perhaps surprisingly, where the bill of lading states that the goods are carried on deck but, in fact, the goods are carried below deck, the Rules apply. Similarly, the Rules apply where the bill of lading is silent as to the location of the goods but, in fact, the goods are carried on deck.

25. Exceptionally, the shipowner or master will be entitled to stow goods on deck where a usage of trade has sanctioned the practice or where, as in the present case, the master has the shipper's consent to stow the goods on deck. Unauthorised deck stowage is a breach

of the contract carriage by the shipowner who will in principle be liable for damage happening to the goods caused by such stowage.

26. There is no rule of law that, because unauthorised loading of deck cargo is a fundamental breach, exceptions in the bill of lading do not apply to protect the shipowner from liability for damage to the goods. Whether exceptions apply is a matter of construction and the normal principles of construction apply. This is also the position where the carriage of cargo on deck is authorised.

F. The Owner's contentions

27. The Owner's contentions with respect to the preliminary issue can be stated shortly.

28. As regards the correct approach to the construction of clauses limiting or excluding liability in contracts agreed between commercial parties, the Owner contends that the modern (and correct) approach is that they should be construed in the same way as any other contractual provision. Although clear words will be necessary to limit or exclude the liability of a party, there is no need to construe words of limitation or exclusion narrowly or artificially. The Owner places particular reliance on paragraph 35 of the judgment of Lord Toulson JSC in ***Impact Funding Solutions Ltd v Barrington Support Services Ltd*** [2016] UKSC 57l [2017] AC 73 and paragraphs 56-57 of the judgment of Jackson LJ in ***Persimmon Homes Ltd v Ove Arup & Partners Ltd*** [2017] EWCA Civ 373.

29. The particular clauses of the Bill of Lading upon which the Owner relies as excluding all liability for the carriage of deck cargo are the provision on page 1 of the Bill of Lading that "*The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising … in respect of deck cargo*" and the provision on page 2 of the Bill of Lading that the 70 packages identified on the attached list were "*loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising*". These two provisions must be interpreted as excluding all liability for carriage of deck cargo. The phrase "*howsoever arising*", which appears in each of the clauses, refers to all causes of

loss or damage. The Owner places specific reliance on the decisions of Saville J, Langley J and Hamblen J in ***The Danah*** [1993] 1 Lloyd's Rep 351, ***The Imvros*** [1999] 1 Lloyd's Rep 848 and ***The Socol 3*** [2010] 2 Lloyd's Rep 221, respectively. These decisions, it asserts, are all supportive of the Owner's case: the words used in the Bill of Lading are clear; they mean what they say; and the court should not re-write the parties' bargain so that they mean something different.

30. The Owner additionally contends that there is no reason to exclude from the ambit of the exclusion expressed in these provisions either negligent loading, stowing and securing or loading, stowing and securing which is so negligent as to render the Vessel unseaworthy. The expressed intention of the parties was that deck cargo would be carried at the risk of cargo-interests and the commercial understanding would have been that the cargo-interests would arrange appropriate insurance.

G. The Cargo-interests' contentions

31. The contentions of the Cargo-interests are altogether more elaborate. They address separately the alleged exclusion of liability for unseaworthiness and the alleged exclusion of liability in negligence, although many of their arguments are common to both.

32. As regards the alleged exclusion of liability for unseaworthiness, the Cargo-interests make a series of submissions:

    (1) First, that the implied obligation of seaworthiness is a fundamental and overriding obligation in a contract of carriage by sea and exclusion clauses do not affect it unless clearly worded;

    (2) Second, that exclusion clauses are commonly held to apply only to events on the voyage and do not ordinarily affect the seaworthiness obligation unless very precise words are used to exclude liability for breach of the obligation;

(3) Third, that, subject to the possible operation of the Bill of Lading words of exclusion, the Bill of Lading placed responsibility for loading, stowing, lashing and securing the cargo (including the deck cargo) on the Owner;

(4) Fourth, that the Bill of Lading words of exclusion do not specifically refer to liability for unseaworthiness or negligence;

(5) Fifth, that the words of exclusion can be given real and substantial meaning even if they do not exclude liability for unseaworthiness (or negligence). Cargo-interests suggest three possibilities:

(a) The words of exclusion exclude strict liability (which arguably exists), but not liability for negligence or unseaworthiness;

(b) The words of exclusion exclude liability for any cause of loss except negligence (e.g. loss caused by breach of an absolute obligation of seaworthiness); and

(c) The words of exclusion exclude liability caused by negligent loading, stowing, lashing and securing of the cargo and negligent navigation, but not the carrier's obligation to exercise due diligence at the commencement of the voyage.

(6) Sixth, that the words of exclusion should be given one of these meanings;

(7) Seventh, that the *obiter* decision of Langley J in ***The Imvros***, which lends some support to the Owner's argument, has been forcefully criticised academically ("Problems with Deck Cargo" [2000] LMCLQ 295) and by the Singapore Court of Appeal (in ***Sunlight v Ever Lucky Shipping Company Ltd*** [2004] 2 Lloyd's Rep 174), is wrong and should not be followed; and

(8) Eighth, that two English cases upon which Langley J relied in ***The Imvros***, ***Travers v Cooper*** [1915] 1 K.B. 73 and ***The Danah*** [1993] 1 Lloyd's Rep 351, do not

support his conclusion because both cases concerned the exclusion of liability for negligence and not the exclusion of the shipowner's obligation to provide a seaworthy ship.

33. As regards the alleged exclusion of liability in negligence, the Cargo-interests submit that, although the words of exclusion are undoubtedly wide enough to cover the Owner's liability arising from its negligence, they should not be so interpreted. The words of exclusion can and should be given a restricted meaning by excluding the Owner's arguable strict liability for any loss or damage to the cargo, or by varying the Owner's obligation from an absolute obligation to one of due diligence. For these reasons, the Cargo-interests contend that the words of exclusion are not sufficiently clearly drafted to exclude liability for negligence.

34. In construing the exclusion clauses and considering whether they cover a breach of the absolute obligation of seaworthiness, the court is invited to place particular reliance on the guidance given by the Privy Council in ***R v Canada Steamship Line*** [1952] A.C. 192. Cargo-interests point out that neither liability for unseaworthiness nor liability for negligence is expressly referred to in the exclusion clauses and submit that the court should therefore carefully reflect on whether the clauses would have meaning even if liability for unseaworthiness or negligence was not excluded. They make three suggestions – see paragraph 32(5) above – and invite the court to adopt one of the suggested meanings.

35. For all of these reasons the Cargo-interests invite the court to find that, on the true construction of the Bill of Lading, the Owner is liable for any loss of or damage to the deck cargo caused by:

(1) unseaworthiness of the Vessel or the Owner's negligence; alternatively

(2) the Owner's negligence; alternatively

(3) the Owner's failure to exercise due diligence to make the Vessel seaworthy before and at the commencement of the voyage.

H. Issue of construction

36. The correct legal approach to issues of the construction of commercial contracts is not seriously in issue. The Supreme Court (and House of Lords before it) has provided guidance which is now well settled. See ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900 at paragraphs 14-23 (per Lord Clarke of Stone-cum-Ebony); ***Arnold v Britton and others*** [2015] AC 1619 at paragraphs 14-21 (per Lord Neuberger of Abbotsbury PSC) and ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173 at paragraphs 8-15 (per Lord Hodge). Clauses limiting or excluding liability are to be interpreted in precisely the same way.

37. Viewed as a question of the construction of the terms of the Bill of Lading, free from authority and with the above guidance in mind, in my view the Owner is correct in its contention that the words of exclusion are effective to exclude liability for both negligence and unseaworthiness. The words of exclusion are clear. The Owner has no responsibility for cargo carried on deck whatever the cause. It is difficult to conceive of wider words of exemption. The exclusion covers any and every cause and there is no justification for excluding either negligence or unseaworthiness as a cause.

I. The authorities

38. For the most part, such relevant authority as exists tends to support my conclusion.

Travers v Cooper

39. In ***Joseph Travers & Sons, Limited v Cooper*** [1915] 1 K.B. 73, where goods were loaded into a barge from a ship for delivery at the barge owner's wharf in the Thames, the contract of carriage contained a clause which exempted the barge owner from liability "*for any damage to goods however caused which can be covered by insurance*". While lying alongside the wharf with the goods on board, the barge was left unattended overnight and became submerged, and the goods were damaged. The court decided (by a majority) that the words of exclusion in the contract of carriage relieved the owner from liability for damage caused by the negligence. Given their natural and plain

interpretation, the words "*howsoever caused*" clearly comprehend all loss or damage, however that loss or damage may originate. Lord Justice Phillimore reconciled two existing lines of authority in this way: "*If you say 'any loss' you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean "any and every loss" irrespective of the cause, and therefore you have not brought home to the person who is entrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them or possibly even for your own personal want of care. But if you direct attention to the causes of any loss, if you say "any loss", "howsoever caused" or "under any circumstances", you give sufficient warning, and it is not necessary to say in express terms "whether caused by my servants' negligence" or in the bill of lading phrase, "neglect or default or otherwise*".

The Danah

40. Almost eighty years later, Saville J (as he then was) came to a similar conclusion in ***The Danah*** [1993] 1 Lloyd's Rep. 351. An addendum to the time charter under consideration – which was on an amended NYPE form – contained the following clause:

> "*72 Deck Cargo Clause.*
>
> *Cargo is only to be carried on deck at Shipper's risk with responsibility for loss or damage howsoever caused …*"

A number of containers were lost over board near the Dutch coast during a voyage governed by the addendum. Since some of the containers contained cargo which the Dutch authorities considered to be dangerous, the authorities sought to locate and salvage the containers, which they managed with partial success. In arbitration proceedings the charterers claimed damages or an indemnity from the owners on the grounds that the casualty and its financial consequences arose from a breach or breaches of the charter by the owners or that under the charter the owners agreed to take responsibility for what happened. They contended that the deck cargo clause should be read as a direction as to what should be inserted into a bill of lading rather than a clause dealing with the rights and obligations of the parties under the charter so that the owners' obligations to the

charterers in respect of the deck cargo remained unaffected. The owners submitted that the clause was a complete code dealing with the owners' responsibility for deck cargo thus displacing the deck cargo provisions in the original charter. The question of law arising in the course of the arbitral reference was referred to the Court for determination. In setting out his interpretation of the clause, Saville J referred to ***Travers v Cooper*** and held that the clause is apt to exclude loss of or damage to deck cargo caused by want of care on the part of the owners in and about the carriage of such cargo.

The Imvros

41. The same or similar words of exclusion were held by Langley J in *obiter dicta* in ***The Imvros*** [1999] 1 Lloyd's Rep. 848 to be effective also to exclude liability for unseaworthiness causing loss of cargo. This was a case which concerned a time charterparty on an amended NYPE form which contained the following clause:

> "*Additional Clause 62: Bills of Lading*
>
> *… (c) In the event that cargo is shipped on deck … Charterers are to ensure that … Bills of Lading are claused as follows: Carried on deck at Shippers' risk without responsibility for loss or damage whosoever caused …*
>
> *Additional Clause 91:*
>
> *Deck cargo*
>
> *Charterers are permitted to load cargo on the vessel's deck … provided always that the permissible loads … are not exceeded. … The vessel is not to be held responsible for any loss of or damage to the cargo carried on deck whatsoever and howsoever caused."*

The vessel loaded, both above and below deck, a cargo of sawn timber in Brazil for carriage to Durban, Kohsichang and Manila. The loading and stowage were carried out under the directions of the charterers' supercargo and the lashing was carried out by the crew. The bills of lading were not claused as required by the terms of the charterparty. In the course of the voyage to Durban, part of the deck cargo was lost and the vessel was damaged. The dispute between the parties was referred to arbitration and the arbitrators found in favour of the owners. The arbitrators found that the cause of the loss of the cargo was insufficiency of lashings (in particular, that the spacing of lashings was in

contravention of the IMO Code of Practice for Ships Carrying Timber Deck Cargoes), that the vessel was accordingly unseaworthy and that the charterers had assumed responsibility for securing the cargo.

42. Charterers appealed. There were two issues before the court: (1) the responsibility for safe loading and unseaworthiness as between owners and charterers under the NYPE charter and (2) the circumstances in which an owner is entitled to be indemnified in respect of cargo claims. The first issue was decided in the owners' favour. As a result, the second issue did not have to be decided by the court. The court nevertheless dealt with the second issue which it formulated as follows: whether, had the bills of lading been claused with the stated words, they would have been effective to exclude the owners' liability to cargo interests for the loss of the timber.

43. The charterers submitted that to exclude liability for unseaworthiness requires clear and unambiguous terms because of the fundamental nature of the obligation and that no clear and unambiguous words are to be found in the charterparty. The charterers conceded that in both ***Travers v Cooper*** and ***The Danah*** the same words had been held to be effective to exclude liability for negligence causing loss of cargo but contended that in neither was it sought to argue that the facts amounted to unseaworthiness or that if they did the exclusion would not have been effective.

44. Langley J rejected the charterers' contentions. He concluded that the words were clear. For cargo carried on deck the owners have no responsibility for loss or damage howsoever caused – whether caused by negligence or by unseaworthiness. In his view, the exclusions cover any cause and there is no justification for excluding unseaworthiness as a cause. The words cannot be qualified in effect by adding "*but not if the loss is caused by unseaworthiness of the vessel*". In his view, the logic of the reasoning of the courts in ***Travers v Cooper*** and ***The Danah*** also supported his conclusion.

Criticism of the Imvros

45. The decision of Langley J on the second issue which arose in ***The Imvros*** has been the subject of both academic and judicial criticism.

46. The academic criticism is in the form of a case note by Professor Simon Baughen in the 2000 edition of the Lloyd's Maritime and Commercial Law Quarterly at page 295. At the time, Professor Baughen was a senior lecturer in law at the University of Bristol. Mr Davidson, on behalf of the Cargo-interests, advances three specific criticisms of ***The Imvros*** based on Professor Baughen's note:

    (1) First, he contends that the extension of the words "*howsoever caused*" to cover unseaworthiness not only conflicts with the previous first instance decision in ***The Galileo*** [1914] P. 9 but is inconsistent with ***Steel v State Line SS Co*** (1877) 3 App. Cas. 72 (H.L. Sc) where the House of Lords held that an express exception against negligence did not cover loss due to unseaworthiness.

    (2) Second, reliance on ***Travers v Cooper*** is open to doubt given the approach to exclusion clauses set out in ***Alderslade v Hendon Laundry Ltd*** [1945] K.B. 189 and endorsed in ***R v Canadian Steamship Company*** [1952] A.C. 192.

    (3) Third, the decision is inconsistent with the judgment in ***Belships v Canadian Forest Products Ltd*** (1999) A.M.C. 2606 in which the Court of Appeal of Canada held that a clause reading "*The carrier shall in no circumstances whatsoever be under any liability for loss of or damage to deck cargo, howsoever the same be caused …*" did not cover loss or damage caused by the carrier's negligence.

47. I am not persuaded by these criticisms.

48. The decision in ***The Imvros*** does not appear to me to conflict with the decision of the Court of Appeal in ***The Galileo***. The facts in that case were that a parcel of machinery was shipped at New York on board a steamship owned by Thomas Wilson, Sons & Co., Limited, for carriage to Hull, and there to be transhipped into another of the owner's steamships for onward carriage to Norrköping. The through bill of lading provided that the machinery would "*be delivered in like good order and condition at the port of Hull. To be thence transhipped at ship's expense and shipper's risk to the port of Norrköping*". The machinery arrived at Hull in good order and condition. At Hull it was placed on a lighter whilst waiting to be transhipped to another of the owner's steamships for carriage to Norrköping. The lighter was unseaworthy and sank with the machinery on board. The

Court of Appeal held that the owner was liable to the cargo-interests for the loss of the machinery because the loss had been caused by the unseaworthiness of the lighter. The words "*at … shipper's risk*" did not exclude the owner's liability for unseaworthiness but were referable to other risks than breach of the fundamental obligation of seaworthiness. The central focus of the decision in ***The Imvros*** was not on the words "*at Shippers' risk*", as it had been in ***The Galileo***, but on words which followed, "*without responsibility for loss and damage whoever caused*". There is nothing in the decision in ***The Galileo*** which casts doubt on the conclusion in ***The Imvros*** as to the true construction of these words.

49. Nor, in my view, is the decision in ***The Imvros*** inconsistent with ***Steel v State Line S.S. Co.***. In that case a cargo of wheat was shipped at New York for carriage to Glasgow. A specially endorsed bill of lading, after the usual stipulations to deliver the wheat in good order and condition, proceeded as follows:

> "*Not accountable for leakage, breakage … however caused. Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise: namely, risk of craft or hulk, or transhipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and however caused, excepted.*" (emphasis added)

On the voyage the sea burst through an insufficiently fastened port-hole, damaging the cargo. A jury found by special verdict that this port-hole had been insufficiently fastened, but they did not find whether this happened before or after starting on the voyage. The Scottish Court of Session, First Division, entered judgment for the shipowners and cargo-interests appealed to the House of Lords. The House of Lords remitted the matter for a re-hearing on the ground that the shipowner was under an implied obligation to supply a seaworthy ship but that the jury had not found whether the ship started on her voyage in a seaworthy condition.

50. In reaching this conclusion the House of Lords construed the exemption clause in the bill of lading quoted above, which, as can be seen, contained an express exclusion of negligence. Their Lordships (or at least 4 out of 5 of their Lordships) concluded that,

whilst the clause expressly excluded negligence, it was concerned with events in transit, i.e. events subsequent to the sailing of the ship with the goods on board. Accordingly, it did not qualify the shipowner's obligation to provide a ship reasonably fit to perform the voyage. Loss caused by unseaworthiness was not excluded by the exemption clause because the clause did not apply to events prior to the commencement of the transit.

51. As regards Mr Davidson's second criticism, the decision in ***Travers v Cooper*** remains good law and has not been questioned. Further, it does not seem to me to be put in doubt by the approach to exclusion clauses set out in ***Alderslade v Hendon Laundry Ltd*** and endorsed in ***R v Canadian Steamship Company*** [1952] A.C. 192.

52. Turning to Mr Davidson's third criticism, whilst the decision in ***The Imvros*** may be inconsistent with the judgment of the Canadian Court of Appeal in ***Belships v Canadian Forest Products Ltd*** (1999) A.M.C. 2606, in my view it was correctly decided. The ***Belships*** case appears to have been decided upon a mechanistic application of ***Canada Steamship Lines Limited v R*** [1952] A.C. 192, an approach which the English court has eschewed. This is a point to which I return below.

53. The decision of Langley J on the second issue in ***The Imvros*** was also subjected to judicial criticism, by the Singapore Court of Appeal in ***Sunlight v Ever Lucky Shipping Company Ltd.*** [2004] 2 Lloyd's Rep. 174. The Court of Appeal in Singapore concluded that the decision ought not to be followed because it is out of line with the authorities. The specific authorities with which it was said to be out of line are ***The Galileo***, ***Steel v State Line S.S. Co.*** [1877] 3 A.C. 72 and ***Owners of Cargo on the Ship "Maori King" v Hughes*** [1895] 2 Q.B. 550.

54. I have already explained why I do not accept the contentions that ***The Imvros*** is inconsistent with ***The Galileo*** and ***Steel v State Line S.S. Co.***.

55. The third authority with which ***The Imvros*** is said to be inconsistent is ***Owners of the Cargo on Ship "Maori King" v Hughes*** [1895] 2 Q.B. 550. This case concerned the carriage of a cargo of frozen meat from Melbourne to London on board a ship fitted with refrigeration machinery. The bill of lading was headed "*Refrigerator bill*" and described the cargo as consisting of 4553 carcases of hard frozen mutton. It stated that the cargo

was shipped in apparent good order and condition and was to be delivered in London in like good order and condition, subject to exceptions mentioned. The exemption clause in the bill of lading provided as follows:

> "*Steamer shall not be accountable (inter alia) for the condition of good shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever. … Loss or damage resulting from any of the following causes or perils are excepted, viz., insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, sweating, evaporation, or decay, injurious effects of other goods, effects of climate or heat of holds, risk of craft, of transhipment, and of storage afloat or on shore, fire on board in hulk, in craft, or on shore, explosion, accidents to or defects in hull, tackle, boilers, or machinery, or their appurtenances, barratry, jettison, neglect, default or error in judgment of the master, mariners, engineers, or others in the service of the owners; collision, stranding, or other perils of the seas rivers, or navigation of whatsoever nature or kind and howsoever caused, and accidents, loss damage, delay, or detention, from any act or default of the Egyptian Government or the administration of the Suez Canal."*

The shippers brought proceedings against the shipowner for damage to the cargo on the ground that it had been caused by the breaking down of the refrigerating machinery. An order was made for the trial of a preliminary question of law, whether the bill of lading contained an implied warranty of the fitness of the refrigerating machinery as alleged by the shippers. The Court of Appeal held (affirming the first instance judge) that the bill of lading contained an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat in good condition and that the exceptions applied only to what might happen during the voyage and not to the original fitness of the machinery. In reaching this conclusion, the Court of Appeal placed reliance on the decision in ***Steel v State Line S.S. Co.***. The exclusion clause, they held, applied after the ship had set sail. In the words of A.L. Smith L.J.: "*They are exceptions during the voyage when, if all or any of the matters which are mentioned take place, the shipowner is not to be liable*".

56. In both ***Steel v State Line S.S. Co.*** and ***The Maori King*** the court interpreted the exemption clause as being limited in its application to the transit and it was for this reason that the implied obligation of seaworthiness, which concerned the state of the ship prior

to shipment, was unaffected by the exemption clause. Neither, in my view, is inconsistent with the decision in ***The Imvros*** in which the exclusion clause was interpreted as being applicable both before and during transit.

Canada Steamship Lines Limited v R

57. In construing the exclusion clauses in this case and in considering whether they cover a breach of what is often described as the "fundamental" or "overriding" duty of seaworthiness, Mr Davidson, on behalf of Cargo-interests, also urged me to have regard to the guidance set out in ***Canada Steamship Lines Limited v R*** [1952] A.C. 192. He submitted that, although the words of the exclusion clauses are sufficiently broad to cover negligence and unseaworthiness, the clauses do not specifically refer to liability for unseaworthiness or negligence. Accordingly, he submits, the court should consider whether the clauses would have meaning if liability for negligence or unseaworthiness was not excluded; and that, if they would, they should be so construed.

58. It is beyond doubt that, in construing an exclusion clause and considering whether it provides relief from liability for negligence, the English court has traditionally paid significant attention to the approach espoused by Lord Morton of Henryton giving the judgement of the Privy Council in ***Canada Steamship Lines Limited v R*** [1952] A.C. 192. He summarised the approach as follows:

> *(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in* ***The Glengoil Steamship Company v Pilkington*** *(1897) 28 S.C.R. (Can) 146.*
>
> *(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: "in cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation".*
>
> *(3) If the words used are wide enough for the above purposes, the court must then consider whether "the head of damage may be based on some ground other than that of negligence", to quote again Lord Greene in the* ***Alderslade*** *case. The*

> *"other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.*

59. Although ***Canada Steamship Lines Limited v R*** was an appeal from six judgments of the Supreme Court of Canada, the approach espoused by Lord Morton of Henryton has been said also to represent the law in England: ***Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd. Rennie Hogg Ltd (Third Party)*** [1973] 1 Q.B. 400, per Buckley LJ at 420A.

60. Subsequent judicial comments on the approach however reveal that Lord Morton's three propositions should not be applied mechanistically, as if they were a codifying statute, but rather as aids to construction, the court's duty always being to construe the words in question to see what they plainly mean to an ordinarily literate and sensible person.

(1) *"… it would be a fatal error to regard* [the three propositions] *as if they were the words of a codifying and, still worse, an amending, statute. They provide a very lucid and useful summary of well settled law, but have to be construed in the light of that law*": ***Lamport & Holt Lines Ltd. v Coubro & Scrutton (M. & I.) Ltd. (The "Raphael")*** [1982] 2 Lloyd's Rep. 42, per Donaldson LJ at 45 lhc.

(2) "*The court's task is still to discern what the parties intended by the wording they have agreed in the context of the particular type of contract under consideration. But although 'rules' of construction are a guide to the intention of the parties, they are not the masters of the parties' intentions*": ***HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*** [2001] C.L.C. 48, per Aikens J at [45].

(3) "*There can be no doubting the general authority of* [the principles propounded by Lord Morton of Henryton], *which have been applied in many cases, and the approach indicated is sound. The courts should not ordinarily infer that a contracting party has given up rights which the law confers upon him to an extent greater than the contract terms indicate he has chosen to do; and if the contract terms can take legal and practical effect without denying him the rights he would ordinarily enjoy if the other party is negligent, they will be read as not denying him those rights unless they are so expressed as to make clear that they do. But … Lord Morton was giving helpful guidance on the proper approach to interpretation and not laying down a code. The passage does not provide a litmus test which, applied to the terms of the contract, yields a certain and predictable result. The courts' task of ascertaining what the particular parties intended, in their particular commercial context, remains*": ***HIH Casualty and General Insurance Ltd v Chase***

Manhattan Bank [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61, per Lord Bingham of Cornhill at [11].

(4) "*The question, as it seems to me, is whether the language used by the parties, construed in the context of the whole instrument and against the admissible background, leads to the conclusion that they must have thought it went without saying that the words, although literally wide enough to cover negligence, did not do so. This in turn depends upon the precise language they have used and how inherently improbable it is in all the circumstances that they would have intended to exclude such liability*": ***HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*** [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61, per Lord Hoffmann at [63].

(5) "[Subsequent comments about] *the Canada Steamship principles show that they should not be applied mechanistically and ought to be regarded as no more than guidelines. They do not provide an automatic solution to any particular case. The court's function is always to interpret the particular contract in the context in which it was made. It would be surprising if it were otherwise"*: ***Mir Steel UK Ltd v Christopher Morris and others*** [2012] EWCA Civ 1397, [2013] 2 All E.R. (Comm) 54, per Rimer LJ at [35]

61. From time to time, the English court has given consideration to the question whether particular words of exemption are adequate to exclude negligence within the meaning of the first of Lord Morton's propositions. In order to constitute an express exemption of liability for negligence within the meaning of the first proposition, must the clause contain the words "*negligence*" or "*negligent*" or some synonym of those words? In ***Gillespie*** the Court of Appeal was called upon to interpret an exemption clause in the Road Haulage Association's Conditions of Carriage (1967) – these terms having been of incorporated into an oral contract between the parties – and both Buckley and Orr L.JJ. concluded that the words "*all claims or demands whatsoever*" (which formed part of a provision that "*The Trader … shall keep the carrier indemnified against all claims or demands whatsoever by whomsoever made in excess of the liability of the carrier under these conditions*") constituted, for the purposes of the first proposition laid down by Lord Morton of Henryton, an agreement in express terms to indemnify the carrier against all claims or demands without exception and therefore including those arising from negligence of the carrier or his servants. However, this reasoning was criticised by the House of Lords in ***Smith v South Wales Switchgear Co. Ltd.*** [1978] 1 W.L.R.165. Lord Fraser of Tullybelton (with whom the other members of the House of Lords agreed) said:

> "*I agree with the decision in [*the ***Gillespie*** case*] and with the statement by Buckley L.J., at p. 421, that the clause was one "which cannot sensibly be construed as subject to an implied qualification" but I am unable to agree with the Lord Justice's conclusion that the clause contained "an agreement in express terms" to indemnify the proferens. I do not see how a clause can "expressly" exempt or indemnify the proferens against his negligence unless it contains the word "negligence" or some synonym for it and I think that is what Lord Morton must have intended as appears from the opening words of his second test ("If there is no express reference to negligence …").*"

In his own words, Viscount Dilhorne said:

> "*To satisfy* [the first proposition], *there must be clear and unmistakable reference to … negligence; that is shown by the words "If there is no express reference to negligence" with which the second* [proposition] *begins. In* ***Gillespie Bros. & Co. Ltd. v Roy Bowles Transport*** *[1973] Q.B. 400, Buckley L.J. and Orr L.J. thought that the first* [proposition] *was satisfied by a clause whereby one party undertook "to save harmless and keep" the other party "indemnified against all claims or demands whatsoever …". With that conclusion I must express my dissent*."

62. Following this guidance, in ***Lamport & Holt Lines Ltd. v Coubro & Scrutton (M. & I.) Ltd. (The "Raphael")*** [1982] 2 Lloyd's Rep. 42, May LJ (at p. 48 lhc) said:

> "*Although there may be a case involving special circumstances in the future, when a different view may be justified, I think that Lord Morton's first test can only be satisfied if the relevant condition does contain expressly the word "negligent" or "negligence".*"

63. Although ***Smith v South Wales Switchgear Co. Ltd.*** concerned an indemnity clause rather than an exemption clause, the approach to construction of both was said to be the same. Further confirmation that the correct approach to the interpretation of both indemnity clauses and exemption clauses is the same was provided in ***Shell UK Ltd v Total UK Ltd*** [2010] EWCA Civ 180. More recently, however, it has been said that the approach is now more relevant to indemnity clauses than to exemption clauses (***Persimmon Homes Ltd v Ove Arup & Partners Ltd*** [2017] EWCA Civ 373, per Jackson LJ at [56]).

64. The second of Lord Morton's propositions requires the court, in the event that there is no express reference to negligence in the exemption clause, to consider whether the words of the clause are wide enough, in their ordinary meaning, to exclude liability for negligence. In answering this question, fine distinctions of language have emerged. If

the clause specifies *losses* without dealing with causes, it may not protect against liability for negligence. On the other hand, if the clause identifies *causes*, and suggests that one party to the contract is free from all losses howsoever caused, that party will generally be protected. In ***White v Blackmore*** [1972] 2 Q.B. 651, Roskill L.J. said:

> "*It will be observed that the exclusion is of "all liabilities arising out of accidents causing damage or personal injury (whether fatal or otherwise) howsoever caused." Wider words of exemption are difficult to conceive. Indeed the words "howsoever caused" have become in the last half century and more the classic phrase whereby to exclude liability for negligence.*"

More recently, but to similar effect, in ***Brown v Drake International Ltd.*** [2004] EWCA Civ 1629, Pill L.J. said:

> "*The expression "however caused" gives the clearest indication that negligence and breach of statutory duty are included. The expression should be given its plain meaning.*"

65. Moving to Lord Morton's third proposition, where the only possible head of damage is negligence, an exemption clause will usually be interpreted as exempting liability from negligence. Although Lord Morton used the word "must" in his formulation, in ***Lamport & Holt Lines Ltd. v Coubro & Scrutton (M. & I.) Ltd. (The "Raphael")*** [1982] 2 Lloyd's Rep. 42, May LJ (at p. 49 rhc) said:

> "*The word "must" in the relevant passage … should be read as "should usually" …*"

66. Where, however, liability may realistically arise otherwise than through negligence, the exemption clause should usually be interpreted as not exempting from liability for negligence. The test is that of an officious bystander having regard to what the parties may realistically have had in mind. In ***Lamport & Holt Lines Ltd. v Coubro & Scrutton (M. & I.) Ltd. (The "Raphael")*** [1982] 2 Lloyd's Rep. 42, Donaldson LJ (at p. 45 lhc) said:

> "*It is the third of Lord Morton's propositions which is liable to mislead, unless full force is given to his caveat that the "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it. The duty of the Court is to divine from the words used what, in the circumstances in which they were used, the parties must have intended by their bargain."*

And at p. 48 rhc, Lord Justice May said:

> *"… although Lord Morton's use of the words "so fanciful or remote" could lead one to suppose that an exemption clause would only pass test three if one could discard all possible other grounds of potential liability other than those which were unreal and speculative, I do not think that this is a correct interpretation of this passage from his opinion. The words "so fanciful or remote" in the third test are followed by the phrase "that the proferens cannot be supposed to have desired protection against it". Secondly, when … the learned Law Lord turned to consider the actual construction of the clauses which were in issue in the* ***Canada Steamship*** *case, he considered and dismissed the likelihood not only of a colloquy between the contracting parties about the meaning of the clauses before the lease in that case had been executed, but also that in such a discussion the proferee would have accepted a clause exempting the Crown's liability for the negligence of its servants.*
>
> *In my opinion, all that one may properly read Lord Morton as saying is that where, under his third test, the Court considers whether the head of damage may be based on some ground other than that of negligence, it should discard any ground to which, on a reasonable assessment of all the circumstances at the time the underlying contract was made, it is unlikely that the parties would have addressed their mind.*
>
> *Such an approach indeed underlines the fact that the exercise upon which the Court is engaged in these cases is one of construction, that it is one of deciding what the parties meant or must be deemed to have meant by the words they used; the guidelines or tests which are referred to in the many authorities are only to be used by the Court as aids to the successful and correct solution of such exercise.*"

67. In commenting on Lord Justice May's observations, in ***E.E. Caledonia Ltd v Orbit Valve Co Europe*** [1994] 1 W.L.R. 1515, Lord Justice Steyn said (at p. 1522):

> "*For my part I am not convinced that these observations add much to what was inherent in what Lord Morton said. But I willingly accept May L.J.'s gloss on Lord Morton's third test. Ultimately, the third test is not a rigid or mechanical rule. It simply is an aid in the process of construction. And the ordinary meaning of the words in their contractual setting is the dominant factor*."

68. In my view, whilst a mechanistic application of the approach espoused by the Privy Council in ***Canada Steamship Lines Limited v R*** might lead one to interpret the exclusion clauses in the Bill of Lading in one of the ways entreated by Mr Davidson, for me to adopt such an approach would be an error. The three propositions are not terms of a statute. They are aids to construction. It is my duty, having regard to the guidance referred to in paragraph 36 above, to construe the exclusion clauses in order to see what they plainly mean to any ordinarily literate and sensible person having all the relevant

background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the Bill of Lading contract was concluded.

Conclusion on authorities

69. It will therefore be apparent that, for the reasons stated above, I see nothing in the authorities to justify departing from what in my view is a point of construction on which both as a matter of plain language and good commercial sense the Owner is right. As I have shown, the same or similar words of exclusion have been held to be effective to exclude both liability for negligence causing the loss of cargo (***Travers v Cooper*** [1915] 1 K. B. 73 and ***The Danah*** [1993] 1 Lloyd's Rep. 351) and liability for unseaworthiness causing the loss of cargo (***The Imvros***) and the logic of the reasoning in those cases is compelling. Words of exemption which are wider in effect than "*howsoever caused*" are difficult to imagine and, over the last 100 years, they have become "the classic phrase" whereby to exclude liability for negligence and unseaworthiness.

J. Conclusion

70. I accordingly answer the preliminary issue as follows:

On a true construction of the Bill of Lading, the Owner is not liable for any loss of or damage to any cargo carried on deck, including loss of or damage to any cargo carried on deck caused by the unseaworthiness of the Vessel and/or the Owner's negligence.

71. I will hear counsel as to what consequential orders I should make in the light of my conclusion on the issues of construction.