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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Claim No: CL-2017-000656

[2018] EWHC 2460 (Comm)

Rolls Building

Tuesday, 15 May 2018

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

CLEARLAKE SHIPPING PTE LIMITED — Appellant

- and -

PRIVOCEAN SHIPPING LIMITED — Respondent

MR J. PASSMORE QC (instructed by Clyde & Co) appeared on behalf of the Appellant.

MR D. GOLDSTONE QC (instructed by Waterson Hicks Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE COCKERILL:

1 This is a hearing under section 69 of the Arbitration Act 1996 of an appeal in respect of an award dated 6 October 2017 (the 'Award') of a Tribunal composed of Captain B Williamson, Captain J Brown and Mr R Gaisford (the 'Tribunal'), which award was in favour of the Owners. Permission to appeal was given by Teare J on 26 January 2018.

Background and Questions of Law

2 The relevant facts are as follows: by a time charterparty on the NYPE form(1946 edition), dated 31 January 2014 between Privocean Shipping Limited ('Owners') and Clearlake Shipping PTE Limited ('Charterers') *M/V PRIVOCEAN* (the 'Vessel') was chartered for a period of about five to eight months. The vessel is a Kamsarmax bulk carrier of roughly 80 tonnes deadweight. She has seven holds and hatches. In that she is somewhat similar to a Panamax vessel but has slightly deeper holds. She was instructed to load soya beans at New Orleans bound for China via the Panama Canal in November 2014. The instructed quantity, bearing in mind draft restrictions in the Panama Canal, was originally 57,000 metric tonnes ± 10 per cent in Owner's option. Ultimately 60,131 metric tonnes were loaded.

3 Following some debate, including four draft plans as to the stowage plan to be followed, and in particular as to whether hold 4 could be left empty, the Master refused to accept a stowage plan, other than one which had holds 2 and 6 only partly loaded, and required the cargo in hold 2 to be strapped. The Master's view in relation to the plans was that if two holds were slack, one had to be strapped.

4 It is the money and time incurred by the strapping of hold number 2 which was the subject of the arbitration, and is the subject of the appeal before me today. The Owner's claim was for a balance of about US$400,000 of hire. Charterers' counterclaim, with which this application is concerned, was for about US$410,000 in damages. The complaint was essentially that the Master was negligent in requiring the cargo in hold number 2 to be strapped. This, Owners contended, had been done in order to ensure the stability of the ship in accordance with the SOLAS Convention. Charterers contended it was not necessary for the cargo to be strapped and that adequate stability could be achieved by other means, such as either ballasting or distributing the cargo within the holds differently.

5 These ballast suggestions had been made in advance of carriage but had been rejected by the Master, and an initial plan involving leaving hold 4 empty had been initially proposed by the Master, but withdrawn on safety grounds.

6 The sum in dispute was paid into an escrow account under an agreement that the Charterers were liable to pay the full amount of hire should the Tribunal make a determination in the Owner's favour.

7 At the hearing, it transpired on the expert evidence that there was a perfectly safe stowage plan which involved leaving hold 4 empty and having two holds slack but without strapping. The experts found this plan in about 90 minutes without any difficulty. The Tribunal held that the Master should not have insisted on the stowage plan ultimately pursued and should, instead, have identified a stowage plan along the lines that the experts ultimately found using a different distribution of the cargo between the holds and the one he had adopted. They found, given that this plan was easy to work out from the software available to him, he was negligent not to do so.

8 The key finding in the Award is that:

> "We do find that the Master provided the Charterers with incorrect information as to the Vessel's capabilities with regard to stowage both in relation to hold number 4 and in relation to loading with more than one slack hold; and in his failure to identify a stowage plan similar in nature to the TMC plan. This was negligent and constituted a breach of clause 8 and clause 83 in that his objection to the stowage plan with hold 4 empty and refusal to load with two slack holds without strapping were unfounded, based on incorrect information and did not have true regard to the Vessel's trim, stability and stress."

9 For present purposes, the provisions which are in focus are largely different provisions. The first one is clause 2 of the NYPE form which provides, *inter alia*, that Charterers are to provide and pay for necessary and requisite cargo fittings. The wording is:

> "Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo …"

10 The Charterers say that the Tribunal was wrong to find that unnecessary and non-requisite fittings such as the strapping insisted on by the Master for hold 2 were for the account of the Owners.

11 The second provision which is in focus is the incorporated version of section 4(2) of the US Carriage of Goods by Sea Act, which states:

> "Neither the Carrier nor the Ship shall be responsible for loss or damage arising or resulting from:
>
> "(a) Act, neglect or default of the Master, Mariner, Pilot orthe Servants of the Carrier in the navigation or in the management of the Ship."

The Charterers say that, having found that the Master's stowage plan was in breach of the charterparty and negligent, the Tribunal were wrong to find that his negligence was in the management of the ship, not the management of the cargo, and was therefore excluded by section 4(2).

12 The questions of law are as follows:

(1) Is the effect of clause 2 of NYPE form 1946 edition that unnecessary and non-requisite fittings insisted upon by the Master are for the account of Owners?

(2) Where the primary purpose of a loading and stowage operation is to put the cargo on board so that it can be carried to the discharge port, and where the Master negligently causes the cargo to be loaded and stowed in such a way that money and time are wasted by fitting and removing unnecessary cargo fittings, is the negligence of the Master in the management of the ship (within the meaning of section 4(2) of US COGSA and Article 4, rule 2, of the Hague/Hague Visby Rules), or the management of the cargo?

<u>Question (1)</u>:

13 As I have already stated clause 2 of charterparty provided:

"Charterers are to provide necessary dunnage and shifting boards and also any extra fittings requisite for a special trade or unusual cargo, but Owners to allow them the use of any dunnage and shifting boards already aboard the Vessel."

14 Also relevant in this context are clauses 8 and 83 of the charterparty which provided:

> "8…and Charterers are to load, stow trim and discharge the cargo at their expense under the supervision of the Captain…
> …
> Clause 83 – Bulk Carrier Safety Clause
> 1…
> 2. In addition to the above and notwithstanding any provision in this charter party in respect of the loading/discharging rates the Charterers shall instruct the terminal operators to load/discharge/shift the vessel in accordance with the loading/discharging plan which shall be approved by the Master with due regard to the vessel's draught, trim, stability, stress or any other factor which may affect the safety of the vessel."

15 The Charterers' argument is that what clause 2 does not provide is that the Charterers are to provide or pay for unnecessary and non-requisite cargo fittings. Essentially, they say, it is a logical correlate of the use of the words "necessary" and "requisite" that where the Master insists on using unnecessary and non-requisite cargo fittings, those fittings are for the account of Owners. They say that to read the clause otherwise would turn it into a liability on Charterers to pay for all cargo fittings, whether requisite or not, and whether necessary or not, and that would make a nonsense of clause 2.

16 The Owner's position is that clause 2 is concerned with what Charterers are required to provide, as it also in some of the earlier lines of the same clause tells one what the Owners are required to provide. They say it says nothing about the position in the rather unusual case of a charterer who provides and pays for a fitting which turns out not to be requisite under clause 2. They say that the Charterers have not attempted to explain on what basis the clause is to be construed as providing for a remedy in relation to a case which, on its own terms, it does not apply.

17 They submit that the position pursuant to the charterparty is governed by, in particular, clause 8, and that, as a matter of authority (see *Court Line v Canadian Transport* [1914] AC 934), clause 8 not only addresses explicitly that the operations therein are to be undertaken or arranged by the Charterers at their own cost, but also that responsibility for such operations is transferred to the Charterers. It follows, they say, that as per the charterparty the cost of and responsibility for cargo operations was on the Charterers, and that clause 2 is in line with that, simply setting out specifically what Charterers were required to provide in respect of dunnage. In order to transfer the responsibility for the cost of or operations to Owners, they say express wording would be required.

18 They also say that there is another route round this, that in the event of Owner's own breach of an obligation under, say, clause 8 which results in additional costs being incurred, those costs could be claimed by way of damages resulting from that breach (as has been done in this cas;, but if no such damages are recoverable, for example, because there is a charterparty exception, there is no basis for extending clause 2 beyond that to cover such a clause. The expenditure, they say, simply lies where it falls, subject to any contrary arrangement that the parties may have made. They say that the Tribunal did not say that the Charterers were under a liability to pay for all fittings, including non-requisite fittings, and that this is an entirely distinct point from whether the clause provides a separate route from

the damages claim to recoup the cost of non-necessary fittings, and that there is no basis for that second route.

19 The Owners also deal with the suggestion which was made by Teare J granting permission to appeal. During the course of his note on permission to appeal, he said this:

> "I am persuaded that the Tribunal's decision is open to serious doubt. Clause 2 probably does not provide a remedy in debt or indeed a remedy in damages, but it is arguable that what it does is to allocate to the Charterers responsibility for certain matters, one of which is responsibility for necessary or requisite cargo fittings. The Tribunal has held that the cost for strapping is not necessary. In those circumstances, that cost was not allocated to the Charterers by clause 2, but arguably by inference to the Owners. In circumstances where the Charterers have paid the cost of strapping into an escrow account, they were not, when relying upon clause 2, seeking payment of a debt or damages for breach. The sum in the escrow account stood as security for the payment of those costs in the event that the Tribunal found in favour of the Owners. Since the Tribunal held, as contended by Charterers, that strapping was not necessary, it is arguable that the sum in the escrow account should have been paid to the Charterers pursuant to and in accordance with clause 2.

20 Owners say that no such argument was pursued below, and hence the point was not considered by the Tribunal and did not form part of the reasons and did not form part of the application for permission to appeal.

21 In any event, they say the point is not a good one. The Tribunal in its reasons described the circumstances in which the escrow was constituted. That comprised the sum deducted by Charterers from hire in respect of their counterclaim for the costs of the extra strapping. It, therefore stood, in effect, as security for the claims of both parties. This, they say, is a commonplace arrangement and absent some special agreement those arrangements are not intended to affect the substantive rights of the parties. The construction and effect of clause 2 could not, therefore, be affected by the subsequent constitution of an escrow.

Discussion:

22 On this issue I am not persuaded that there is any error of law.

23 I shall deal first with the question of escrow. I agree that this argument, which has not been relied upon by the Charterers, would not have been available to them, not having been argued below, and not having formed part of the application for permission to appeal. In any event, however, I am satisfied that it would not provide an answer. The escrow was agreed as a measure essentially to hold the line while the arbitration was on foot. It was not, so far as it seems, done by reference to any subsequent claim. It has no reference to the arguments under the contract, and accordingly it seems to me that it could not provide an answer.

24 I have referred earlier to the way in which Teare J saw the potential for the main issue to be read. However, I do not see how the reading which he adverts to, or the reading for which Charterers contend, can sit with either the wording of the clause which, on its face, simply does deal with what the respective parties are each to provide, and does not deal with recoupment or with clause 8 and clause 83, to which Owners have referred me. In particular, the effect of clause 8 is well known. It is a broad transfer of responsibility, and in that context too I find it hard to see how a qualification for necessity could properly be read

into clause 2 without rather more than appears. That conclusion is only reinforced by clause 83.

25 I might be more in charity with this argument were any conventional argument as to construction addressed to it, by reference to the other clauses and the scheme of the contract and the authorities, for example. However, what I am essentially urged to do is to read clause 2 as bringing about a result, without the route in terms of an argument on construction which gets to that result ever having been enunciated. In the light of all of these matters, I am entirely unpersuaded on the first question.

Question (2):

26 Section 4(2) of US COGSA, which is in the same terms as Article 4, rule 2(a) of the Hague Rules, provides:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

27 I note that it has not been in issue between the parties that this section, which of course is primarily designed with reference to cargo damage, is applicable to the rather different claim in this case.

28 The key point in this case is that "management of the ship" has a restricted meaning and must be distinguished from "management of the cargo" (see *Gosse Millerd v Canadian Government Merchant Marine (The Canadian Hyundai)* [1927] 29 Lloyd's Rep 190, (CA) [1929] AC 223, (HL)). In *Gosse Millerd*, Lord Hailsham noted that the words "management of the ship" in the Carriage of Goods by Sea Act 1924 had a long judicial history, including in the US Harter Act, which had been the subject of English decisions.

29 My attention is drawn specifically to the following *dicta*. The first is that Gorrell Barnes J in The *Glenochil* (1896) P. 10, where he said:

> "An act that is 'done for the safety of the ship herself and is not primarily done at all in connection with the cargo' is an act of management of the ship."

The *dictum* of Sir Francis Jeune in the same case at page 16:

> "The distinction I intended to draw [in *The Ferro*] and intend to draw now is one between the want of care of cargo and the want of care of the vessel indirectly affecting the cargo."

30 The Charterers argue that the Master failed properly to manage the cargo in that he failed to cause the cargo to be loaded according to a stowage plan which negated the need for strapping, and that the money and time wasted by the strapping were the direct results of the Master's mismanagement of the cargo.

31 The main authorities relied upon by the Charterers in support of this argument are *The Germanic*, a decision of the United States Supreme Court at 196 US 589 (1905), reported at 196 US 589, and also *The Iron Gippsland* [1994] 1 Lloyd's Reps 325. Those

authorities are both about damage to cargo rather than claims of the nature which are before me today.

32 In *The Germanic*, the facts were that a steamer arrived in New York coated with over 200 tons of ice, the weight of which was later added to by a heavy fall of snow. Because she had arrived 36 hours late and wanted to make her regular time to sail four days later, she began to discharge cargo from all of her five hatches at once, while at the same time taking in coal from barges on both sides. When she had discharged most of her cargo, she went suddenly from a starboard list of 8 degrees to a port list of 9 degrees. During that incident the open cover of an aft coal port was knocked off. It is recorded in the judgment that the Master had previously given no attention to the discharge of cargo or the loading of coal, but in response to the rolling he gave orders. Those orders were that coaling should be stopped on the port side but continued on the starboard side, to cease discharging from the lower hold, and to shift some sugar in bags to the starboard side. After 10 tons of sugar had been shifted the steamer rolled back to starboard and assumed her previous starboard list. After that coaling and discharging continued and other cargo was loaded. During these operations, the starboard list increased and then very suddenly the steamer rolled over again to port. The open coal port went under the water line, the vessel sank and the cargo was damaged.

33 The issue was whether there was liability for negligence, fault, or failure in the proper loading, storage, custody, care, or proper delivery of merchandise under section 1 of the Harter Act, or whether there was an exemption from liability under the parallel provision to the one which is in question before me today.

34 Having considered *The Glenochil*, Holmes J, giving the judgment of the US Supreme Court said:

> "We assume further that the captain retained authority over his ship, so that it was his power, and perhaps his duty, to intervene in any case that needed his control. On these assumptions, the argument is that cargo has also a function as ballast; that if, for instance, the loss is caused by the improper shifting of pigs of lead, it does not matter whether they are called ballast or cargo, but in either case, so far as the change affects the fitness of the ship as a carrier, it is management of the vessel within the act. The thing done is the same, and the name of the object cannot affect the result.
>
> Nevertheless, in a practical sense, the ship was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of the section, adopted by the Court in *The Glenochil* and sanctioned by this Court in *Knott v. Botany Worsted Mills,* 179 US 69, 179, US 73-74, to faults 'primarily connected with the navigation or the management of the vessel, and not with the cargo.' (1895) Prob. 15, 19. In the case supposed, the name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel; but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore. the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspect, falls within both sections, and if that be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.

> A distinction was hinted at in argument based on the fact that the damage was not to the cargo removed, but to that left behind in the ship. If the damage was attributable to negligence in unloading, it does not matter what part of the cargo is injured. The fact referred to does bring out, however, that the negligence in removing the cargo was negligence only because of its probable effect on the ship, and was negligence towards the remaining cargo only through its effect on the ship. But, although this may be conceded, the criterion which we have given is undisturbed. That 'in' which, as the statute puts it, the fault was shown, was not management of the vessel, but unloading cargo, and, although it was fault only by reason of its secondary bearing, the primary object determines the class to which it belongs."

35 Charterers emphasised that in the present case the cargo was loaded in accordance with a stowage plan produced by the Master, and that only he ever produced the stowage plans. They submit the stowage plan was the document which told everyone involved in the loading and stowage operation how much cargo was to be loaded, where in the vessel it was to be loaded and stowed, and that the primary purpose of the loading and stowage operation done pursuant to the stowage plan was plainly to put the cargo on board so that it could be carried to the discharge port. But for that primary purpose, the cargo would not have been put on board at all, and in the ordinary way in the loading and stowage of cargo it was necessary to have regard to matters such as trim, stability and sheer forces. They submit that *The Germanic* makes clear that in an ordinary loading operation such considerations do not transform the stowage plan, or loading and stowage pursuant to the stowage plan, into matters of management of the ship. Accordingly, they say *The Germanic* provides strong support for their submissions.

36 The second case relied on, *The Iron Gippsland*, was a case where a carrier carried two types of cargo simultaneously, ADO and Tapis blend crude oil. The IG system of the vessel was mismanaged in that after the tank which contained the ADO was filled with inert gas, the tank was not isolated. As a result, as the experts all agreed and the court found, the gas from the Tapis crude travelled via the inert gas system and contaminated the ADO.

37 In the Admiralty Division of the Supreme Court of New South Wales, Carruthers J, in a short passage in a very lengthy judgment, held that owners could not rely on the exceptions. Carruthers J said:

> "It is true that inert gas systems were installed on tankers fundamentally for the protection of the vessel. However, the purpose of inert gas system is primarily to manage the cargo, not only for the protection of the cargo but for the ultimate protection of the vessel from adverse consequences associated with that cargo. Thus, essentially the inert gas system is concerned with the management of the cargo and, in my view, damage occasioned to cargo by mismanagement of the inert gas system cannot be categorized as neglect or fault in the management of the ship."

38 Charterers argued that an inert gas system is intended to protect the vessel from dangers associated with the cargo during carriage and after discharge, and mismanagement of a system intended to protect the vessel from cargo is a mismanagement of the cargo rather than mismanagement of the vessel, and that is analogous, they say, to another way in which vessels must be protected from dangers associated with cargo; that is in relation to trim, stability and sheer forces. So, where the primary purpose, as here they say, of a loading operation is the carriage of cargo, *The Iron Gippsland* case indicates that negligence in relation to the operation of such a system is mismanagement of the cargo, even if the negligent act is also aimed at protecting the vessel from the cargo.

39 I was referred by Charterers to a similar English case, *The Eternity* [2009] 1 Lloyd's Reps 107, in which David Steel J looked at a similar issue but with the focus on the question of separation valves. David Steel J indicated that he had some doubt on the idea expressed in *The Iron Gippsland*, that the IG system is primarily for cargo management, pointing out that, in fact, it has two functions, to prevent explosion and preventing contamination of cargos. He broadly approved the approach in *The Iron Gippsland*, arriving at the same conclusion, but this time by reference to the use of a separation valve and the fact that there no gas freeing at the relevant time.

40 Charterers also referred me back to *The Glenochil* , where the "management of the ship" exclusion was held to prevent Owners with damage done by water which escaped from a broken water pipe by reason of the fact that Owners had pumped water along the pipe into a ballast tank without realising that it was broken with the consequence that cargo suffered damage. It was in this context that Sir Francis Jeune said, as quoted later by Lord Hailsham, that the distinction that he wished to draw was between want of care of the cargo and want of care of the vessel indirectly affecting the cargo. Charterers say in *The Glenochil* the damage to cargo was the indirect result of Owners' failure to mend the broken pipe, and Charterers say that this case is distinguishable in that in the present case the Master's want of care directly affected the cargo. The wasting of time and money by strapping cargo was the direct result of the cargo being incorrectly and negligently distributed between the vessel's holds when loaded.

41 They say that it matters not that the Master's intention in acting as he did was to ensure the safety of the vessel as the Tribunal found. They explained that that was also the case in *The Germanic*. In *The Germanic* it was held that the Master retained his authority over his ship so that it was in his power, and it was perhaps his duty to intervene in any case that needed its control. They note that the orders to continue coaling only on the starboard side, and so forth, were entirely concerned with the stability of the vessel.

42 They also point to the fact that it was found that the Master's *"negligence in removing in cargo was negligence only because of its probable effect on the ship and was negligence towards the remaining cargo only through its effect on the ship."* The say none of this led to the negligence of the Master being categorised as management of the ship, and that the important point was that the primary purpose of the operation was to get the cargo ashore. It, therefore, followed that the negligence was in the management of the ship. That, they say, is akin to the present case where the primary purpose of the operation was to get the cargo on board and as a result, the Master's negligence was not in the management of the ship but in the management of the cargo.

43 Charterers point to paragraph 58 of the award and also paragraphs 53 and 56 as demonstrating that the Tribunal failed to apply the correct test - that is between the management of the vessel and management of the cargo. They say that if the Tribunal had correctly applied the distinction they would have held that the primary purpose of the loading and stowage operation was to put the cargo on board. They say that the Master's negligence was not only in relation to what he did, but what he failed to do, and point to the finding at paragraph 46 of the award that the Master should have produced a stowage plan similar to the plan identified by the Charterers' expert. They say that if the Master had produced a stowage plan similar to the TMC plan it would have formed the basis of instructions as to how much cargo to load, and where in the vessel the cargo was to be loaded and stowed, and would have provided or caused proper instructions as to the management of the cargo. It follows, therefore, that the failure in relation to the plan was mismanagement of cargo.

44 Charterers also make an analogy with situations of overloading and underloading, and say that causing Charterers to incur an expense by failing to produce a stowage plan which would have negated the need for strapping the analogous to causing Charterers to incur expense by loading too little or too much cargo, both of which are mismanagement of the cargo, though it might naturally have consequences for the vessel in terms of trim, stability or other aspects of safety.

45 The Owners say that the starting point in this regard has to be to ask: what is the relevant act, neglect or default; that is the act which causes the loss? Of course, in normal cases of cargo damage, they say this is easy to identify. They say that one has to be more careful to identify the relevant causative breach here, and that in this case it is not a failure by the Master, as the Charterers submit, to provide the Charterers with any particular stowage plan because, as a matter of contract stowage and loading were matters for the Charterers. The Master had rights of supervision and approval which were rights of intervention for safety of the ship, but the breach of duty could only lie in rights of supervision and approval under clauses 8 and 83. It was not a matter for the Master under the contract to plan the stow, for example. They point, therefore, to the relevant breach as being the Master's insistence that the vessel could not safely load with hold 4 empty, and with more than one slack hold without one of those being strapped. That is said to be a breach because that insistence was wrong, and negligently wrong. He had a right to intervene, but if he did intervene, as he did, he had to get it right, and they point to paragraphs 37 to 39 of the award in this regard.

46 So, the Owners submit, if there is no breach in the failure to produce a different plan, the failure is in the insistence on the wrong plan; with a corollary that the failure to identify the right plan which would have led to no breach existing, is also a breach. The question, they say, is whether the refusal to permit any different stowage plan on safety grounds is an act in management of the ship or cargo.

47 Owners say that the law has to be looked at in the light of this starting point and also in the light of the Tribunal's findings of fact. They have pointed me to paragraph 36 of the award which deals with the general law; and to paragraph 40 which indicates that it was for the Charterers, as a matter of contract, to produce a stowage plan which had to be approved by the Owners; to paragraph 42, which again says that it is a matter for Charterers to be contractually loading and stowing, and that is where the Tribunal say that there was a need to produce or adopt a stowage plan. They point me to paragraph 43, where the Tribunal found that the Master was wrong to state that he could not load with one hold empty and with one hold slack without need to strap. They also point me to paragraph 46 where the Tribunal notes breach of clauses 8 and 83 in that his objections were unfounded based on incorrect information and did not have due regard to the vessel's trim, stability and stress. They have also pointed me to paragraphs 53, 56 and 58, which state:

"53…Charterers were entitled to present whatever stowage plan they wished. The Master's entitlement was to reject it or call for its modification. [The Master's] objections in the present case were solely concerned with her ability to perform the intended voyage while maintaining the requisite stability. It was not concerned with care for the cargo.

…

56…In the present case, as the Master's involvement was purely in relation to the Vessel's stability and was not concerned with the safety of the cargo except, of course insofar as the cargo might be lost if the Vessel was lost through her instability…

…

58…The purpose of the Master's involvement was primarily if not solely in relation to ensuring the safety of the Vessel in terms of stability and avoidance of excessive shear forces. Questions of management of the cargo, including how it was loaded or discharged,

and indeed where it should be stowed, were all matters for the Charterers to decide but subject to the Master's intervention for the purposes of the said safety of the Vessel."

48 They say that when one looks at paragraph 59 of the award, one can see the conclusion of the Tribunal, *"We have accordingly come to the conclusion that the Owners were indeed entitled to rely on the exemption from liability provided by section 4(2) of US COGSA."* They say that it can clearly be seen that the Tribunal correctly asks itself the critical question of whether the relevant acts of the Master were primarily, if not solely, for the purpose of ensuring the safety of the ship.

49 They say that this is the obviously sensible result, given that, as found by the Tribunal, the Master was seeking to ensure that the ship had sufficient stability in accordance with an international convention. They say that this is an archetypal matter of ship management, as the breaches identified by the Tribunal presuppose that the intervention was for the purpose of safety of a vessel. They therefore say that the absolute most that can be said that this is a case in which the care of the vessel indirectly affected the cargo.

50 The Owners also point out that the same result could have been achieved by ballasting the vessel's ballast tanks and remind me that this had been initially urged by the Charterers, as noted in paragraph 8 of the reasons, and that if that had been done the case would have been on all fours with *The Glenochil,* where what was done was ballasting to change the trim of the vessel.

51 They point out that the logic of the Charterers' position is that if the Master had insisted on ballasting and this had caused the Charterers to incur expenditure, there would plainly have been a defence, by the authority of *The Glenochil* under Article 4, rule 2(a). They say it would be a peculiar result that because the particular method insisted upon by the Master entailed strapping the cargo, rather than ballasting, the result would be the opposite.

52 It was suggested by Mr Goldstone that, in the light of the authorities, I should conclude that the relevant test which I need to apply is whether the conduct is directed at, or guards against danger to the ship or is concerned with the safety of the ship as a whole. He says that if that is the relevant test the case can only have one answer based on the Tribunal's findings because it is utterly plain that that is what the Master was concerned with, and that that makes sense because that is what he was contractually entitled to do, given that, as a matter of contract, his rights were limited to supervision and approval on safety grounds.

53 The Owners have taken me through the authorities, including *The Ferro*, pointing out to me that while Gorrell Barnes J states in terms there that improper stowage is not a question of ship management, Sir Francis Jeune said rather that bad stowage does not fall within safe negotiation *"unless such stowage affects the safe sailing of the ship"*.

54 In relation to *The Glenochil* I have been taken to the classic tests and also had it pointed out to me that that was a case where the ballasting exercise took place in the course of discharge. So, it was submitted that the fact that it was connected with the cargo and in the course of discharge does not tell one that it ceases to be management. It is still necessary to ask what the conduct is and what it is primarily concerned with. It was also submitted that the claimant's submission that shifting mid-voyage would be management does not bear up against the facts of *The Glenochil.*

55 In relation to *The Germanic*, I was taken to the specific factual findings in that case which it was submitted were absolutely key. Those factual findings were that the loss was due to hurried and imprudent unloading, that there were shore agents in charge of the ship, that the

ship was not under management. It was submitted that that case shows that what happens if you shift cargo and create instability is that it is an act done in management. If you shift for stability it is the same whether you are using ballast, and I am pointed to a particular passage (towards the bottom of the first column on page 3 of the version we have been using), *"If, as in view of the findings we must take to have been the case here, the primary purpose was to get the cargo ashore"*, as denoting that the finding in that case was very specifically predicated on the factual findings. It is said to me that the decision endorses the proposition that you have to look at the purpose of the relevant activity if it is directed to stability, even if it involves cargo. Here it is a somewhat different case, as I have already indicated.

56 I was directed to *Hourani v Harrison* (1927) 28 Ll. L. Rep. 120, a case of theft by stevedores, again approving the citations, including *The Germanic*, and there was a case which was an act relating to the ship itself, and only incidentally damaging the cargo, and an act dealing solely with the goods, or not directly or indirectly with the ship itself; the *Gosse Millerd* case, which was one of repairs in the course of voyage where the issue was protection of hulls from entry of rainwater which was not directed at the safety of the ship, but solely in the interests of the cargo, but specifically approved the test in *The Glenochil*, and also approved *The Germanic* and the version of the test.

57 I was also referred to *The Hector* (1883) 8 P.D. 218, which was a slightly different case of water ingress through hatch covers, but in that case, there had been a failure to maintain securing wedges so the tarpaulins were stripped away on an exposed weather deck with the result that 20 tons of sea water entered the hold. In that case the finding was that the particular matters were part of the safety of the ship and not primarily for the cargo, even though there was no instability caused.

58 In relation to *The Iron Gippsland* the submission was made that essentially the result of those is that IG assistance can and does serve two purposes. If there is a negligent use of the system, you have to look and see whether it is a negligent use which relates to one or other of those purposes, and that will govern whether it is a failure in management or failure in relation to cargo, and on the facts, both of those cases are cases where the use of a system related to contamination rather than to explosion or avoiding explosion. It was submitted that if damage had occurred during the course of gas freeing, the result in those cases would have been different.

59 The Owners note that Teare J observed, as one of the reasons for granting permission, there are no cases referred to by the Tribunal which concern a Master who puts forward an inappropriate stowage plan. But they say, as *The Germanic* makes clear, the test is what the primary nature and object of the acts which caused the loss are, the Master's action in requiring the cargo to be strapped, the Owners say was directed at the safety of the ship. The fact that the requirement was reflected in the stowage plan cannot affect the analysis.

60 It is also submitted that this is case is *a fortiori* in most of the authorities in circumstances where the contractual position is that the primary responsibility for the stowage rested on the Charterers, and the Master was only able to intervene for the purpose of the safety of the vessel. That was precisely what he did, as the Tribunal found. Accordingly, they say the Tribunal was very right to distinguish the case from the cases upon which the Charterers rely, that they applied the correct test, and they applied it correctly in the light of their factual findings which cannot now be challenged, and in the circumstances the Tribunal reached the correct decision. This case, they say, clearly falls on the management side of the line.

Discussion:

61 On the second point I am also not persuaded that any error of law can be discerned. Although, as Teare J noted, the editors of **Scrutton** regard the authorities as not being in a perfect state of harmony, and the editors of **Voyage Charters** had expressed some concern about one of the minor authorities, *The Hector*, the underlying line of determination is, however, in my judgment, clear. The primary way in which the test is put is "what is the primary nature and object of the acts which caused the loss?". To this may be added the questions posited in **Voyage Charters** and *The Glenochil*:
(i) one which was done or left undone as part of the care of the cargo, or as part of the running of the ship not specifically related to the cargo?
(ii) is the act or default which has caused loss or damage or want of care of cargo and want of care of the vessel indirectly affecting the cargo?

62 I was invited by Mr Goldstone for the respondents effectively to endorse a new test posited by him on the basis of a consideration of the authorities being: "Is the conduct directed at guarding against or concerned with the safety of the ship as a whole?"

63 I am not going to accede to his invitation to reformulate the test. The tests we have have been set out by the courts of the highest authority peopled by judges who, as the authorities show, had perhaps greater opportunities than a modern judge of considering these issues in the context of shipping cases. It would, in my view, be presumptuous for me to try to improve on these tests, particularly in the context of what the parties agree is a somewhat unorthodox case. The tests we have are tests which necessarily involve a consideration of the facts, and it is in that context not at all surprising that the authorities which treated the inter-relationship of cargo management and ship management issues in very different factual situations may not on their face harmonise perfectly. For the same reason I do not find it surprising, as did Teare J, that there are no cases on very similar facts to the present, i.e. dealing with an inappropriate stowage plan.

64 Looking at the award, it seems to me that the submissions advanced by Mr Goldstone for Owners as to the nature of the breach in question are correct, and what the Tribunal found was that the breach consisted in a refusal to accept that the Master could load with hold 4 empty and two slack holds unstrapped; or, to put it another way, a failure to identify and hence accept that the converse arrangement was safe. There was no separate obligation to produce a plan or to hand one over, and there could not have been, because of the division of responsibility set out in the contract as regards cargo operations.

65 As for the reason for this breach, it is clear from the Tribunal's findings, some of which I have reproduced above, but I mention also paragraph 1 of the reasons where they say that *"this is a dispute ... [which] concerns which of them is liable for the costs of strapping one of the vessel's holds in order to maintain the requisite stability of the vessel in performance of the voyage in compliance with the International Code for the Safe Carriage of Grain in Bulk."*

66 It is clear from findings such as this that, subjectively, what drove the Master to act as he did was a consideration of the stability of the vessel and was, hence, a care of the ship issue.

67 Charterers rightly say that *The Germanic* indicates that this is not determinative, because in that case there were clear findings in relation to a concern for stability, but the US Supreme Court nonetheless held that the main concern was one regarding cargo and the exception did not apply. Of course, I am not bound by that decision. However, I am not asked to say that I consider it was wrong. It has plainly been accepted as at least applying the correct principles in all the subsequent cases in this jurisdiction and, having looked at those

authorities, it seems to me that the decision actually does broadly harmonise with the other authority. I do consider that there may be cases, of which *The Germanic* appears to be one, when there may be a subjective concern for stability or other ship management issues, and that may still be outweighed by cargo care concerns.

68 This illustrates what I have said about the fact sensitivity of these cases because it is clear on a close reading of *The Germanic* that, in fact, that decision does turn on just such a consideration. One can see, as Mr Goldstone submitted, that in that case there were very key specific factual findings which do not emerge particularly clearly in a bulk from the report on a first reading,. But just before page 598 of the report the judge said this:

> "If the primary purpose is to affect the ballast of the ship that changes management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore … [it is not]."

It is, therefore, clear that the court in *The Germanic* was operating on the basis that it had factual findings which amounted to a conclusion that the primary purpose was to get the cargo ashore.

69 Those appear, despite the other findings which indicated there was a concern as to ship management, to have been the following points: the loss was due to hurried and imprudent unloading, there were shore agents in charge of the ship, the ship was not under management but rather was *"the inert ground ... of activities that looked ... to getting the cargo ashore"*, and that the acts of the Master were directed to that. I do consider that the decision is both consistent with the other authorities, including *The Glenochil*, and that it is plainly distinguishable from the present case.

70 As to *The Glenochil*, it at first appears that there is a lack of harmony about the results in that in *The Glenochil* the vessel was, in fact, discharged when the ballasting was done, making it a case where, like *The Germanic*, both cargo and stability operations were, in effect, at once. However, there the conclusion was that, on the facts, the primary purpose of the move was to ensure stability. It was not a case, as Sir Francis Jeune said, of want of care of the cargo. There were in that case none of the rather unusual factual findings which appear to have driven the conclusion in *The Germanic*. Further, *The Germanic* is, at page 597 in the consideration of the pigs of lead point, dealing with shifting of cargo or ballast for stability and is entirely in harmony with *The Glenochil* saying:

> "If … losses caused by the improper shifting of pigs of lead, it does not matter whether they are called ballast or cargo, but in either case, so long as it affects the fitness of the ship as a carrier, it is management of the vessel within the act. The thing done is the same and the name of the object cannot affect the result."

71 As to the distinction between *The Germanic* and this present case, I do not find here anything like the key findings which, as I have found, essentially drove the conclusion in *The Germanic*. There you had a situation where discharge was actually in progress, and the Master had a direct control over it. Stability arose out of issues which looked to discharge, and there were, as I have said, those specific findings as to the absence of any active ship management.

72 Here the situation is very different. The acts complained of predated any act of loading. It was the refusal to contemplate a particular stowage arrangement desired by Charterers, and at most the failure to identify that there was a stowage plan which could accommodate their preferences. That stowage plan was then, as the Tribunal said, effectively adopted by the

Charterers, albeit unwillingly. That situation was the correlate of the contractual position where, as a matter of law, the responsibility for loading had been devolved under clause 8, which I note was not amended to add "and responsibility", as is often done. The Master's role in creating the stowage plan, therefore, is, in such a case, supervisory and not primarily related to the care of the cargo. It is, in my judgment, very much best seen as he, perhaps unsurprisingly, plainly subjectively perceived it to be - as pertaining to the stability of the vessel.

73 Nor does anything in the other cases drive me to a different conclusion. Indeed, as Owners have submitted, the analogy with *The Glenochil* where what was in issue was ballasting, indicates the contrary. Here the Charterers initially argued that the alternative route available was ballasting, but dropped that argument before the hearing of the arbitration. In *The Glenochil* it was accepted that ballasting was directed at ship's safety, and it would, it seems to me, be an oddity, in the light of this conclusion and in the light of the "pigs of lead" analysis in *The Germanic*, if, in a similar or *a fortiori* situation (this not being a stability issue in the course of loading or discharge and this being a case where loading and discharge are the business of Charterers), the position were different to that in *The Glenochil* unless there were factual findings which took the case out of the ordinary run.

74 So far as *The Iron Gippsland* is concerned, that is a case on very different facts, and the factual findings there are clear and very different to those in the present case. Further, in its sister case, *The Eternity*, it seems to me that David Steel J's focus on the use to which the relevant valves were being put is entirely in line with the approach indicated above. It denotes that a focus on the primary purpose or object may turn on quite fine distinctions.

75 It follows from all that I have said that I cannot accept Mr Passmore's submissions ,so ably advanced, which indicated that I should look at the matter overall and conclude that the purpose of the stowage plan was to allow cargo to be loaded, and that it dealt with the fundamental questions of how much cargo was to be loaded, and thus the plan was connected with the cargo, and primarily so.

76 Having looked at the relevant tests to which I have already adverted, it seems to me that it is relatively clear that the primary nature and object of the acts which caused the loss were ones which related to ship management in the sense of stability, and that what was in question was not a want of care of cargo, but a want of care of the vessel which had an effect on the cargo.

77 Accordingly, I have come to the conclusion that the Tribunal reached the correct result. There was no error of law, and the appeal fails.

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