HONG KONG FIR SHIPPING CO., LTD. *v.* KAWASAKI KISEN KAISHA, LTD.

[QUEEN'S BENCH DIVISION (Salmon, J.), January 30, 31, February 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 22, 1961.]

Shipping—Charterparty—Unseaworthiness—Incompetent and inadequate engine-room staff—Whether charterers entitled to repudiate charter.

By a time charter dated Dec. 26, 1956, it was mutually agreed between the owners of the vessel Hong Kong Fir, classed Lloyd's 100 A1, and the charterers that (cl. 1) the owners would let and the charterers hire the vessel for twenty-four months from the date of her delivery to the charterers at Liverpool "she being in every way fitted for ordinary cargo service" and that (cl. 3) the owners would "maintain her in a thoroughly efficient state in hull and machinery during service". Under the charter hire was payable at the rate of 47s. per ton but it was provided that no hire should be paid for time lost exceeding twenty-four hours in carrying out repairs to the vessel and that such off-hire periods might at the charterers' option be added to the charter time. The vessel was delivered to the charterers at Liverpool on Feb. 13, 1957, and the same day she sailed for Newport News, U.S.A., to load a cargo of coal which she was to carry to Osaka. When she was delivered to the charterers at Liverpool her engine room was undermanned and her engine-room staff incompetent although the owners knew that the vessel's machinery was very old and therefore required an ample and efficient engine-room staff to maintain it. During the voyage to Osaka the vessel was off hire for repairs to her engines for a total period of about five weeks and when she arrived at Osaka, on May 25, 1957, it was found that the engines were in a very bad state and that it would take a further fifteen weeks to make the vessel seaworthy. The condition of the engines at Osaka was due mainly to the inefficiency of the engine-room staff on the voyage from Liverpool. By Sept. 15, 1957, the vessel had been made seaworthy in every respect and then had an efficient and adequate engine-room staff; at that date she was still available to the charterers for seventeen months. In mid-June there had been a steep fall in freight rates from 47s. to 24s. per ton and by mid-August the rates had dropped again to 13s. 6d. per ton. On June 6 and on Sept. 11, 1957, the charterers had written to the owners repudiating the charter. In an action by the owners for wrongful repudiation the trial judge found that the owners were in breach of cl. 1 of the charter in delivering a vessel that was unseaworthy with regard to her engine-room staff and were also in breach of cl. 3 in negligently failing to maintain the vessel in an efficient state, but that in June there were no reasonable grounds for thinking that the owners were unable to make the vessel seaworthy by mid-September at the latest. The charterers contended that the owners' breaches of charter entitled them to repudiate the charter, alternatively that the charter had been frustrated.

Held: the charterers were not entitled to repudiate the charter for the following reasons—

(i) unseaworthiness by itself did not entitle the charterers to rescind the charter, and a fortiori a breach of the owners' obligation to maintain the vessel in an efficient state could not by itself entitle the charterers to rescind (see p. 264, letter B, post); therefore the charterers could not succeed in establishing a right to repudiate the charter unless the delay in making the vessel seaworthy was likely at the date of repudiation to be so great as to frustrate the commercial purpose of the charter.

Tarrabochia v. *Hickie* ((1856), 1 H. & N. 183), and dictum of DEVLIN, J., in *Universal Cargo Carriers Corpn.* v. *Citati* ([1957] 2 All E.R. at p. 82) followed.

Judgment of LORD ELLENBOROUGH, C.J., in *Havelock* v. *Geddes* ((1809), 10 East, 555), dictum of BUCKNILL, J., in *The Europa* ([1908] P. at p. 93) and speeches of LORD ATKINSON in *Kish* v. *Taylor* ([1912] A.C. at p. 617), of LORD SUMNER in *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus & Co.* ([1922] All E.R. Rep. at p. 563) and of LORD ATKIN in *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.* ([1936] 2 All E.R. at p. 601) explained.

(ii) in judging delay for the purposes of (i) ante, p. 257, there was no real difference between a yardstick of " reasonable time " and one of " frustrating time " (see p. 264, letter D, post).

Dictum of DEVLIN, J., in *Universal Cargo Carriers Corpn.* v. *Citati* ([1957] 2 All E.R. at p. 83) followed.

(iii) at the dates of repudiation, viz., June 6 and Sept. 11, the delay likely to occur or which had occurred in making the vessel seaworthy was not so great as to render the prospective performance of the charter a thing radically different from what was undertaken, so that there was no frustration of the charter and the delay was insufficient to justify its repudiation (see p. 265, letter F, post); moreover in considering the issue of frustration neither the steep fall in freight rates nor the fact that under the charter off-hire periods might be added to the charter time was material (see p. 264, letter H, post).

[As to unseaworthiness due to an incompetent and insufficient crew, see 30 HALSBURY'S LAWS (2nd Edn.) 466, para. 622; as to the effect of unseaworthiness, see ibid., 471, para. 628.

As to the doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-191, paras. 320-323.

For cases on fitness of the ship, see 41 DIGEST 325, 326, *1833-1838.*]

Cases referred to:

Atlantic Shipping & Trading Co. v. *Louis Dreyfus & Co.*, [1922] All E.R. Rep. 559; [1922] 2 A.C. 250; 91 L.J.K.B. 513; 127 L.T. 411; 15 Asp. M.L.C. 566; Digest Supp.

Clifford v. *Hunter*, (1827), 3 C. & P. 16; Mood. & M. 103; 172 E.R. 303; 29 Digest 189, *1488.*

Compania Cantabrica de Navigacion v. *Anglo-American Oil Co., Ltd.*, (1923), 16 Lloyd's Rep. 235; 39 T.L.R. 614; 41 Digest 472, *3033.*

Davis Contractors, Ltd. v. *Fareham Urban District Council*, [1956] 2 All E.R. 145; [1956] A.C. 696; [1956] 3 W.L.R. 37; 3rd Digest Supp.

Europa, The, [1908] P. 84; 77 L.J.P. 26; 98 L.T. 246; 11 Asp. M.L.C. 19; 41 Digest 480, *3129.*

Hain S.S. Co., Ltd. v. *Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; 19 Asp. M.L.C. 62; 55 Lloyd's Rep. 159; Digest Supp.

Havelock v. *Geddes*, (1809), 10 East, 555; 103 E.R. 886; 41 Digest 325, *1834.*

Kish v. *Taylor*, [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 12 Asp. M.L.C. 217; 41 Digest 485, *3170.*

Metropolitan Water Board v. *Dick, Kerr & Co., Ltd.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 12 Digest (Repl.) 456, *3410.*

Port Line, Ltd. v. *Ben Line Steamers, Ltd.*, [1958] 1 All E.R. 787; [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; 3rd Digest Supp.

Rio Tinto Co., Ltd. v. *Seed Shipping Co.*, (1926), 134 L.T. 764; 17 Asp. M.L.C. 21; 41 Digest 483, *3161.*

Snia Societa di Navigazione Industria e Commercio v. *Suzuki & Co.*, (1924), 29 Com. Cas. 284; 41 Digest 304, *1659.*

Stanton v. *Richardson, Richardson* v. *Stanton*, (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 1 Asp. M.L.C. 449; *affd.* Ex.Ch., (1874), L.R. 9 C.P. 390; H.L., (1875), 45 L.J.Q.B. 78; 41 Digest 303, *1651.*

A *Tamplin (F. A.) S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; sub nom. *Re Tamplin (F. A.) S.S. Co., Ltd. & Anglo-Mexican Petroleum Products, Co., Ltd.*, 115 L.T. 315; 13 Asp. M.L.C. 467; 12 Digest (Repl.) 442, *3361.*

Tarrabochia v. *Hickie*, (1856), 1 H. & N. 183; 26 L.J.Ex. 26; 156 E.R. 1168; 41 Digest 326, *1836.*

B *Tully* v. *Howling*, (1877), 2 Q.B.D. 182; 46 L.J.Q.B. 388; 36 L.T. 163; 3 Asp. M.L.C. 368; 41 Digest 356, *2052.*

Universal Cargo Carriers Corpn. v. *Citati*, [1957] 2 All E.R. 70; [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; *affd.* C.A., [1957] 3 All E.R. 234; [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; 3rd Digest Supp.

Action.

C In this action the owners of the vessel Hong Kong Fir claimed from the charterers of the vessel damages for wrongful repudiation of the charterparty. By their defence the charterers alleged that they were entitled to repudiate the charterparty because of breaches of the charter by the owners in delivering to the charterers a vessel that was unseaworthy or not fitted for ordinary cargo service; in failing to exercise due diligence to make the vessel seaworthy and in giving D an inaccurate description in the charterparty of the vessel's steaming capability. Alternatively, the charterers claimed that because of these breaches the vessel could not be rendered seaworthy or fit for ordinary cargo service or be put into a thoroughly efficient state in respect of her machinery within a reasonable time or within such time as would not frustrate the commercial purpose of the charterparty. The charterers counterclaimed for damages for breach of the E charterparty.

The relevant terms of the charter, a Baltic and International Maritime Conference Uniform Time Charter, are set out, and the facts are stated, in the judgment, post.

Stephen Chapman, Q.C., M. R. E. Kerr and *C. S. Staughton* for the owners.

Ashton Roskill, Q.C., Basil Eckersley and *Brian Davenport* for the charterers.

F *Cur. adv. vult.*

Feb. 22. **SALMON, J.,** read the following judgment: The plaintiffs are the owners of a diesel vessel called the Hong Kong Fir which was built in 1931. They purchased this vessel for £397,500 from the Avon Shipping Co., Ltd. (which is a subsidiary of the New Zealand Shipping Co.) at about the same time G as they entered into the charter to which I shall presently refer. In the contract of sale the vessel was described as "Classed at Lloyd's 100 A1 Special Survey passed July, 1955". The contract contained provisions that the vessel was to be delivered with its class maintained and that she should be taken with all faults and errors of description but subject otherwise to the provisions of the contract. By a time charter dated Dec. 26, 1956, the owners chartered this vessel to the H defendants. The material words of the charter read as follows:

"It is this day mutually agreed between Hong Kong Fir [Shipping] Co., Ltd., Hong Kong, owners of the vessel called Antrim to be renamed Hong Kong Fir . . . classed Lloyd's 100 A1 . . . and fully loaded capable of steaming about twelve and a half knots in good weather and smooth water . . . and Messrs. Kawasaki Kisen Kaisha, Ltd., Kobe, Japan, charterers, as follows:

I "1. The owners let, and the charterers hire the vessel for a period of 24 (twenty-four) (with one month more or less at charterers' option) calendar months from the time . . . the vessel is delivered and placed at the disposal of the charterers . . . at Liverpool . . . she being in every way fitted for ordinary cargo service . . .

"3. The owners to provide and pay for all provisions and wages, for insurance of the vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service . . .

"6. The charterers to pay as hire: 47s. (British sterling forty-seven

shillings) per deadweight ton on vessel's deadweight of 9,131 tons per thirty days, commencing in accordance with cl. 1 until her re-delivery to the owners...

" 11. (A) In the event of dry docking or other necessary measures to maintain the efficiency of the vessel, deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than twenty-four consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required. Any hire paid in advance to be adjusted accordingly ...

" 12. Overhauling of machinery whenever possible to be done during service, but if impossible the charterers to give the owners necessary time for overhauling. Should the vessel be detained beyond forty-eight hours hire to cease until again ready.

" 13. The owners only to be responsible for delay in delivery of the vessel or for delay during the currency of the charter and for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of the owners or their manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the owners or their manager or their servants ...

" 32. Any off-hire time by reason obtained in cl. 11, charterers' option to add off-hire time to vessel's period under this charter. And such option to be declared one week after vessel is on hire again before expiration of this charterparty.

" 44. This charterparty is also subject to the vessel being taken over by Messrs. Hong Kong Fir Shipping Co., Ltd., Hong Kong, in Liverpool, according to purchase agreement."

I have read the only relevant clauses, and I have omitted from them the immaterial words.

The vessel was delivered to and placed at the disposal of the charterers on Feb. 13, 1957. She sailed in ballast from Liverpool at 6 p.m. that day. The intention was that she should proceed to Newport News in Virginia, U.S.A., and there pick up a cargo of coal and carry it to Osaka, calling on the way at Cristobal in the Panama Canal zone. The Atlantic crossing was stormy but by no means exceptional for the time of year. She arrived at Newport News on Feb. 28, where she loaded her cargo, and was off hire for one day nineteen hours, £1,180 being spent on repairs to her main engine attached pumps. She left Newport News on Mar. 6 and arrived at Cristobal on Mar. 15, having met with two serious accidents on the way. At Cristobal she was off hire for about eleven days, and £8,220 was there spent in repairs, chiefly to No. 5 and No. 8 engines, and also to the bilge and general service pumps. She left Cristobal on Mar. 26 en route for Osaka. She sustained another accident to No. 5 engine on Mar. 31 and also had a major breakdown of the scavenge pump on Apr. 2. Temporary repairs were carried out to the scavenge pump at sea, but they would not have enabled her to cross the Pacific in safety. Accordingly she made for San Pedro, near Los Angeles, where she arrived on Apr. 14. Here she was off hire for about twenty-two days, sixteen hours, and a further £12,000 was spent on repairs. She left San Pedro on Apr. 29 and arrived at Osaka on May 25. It was there discovered that her main engine and auxiliaries were in a very bad state, due chiefly to corrosion. A further £37,500 was spent on repairs and she was not ready to put to sea until Sept. 15. Thus it will be seen that between Liverpool and Osaka she was at sea for about eight and a half weeks, off hire for about five weeks, and had £21,400 spent on her for repairs. Whilst at Osaka a further period of about fifteen weeks and an expenditure of £37,500 were required to make her ready for sea.

In the meantime there had been a very steep fall in the freight market. By

A mid-June the rate had fallen from 47s. to 24s. per ton, and by mid-August there had been a further fall to 13s. 6d. per ton. On June 5 and 6, and on July 27, the charterers wrote repudiating the charter and claiming damages for breach of contract. On Aug. 8 and 12 the owners wrote intimating that they would treat the contract as cancelled by the charterers' wrongful repudiation and claim damages. It has been argued on behalf of the charterers that two letters written B on the owners' behalf on Sept. 9 and 10 respectively waived their former acceptance of the charterers' alleged wrongful repudiation. On the other hand it has been argued on behalf of the owners that once repudiation is accepted the contract is dead, and there can be no question of waiver. It is argued that the letters relied on by the charterers as a waiver could at the most amount to a fresh offer to enter into a new contract on the same terms as the old. Without expressing C any concluded view, I am inclined to think that the owners are right on this point. It does not, however, seem to be material since the charterers wrote on Sept. 11 again repudiating the charter and the owners formally accepted this repudiation on Sept. 13. The position on June 6 was not materially different from that on Sept. 11. In June it was known that a very long time would be required to repair the vessel, and then presumably a further substantial period D for her trials. By Sept. 11 the repairs and trials had been virtually completed. If the charterers were entitled to repudiate on Sept. 11 they were equally entitled to do so on June 6.

The owners now bring this action claiming damages for wrongful repudiation of contract. The charterers' defence is that they were entitled to throw up the charter because of breaches of the charter on the part of the owners. The breaches E relied on by the charterers are: (i) A breach of the obligation under cl. 1 of the charterparty to deliver a seaworthy vessel. The vessel is said to have been unseaworthy in respect of her machinery and of her engine-room staff; (ii) A breach of the obligation under cl. 3 of the charterparty to maintain the vessel properly; and (iii) A breach of the obligation to deliver a vessel capable of making about 12½ knots in good weather and smooth water. The charterers contend that F any of these breaches would per se entitle them to throw up the charter. Alternatively they say that they were so entitled by the failure of the owners to remedy the breaches (a) within a reasonable time, or (b) within what has been referred to in argument as "a frustrating time," that is to say, they contend that the breaches were such that the delay involved in remedying them frustrated the commercial purpose of the charter.

G One of the chief issues in this case is whether the vessel was seaworthy when she left Liverpool on Feb. 13. Counsel for the charterers, relying on the facts outlined at the beginning of this judgment, says that the owners are on the horns of a dilemma: either the machinery was in a thoroughly bad condition at the start or it was wrecked by the incompetence of the engine-room staff during the course of the voyage. Counsel for the owners says that everything can be ex- H plained on the basis of heavy weather, bad luck and perhaps one isolated piece of negligence on the part of the chief engineer.

[HIS LORDSHIP then reviewed the evidence and made the following findings of fact. On Feb. 13, 1957, when the vessel was delivered to the charterers, she was seaworthy with regard to her machinery which then was in a reasonably good condition but, because of age, needed to be maintained by an experienced, I competent and adequate engine-room staff. At the date of delivery, however, the vessel was unseaworthy with regard to her engine-room staff since, applying the test in *Clifford* v. *Hunter* (1) and *Rio Tinto Co., Ltd.* v. *Seed Shipping Co.* (2), a reasonably prudent owner knowing, as did the owners in the present case, that the machinery was old and required maintenance by an experienced and dependable staff, would not have allowed the vessel to put to sea with an engine-room staff which on the facts was incompetent and numerically insufficient. The

(1) (1827), 3 C. & P. 16. (2) (1926), 17 Asp. M.L.C. 21.

condition of the machinery on the vessel's arrival at Osaka was due partly to heavy weather but also to the inefficiency of the engine-room staff on the voyage from Liverpool. By Sept. 15, 1957, the owners had provided a competent and ample engine-room staff. On those findings, the owners were in breach of cl. 1 of the charter (having failed to provide a vessel fitted for cargo service), and they were also in breach of cl. 3 in failing to maintain the vessel in an efficient state owing to the negligence of the owner's servants, the engine-room staff. These breaches being caused by want of due diligence by, or vicariously attributable to, the owners, they were not protected by cl. 13 of the charter (for which see p. 260, letter C, ante). Both at the date of the charter, Dec. 26, 1956, and at the date of delivery of the vessel to the charterers, she was capable of steaming at about 12½ knots in good weather and smooth water. HIS LORDSHIP continued:]

There remains to be considered the effect in law of the findings of fact at which I have arrived. Counsel for the charterers argues that the obligation to deliver a seaworthy vessel is a condition precedent to the charterer's liability under the charterparty and that the breach of this obligation is a fundamental breach of contract which, since it was never waived, per se entitles the charterers to throw up the charterparty. There is no reported case of a breach of the owner's obligation to deliver a seaworthy vessel being held by itself to entitle the charterer to escape from the charterparty. On the other hand, there is a considerable body of authority over the last 150 years for the proposition that such a breach does not allow the charterer to escape unless the delay involved in remedying the breach would frustrate the commercial purpose of the charter. Although it is argued by counsel for the charterers that *Havelock* v. *Geddes* (3) was decided on the basis that the charterers had waived the term as to seaworthiness, in my view the judgment of LORD ELLENBOROUGH, C.J., is clearly based on the ground that the seaworthiness clause is not a condition precedent to the owner's rights under the charterparty. *Tarrabochia* v. *Hickie* (4), is a decision directly contrary to counsel's contention. He seeks to distinguish it on the ground that it concerned a voyage charter. It is difficult to see why seaworthiness should be a condition precedent in a time charter if it is not a condition precedent in a voyage charter. In *Tully* v. *Howling* (5), where there was a time charter for twelve months from a certain date, the owners were unable to deliver their vessel until two months after that date, the intervening time being necessary to make her seaworthy. MELLOR, J., in the court below (6) and BRETT, J., in the Court of Appeal (7) found for the charterers on the ground that the time required to make the vessel seaworthy frustrated the object of the charterparty. The other judges based their judgment on the ground that the charterers, having contracted to take the vessel for twelve months, could not be obliged to take her for ten months. In *Stanton* v. *Richardson*, *Richardson* v. *Stanton* (8), the decision in *Tarrabochia* v. *Hickie* (4) was approved. BRETT, J., observed (9):

> "... that the conclusion to be drawn from all the cases analogous to this is, that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether."

DEVLIN, J., has expressed the view, with which I respectfully agree, that these authorities are conclusive; see *Universal Cargo Carriers Corpn.* v. *Citati* (10). If further authority were needed I would refer to the judgment of BAILHACHE, J.,

(3) (1809), 10 East, 555.
(4) (1856), 1 H. & N. 183.
(5) (1877), 2 Q.B.D. 182; 3 Asp. M.L.C. 368.
(6) (1877), 2 Q.B.D. at p. 184; 3 Asp. M.L.C. at p. 369.
(7) (1877), 2 Q.B.D. at pp. 188, 189; 3 Asp. M.L.C. at p. 371.
(8) (1872), L.R. 7 C.P. 421; 1 Asp. M.L.C. 449; *affd.* Ex.Ch., (1874), L.R. 9 C.P. 390.
(9) (1872), L.R. 7 C.P. at p. 437; 1 Asp. M.L.C. at p. 455.
(10) [1957] 2 All E.R. at p. 82; [1957] 2 Q.B. at p. 433.

in *Compania Cantabrica de Navigacion* v. *Anglo-American Oil Co., Ltd.* (11), and to the judgments of BANKES and SCRUTTON, L.JJ., in *Snia Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.* (12). Counsel for the charterers relies on certain dicta of BUCKNILL, J., in *The Europa* (13) but I think that these amount to no more than a statement that if a ship is unseaworthy at the time of loading the charterer is not obliged to load whilst she remains so and not that he may rescind the contract. Indeed, the very basis of the decision in *The Europa* (14) is that the term as to seaworthiness is not a condition precedent to the charterer's obligations under the contract. Counsel for the charterers also relies strongly on the following passage in the speech of LORD ATKINSON in *Kish* v. *Taylor* (15):

> " The fact that a ship is . . . from any cause unseaworthy when about to start on her voyage, will justify the charterer . . . in repudiating his contract and refusing to be bound by it . . .".

But the House of Lords in *Kish* v. *Taylor* (16) expressly affirmed and followed *The Europa* (14). Indeed, LORD ATKINSON says (17):

> " It was held by BUCKNILL and BARGRAVE DEANE, JJ., on a line of reasoning which appears to me convincing, that the charterparty, notwithstanding this unseaworthiness, was not displaced . . .".

I cannot think that LORD ATKINSON intended the passage on which counsel for the charterers relies to be read in the wide sense for which counsel contends. If he did, it was obiter and inconsistent with the authorities including the decision in *Kish* v. *Taylor* (16) itself. I think, however, that LORD ATKINSON meant to refer only to the charterer's obligation to load. Counsel for the charterers next relies on the following passage in the speech of LORD SUMNER in *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus & Co.* (18):

> " Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability, namely, that the shipowners shall have provided a seaworthy ship."

It is argued that this passage is in effect a statement that the term as to seaworthiness goes to the whole root of the contract and that therefore any breach of this term must entitle the charterers to rescind. LORD SUMNER, however, was in my judgment considering no such problem. The point before him was whether an exception clause governed the implied term as to seaworthiness, and the perhaps strange rule of construction was re-affirmed that, whilst an express term as to seaworthiness must be read in the light of the exception clause, an implied term as to seaworthiness because it underlies the whole contract of affreightment is unaffected by the exception clause.

Counsel for the charterers finally relied on *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.* (19), where LORD ATKIN stated (20) that any departure from the voyage contracted, however slight the deviation, is of such a serious character that the other party to the contract is entitled to treat it as going to the root of the contract and to declare himself no longer bound by it. Counsel for the charterers says that unseaworthiness is at least as important as deviation and accordingly by analogy must have the same result. I do not accept this contention. LORD ATKIN was dealing solely with deviation, and analogies are sometimes dangerous —not least in this branch of the law.

It may be that on principle it is difficult, as counsel for the charterers contends,

(11) (1923), 16 Lloyd's Rep. 235. (12) (1924), 29 Com. Cas. 284.
(13) [1908] P. at p. 93; 11 Asp. M.L.C. at p. 21.
(14) [1908] P. 84; 11 Asp. M.L.C. 19.
(15) [1912] A.C. at p. 617; 12 Asp. M.L.C. at p. 220.
(16) [1912] A.C. 604; 12 Asp. M.L.C. 217.
(17) [1912] A.C. at p. 616; 12 Asp. M.L.C. at p. 220.
(18) [1922] All E.R. Rep. at p. 563; [1922] 2 A.C. at p. 260; 15 Asp. M.L.C. at p. 569.
(19) [1936] 2 All E.R. 597; 19 Asp. M.L.C. 62; 55 Lloyd's Rep. 159.
(20) [1936] 2 All E.R. at p. 601; 19 Asp. M.L.C. at p. 64; 55 Lloyd's Rep. at p. 173.

to see why any breach of so important an obligation as that relating to seaworthiness should not by itself give the charterers the right to rescind as soon as they become aware of it. On the other hand, it would be strange if, for example, a charterer after receiving satisfactory service from a vessel could repudiate the charterparty on learning that she was in fact unseaworthy in some minor particular and had been so at the date of delivery under the time charter notwithstanding that she could easily and speedily be rendered seaworthy. However this may be, the authorities which I have reviewed and by which I am bound in my judgment clearly establish that unseaworthiness by itself gives the charterers no right to rescind, and I accordingly so hold. A fortiori a breach of the condition to maintain the vessel in a thoroughly efficient state cannot by itself entitle the charterers to rescind.

It follows that the charterers cannot succeed in their defence unless the delay in making the vessel seaworthy was or appeared likely at the date of the repudiation to be so great as to frustrate the commercial purpose of the charter. Counsel for the charterers argues that the delay must be judged by whether it was reasonable or unreasonable and that it is not necessary for him to show that it would frustrate the contract. If he means that a reasonable time may be shorter than a time that works frustration, I do not agree with him. For this purpose, there can be no real difference between the "reasonable time" yardstick and the "frustrating time" yardstick. As DEVLIN, J., observed in *Universal Cargo Carriers Corpn.* v. *Citati* (21):

> "The truth is that there is nothing wrong in using a reasonable time as a yardstick provided you determine what is reasonable by considering whether or not there has been unreasonable delay in the light of the object which the parties had in mind. It is only when the two yardsticks have in effect been shown to be the same that the courts have accepted the test of reasonableness. Where they have been contrasted . . . the test of reasonable time has been rejected."

I have every sympathy with the charterers in the natural irritation they must have felt at the inconvenience and possible hardship caused to them by this vessel's halting voyage to Osaka and the prospect of the vessel being detained there some months for further substantial repairs. Nevertheless, as LORD RADCLIFFE pointed out in *Davis Contractors, Ltd.* v. *Fareham Urban District Council* (22):

> ". . . it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

I appreciate also that there was a catastrophic fall in the freight market between February and June of 1957 and that it would only be natural in these circumstances for the charterers to wish to escape from the charterparty if they lawfully may. I do not think, however, that in considering the issue of frustration the fall in the market can be material. Neither on the other hand are the clauses dealing with off hire of particular materiality. It is true that they show that some substantial period for repairs and overhaul during the currency of the charter were contemplated and that these off-hire periods might, at the charterer's option, be added on to the charter time, but they do not mean that the parties intended the contract to bind no matter how long the off-hire periods might last. These clauses would not have prevented the charterparty from being frustrated if, for example, the vessel had been out of commission for the whole of 1957. I am not sure whether it is permissible to equate time lost for repair on account of the owner's breach of contract with time lost through some supervening cause such as requisition for which the owner is blameless. The authorities

(21) [1957] 2 All E.R. at p. 83; [1957] 2 Q.B. at p. 434.
(22) [1956] 2 All E.R. at p. 160; [1956] A.C. at p. 729.

A are not very helpful on this point. It might be thought that an owner should be in a better position if the delay is in no way attributable to him than if it is wholly his fault. On the other hand, it is perhaps difficult to see why logically there should be any difference qua frustration between the two cases.

Apart from *Snia Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.* (23) there does not appear to be any reported case where a charter has been held B to be frustrated on account of unseaworthiness after the charterers have received some service under it. The facts in that case were exceptional. The charterers, after the failure of repeated efforts of the owners to make the vessel seaworthy, had good reason to believe that the shipowners would never be able to do so. If in this case the engine-room crew engaged at Osaka had proved to be incompetent and as a result the engine had again suffered serious breakdown, this C case would have been much more analogous to the *Snia* case (23), for then there would have been reasonable grounds to suppose that the shipowners could never make the vessel seaworthy and that accordingly for the remaining period of the charterparty the charterers would receive no substantial benefit under it. As it is, the vessel was being repaired and undergoing sea trials for over three months at Osaka, but on Sept. 15 she was admittedly in every respect D seaworthy and was then still available for about seventeen months under the charterparty. In my view the charterers had no reasonable grounds in June for thinking that the owners would be unable to make the vessel seaworthy at the latest by mid-September. That they had in fact elected not to exercise their option under cl. 32 to add on the off-hire periods is of no significance, since obviously they would, in no circumstances, have done so, having regard to the then E state of the freight market. Like DIPLOCK, J., in *Port Line, Ltd.* v. *Ben Line Steamers, Ltd.* (24), I shrink from adding to what LORD RADCLIFFE described (25) as an anthology of phrases by attempting any restatement of the principle of frustration.

Whether one applies the test enunciated by EARL LOREBURN in *F.A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (26), or that by F LORD DUNEDIN in *Metropolitan Water Board* v. *Dick, Kerr & Co., Ltd.* (27), or the test of the implied term, the basic idea is the same. In the end the problem is to look at the delay and the events that have occurred against the period and other terms of the charterparty and decide whether in truth the circumstances in which performance is called for would render it a thing radically different from that which was undertaken. I reach the conclusion that it does not and that the G charterparty has not been frustrated.

It follows that the charterers had no legal right to repudiate the charterparty. They would, however, be entitled to such damage as they suffered by reason of delay caused by the owner's breaches of the charterparty, but the counterclaim under this head has been abandoned. There must accordingly be judgment for the owners for the agreed sum of £158,729 with interest as agreed at six per cent. from May 31, 1958, and the counterclaim must be dismissed.

Judgment accordingly for the shipowners.

Solicitors: *William A. Crump & Son* (for the owners); *Constant & Constant* (for the charterers).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(23) (1924), 29 Com. Cas. 284. (24) [1958] 1 All E.R. 787; [1958] 2 Q.B. 146.
(25) In *Davis Contractors, Ltd.* v. *Fareham Urban District Council*, [1956] 2 All E.R. at p. 159; [1956] A.C. at p. 727. (26) [1916] 2 A.C. 397; 13 Asp. M.L.C. 467.
(27) [1918] A.C. 119.