

QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)

July 30, 1976

AEGNOUSSIOTIS SHIPPING
CORPORATION OF MONROVIA
v.
A/S KRISTIAN JEBSENS REDERI OF
BERGEN
(THE "AEGNOUSSIOTIS")

Before Mr. Justice DONALDSON

Charter-party (Time) — Hire — Non-payment of hire — Owners instructed master to stop discharge of cargo — Whether owners cancelled charter-party — Whether owners temporarily withdrew vessel — Whether owners exercised a lien on cargo.

By a time charter in the New York Produce Exchange form the owners let their vessel *Aegnoussiotis* to the charterers for a St. Lawrence round voyage. The material clauses of the charter-party provided (inter alia):

5. Payment of said hire to be made in London in cash . . . monthly in advance, and for the last month or part of the same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day as it becomes due, if so required by Owners . . . otherwise failing the punctual and regular payment of the hire . . . or any breach of this charter-party the Owners shall be at liberty to withdraw the vessel from the service of the charterers. . . .

18. That the owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this Charter. . . .

While the vessel was discharging, a dispute arose as to whether any and if so how much hire was due. Hire had been paid up to 11 04 hours on Nov. 22, 1973, but not thereafter. On Nov. 26, 1973, the owners told the charterers that the master would be instructed to stop discharging unless the hire was paid by 17 00 hours. Hire was not paid and discharging stopped at 21 15 hours.

The owners contended that they were entitled to take this course since they were (a) cancelling the charter or (b) temporarily withdrawing the vessel or (c) exercising a lien on the cargo in accordance with the provisions of the charter.

The dispute was referred to arbitration and the arbitrator found in favour of the

charterers but stated his award in the form of a special case, the question of law for decision of the Court being inter alia:

Whether hire was payable for the period lost to the vessel by reason of the stopping of discharge.

—Held, by Q.B. (Com. Ct.) (DONALDSON, J.), that (1) although the right of cancellation had arisen, the exercise of the right required some action on the part of the owners which would be sufficient to terminate the charter like informing the charterer that the non-payment of hire was being treated as a termination of the charter-party (see p. 275, col. 2); in this case the owners advised the charterers that they would not discharge the vessel and this did not amount to a cancellation (see p. 275, col. 2);

(2) there was no right to temporarily withdraw the vessel since (a) the performance of the owners' obligation was not dependent upon payment of hire unless the contract so provided (see p. 276, col. 1); (b) a failure to pay hire regularly and punctually was a breach of contract which could never be repaired (see p. 276, col. 1); and if service under the charter was resumed the parties' rights would be governed by a new contract even if the terms remained the same (see p. 276, col. 1);

—The *Agios Giorgis*, [1976] 2 Lloyd's Rep. 192, considered and applied.

(3) cl. 18 meant what it said and the owners had a lien upon all cargoes and hire continued to be payable during the discharging period (see p. 276, col. 2);

—The *Agios Giorgis*, [1976] 2 Lloyd's Rep. 192, distinguished.

Judgment for the owners.

The following case was referred to in the judgment:

Agios Giorgis, The, [1976] 2 Lloyd's Rep. 192.

This was an award in the form of a special case stated by an umpire, Mr. Clifford Clark, in a dispute between Aegnoussiotis Shipping Corporation of Monrovia, the owners of the vessel *Aegnoussiotis*, and the charterers, A/S Kristian Jepsens Rederi of Bergen, regarding the payment of hire due under the charter-party.

The arbitration award provided inter alia:

"A. By a New York Produce Exchange Timecharterparty dated LONDON, the 9th

October 1973, the Claimants (hereinafter called 'the Owners') timechartered their motorship 'AEGNOUSSIOTIS' (hereinafter called 'the vessel') to the Respondents (hereinafter called 'the Charterers') for one St. Lawrence roundvoyage with a cargo of pig iron or titanium slag in bulk, upon the terms and conditions therein set out.

B. Disputes arose between the parties in respect of matters hereinafter particularised. The said charterparty provided that any dispute should be referred to arbitration to three persons in London, one to be appointed by each of the parties and the third by the two so chosen. By reason of Section 9 (2) of the Arbitration Act 1950 the said provision is to be construed as if it provided for the appointment of an Umpire and not for the appointment of a third arbitrator. The Owners appointed Mr. Donald Davies of Albert Buildings, 49 Queen Victoria Street in the City of London and the Charterers appointed Mr. Ralph E. Kingsley of Kempson House, 35/37 Camomile Street, in the City of London, to be their arbitrators respectively.

C. By a notice in writing dated the 29th May 1974 the said arbitrators appointed me, CLIFFORD ALBERT LAWRENCE CLARK of 21 College Hill in the City of London to be the Umpire in the reference. I was subsequently informed by the said two arbitrators by written notice dated the 12th July 1974 that they were unable to agree, whereupon I entered into the reference in their stead accordingly.

D. The matters referred to me were three claims by the Owners against the Charterers and four counterclaims by the Charterers against the Owners, as follows:—

<i>Owners' claims</i>	<i>U.S. \$</i>
1. Balance of account in the sum of	54,633.97
2. Damages for Charterers' breach of clause 31 of the said charterparty in that the vessel was redelivered with 614.85 long tons of fuel oil instead of 750 long tons in the sum of	8,379.30
Alternatively, damages in the sum of	1,629.98
3. Damages for Charterers' breach of clauses 31, 4 and 5 of the said charterparty for costs and expenses incurred by them	

or on their behalf in relation to representation in Rotterdam as a result of the said breaches	2,468.88
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Charterers' counterclaims

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|---|-----------|
| 4. Off hire/Damages for grounding at Sorel in the sum of | 6,833.28 |
| 5. Damages for deadweight deficiency in the sum of | 8,090.90 |
| 6. Off hire/Damages at Rotterdam in the sum of | 37,046.08 |
| 7. Damages representing expenses at Rotterdam in the sum of | 11,439.70 |

E. I was requested by the parties, and I have agreed, to give a Final Award on items as recited in D 1, 2, 4 and 5 above, and to state items as recited in D 3, 6 and 7 above in the form of a Special Case.

NOW I the said CLIFFORD ALBERT LAWRENCE CLARK having taken upon myself the burden of this Umpirage and having listened carefully to the contentions of the parties through the medium of their respective Solicitors, read the correspondence, considered and weighed the facts and the evidence

DO HEREBY MAKE ISSUE AND PUBLISH THIS MY FINAL AWARD

as follows:—

1. I FIND AND HOLD that the Owners' claim for balance of account (as set out in recital D 1 above) succeeds in the sum claimed of \$54,633.97 (Fifty Four Thousand Six Hundred and Thirty-Three U.S. Dollars and Ninety-Seven Cents).

2. I FIND AND HOLD that the Owners' claim for Damages (as set out in recital D 2 above) succeeds to the extent of their alternative claim in the sum of \$1,629.98 (One Thousand Six Hundred and Twenty-Nine U.S. Dollars and Ninety-Eight Cents) and no more.

3. I FIND AND HOLD that the Charterers' counterclaim for Off Hire/Damages (as set out in recital D 4 above) fails and that the same be and it is hereby dismissed.

4. I FIND AND HOLD that the Charterers' counterclaim for Damages (as set out in recital D 5 above) fails and that the same be and it is hereby dismissed.

5. I AWARD AND ADJUDGE on the above items that the Charterers shall forthwith pay to the Owners the sum of U.S. \$56,263.95 (Fifty-Six Thousand Two Hun-

dred and Sixty-Three U.S. Dollars and Ninety-Five Cents) together with interest at the rate of 8% (eight per cent) per annum from the 1st January 1974 to the date hereof.

6. (a) As a considerable amount of time was devoted by the Arbitrators, Solicitors and by me to the matters on which I am asked to make a Final Award and to those on which I am asked to state a Special Case, I deal separately with the costs relating to each part of my Award.

(b) With regard to the costs of that part of my Award on which I have made a Final Award in paras. 1-5 hereof, I FURTHER AWARD AND ADJUDGE that the Charterers shall bear and pay their own and the Owners' costs of the reference and shall further bear and pay the fees and expenses of the Arbitrators and myself, which I have taxed and assessed in the sum of £350.00 (Three Hundred and Fifty Pounds) and if in the first instance such costs shall have been paid by the Owners then the Charterers shall forthwith reimburse them.

SPECIAL CASE

stated pursuant to section 21 (1)
of the Arbitration Act 1950

7. . . . The relevant clauses, or parts thereof, of the said charterparty provide as follows:—

Preamble " "AEGNOUSSIOTIS" . . . about 19,770 tons of 2240 lbs dead-weight capacity (cargo and bunkers including fresh water and stores not exceeding 300 tons on a draft of 32'8" summer freeboard . . . "

Clause 4 ' That whilst on hire the Charterers shall pay for the use and hire of the said Vessel at the rate of U.S. \$8,000 (EIGHT THOUSAND UNITED STATES DOLLARS) United States Currency per day, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a day, hire to continue until the hour of the day of her redelivery in like good order and condition, ordinary wear and tear and minor incidents excepted, to the Owners (unless lost) at A SAFE PORT IN CHARTERERS' OPTION IN UNITED KINGDOM OR CONTINENT, HAVRE-HAMBURG RANGE unless otherwise mutually agreed. Charterers are to give Owners not less than 10 days APPROXIMATE NOTICE AND 5 DAYS DEFINITE

notice of vessel's expected date of redelivery, and probable port. '

Clause 5 ' Payment of said hire to be made in London in cash . . . monthly in advance, and for the last month or part of the same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or any breach of this Charterparty the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. '

Clause 18 ' the Owners shall have a lien upon all cargoes . . . for any amounts due under this Charter . . . '

Clause 31 ' BUNKERS The Charterers at the port of delivery and the Owners at the port of redelivery shall take over and pay for all fuel oil remaining on board the vessel.

The vessel to be delivered with bunkers as on board, maximum 750 long tons fuel oil and maximum 50 long tons diesel oil and to be redelivered with similar quantities.

Bunkers prices both on delivery and redelivery

U.S. Dollars 25.00 per ton for fuel oil and U.S. Dollars 40.00 per ton for diesel oil.

Master to adhere strictly to Charterers' bunkering instruction at all times during the currency of this Charter Party. '

8. The vessel was delivered at Immingham on Sunday, the 21st October 1973, at 2100 hours. She sailed on the Charterers' orders, in ballast, to Sorel, on the St. Lawrence River, where she loaded a cargo of pig iron said by the Bills of Lading to amount to 18,281.8 long tons. She loaded this cargo between the 2nd and 10th November. The Charterers ordered the vessel to proceed to Rotterdam to discharge. She arrived at Rotterdam at 2220 hours on the 21st November 1973 and commenced discharge at 2330 hours on the same day.

9. Up to and including the 26th November, the Charterers made payments

on account of hire and other sums due to the Owners under the Charterparty, which sums were received by the Owners' bank on the dates set out in the first column of the following Schedule. The amounts of the various payments appear in the second column of the same Schedule and the period in relation to which such payment was, I find as a fact, made, appears in the third column of the same Schedule.

(\$7,833.33 per day—hire less commission and overtime)

DATE received by Owners' bank	AMOUNT	PERIOD
Wed. 24th Oct.	\$214,078.75	21st Oct. 2100— 15th Nov. 2100.
Thurs. 1st Nov.	\$ 5,500.00	15th Nov. 2100— 16th Nov. 1351.
Tues. 6th Nov.	\$ 13,000.00	16th Nov. 1351— 18th Nov. 0540.
Tues. 13th Nov.	\$ 8,493.75	18th Nov. 0540— 19th Nov. 0741.
Tues. 20th Nov.	\$ 15,666.66	19th Nov. 0741— 21st Nov. 0741.
Fri. 23rd Nov.	\$ 8,942.42	21st Nov. 0741— 22nd Nov. 1104.

As appears therefrom the Charterers failed to make punctual and regular payment of the hire since, on the 26th November 1973, hire had only been paid up to the 22nd November at 1104 hours. The Owners in telex exchanges with the Charterers had repeatedly required the punctual and regular payment of hire and had not in any way waived their right to punctual and regular payment.

10. A deduction of \$6,833.28 had been made by the Charterers from the hire comprised in the payment received on the 23rd November 1973 on the grounds that the vessel had been off hire at the loading port for 20 hours 30 mins. during which time the vessel was aground because, as the Charterers alleged, of the carriage of the undisclosed quantity of a liquid, which I found to be bunkers, referred to in paragraph 17 hereof. The Charterers were not entitled to make this deduction, and I have already dealt with it in paragraph 3 of this Award. The Charterers' obligation at the material time was to pay day by day as the hire became due. On the 22nd November 1973 the owners requested that a further five days hire be paid up to the 27th November 1973 and on Friday the 23rd November the Charterers (who had previously made deductions not relevant to this Award) replied that hire up to and including the 25th November had been paid the previous day and they would attend to the payment of further hire on Monday the 26th Novem-

ber. Insofar as it is a matter of fact I find and insofar as it is a matter of law I hold that hire had been duly paid up to 1104 hours on Thursday the 22nd November.

11. Under the terms of the Charterparty the Charterers were obliged to provide the bunkers. The Charterers took over and paid for the 651.40 metric tons of fuel oil and the 57 metric tons of diesel oil remaining on board on delivery by payment to the Owners of the sum of \$18,272.50 which was included in the payment which they made on Wednesday, the 24th October 1973, and amounting to \$214,078.75. The Charterers did not acquire any further bunkers during the course of the performance of the Charterparty and it was therefore their obligation to replenish bunkers to the vessel at Rotterdam so that she should be redelivered pursuant to Clause 31 of the Charterparty with similar quantities of fuel oil and diesel oil to those with which she had been delivered. Redelivery was to take place after completion of discharge of the cargo of pig iron at Rotterdam.

12. At or around the time of arrival at Rotterdam the Master advised the Owners' Agents in Rotterdam that on arrival at Rotterdam he had 10 tons of fuel oil remaining on board and 5 tons of diesel oil. At about this period there was a world shortage of bunkers and the market price had risen to around \$87 per long ton. The agreed price under the Charterparty in relation to fuel oil for purchase by the Charterers on delivery and by the Owners on redelivery was \$25 per long ton, a difference of about \$62 per long ton. It was therefore natural that the Owners for their part might be anxious as to whether or not the Charterers would replenish the bunkers consumed on the roundvoyage and that the Charterers for their part would wish to establish exactly what amounts had been consumed on the roundvoyage.

13. The Charterers did not believe the figures quoted by the Master because they as Shipowners in their own right knew that the last quantities of bunkers could not be physically pumped from the bottom of the tanks and because no Master could have been expected to sail across the North Atlantic at that time of year with so small a margin of bunkers. No significant delays due to bad weather had been suffered by the vessel during the roundvoyage.

14. The Charterers accordingly requested a bunker survey to be carried out but the Marine Surveyor instructed by the Charterers who went on board at around noon

on the 22nd November was not allowed by the vessel's command to carry out the survey. Later the same day in the afternoon the Master again refused to allow the survey.

15. At 1540 hours on the same day, the Charterers telexed the Owners' Agents in London that no bunkers would be supplied to the vessel until the correct amount of bunkers remaining on board had been established by an independent surveyor. At 1634 hours the Owners instructed the Master to allow the bunker survey to be carried out and the Master agreed it should be performed at 1600 hours the next day, Friday, the 23rd November.

16. The said survey was held between 1530 hours and 1730 hours on Friday, the 23rd November, and the following quantities were found on board:—

60.83 metric tons of fuel oil

6.47 metric tons of diesel oil

583.47 cubic metres of a liquid in the forward deep tanks.

17. The existence on board of the said 583.47 cubic metres of liquid had not been disclosed on the delivery certificate and the carriage of it by the Owners was in breach of the Charterparty in that the whole reach of the vessel was not at the Charterers' disposal under Clause 7 and the bunker quantities on delivery exceeded the amount permitted by Clause 31.

18. The Master refused to allow samples to be taken of the said quantity of 583.47 cubic metres at the time of the survey. Samples were subsequently allowed to be taken on Monday, the 26th November, at about 1240 hours. The results of the analysis were available on the 28th November and showed this quantity to be bunkers contaminated with between 5% and 10% of fresh water, which I find for all practical purposes to be bunkers.

19. At no time prior to orders being given for the stopping of discharge referred to later did the Charterers refuse unconditionally to replenish the amount of bunkers consumed on the roundvoyage, except that after the discovery of the said quantity of 583.47 cubic metres of liquid the Charterers attempted to include this figure in calculating the amount to be supplied by them on redelivery (see telex at 2008 at pages 3/4 of the bundle), but this was subsequently withdrawn. The Charterers had in fact stemmed with B.P. in Rotterdam a sufficient quantity of

bunkers to comply with their obligations, and the Owners had through their own independent inquiries and without the knowledge of the Charterers ascertained on the 20th November that the vessel had been so stemmed.

20. There was a dispute before me as to exactly what quantity of bunkers the vessel had used on the roundvoyage, and I find this was about 590 tons. This quantity was supplied by the Charterers prior to redelivery.

21. On the 26th November, at 1418 hours, the Owners' Agents sent to H. Clarkson & Co. a telex in which they said *inter alia* that the Master would be instructed to stop discharging unless the Charterers:—

(a) started immediately supplying the bunkers consumed and

(b) by 1700 hours paid the unpaid hire

H. Clarkson & Co. were intermediary brokers between the Owners Agents (who acted as Owners' brokers) and Erling Mortensen A/S of Oslo who acted as the Charterers' brokers. A copy of the said telex is at page 1 of the bundle attached hereto.

22. At 1800 hours on the same day the Owners' agents sent a second telex . . . to H. Clarkson & Co. saying that, as no reply had been received from the Charterers in respect of replenishing bunkers consumed and in respect of hire payment, they had instructed the Master to stop discharging the Charterers' cargo. The discharge of the cargo stopped at 2115 hours on the 26th November, and the vessel was subsequently ordered off the berth. The cargo was not at any material time the property of the Charterers.

23. Negotiations between the parties took place over the next few days. Also legal action on the part of the Receivers resulted in a threat that the vessel would be arrested. In the event discharging operations were resumed on the Owners' orders on the 1st December 1973 at 0600 hours. Discharging was first resumed with a floating crane and it was stopped again at 1715 hours on the 1st December in order to shift the vessel back to the discharging berth where she arrived at 0135 hours on the 2nd December, and discharging was then resumed again on the 2nd December at 0200 hours. Discharging was completed at 0700 hours on the 2nd December and the vessel was redelivered following completion of the off-hire survey at 1000 hours on the 2nd December 1973.

24. Insofar as it is a question of law I hold and insofar as it is a question of fact I find that the Charterers were in default in not making punctual and regular payment of hire, and that, as they themselves later recognised, they were in default in seeking to credit themselves with the 583.47 cubic metres of bunkers when calculating the bunkers required on redelivery. I further find and hold that as a consequence the Owners, on the 26th November, were entitled to withdraw the vessel from the service of the Charterers under the terms of clause 5 of the Charterparty, but were not entitled to exercise a lien on the cargo.

25. The Owners gave no notice of withdrawal under the said Clause 5 of the Charterparty, but simply gave notice of stopping discharge, as set out in paragraphs 21 and 22 of this Award. The Owners subsequently simply stopped discharge. As a result of this stoppage of discharge, time was lost to the vessel (after giving credit for the time spent discharging by floating crane) amounting to 4 days 17 hours and 30 minutes. Hire and overtime for this period would amount to \$37,046.08.

26. As a further result of stopping discharge, expenses by way of stevedore stoptime, shifting, tugs and pilotages were incurred amounting to D.Fl. 31,216.08 equalling \$11,439.70 at D.Fl. 2.72 to the \$1.00. The said expenses were charged by the stevedores, tug companies and pilots through the Charterers' agents in Rotterdam to the Charterers and have been paid by them.

27. It was or should have been within the contemplation of the Owners, their Agents and the Master or was foreseeable by them that the expenses referred to in paragraph 26 were likely to be incurred at Rotterdam if discharge was stopped.

28. The Damages claimed by the Owners under recital D.3 above consisted of:—

Boatmen		
Association	D.Fls.	78.00
Car Service		362.30
Survey Expenses		380.00
Water Clerk Expenses		25.00
	D.Fls.	845.30
at the rate of 6.34=	£	133.33
Superintendent's Expenses		123.80
Owners' Agents Expenses in Rotterdam		
D.Fls. 2,435.00 @ 6.34		384.07

Owners' Agents' (London)	
Expenses Telephone and Telexes	387.50
	<u>£1,028.70</u>

@ 2.4=\$2,468.88

29. The Owners contended before me:

i. They were entitled to stop discharge when they did because either

(a) hire was unpaid and/or the Charterers had failed to replenish bunkers and the actions of the Owners amounted to a withdrawal of the vessel from the Charterers' service under Clause 5 of the Charterparty for non-payment of hire or any breach of the Charterparty.

or (b) their actions amounted to the exercise of a lien upon the cargo for amounts due under the Charterparty in accordance with Clause 18 thereof.

In relation to this alternative, the Owners argued that the Charterers were not entitled to derogate from their grant as against the Owners by denying that the cargo belonged to them. The question of when or whether the Owners could enforce the alleged lien was not agreed before me.

ii. That under alternative (a) the Owners were entitled to damages or quantum meruit at the current market rate from stoppage of discharge until redelivery.

iii. That under alternative (b) hire at the Charterparty rate continued to be payable without interruption until redelivery.

30. The charterers contended before me:

iv. Hire was not unpaid and the Charterers' obligation to replenish bunkers arose only at the time of redelivery and not before.

v. If hire was unpaid or the Charterers had failed to replenish bunkers the Owners' rights (if any) were to withdraw the vessel and thereby terminate the Charterparty. No further hire was therefore payable except to the extent that the vessel was subsequently at the disposal of the Charterers so that discharge could be completed, when a quantum meruit equal to the hire was payable.

- vi. The Owners' rights however did not extend to the stopping of discharge because this amounted to an unlawful and unwarranted interference with the contract evidenced by the Bill of Lading between the Owners and the Receivers to which the Charterers were not a party. The Owners were under tortious liability for such interference or committed a breach of contract in not permitting the discharge of the cargo to be completed with the result that either hire was not payable for the period that the vessel was not at the Charterers' disposal or damages equal to such hire were payable by the Owners and damages were payable by the Owners in the amount of the expenses incurred referred to in paragraph 26 hereof.
- vii. The Owners had no lien on the cargo because it was the property of the Receivers and not the Charterers, and if any amounts were due under the Charterparty they were due from the Charterers and not from the Receivers. The lien given by Clause 18 of the Charterparty had either been waived or lost by the Owners by the issue of Bills of Lading to persons other than the Charterers or the said Clause was to be read subject to an implied term that it could only be operated on cargoes owned by the Charterers.
31. The questions of law for the decision of the Court are whether on the facts found and on a true construction of the Contract
- Hire was payable for the period of 4 days 17 hours and 30 minutes lost to the vessel by reason of the stopping of discharge.
 - If hire was payable, damages equal to the said hire are payable by the Owners to the Charterers.
 - The expenses or damages equal to such expenses referred to in paragraph 26 hereof are recoverable by the Charterers from the Owners.
 - The expenses or damages equal to such expenses referred to in paragraph 28 hereof are recoverable by the Owners from the Charterers.
32. Subject to the decision of the Court on the questions of law set out in paragraph 31 hereof, insofar as they are matters of fact I find and insofar as they are matters of law I hold that:—
- As at the time that orders were given for the stopping of discharge the Charterers were in breach of Clause 5 of the Charterparty in that hire had not been regularly and punctually paid and further hire was due.
 - The Owners did not at any time withdraw the vessel from the service of the Charterers under the terms of the said Clause 5.
 - As at the time the said orders were given the Charterers were not in breach of the Charterparty in relation to their obligation thereunder to supply bunkers to the vessel.
 - The Owners had no exercisable lien on the cargo remaining to be discharged because it was not the property of the Charterers.
 - The Owners were not entitled to stop discharge, and such stoppage was a breach of contract.
33. I FIND AND HOLD that the Owners' claim for Damages (as set out in recital D. 3 above) fails and that the same be and it is hereby dismissed.
34. I FIND AND HOLD that the Charterers' counterclaim for Off Hire/Damages (as set out in recital D. 6 above) succeeds in damages in the sum claimed of \$37,046.08 (Thirty-Seven Thousand and Forty-Six U.S. Dollars and Eight Cents).
35. I FIND AND HOLD that the Charterers' counterclaim for Damages (as set out in recital D. 7 above) succeeds in the sum claimed of \$11,439.70 (Eleven Thousand Four Hundred and Thirty-Nine U.S. Dollars and Seventy Cents).
36. I AWARD AND ADJUDGE that the Owners shall forthwith pay to the Charterers the sum of U.S. \$48,485.78 (Forty-Eight Thousand Four Hundred and Eighty-Five U.S. Dollars and Seventy-Eight Cents) together with interest at the rate of 8% (eight per cent) per annum from the 1st January 1974 to the date hereof.
37. I FURTHER AWARD AND ADJUDGE that the Owners shall bear and pay their own and the Charterers' costs of the reference relating to the matters dealt with in the Special Case, and shall further bear and pay the fees and expenses of the Arbitrators and myself relating to the same . . . and if in the first instance such costs shall have been paid by the Charterers the Owners shall forthwith reimburse them.

38. Should the decision of the Court be other than as set out in paragraphs 33 to 37 hereof, I respectfully request that my Award be remitted to me with the appropriate directions.

39. In the event of neither party setting down the Special Case for hearing within six weeks from the date of the publication of this my Award (or within such further time as the Court may order), then my Award, as set out in paragraphs 33 to 37 above, shall be my Final Award."

Mr. Anthony Hallgarten (instructed by Messrs. Holman, Fenwick & Willan) for the claimant owners; Mr. Anthony Colman (instructed by Messrs. Sinclair, Roche & Temperley) for the respondent charterers.

The further facts are stated in the judgment of Mr. Justice Donaldson.

Judgment was reserved.

Friday, July 30, 1976

JUDGMENT

Mr. Justice DONALDSON: The vessel was time chartered for a St. Lawrence round voyage on the New York Produce Exchange form. While the vessel was discharging, a dispute arose as to whether any and, if so, how much hire was due. The owners stopped discharging the cargo and the vessel was ordered off the berth. Discharge was resumed four days later following negotiations between the parties and threat of legal action by the receivers of the cargo.

There followed an arbitration in which Mr. Clifford Clark, the umpire, was assailed by a multitude of claims and counter-claims. Some of these he disposed of by a final award. Those which remained have been passed on to me in an award in the form of a special case.

The essential facts are as follows. Hire was paid up to 11 04 hours on Nov. 22, 1973, but not thereafter. On Nov. 26, 1973, the owners told the charterers that the master would be instructed to stop discharging unless bunkers were supplied to the vessel and the unpaid hire was paid by 17 00 hours. The argument about bunkers has been disposed of by Mr. Clark and is no longer material. Hire was not paid by this time and discharging stopped at 21 15 hours.

The owners maintain that they were entitled to take this course because they were thereby (a) cancelling the charter or (b) temporarily withdrawing the vessel from the charterers' service or (c) exercising a lien on the cargo, all in accordance with rights said to be conferred upon them by the charter. Mr. Clark found in favour of the time charterers.

Cancellation of the charter: The owners rely upon cl. 5 of the charter-party which provides that:

Payment of said hire to be made in London in cash . . . monthly in advance, and for the last month or part of the same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or any breach of this Charterparty the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim (the Owners) may otherwise have on the Charterers.

There can be no doubt that the right of cancellation had arisen. The question is whether it was exercised. Mr. Colman, for the charterers, submits that a time charter withdrawal clause entitles the owner to treat non-payment of hire as a repudiation of the charter-party, although, in the absence of such a clause, he could not do so. He submits that the exercise of the right therefore requires some action on the part of the owner which would be sufficient to terminate the charter-party in the event of a repudiatory breach. In my judgment, this is the correct test. No particular form of words or notice is required, but the charterers must be informed that the owner is treating the non-payment of hire as having terminated the charter-party. That did not happen in the present case. The owners simply said that they would not discharge the vessel. This is equivocal. It may mean that the charter is being treated as at an end, but it can equally mean that the owners are refusing to perform their obligations, unless and until the charterers perform theirs. I therefore hold that the charter-party was not "cancelled".

Suspension of the charter-party: In *The Agios Giorgis*, [1976] 2 Lloyd's Rep. 192, Mr. Hallgarten, for the owners, sought to persuade Mr. Justice Mocatta that cl. 5,

properly construed, confers a right of temporary withdrawal of the vessel from the service of the charterers in the event of non-payment of hire. Alternatively, he submitted that regular and punctual payment of the hire by the charterers and the performance by the owners of their obligations are concurrent and mutually dependent obligations. It followed, as he submitted, that, if and so long as hire was overdue and unpaid, the owners need not discharge the vessel. However, as soon as the hire was paid, the owners' obligations revived. He has refined and repeated the arguments before me.

Mr. Hallgarten failed to persuade Mr. Justice Mocatta that this is correct, and he has failed to persuade me. The concept of the right to withdraw a vessel for non-payment of hire is very well known. It involves, and has always involved, a final withdrawal and the termination of the charter-party. If, thereafter, the service is resumed, it is because the parties have agreed that this should occur. In other words, their rights are governed by a new contract, even if the terms remain the same. Mr. Hallgarten's alternative argument fails for at least two reasons. First, the performance of the owners' obligations is not in law dependent upon payment of hire unless the contract so provides and it does not. Second, a failure to pay hire regularly and punctually, as contrasted with default in payment of hire, is a breach of contract which can never be repaired. If a failure to make punctual and regular payments excused performance by the owners, the time could never come when they were again under an obligation to perform.

Exercise of lien: Clause 18 of the charter-party provides:

That the owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this Charter . . .

Mr. Hallgarten submits that the owners were exercising or purporting to exercise a lien on the cargo, when they refused to continue discharging unless and until the hire was paid. Mr. Colman submits that as the cargo was not owned by the time charterers, the owners were not entitled to exercise a lien and their attempt to do so was a breach of the charter-party. Mr. Hallgarten replies that, if there was no right of lien, this was caused by the time charterers' failure to provide that the cargo-owners conferred this right on the owners and that this failure constituted a breach

of cl. 18. Any damages which the time charterers could claim against the owners would form the basis of a counterclaim by the owners against the time charterers and the time charterers' claim would accordingly fail because the Courts will not permit circuity of action. Mr. Colman rejoins that there is no circuity. The owners are liable to the time charterers, but the owners either have no counterclaim against the time charterers or it is for a different amount. The proximate cause of the owners' loss was not the failure of the time charterers to afford them a right of lien, but the owners' purported exercise of a right which they did not have.

The same point arose in *The Agios Giorgis*, [1976] 2 Lloyd's Rep. 192, and Mr. Justice Mocatta held that the owners could not rely upon cl. 18 where the cargo was not owned by the time charterers. It is not clear from the judgment whether the learned Judge took the view that "all cargo" in cl. 18 was limited to the time charterers' cargo or whether he accepted the argument that the time charterers' failure to arrange for a lien over the cargo of third parties and the owners' purported exercise of a lien created cross-claims in damages of different amounts.

I have come to a different conclusion. In my judgment, cl. 18 is to be construed as meaning what it says, namely, that the time charterers agree that the owners shall have a lien upon all cargoes. In so far as such cargoes are owned by third parties, the time charterers accept an obligation to procure the creation of a contractual lien in favour of the owners. If they do not do so and the owners assert a lien over such cargo, the third parties have a cause of action against the owners. But the time charterers themselves are in a different position. They cannot assert and take advantage of their own breach of contract. As against them, the purported exercise of the lien is valid. It follows that hire continued to be payable during the delay in discharging and that the time charterers' claims, based upon that delay, fail.

Mr. Clark's provisional decision was that . . . The owners had no exercisable lien on the cargo remaining to be discharged because it was not the property of the charterers.

He has asked that the award be remitted to him if I take a different view. In this one respect I do, and the award will be remitted accordingly. It will, of course,

be open to the parties to avoid the expense of remission by reaching agreement on what is the appropriate award in the light of my decision and to do so without prejudice to any rights of appeal.

**QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)**

Nov. 3 and 4, 1976

WARINCO A.G.
v.
FRITZ MAUTHNER

Before Mr. Justice DONALDSON

Sale of goods (c.i.f.)—Non-delivery—Prohibition of export—Suspension of export licence—Sellers unable to perform contract—Buyers claimed damages for non-delivery—Whether sellers protected by cl. 21 of GAFTA 100.

The sellers agreed to sell to the buyers 1000 metric tonnes of U.S. soya bean meal c.i.f. Weser, shipment Mediterranean Port between May 29 and June 15, 1973. The contract incorporated the terms of GAFTA 100, cl. 21 of which provided:

Prohibition—In case of prohibition of export . . . or in any case of any executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate, preventing fulfilment, this contract or any unfulfilled portion thereof so affected shall be cancelled. In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated therein, sellers shall advise the buyers without delay for the reasons therefor. If required sellers must produce proof to justify their claim for cancellation.

In order to perform the contract, the sellers purchased 2000 metric tonnes of soya bean meal f.o.b. Piraeus Silo from P. the holders of an export licence. The sellers notified the buyers that the contract would be performed by shipment on the vessel *Leda* from Piraeus and that a notice of appropriation would follow:

On June 8, when loading was about to begin, the sellers learned that the export licence had been suspended on the previous day and that it would be illegal to export soya bean meal throughout the remainder of the shipment period. The sellers and their agents took all reasonable steps to have the suspension lifted or a new licence granted but in vain, and the buyers claimed damages for non-delivery.

The dispute was referred to arbitration and the Board of GAFTA upheld the buyers claim, rejected the sellers contention that they were protected by cl. 21, but stated their award in the form of a special case the question of law for decision of the Court being