

OWNERS' RIGHTS OF REMUNERATION AFTER A DEFAULTING TIME CHARTERER.

A Court of Appeal decision has been recently published in London regarding the owners' rights for compensation in case the time charterer is in default and it is worth reading that owners were only entitled to the bunkers consumed during discharge of the cargo back to charterers and could not recover the loss of use of the vessel at the market rate as there was no element of emergency or necessity. The owners appealed to Supreme Court as referred below.

Referring to the charter agreement, owners entered into a time c/p on the Shelltime form which included the standard form of withdrawal clause providing a right of the owners to withdraw the vessel in the event of non payment of hire and there was no anti-technicality clause in the c/p. Charterers failed to pay an instalment of advance hire and so the owners withdrew the vessel after completing loading of cargo in Brazil and whilst no Bills of Lading had been issued to anyone in relation to cargo on board. Discussions were fruitless and charterers made arrangements to take back the cargo which was discharged and vessel sailed.

The charterers challenged the withdrawal unsuccessfully and threatened to arrest the vessel and owners presented additional claims for expenses incurred in providing and maintaining a first class bank guarantee in order to avoid arrest. The Commercial Court only allowed owners' claim relying on the principal of "Winson" in that owners were gratuitous bailees of the cargo and could recover the bunkers as well as time spent during the period of bailment and the bank guarantee expenses as litigation costs.

The Supreme Court decision considered the "indemnity" clause and the "bailment" and the leading Judgment was by Lord Sumption. Lords agreed that the indemnity was to protect the Owners against losses arising from risks or costs which they had not expressly or implicitly agreed in the charterparty to bear, and not from anything for which they were already remunerated for by the payment of hire. The clause did not cover typically ordinary risks and costs associated with the performance of the chartered service. Secondly, the indemnity only covered losses caused by complying with the Charterers' orders.

Lord Sumption held that both conditions were satisfied. The need to discharge the cargo at the time and expenses of the Owners was not a risk that they had assumed under the charterparty, as it had already come to an end under the withdrawal clause. The cargo had to be discharged because the Charterers ordered it to be loaded and came within clause 13. The Owners' reasons for the withdrawal of the vessel were irrelevant. The Owners' decision to withdraw the vessel was adventitious in timing and merely determined the place at which the cargo was to be discharged. It did not break the chain of causation between the Charterers' order and the detention of the vessel after withdrawal. Thus the losses, namely

for the market hire and the bunkers were recoverable. The two heads of loss must stand or fall together.

Lord Mance, although he agreed with the other four Lords on the bailment point, he delivered a *dissent* on the indemnity point. He was of the view that the Charterers' order had to be the "proximate" or "determining" cause of the Owners' loss in order to trigger the indemnity clause. It was necessary to establish an unbroken chain of causation between the Charterers' orders and the loss in the light of the *White Rose* decision [1969]. It was not sufficient that the Charterers' order was "a" cause of the loss. The Owners' loss was not as a result of complying with the Charterers' instructions, rather it was caused because the charterparty was at an end. While no cargo would have been on board the vessel but for the Charterers' instructions, this did not make the latter the proximate cause of the Owners' loss. It was unrealistic to attribute the loss to instructions to load, ignoring the failure to carry. Recovery of such loss was sufficiently taken care of by the principle in the *Winson* case without "stretching" the scope of the indemnity clause. There was no "direct" or "unbroken" causal link.

The Supreme Court unanimously allowed the appeal on the basis of the principle in the "*Winson*". Strictly speaking, it was not necessary to address this point in view of the decision on the indemnity point but this was so found in the High Court. A coherent system of law produced a consistent answer under both heads. Lord Sumption noted that there was no general right under English law to recover benefits conferred on others or expenses incurred in the course of conferring them. However, one exception appeared under the law of bailment. Relying on the "*Winson*" case the Owners could recover in bailment when

- (1) The cargo was originally bailed under a contract of carriage and the carrier had no choice but to remain in possession after the contract had ended
- (2) As a matter of law, their obligation to look after the cargo continued notwithstanding the termination of the charterparty; and
- (3) the only reasonable or practical option open to them once the charterparty had come to an end was to retain the cargo until it could be discharged at the port where the vessel was located.

The bailee had a duty to take reasonable care of the cargo. It would be manifestly unjust if the bailee did not have a correlative right to charge the bailor for the expenses incurred. This right was based on the existence of a continuing duty to take care of the cargo. It was not dependant on the existence of any emergency or of the carrier being an agent of necessity of the cargo owner. So long as the bailee had to incur those expenses in discharging, being his responsibility to care for the property, they were recoverable. The bailment between the Owners and Charterers over the cargo was initially a consensual one under the charterparty. When the vessel was withdrawn, the Owners became a gratuitous bailee and had the duty to take reasonable care. The Owners claim for expenses and loss of time succeeded.