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Case No: CL-2019-000815

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

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

Date: 7 September 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

K LINE PTE LTD.	**Claimant**
- and -	
PRIMINDS SHIPPING (HK) CO., LTD.	**Defendant**

m.v. "Eternal Bliss"

- -
- -

Tom Bird (instructed by **Reed Smith LLP**) for the **Claimant**
Alexander Wright (instructed by **Penningtons Manches Cooper LLP**) for the **Defendant**

Hearing date: 9 July 2020

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Approved Judgment

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

Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on 7 September 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. From time to time, a case provides the opportunity to resolve a long-standing uncertainty on a point of law of significance in a particular field of commerce. This is such a case. It concerns the nature of demurrage payable under a voyage charter when the charterer has failed to load or discharge the ship within the laytime allowed. On the facts, the question arises following a failure timely to discharge cargo resulting in delay at the discharge port.

2. No breach of contract is alleged against the defendant charterer ("Priminds") other than failure to discharge within the laytime. The claimant owner ("K-Line") says that by reason of the prolonged retention of the cargo on board due to that breach, it deteriorated without fault on the part of K-Line, and that the cargo would have been in sound condition if timely discharged. K-Line claims that as a result it was confronted with damages claims brought by the cargo owners and their insurers that were reasonably compromised at a total cost of c.US$1.1 million. If all that is proved in arbitration, will K-Line be entitled to an award requiring Priminds to compensate it in respect of that cost, by way of damages or under an implied indemnity, or was the demurrage the charter required Priminds to pay K-Line's exclusive remedy for the breach (there being no question of such prolonged delay as might have entitled K-Line to say that Priminds had repudiated the charter)? That last qualification should be borne in mind throughout, to save repetition; I am not dealing with repudiatory delay, or loss caused by or arising after a termination for such delay.

3. *Scrutton* (with a fascinating history, considered below) sides with K-Line: "*Demurrage … is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the laydays or laytime*"; "*Where there is no further breach of charter beyond the failure to load or discharge within the laydays, but the charterer's breach causes the shipowner damage in addition to the detention of the ship, the position is not clear but it is submitted that the better interpretation of Aktieselskabet Reidar v Arcos is that these losses can be recovered in addition to demurrage*", *Scrutton on Charterparties*, 24th Ed. (2020), at 15-001, 15-006. The case for that answer was also argued in some detail in an article by Robert Gay, then of Hill Taylor Dickinson (as they were then), "*Damages in addition to demurrage*", [2004] LMCLQ 72 ("*Gay*").

4. *Voyage Charters* sides with Priminds: "*The varying reasoning of the members of the court in Reidar v Arcos left it in doubt whether, if damages in addition to demurrage are to be recovered, it is necessary to show breach of a separate obligation as well as damage of a different kind from delay in the completion of the loading and discharging operation. In Suisse Atlantique …, both Mocatta J and the Court of Appeal took the view that it is necessary to show a separate breach. The contrary view was taken in The Altus, in which Suisse Atlantique was not referred to, but in The Bonde Potter J, after reviewing all the authorities, preferred the view taken in Suisse Atlantique, which it is submitted is the better view*", *Cooke, Young et al.*, "*Voyage Charters*", 4th Ed. (2014), at 16.14.

5. As those quotations show, and as will be familiar to those practising in this field, the controversy has been seen as one of interpretation of the judgments of the Court of

Appeal in *Akt. Reidar v Arcos* [1927] KB 352, in particular after what was said about them in *Suisse Atlantique d'Armement Maritime SA v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361; so it was nearly 90 years old when the facts of the present case arose. To my mind the debate over how to read the judgments in *Reidar v Arcos*, particularly the judgment of Atkin LJ, important though it is in the discussion, has also distracted from the underlying arguments of principle that ought to drive the answer. In the present case, Mr Bird for the claimant and Mr Wright for the defendant gave those arguments their due prominence, and in my view their submissions were the better for that.

6. If K-Line's claim survives this test of its viability in law, sadly the arbitration tribunal that will decide the remaining issues will not include the late Simon Kverndal QC. He was appointed by Priminds after K-Line had commenced the arbitration by appointing Simon Gault. LMAA Terms apply to the reference and Messrs Gault and Kverndal had not yet come under an obligation to appoint a third arbitrator prior to Mr Kverndal's untimely death on 14 June 2020. His contribution as legal adviser, advocate, arbitrator and mediator to the continuing pre-eminence of London for international shipping dispute resolution was substantial. His warmth of personality, kindness and wisdom were widely valued. He is and will be greatly missed.

7. The matter comes before the court by agreement between the parties for the determination of a question of law arising in the arbitration. I am satisfied that it substantially affects the rights of the parties, since K-Line's claim for the compensation it seeks in the arbitration requires the answer it gives to that question to be correct. The parties were also agreed, and again I am satisfied, that I have jurisdiction to entertain and determine the question, under s.45 of the Arbitration Act 1996, and that it is just and convenient as a matter of discretion to do so (subject to a qualification concerning the second part of the question). Indeed, I commend them for invoking s.45 here so that the law may be clarified, although it may take a judgment from the Court of Appeal for the controversy to be settled definitively.

The Facts

8. K-Line and Priminds entered into a contract of affreightment dated 30 July 2014 for 9 separate voyages, each to be performed by tonnage to be nominated by K-Line, with one laycan per month from February to October 2015 inclusive and otherwise on materially identical terms. The contract was drawn up on, and was subject to the terms and conditions of, a Norgrain form (the North American Grain Charterparty 1973, Amended 1/7/74), as amended and supplemented by the parties. It included bespoke provisions for the creation and narrowing of the individual voyage laycans, and the nomination of tonnage for each by K-Line. This was therefore a contract pursuant to which 9 individual voyage charters would be created and performed, all going well, each on Norgrain terms as amended and supplemented by the parties.

9. By agreement concluded on 2 July 2015, as reflected in additions within the copy of the updated contract that was in evidence before me, 3 further voyages were added, for laycans to be created and narrowed within November 2015, December 2015 and January 2016.

10. Additional clause 45 specified that loading for each voyage was to be one safe port one safe berth Santos or Tubarao or Paranagua or Rio Grande or Sao Francisco do

Sul, or in Priminds' option one safe Argentine berth up river not above Timbues of San Lorenzo or Nueva Palmira, or one safe berth port Montevideo, in either case followed by completion cargo at one safe port berth Bahia Blanca or Necochea, or one safe berth port Montevideo. The additional 'charterer's option' loading range was not available if the discharge port was to be in Japan.

11. Additional clause 47 specified that discharge for each voyage was to be one safe berth, one safe port China, with Priminds guaranteeing a 13.0 metre arrival draft, with an option in Priminds for the 8th and 9th shipments only to declare instead discharge at either one safe port one safe berth Incheon, Korea, one safe port one safe berth Kaohsiung, Taiwan, or one or two safe berth(s) at up to three safe port(s) Kashima to Kagoshima range (both inclusive), including Hakata, Japan.

12. The cargo for each voyage – specified by additional clause 46 – was to be 60,000 m.t., 10% more or less in K-Line's option, of Heavy Grain, Soya or Sorghum in bulk, with stowage factor about 48/49 without guarantee (i.e. about 48/49 cu.ft./lt, which is about 0.75 m.t. per cubic metre).

13. Clause 18 of the contract set a contractual discharge rate of 8,000 m.t. per weather working day Saturday, Sunday and Holidays excepted even if used (Friday 1700 hrs to Monday 0800 hrs not to count), and thus determined the laytime allowed and when the chartered ship went on demurrage at the discharge port. The demurrage clause was Norgrain clause 19, in the following terms as amended by the parties:

> "*Demurrage at loading and/or discharging ports, if incurred, to be ~~paid at the rate of~~* ***declared by Owners upon vessel nomination but maximum USD 20,000 per day or pro rata / despatch half demurrage laytime saved at both ends.*** *~~per day or~~ for part of a day and shall be paid by Charterers in respect of loading port(s) and by Charterers/~~Receivers~~ in respect of discharging port(s). Despatch money to be paid by Owners at half the demurrage rate for all laytime saved at loading and/or discharging ports. Any time lost for which Charterers/Receivers are responsible, which is not excepted under this Charter Party, shall count as laytime, until same has been expired, thence time on demurrage.*"

14. The dry bulk carrier *Eternal Bliss* was nominated by K-Line so as to become the chartered ship for the June 2015 laycan. She loaded 70,133 m.t. of soybeans at Tubarao for discharge in China. Loading was completed and bills of lading were issued on 11 June 2015.

15. *Eternal Bliss* arrived at Longkou anchorage and tendered NoR for discharge at 0442 hrs local time on 29 July 2015. She was kept at the anchorage for some 31 days due to port congestion and lack of storage space ashore for the cargo, such that discharge only got underway on 30 August 2015. Upon discharge, the cargo is said to have exhibited significant moulding and caking throughout the stow in most of the cargo holds. Discharge was completed, and the ship sailed away from Longkou, on 11 September 2015, having provided a US$6 million letter of undertaking from China Reinsurance (Group) Corp as guarantors in favour of the cargo receivers, Shandong Xiang Chi Grain and Oil Company Ltd, as security for the receivers' cargo claim, in return for the receivers refraining from arresting the ship.

16. As already indicated, K-Line says it later settled the receivers' and their insurers' claims at a total cost of c.U$1.1 million. It commenced arbitration seeking damages or an indemnity in respect of that cost, appointing Mr Gault, in January 2019. Written claim, defence and reply submissions were served in the arbitration. Leaving aside what is for present purposes a question-begging allegation of breach by failure to indemnify K-Line, the only allegation of breach made against Priminds is that it failed to discharge the subject cargo at the rate specified by clause 18.

17. The possibility of taking the question of law now before the court as a preliminary issue was identified, and the parties in due course agreed to bring it straight to the court under s.45 of the 1996 Act. For that purpose, the parties are agreed, and I am content, that the following further facts should be assumed, without pre-judging which of them (if disputed) will be established in the arbitration, namely that:

    (i) *Eternal Bliss* was detained at the discharge port beyond the contractual laytime, due to port congestion and a lack of storage.

    (ii) Priminds was therefore in breach of its obligation to complete discharge within the permitted laytime.

    (Strictly, I observe, the breach would be failure to discharge at the rate specified in clause 18. The amount of laytime permitted under that clause is derived from the discharge rate and the facts, e.g. the weather actually experienced, rather than being expressed in the contract; but that does not affect the legal analysis.)

    (iii) The condition of the cargo deteriorated as a result of the detention beyond the laytime, and not due to any want of care by K-Line.

    (iv) K-Line suffered loss and damage and incurred expense as a result of the detention beyond the laytime, including dealing with and settling the cargo claims brought by the cargo interests and insurers.

    (v) The loss, damage and expense suffered by K-Line were:

        (a) not caused by any separate breach of charter other than Priminds' obligation to discharge within the contractual laytime;

        (b) not caused by any event which broke the chain of causation; and

        (c) reasonably incurred.

    (vi) The loss, damage and expense suffered by K-Line were consequences of compliance with Priminds' orders to load, carry and discharge the cargo.

    (The factual basis for K-Line's case about that in the arbitration, I add for completeness, is that the cargo was shipped with what K-Line will say was a high moisture content for the anticipated voyage length, averaging 12.52%; but it is not said that moisture content involved or resulted from any breach of contract by Priminds.)

18. Whether or not I say so expressly, it should be understood throughout that what I say about this case is on the facts presently assumed, as set out above.

The Question of Law

19. The parties' agreed formulation of the question of law for determination under s.45 was as follows:

> "*Where a voyage chartered vessel has been detained at a discharge port beyond the laytime, and such delay has caused deterioration of the cargo and led to the vessel's owners suffering loss and damage and being put to expense (including in the form of liabilities to third parties), are the owners in principle entitled to recover from the charterers, in addition to any amounts payable as demurrage, such loss/damage/expense by way of:*
>
> *(a) damages for the charterers' breach of contract in not completing discharge within permitted laytime; and/or*
>
> *(b) an indemnity in respect of the consequences of complying with the charterers' orders to load, carry and discharge the cargo?*"

20. A significant if condensed set of prospective conclusions of fact in favour of K-Line was built into the premise within that formulation for the question of law. The intention of the assumed facts (paragraph 17 above) was, I think, to make it clear that for present purposes the court is not to trouble over such matters as, for example, whether there is any possibility that the cargo damage may have been caused by a want of care by K-Line (assumed fact (iii)) or that K-Line may have caused some or all of its loss by settling the cargo claims unreasonably (assumed fact (v)(c)). However, those extra elements were not part of the premise of the stated question, unless perhaps encompassed within the causation assumptions "*has caused*" and "*led to*"; and so it was not clear to me that if I accepted K-Line's argument on the demurrage clause, the answer to the question as stated would be an unqualified 'yes', or that if I accepted Priminds' argument the answer would be 'no' rather than 'not necessarily'.

21. Having discussed the point with counsel at the hearing, it was agreed that a neater and better question to state and answer is this:

> "*If the facts were as presently assumed [paragraph 17 above] in respect of the voyage charter of m.v. 'Eternal Bliss' in relation to the June 2015 laycan under the contract of affreightment between the parties dated 20 July 2014, is the charterer liable to compensate or indemnify the owner in respect of the loss, damage and expense referred to therein by way of:*
>
> *(a) damages for the charterer's breach of contract in not completing discharge within permitted laytime;*
>
> *(b) an indemnity in respect of the consequences of complying with the charterer's orders to load, carry and discharge the cargo?*"

22. The main point of principle involved asks what it is that demurrage liquidates. It is well-established that demurrage is by nature liquidated damages, but in respect of what does demurrage, calculated in accordance with the voyage charter, fix (and therefore limit) the owner's recovery? Because that is the point, cases on liquidated damages provisions in other contexts, even if they were liquidated damages provisions relating to delay, are not of as much assistance as Mr Wright contended.

23. Thus, Mr Wright referred me to cases confirming or explaining the exclusivity as remedy of the liquidated damages provided for by a liquidated damages clause in respect of matters covered by it, such as *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20, *Temloc v Errill Properties* (1988) 39 BLR 30, *Chattan Developments Ltd v Reigill Civil Engineering Contractors Ltd* [2007] EWHC 305 (TCC) and *Bath and North East Somerset DC v Mowlem plc* [2015] 1 WLR 785. Mr Wright submitted by reference to such cases that when it comes to demurrage, "*the starting point as a matter of principle must be that, in common with all liquidated damages provisions, the rate of demurrage for breach of the obligation to complete cargo operations within agreed laytime is intended to be the parties' exclusive remedy in respect of <u>all</u> loss and damage flowing from the breach*" (his emphasis).

24. If that were the starting point, it is difficult to see why it would not also be the finishing point or why the question for determination now has been the subject of serious debate and differences of view for so long. It is not the starting point, however, because it begs the very issue of construction that has to be determined; it will be the finishing point if Mr Wright is correct on that issue, not because the answer to it falls to be assumed in his favour at the outset. It is therefore also nothing to the present point that in *The Lips, President of India v Lips Maritime Corp* [1988] 1 AC 395, the House of Lords founded upon the proposition that a payment of demurrage is by nature a payment of liquidated damages the decision whether the exchange rate loss suffered in that case because of when demurrage was paid was recoverable as damages in addition.

25. All that is because the question of the scope of any given liquidated damages provision is a question of its proper construction, within the contract in which it appears; and as is typical, the Norgrain demurrage provision, clause 19, does not say that the charterer is to make a payment by way of liquidated damages for all and any breach of the discharging rate obligation under clause 18. All that clause 19 does is specify the rate at which "*Demurrage …, if incurred*", is to be paid. In other words, again as is often seen, clause 19 does not itself say what demurrage is, or what it seeks to liquidate; and that is how the question before me arises and why there is room for it to be contentious.

26. To illustrate again by reference to *The Lips*, having just mentioned it, Lord Brandon said, *ibid* at 422F-G, that "*demurrage is … a liability in damages to which a charterer becomes subject because, by detaining the ship beyond the stipulated lay days, he is in breach of contract. Most, if not all, voyage charters contain a demurrage clause, which prescribes a daily rate at which the damages for such detention are to be quantified. The effect of such a clause is to liquidate the damages payable …*". That is not inconsistent with either side's case before me, because it does not seek to unpack what is meant in this context by damages for detention. That is no surprise, since the point I have to decide did not arise in *The Lips*. The owner's claim required a separate breach by way of late payment, and so failed because there was no implied

contractual obligation as to time for payment such as the owner alleged, because the effective cause of the exchange rate loss was not the failure to complete cargo operations within time but the independent action or choice on the charterer's part as to when it paid the demurrage due.

27. It follows that, whether or not I agree with the conclusion in *Gay*, the way it is articulated is correct. If K-Line is to prevail, it must be because "*in the end what is significant in the facts of Reidar v Arcos is not whether or not charterers were in breach of the obligation to supply a contractual cargo for the vessel, but the fact that the charterers' breach (whatever it was) resulted in a loss to the owners of a separate type, which was not covered by the demurrage rate agreed*", *ibid* at p.103 (my emphasis). What *does* the law take to be covered by a demurrage rate? What *does* demurrage liquidate?

Discussion

Introduction

28. I start by making the obvious point, so as to put it aside, that particular parties could contract using language in their demurrage clause that answers the present issue. The Norgrain form does not contain such language and neither do the parties' amendments to the form. By using the Norgrain form, they agreed that "*Demurrage …, if incurred*" was to be paid at a certain rate, so their agreement was that 'demurrage' be paid, whatever that may mean when not elaborated by express provision.

29. That is a familiar phenomenon in standard voyage charter forms, for example:

    (i) The Gencon form, with its 'Part I / Part II' structure, Part I for details of the instant voyage, Part II the standard terms, calls for a demurrage rate and manner of payment to be inserted in Part I in a Box cross-referenced to clause 7 of Part II:

        (a) For Gencon 1976, Box 18 in Part I is for "*Demurrage rate (loading and discharging) (Cl.7)*"; and clause 7 provides, "*Ten running days on demurrage at the rate stated in Box 18 per day or pro rata for any part of a day, payable day by day, to be allowed Merchants altogether at ports of loading and discharging*";

        (b) For Gencon 1994, Box 20 in Part I is for "*Demurrage rate and manner payable (loading and discharging) (Cl.7)*"; clause 7 provides, "*Demurrage at the loading and discharging port is payable by the Charterers at the rate stated in Box 20 in the manner stated in Box 20 per day or pro rata for any part of the day. Demurrage shall fall due day by day and shall be payable upon receipt of the Owners' invoice*"; and clause 7 includes a right in the owner to terminate if there is a default in payment of demurrage unrectified for 96 hours following notice.

    (ii) The Asbatankvoy form, likewise adopting a 'Part I / Part II' structure, calls for "*Demurrage per day*" to be inserted in section I of Part I; and clause 8 of Part II provides, "*Charterer shall pay demurrage per running hour and pro rata for*

a part thereof at the rate specified in Part I for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime elsewhere herein specified." Clause 8 also contains partial and total demurrage exceptions, providing for demurrage to be at half-rate to the extent incurred by reason of various specified causes, e.g. fire, explosion or storm, and exempting the charterer from demurrage liability in respect of delay caused by various other specified causes, e.g. crew strike. The BPVOY4 Form adopts a similar approach and Part II language. The Exxonvoy 90 Form is similar: a demurrage rate, or basis for calculating it, to be inserted in Part I (section (J)); a provision in clause 8 of Part II that, "*The rate for demurrage … shall be*" as specified or derived from Part I(J); then clause 13(c) in Part II – "*Charterer shall pay demurrage per running day and pro rata for a part thereof for all time by which the allowed laytime specified in Part I(I) is exceeded by the time taken for loading and discharging and for all other Charterer's purposes and which, under this Charter, counts as laytime or time on demurrage*" – with detailed laytime/demurrage calculation provisions, including some half-demurrage provisions and complete exclusions, in clause 14.

Reidar v Arcos

30. I turn next to *Reidar v Arcos*, to identify what the controversy is or has been and also what it is not (or at least should not be). The m.v. *Sagatina* arrived at Archangel on the White Sea in good time to load a full and complete cargo of timber, including a full summer deck cargo, for carriage to Manchester under a voyage charter on the Chamber of Shipping White Sea Wood form. However, in breach of charter, cargo was not loaded at the specified rate, by reason of which (a) the ship went on demurrage and (b) loading was not completed in time to allow the ship to complete her laden voyage before 1 November, when a winter deckload limit would come into effect pursuant to the Merchant Shipping Act 1906. So the ship was loaded to the winter rules. The charterer's case was that it had more cargo available, but the Master would have been entitled to refuse additional cargo the loading of which would have caused the ship to arrive at Manchester unlawfully overladen under English law. Thus the factual basis for the case was that the short shipment was caused by the failure to load within the laydays.

31. The claim was for deadfreight, i.e. the owner's net loss of freight caused by loading only a winter full load. The full load obligation was expressed in the voyage charter in classic terms as an obligation to load a "*full and complete cargo*" of wood products. The only claim made was for damages for breach of that obligation, asserting that the 'full and complete cargo' the charterer was obliged to load was to be assessed assuming loading at the contractual loading rate. The demurrage clause provided that "*Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at £25 per day, and pro rata for any part thereof*". The defence at trial was that, since the charterer was entitled to detain the ship, paying demurrage under that clause – the owner could not have terminated the charter because of the delay – there was no obligation to load a full summer cargo, only an obligation to load a full cargo as and when cargo was in fact loaded, that is to say there was in the event only an obligation to load a full winter cargo.

32. The question for Greer J was whether that was a good defence. He held it was not, agreeing with the owner that a 'full and complete cargo' meant that which would have been a full load if the charterer had complied with the obligation to load at the agreed rate. The demurrage clause had not "*completely provided for the amount that is to be paid by the charterer for that delay in loading*" because it "*merely provide[d] for damages due to the detention of the ship – so much per day for the detention of the ship*". The owner's claim therefore succeeded, (1926) 25 Ll L Rep 30.

33. The Court of Appeal unanimously dismissed the charterer's appeal, [1927] 1 KB 352. The argument for the charterer (at 355-356) was that (i) demurrage is not in the nature of liquidated damages, but is an agreed payment for the use of the ship beyond the laydays, alternatively (ii) if it is agreed damages to be paid for delay of the ship in loading, then "*the owners cannot recover anything beyond the agreed damages*". The dismissal of the appeal means that the charterer's arguments were both bad. The owner argued (at 356) that there were two obligations – first, to load a full cargo, and second, to load within the laydays – and that "*For breach of [the second] obligation, but not for breach of the obligation to load a full cargo, the damages are agreed by clause 3 … . The appellants have committed a breach of this obligation and must pay the agreed damages; but that does not absolve them from what Greer J. has called the primary obligation to load a cargo of 850 standards [i.e. the summer full cargo quantity]*".

34. For Bankes LJ, the owner's answer to the appeal was unsound, but he was for dismissing the appeal nonetheless. The only breach was the failure to load at the charter rate, there was no breach of the full load obligation, but the demurrage clause did not defeat the claim because the lost freight was "*essentially distinct from any claim for the detention of the vessel*", [1927] 1 KB at 362. Thus Bankes LJ dismissed the appeal on the basis of a cause of action that had not been asserted. If that were the *ratio* of all three judgments, or a majority of them, it would be a *ratio* binding me to decide the issue in the present case in favour of K-Line (unless there were a basis for distinguishing the loss in this case from the loss of freight for which damages were recovered in *Reidar v Arcos*).

35. The contentious point has been whether Atkin LJ was with Bankes LJ in saying there was only one breach of contract by the charterer (as Webster J concluded in *The Altus* [1985] 1 Lloyd's Rep 423), or with Sargant LJ (and Greer J) in saying that there were two breaches (as Potter J, as he was then, concluded in *The Bonde* [1991] 1 Lloyd's Rep 136). On that, I respectfully agree with Potter J, as Mr Wright submitted that I should.

36. It follows that *Reidar v Arcos* is not authority for the proposition that Bankes LJ's approach is correct in law. What *Reidar v Arcos* decided, by the majority *ratio*, is that (i) the content of a voyage charterer's obligation to load a 'full and complete cargo' is to be determined assuming loading at the contractual loading rate, and (ii) the demurrage clause does not defeat a claim for deadfreight for breach of the full load obligation even where that breach itself results from a failure to load at the loading rate required by the charter.

37. That means in turn, and here I am agreeing with Mr Bird, that *Reidar v Arcos* is not authority for the proposition that Bankes LJ's approach is wrong *as regards the scope and effect of the demurrage clause*. Firstly, *Reidar v Arcos* cannot have decided that,

as that would require that the majority had agreed with Bankes LJ that there was only one breach and allowed the appeal on that basis. Secondly, and therefore, the majority judgments are at most persuasive to the effect that Bankes LJ's approach to the demurrage clause is wrong for a 'one breach' case; and they are only even that if they expressly or impliedly disagree with it. Disagreeing with Bankes LJ, as the majority did, that there was only one breach does not amount to or imply disagreement with his conclusion that the owner's claim was sound if there were only one breach; and the reason why the demurrage clause did not defeat the owner's claim, according to the majority, is consistent with Bankes LJ's approach.

38. To complete this setting of the scene, I should mention *Inverkip Steamship Co v Bunge & Co* [1917] 2 KB 193, the leading Court of Appeal decision prior to *Reidar v Arcos*. That case is authority for a proposition stated in these terms by Bankes LJ, in *Reidar v Arcos* at 362: "*If the [owner's] claim was in substance, though not in form, a claim for detention of the vessel, the special damage here claimed for would not be recoverable*". Demurrage on any view liquidates the damages, and therefore is the owner's only remedy, "*for detention of the vessel*" beyond the laytime; and that is so even if that detention results from (or also from) some breach of contract other than the failure to load or discharge (as the case may be) at the required rate. Thus, where dangerous cargo was shipped in breach of contract but the only consequence harmful to the owner was delay to the ship beyond the laydays, there was no recovery beyond the demurrage provided for by the charter: *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240.

39. It is possible, therefore, to construct this grid:

Can Owners Recover Beyond Demurrage?		**Claim other than for 'detention of the vessel'?**	
		Yes	**No**
Separate Breach?	**Yes**	**Recovery Possible** (*Reidar v Arcos* – even if extra breach caused by failure to complete within laytime)	**Recovery Not Possible** (*Inverkip SS v Bunge*; *Chandris v Isbrandtsen-Moller Co Inc*)
	No	**?** (The principal question arising in this case)	**Recovery Not Possible** (Obviously; *Inverkip SS v Bunge, a fortiori*; *Suisse Atlantique*)

40. The present case inhabits the bottom half of the grid, since no breach by Priminds is alleged other than the failure to discharge within the laydays. It is convenient to take first the nature of the loss claimed, to determine whether the case is in the left or right half of the grid, both because if Priminds is right on that point it is a short answer to the question I have to determine, and also because doing serves to introduce *The*

Bonde, the principal authority on which Priminds relies. Although the nature of the argument before me has caused this judgment to be quite lengthy, the decision comes down to whether to follow or depart from Potter J in that case.

Type of Loss

41. For K-Line, Mr Bird submitted that its cargo claim liabilities are unrelated to the loss of the use of the ship as a freight-earning vessel, and that therefore K-Line is not claiming damages for detention. The relevant loss was a liability for damage to the cargo caused by its retention on board the ship. That it was in turn a by-product of the delay to the ship does not stop the cargo damage (or liability in respect of it) from being a different kind of loss. There was the same causal connection between the delay beyond the laydays and the loss recovered on top of demurrage in *Reidar v Arcos*. (To be clear, when I refer to K-Line having a liability, I do not distinguish between a liability that existed but was settled and a liability created by a reasonable settlement agreement where there would not have been a liability otherwise, because on the assumed facts there was an unbroken chain of causation either way.)

42. For Priminds, Mr Wright submitted that this is not a case of different loss. The case falls into the bottom right of the grid, not the bottom left, because on the assumed facts the deterioration in the cargo and the consequent loss and expense all resulted from the ship being delayed at Longkou beyond the laydays. The claim is therefore still only a claim for detention of the ship.

43. I prefer K-Line's argument. On any view, the answer to it suggested by Priminds is not right. If being a result of delay to the ship beyond the laydays meant a loss could not be recovered separately from or additionally to demurrage, the decision in *Reidar v Arcos* would have gone the other way. There, the reduced freight was caused by the detention of the ship beyond the laydays when it lasted long enough to bring the winter safe loading rules into play. If it is right to distinguish *Reidar v Arcos* here, it must be on the point of there having been in that case, *per* the majority, a separate breach.

44. This is a case of cargo damage, and loss suffered by K-Line in respect of it by way of liability or the reasonable settlement of possible liability. The cargo became damaged because the excess period of confinement in the cargo holds lasted long enough for it to deteriorate. If K-Line is right in what it alleges in the arbitration, that in turn is because the lengthy confinement brought the capacity of the cargo to damage itself by self-heating into play, but it is not necessary to know whether that will be proved – and there is no assumed fact about it – to state the more limited, basic proposition that on the assumed facts the cargo damage resulted from the prolonged cargo confinement, and resulted without any want of care by K-Line, so that there is no question of K-Line being responsible for it as between itself and Priminds.

45. In my judgment, the damage to the cargo is quite distinct in nature from, and is additional to, the detention of the ship, *as a type of loss*. On the assumed facts, K-Line felt that loss to the extent of the cost of its settlement of cargo claims made against it and there is an unbroken chain of causation in that regard. That is every bit as different as was the deadfreight in *Reidar v Arcos*. If there had been a separate breach, *Reidar v Arcos* would simply have applied on its majority *ratio* to answer this case in K-Line's favour. Stepping back, indeed, it is a little surprising the contrary was

argued. If the moisture content of the cargo on shipment had put Priminds in breach of an obligation under the voyage charter as to cargo specification, and if the cargo damage was due to that moisture content as alleged by K-Line (in combination with the delay caused by Priminds' failure to discharge at the contractual rate), I cannot imagine Priminds would have suggested that it could invoke the demurrage clause to defeat K-Line's claim in respect of the cargo damage founded upon the cargo specification breach. An argument that K-Line was in substance claiming damages for detention, so could not claim anything other than demurrage, rightly would have been given short shrift.

46. However, this all means also that, as Mr Wright submitted, K-Line cannot escape from *The Bonde* by reference to the nature of the loss in that case. It concerned an f.o.b. contract on the GAFTA 64 form with carrying charges of US$0.25 per m.t. per day if the buyer's ship on arrival for loading filed with the authorities outside the shipment period, payable until the actual bill of lading date. The ship filed late, so carrying charges were payable. But the period for which they were thus payable was prolonged because the seller failed to load at the rate specified in the contract. The seller claimed the carrying charges calculated as per the contract. The buyer resisted liability for such part of those carrying charges as resulted from the seller's failure to load at the charter rate. The sale contract demurrage provision was: "*Demurrage / despatch: to be for sellers' account at charter-party rate but maximum 8,000/4,000 US $/day*."

47. Carrying charges were held by a GAFTA Board of Appeal to be in the nature of liquidated damages, that is to say liquidated damages payable *by the buyer* for the seller's loss *by way of prolonged carriage of the cargo ashore*. They were, in functional terms, an increase in the price the buyer had to pay for the cargo because the ship arrived late to load it; and the buyer was thus claiming for, or rather defending itself against, the increase in that increase in the price that was caused by the seller's loading rate default. The seller succeeded before a GAFTA Board of Appeal, i.e. the buyer's relevant claim failed, and Potter J dismissed the buyer's appeal under the Arbitration Act 1979.

48. The *ratio* of Potter J's judgment is that the buyer could not recover damages beyond demurrage because the only breach by the seller had been the failure to load at the contractual rate. The aggravation in the increased cost of the cargo to the buyer cannot be characterised as part of, or akin to, the *owner's* daily loss of the use of the ship for earning freight. As in *Reidar v Arcos*, and as in the present case, the buyer in *The Bonde* was complaining about harm separate from and different in kind than the detention of the ship, albeit harm that resulted from delay to the ship beyond the laydays. On Bankes LJ's approach, that should have been regarded as recoverable by the buyer on top of demurrage.

49. Nor do I accept that it is a material distinction that *The Bonde* concerned the demurrage provision in an f.o.b. sale contract. It would be a matter for the terms of the voyage charter whether the owner was in breach because the ship arrived only when it did. But within the interlocking pattern of bilateral contracts constituting the trade in question, that is how in principle it might be expected that carrying charges would be passed on, the seller charging the buyer under the f.o.b. sale contract, the buyer then seeking to charge the owner in damages under the voyage charter (if it could say the ship's late arrival was a breach). On the simple, oft-seen, demurrage wording in the

sale contract, it would not be thought the intention to leave the buyer mis-matched in the middle as to what was meant by, or encompassed within, demurrage. If the buyer's partial defence to the carrying charges claim was to be defeated by the demurrage provision, so too the owner's equivalent partial defence to any claim the buyer might otherwise have to pass the carrying charges on as damages for the ship's late arrival.

50. I therefore reject, as did Potter J, the argument that it should make a difference that he was considering an f.o.b. sale not a voyage charter. In my judgment, with respect, Potter J was correct to reason from whether the demurrage rule for a voyage charter was as contended for by the seller before him, and by Priminds before me, to whether the buyer's partial defence was correctly rejected by the GAFTA Board of Appeal.

51. That means Mr Wright is correct to say that *The Bonde* is authority deciding in his favour the point now before me. K-Line cannot escape the need to contend, as Mr Bird did contend, that *The Bonde* is wrongly decided and should not be followed. I shall come back to *Scrutton on Charterparties* and the interesting history to which I referred in paragraph 3 above. Whether or not the view expressed in *Scrutton* is correct, it is a surprise that the Editors cite *The Altus* [1985] 1 Lloyd's Rep 423 and *The Adelfa* [1988] 2 Lloyd's Rep 466 but not *The Bonde*, in which Potter J considered both those cases, identified that *The Adelfa* did not decide the point, and declined to follow *The Altus* on it, calling it an unreliable authority.

Initial Analysis

52. That raises a question of the doctrine of precedent. There is a well-known statement of the rule as it applies at first instance in *Colchester Estates (Cardiff) Ltd v Carlton Industries plc* [1986] Ch 80, *per* Nourse J, as he was then, at 84F-85H, which was approved by the Court of Appeal in *Re Lune Metal Products Ltd (in administration)* [2006] EWCA Civ 1720 at [9]. It holds *inter alia* that the law is settled at first instance by a considered first instance refusal to follow an earlier first instance decision (here, subject to what may be an important subtlety, that would be the refusal in *The Bonde* to follow *The Altus*). That rule is subject to exception "*only in the case, which must be rare, where the third judge is convinced that the second judge was wrong in not following the first*", *ibid* at 85G.

53. That sets a high bar for K-Line if I am to decline to follow *The Bonde*. But it is not necessarily insurmountable. The third judge is not reduced to identifying the prior authority so that an appeal may be pursued, effectively against the second decision, without forming any independent view. At all events, that is so where, as here, the contention is squarely raised that the second decision, even if it *prima facie* governs at first instance, is clearly wrong and should not be followed. I propose therefore, firstly, to consider the issue, as best I can though familiar with all these authorities, free from questions of what to make of the prior judgments, before, secondly and thirdly, considering the *dicta* on it in those judgments and reviewing the textbooks, and then, fourthly and finally, circling back to *The Altus*, *The Bonde*, and how I should decide this case.

54. Before doing even that, I should identify the subtlety to which I referred in paragraph 52 above. It will be seen when I come back to *The Altus* and *The Bonde* that I respectfully agree with Potter J that what Webster J said about *Reidar v Arcos* is

unreliable. Thus, I agree with Potter J that the judgment in *The Altus* is not a sound basis for deciding in favour of K-Line the point I have to decide. But *The Altus* was not wrongly decided; what Webster J said about *Reidar v Arcos* was not necessary to his decision. Therefore, there was in *The Bonde* no refusal to follow a prior decision at first instance, only a refusal to adopt unpersuasive reasoning in a prior judgment that does not affect the correctness of the decision for which that prior judgment was delivered. On that view of the matter, *The Bonde* is the first decision on the point, and I am prospectively the second judge rather than a prospective third judge as regards the rule of precedent stated in *Colchester Estates*.

55. For K-Line, Mr Bird submitted as follows:

(i) A range of factors supports the notion that a demurrage rate provides a pre-estimate of the (negative) value to the owner of the loss of use of the ship as a freight-earning instrument, such that "*No reasonable person entering into a voyage charter would envisage that compensation for cargo claim liabilities would be addressed by a mere day rate for demurrage*". Priminds' case, it was said, "*defies common sense by providing windfall protection … for losses which are entirely separate from any loss of use*". Thus:

(a) A daily demurrage rate is given, to accrue day by day (and pro rata for part of a day), to reflect the fact that a cargo ship is an income-generating chattel, kept out of the market if the loading or discharging operation takes longer than has been promised so as to be taken to have been factored into the freight.

(b) It is obvious and well understood that the daily rate is a proxy for the loss of net daily revenue caused to the ship by the extra time taken to load or discharge. That is why it may be taken as *prima facie* evidence of the daily loss of revenue if there is a claim by the owner for damages for delay falling outside the laytime/demurrage calculation, e.g. for a breach of charter that prevents the ship from becoming an arrived ship so as to trigger the commencement of laytime. Noting and relying on the fact that the demurrage rate is in this way a proxy for the daily loss of revenue is not to beg the question, but does suggest that something more is needed than the existence of an agreed daily demurrage rate for a conclusion that demurrage excludes any remedy for loss beyond loss of earnings.

(c) Whether or not despatch is provided for (as it happens, it was in this case), commercially speaking despatch is the opposite of demurrage, even if in law they are different in nature because demurrage is classified as liquidated damages and despatch is not. The fact that the law classifies demurrage as damages does not detract from the fact that it is functionally an increase in the charterer's cost of freight for the voyage in question, just as despatch reduces that cost and is indeed by nature a rebate on the freight, as it is put in *Schofield, "Laytime and Demurrage"*, 6th Ed. (2016) at 7.2, citing *Compania de Navigacion Zita SA v Louis Dreyfus & Cie* [1953] 2 Lloyd's Rep 472 at 475 (see paragraph 62(i) below).

(ii) To find for Priminds is to conclude that a typical demurrage clause is a partial exclusion or limitation clause, contrary to strong *dicta* in the House of Lords in *Suisse Atlantique* and though there is no language of that kind in the contract.

(iii) There is an asymmetry or clash of logic between the proposition that proving a breach other than the failure to load or discharge within the laydays does *not* result in recovery beyond demurrage for the detention of the ship after the expiry of the laytime (the *Inverkip* rule), and the proposition that proving loss beyond and different in kind from the detention of the ship does not result in recovery in the absence of a separate breach. Those should not both be good law, Mr Bird argued, because the essential and only reason for the first is that the number or nature of any breaches is for these purposes immaterial. That is to say, the reason for the *Inverkip* rule is, and so the existence of that rule shows, that demurrage is by nature liquidated damages for the detention of the ship after the expiry of the laytime; and that establishes the correctness of Bankes LJ's approach in *Reidar v Arcos*, for all he did was give that premise its logical consequence.

(iv) *The Bonde* aside, the consistent focus in judgments contemplating the recoverability of damages on top of demurrage for loss suffered by an owner where the ship has been detained beyond the laydays has been the nature of the loss, and its counterpart the particular nature of the loss intended to be quantified by the demurrage rate, rather than the question of separate breach.

56. For Priminds, Mr Wright submitted as follows:

(i) It is well settled that a demurrage clause is by nature a liquidated damages provision. It should be given the effect ordinarily given to such clauses, that is to say it should be treated as fixing (and limiting) the damages recoverable for the breach it covers.

(ii) The *Inverkip* rule neither says nor implies more than that demurrage additionally *also* liquidates the damages, so as to limit owners to the demurrage rate, where a separate breach results only in detention of the vessel at the loading port or discharge port beyond the expiry of the laydays.

(iii) The fixing of an agreed basis for assessing damages for all the consequences of the charterer's failure to load or discharge within the laydays promotes certainty. That is mutually beneficial; for example *per* Lord Upjohn in *Suisse Atlantique* at 420G, "*An agreed damages clause is for the benefit of both; the party establishing breach by the other party need prove no damage in fact; the other must pay that, no less but no more* ... ." This was expanded to a submission that K-Line's approach created uncertainty as to whether or not a particular loss fell within or outwith the scope of the demurrage provision, compounding the uncertainty created by the need to prove and quantify loss and the related potential for disputes over causation, remoteness, mitigation and the like.

(iv) K-Line's case did not work, or worked less well, with well-known elements of many demurrage regimes, even if they are not found in the Norgrain form, namely demurrage exceptions (full or partial, e.g. the Asbatankvoy half-

demurrage regime) and demurrage time bars (usually calling for demurrage claims to be made, readily documented, within a relatively short period after completion of operations).

57. As with the question of the type of loss, here also for my part I prefer K-Line's argument. Reading the Norgrain Laytime and Demurrage/Despatch provisions together, clauses 18-19 of the standard form, the language conveys an obligation to take up no more of the ship's time for loading or discharging operations, plus "*time lost for which Charterers/Receivers are responsible*", than the laytime allowed, and to compensate the owner for the ship's time beyond that, or be rewarded by the owner for ship's time saved against that, at the demurrage rate, respectively the despatch rate. That conveys that the demurrage provided for is compensation for the fact that time is money for the ship, with despatch the reward counterpart founded on the same principle.

58. English law classifies demurrage as liquidated damages for breach of contract, rather than saying it is remuneration (additional freight) for additional services that it is not a breach for the charterer to require. It does so even though the reward counterpart, despatch, is in the nature of a rebate on freight and not a species of damages liability. The classification of demurrage as damages, not debt, may have other consequences (as, for example, it meant in *The Lips* that there was no claim for damages for the late payment of demurrage). But that classification does not mean or necessarily imply that the demurrage rate is intended to be more than an agreed measure of the value of the ship's lost time. I do not think it would occur to commercial parties unaware of the case-law that agreeing a demurrage rate liquidated, for example, claims in respect of physical injury to ship, cargo or crew, as they would understand, I suggest, that the demurrage rate simply compensated the owner for the use of the ship beyond the laytime, that use not being paid for by the freight.

59. I agree with Mr Bird that the points summarised in paragraph 55(ii)-(iv) above reinforce those conclusions. By contrast, I did not find Mr Wright's general arguments persuasive (paragraph 56 above):

(i) His first and most general argument (paragraph 56(i) above) begs the question, as I noted at paragraphs 23 to 25 above.

(ii) The reason given in *Inverkip* for the rule it established that owners are limited to the demurrage rate where, however many different breaches occur, the only result is a loss of time to the ship after the expiry of the laydays, is that demurrage is compensation for that loss of time. That is why, as Mr Bird submitted, K-Line's argument in the present case is harmonious with the *Inverkip* rule and Priminds' is not, or less so.

(iii) There is a sense in which giving demurrage provisions the wider embrace Priminds gives them promotes certainty to a greater extent than if K-Line is correct. But the sense in which that is true is only the sense in which it can be said that a clearly worded exclusion clause promotes certainty by making clear that a claim cannot be made. There is no language of that kind in the demurrage clause here (or typically), and, as Mr Bird noted, the approach of the House of Lords in *Suisse Atlantique* was that demurrage provisions are *not* exclusion clauses. There is nothing in the expansion of Mr Wright's certainty

argument, since come what may the *Inverkip* rule and *Reidar v Arcos* mean that parties to voyage charters have to grapple with the question of whether or not a different type of loss has been suffered, or only loss compensated for by the demurrage rate, alongside questions of proof of loss, causation, remoteness, mitigation and so on, if the owner is able to allege that there has been a separate breach.

(iv) The other features of many demurrage regimes relied on by Mr Wright, for example demurrage exceptions and demurrage time bars, do not stand in the way of K-Line's argument at all. They do not clash with a view that the demurrage rate has no impact on a claim such as K-Line makes in this case, for loss that is different in kind from the 'time is money' measure of delaying the ship's being free for new employment. If such a claim is viable, as K-Line submits, it is by definition not a demurrage claim so as to be affected by a time bar provision for making demurrage claims or by the impact upon the calculation of the demurrage of charter exceptions, if there are any, that are clear enough to overcome the well-known rubric 'once on demurrage, always on demurrage'. If such a claim is not viable, as Priminds submits, that must be for other reasons, not because a demurrage claim might be affected by such provisions.

60. Overall, I gratefully adopt the following statement of "*the general nature of the commercial bargain which is contained in voyage charterparties*", *per* Donaldson J (as he was then) in *Navico AG v Vrontados Naftiki Etairia PE* [1968] 1 Lloyd's Rep 379, at 383 lhc:

> "*They are contracts for the carriage of goods in consideration for the payment of freight. The freight covers the passage between the loading and discharging ports and an agreed conventional period of time for loading and discharging the cargo (the "laytime"). I say "conventional" because although this period may have some relation to the time which the parties expect to be spent in loading and discharging, no one would be more surprised than they if this estimate proved completely correct in the event. Almost all charter-parties go on to make provision for adjustment in the payment due from or to the charterers according to whether the processes of loading and discharging take more or less than the laytime. All the overhead and a large proportion of the running costs of a ship are incurred even if the ship is in port. Accordingly the shipowner faces serious losses if the processes take longer than he had bargained for and the earning of freight on the ship's next engagement is postponed. By way of agreed compensation for these losses, the charterer usually contracts to make further payments, called demurrage, at a daily rate in respect of detention beyond the laytime. If the processes of loading and discharging take less than the conventional period, the shipowner, in theory at least, reaps the advantage of being able to proceed earlier upon the ship's next freight earning engagement. In recognition of this advantage provision is usually made for the payment by the owners of a rebate of freight at a daily rate for all time saved. This rebate is known as "dispatch money", "dispatch rebate" or, more simply, "dispatch". ...*"

61. Accordingly, were the issue free from prior consideration in the authorities, I would say K-Line had the better of the argument by a clear margin. Agreeing a demurrage rate gives an agreed quantification of the owner's loss of use of the ship to earn

freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more. Where such delay occurs, the demurrage rate provides an agreed measure by which the parties are bound for the owner's claim for damages for detention, but it does not seek to measure or therefore touch any claim for different kinds of loss, whatever the basis for any such claim.

The Dicta

62. I have just set out Donaldson J's description of the general nature of a voyage charter bargain, so far as it bears on the present issue, as stated in *Navico v Vrontados*. It is helpful to K-Line, speaking as it does to an understanding that the function of demurrage is to compensate for the loss of earnings due to the postponement of the time when the ship will be free for next employment. It is *dictum* only, the issue in the case having been quite a narrow one on the operation of a particular sentence in the Centrocon strike clause. To similar effect in cases where the decisions were on rather different points:

    (i) in *Compania de Navigacion Zita, S.A. v Louis Dreyfus et Cie* [1953] 2 Lloyd's Rep 472, in which the decision concerned the precise method for calculating the laytime allowed from a requirement to load "*at an average rate of 150 metric tons per available workable hatch per weather working day (Sundays and Holidays excepted) provided vessel can receive at this rate*", Devlin J, as he was then, noted at 475 rhc that "*The shipowner's desire is to achieve a quick turn-around; time is money for him. The object of fixing lay days and providing for demurrage and dispatch money is to penalize dilatoriness and rewards promptitude*", at 476 rhc that the object of the loading rate provision was "*to penalize the charterers for wasting time and reward them for saving it*" and at 477 lhc that it did not lay down a method of loading but set a standard, "*drawing a notional line above which there will be a bonus and below a penalty*"; and

    (ii) in *The Nikmary* [2003] 1 Lloyd's Rep 151, which mostly concerned the laytime/demurrage calculation in the case but also whether the cost of diesel consumed while the ship was on demurrage could be claimed in addition to the demurrage due on that calculation, Moore-Bick J, as he was then, noted at [47] that "*demurrage, being liquidated damages for detention, notionally reflects the full cost to the owner of keeping his ship in port. As such it is deemed to cover all normal running expenses, including the cost of diesel oil required to run the ship's equipment.*" (There was an appeal to the Court of Appeal that did not touch that point, see [2004] 1 Lloyd's Rep 55.)

63. That brings me to cases that raised questions of the recoverability of damages in addition to demurrage for loss caused by delay, prior to the first-instance trio of *The Altus*, *The Adelfa* and *The Bonde*.

64. As I have said already, *Inverkip SS v Bunge* decided that the failure to provide a cargo, even if a separate or additional breach beyond the failure to load at the required rate (in that case, a requirement to load with customary despatch), did not entitle the owner to damages beyond demurrage where the only harmful consequence was the prolongation of the employment. Warrington LJ reasoned, [1917] 2 KB at 198, that by the demurrage provision "*the parties have provided that the shipowners shall accept*

compensation at a fixed rate in respect of the detention which has in fact occurred and therefore they must be content with that". Having noted, at 202, that one main argument for the owner was that "*as the charterer was bound to have a cargo ready for loading, and had not such a cargo, the demurrage provision did not apply*", Scrutton LJ answered it, at 203, by saying that "*If there was a breach in not having a cargo ready … the only consequence is detention of the ship, and the damages for that, which is the same detention, however it arises, are agreed in the charter and have been paid*", i.e. demurrage.

65. Next comes *Reidar v Arcos* itself. The judgment of Bankes LJ in the Court of Appeal favours K-Line, of course, and I say no more about it now. The greater interest at this stage is in seeing why Greer J and the majority in the Court of Appeal, for whom *Reidar v Arcos* was a 'two breaches' case, said the nature or effect of agreeing a demurrage rate meant that it did not cover the damages claimed even though the loss resulted from the failure to load at the required rate, not from a lack of cargo available to load or some other cause, which was that the demurrage rate compensated for the detention of the ship, but the loss being claimed was of a different kind; and in noting that neither judge in the majority in the Court of Appeal in fact expressed any disagreement with the approach taken by Bankes LJ for a 'one breach' case. Thus:

(i) *per* Greer J, 25 Ll L Rep at 33 rhc, the agreed demurrage rate "*merely provides for damages due to the detention of the ship – so much per day for the detention of the ship*";

(ii) *per* Atkin LJ, [1927] 1 KB at 363, "*The provisions as to demurrage quantify the damages, not for the complete breach, but only such damages as arise from the detention of the vessel*", so that "*If … the charterer becomes unable to do that which he contracted to do – namely, put a full and complete cargo on board during the fixed lay days, … the shipowner may recover the loss that he has incurred in addition to his liquidated demurrage or his unliquidated damages for detention*";

(iii) *per* Sargant LJ, at 366, expressing this as agreement with Greer J, the demurrage provision "*merely assesses damages at 25l. a day for any detention of the ship due to a failure of the charterers to load at the prescribed rate*", whereas "*The loss inflicted on the owners and claimed by them is loss of another character – namely, loss of freight caused by the breach by the charterers of their contract to load a full and complete cargo …*".

66. Thus far, in my judgment Mr Bird is right to submit that the focus, in explaining why demurrage did or did not liquidate the particular loss claimed, so as to be the sole remedy for it, is on the nature of the loss, i.e. whether it was only that the ship was detained beyond the expiry of the laydays, delaying her becoming free for other employment.

67. So also in *Chandris v Isbrandtsen-Moller*. Dangerous cargo was shipped in breach of charter, but the only deleterious consequence was the prolongation of the employment. Damages beyond demurrage were not available. Devlin J explained, [1951] 1 KB at 249, that "*A demurrage clause is merely a clause providing for liquidated damages for a certain type of breach. It is presumably the parties' estimate of the loss of prospective freight which the owner is likely to suffer if his ship is*

detained beyond the lay days"; or at 254, in discussing *Reidar v Arcos*, that a demurrage clause was only apt to measure damages for detention, "*leaving damages of any other character to be assessed at large*".

68. That brings me to *Suisse Atlantique*. The contract was for consecutive voyages over a two-year period. The owner claimed that there was an implied promise that a certain minimum number of voyages would be performed. That claim failed, so the only breach of contract was that laytime had been exceeded, as in the event it was on all but the first of the eight voyages under the contract. The only loss the owner could say it had suffered was a loss of remunerative employment for the (aggregate) period spent on demurrage. The 'lost' employment would have been under the same contract – the allegation was that more voyages could and would have been performed during its currency – rather than follow-on employment fixed on the market, but that did not change the character of the loss claimed. Leaving aside the supposed doctrine of 'fundamental breach', relied on in the House of Lords so as to lend the case the wider, general significance for which it is well known, *Suisse Atlantique* was thus straightforwardly a case in which the owner's claim failed. As I noted in my grid at paragraph 39 above, given *Inverkip*, it was a bad claim *a fortiori*.

69. It was argued for the owner that "*the charterers were admittedly in breach of the laytime provisions of the charter-party and, as this had caused the owners more than the mere detention of their vessel, the demurrage provisions did not provide the correct measure of the owners' damages*" (my emphasis), *per* Mocatta J at first instance, [1965] 1 Lloyd's Rep 166 at 172 rhc. If the owner's emphasised premise had been correct, the issue now before me would have arisen. It was not, however, and so *Suisse Atlantique* did not settle the answer to it. Rather, the owner's claim was successfully met by the charterer's response that "*the owners had suffered in that their vessel had been detained and for that the payment of demurrage was, on the authorities, an exclusive remedy. The pith of [that] argument was that there was here only one material obligation, namely to load and discharge in the fixed time provided, and one loss, namely detention, for which demurrage was the only legal remedy*", *per* Mocatta J at 173 lhc.

70. Continuing at 173 lhc, Mocatta J said the relevance of the owner's arguments to the effect that there was a material obligation other than the obligation to load or discharge within the stipulated laytime was that if any of them were correct, there was "*an obligation upon the charterers different from or in addition to that imposed upon them expressly by the application of the laytime provisions to each consecutive voyage*" so that the owner "*may thus be afforded a means of recovering damages other than demurrage*". In my view, reading Mocatta J's judgment as a whole (given paragraphs 71 to 74 below), the sense there of "*a means*" is "*one means*", not "*the only available means*".

71. In rejecting the owner's arguments for a separate breach, at 174 rhc-175 lhc, Mocatta J referred with approval to the *dictum* of Devlin J in *Chandris* quoted in paragraph 67 above, and cited the definition of demurrage in *Scrutton*, to which I return below, namely that it is "*liquidated damages for delay beyond a stipulated time for loading or unloading*", noting that it went back at least to the 10th Edition in 1921 (the last Edition for which Scrutton LJ himself was responsible being the 11th Edition in 1923).

72. Turning then to the owner's alternative submission, Mocatta J noted at 175 rhc that it was based on the established breaches by the charterers of the laytime provisions in the charter and the proposition that "*The loss of earnings under the voyages that would have been performed under this charter are special damages not covered by demurrage.*" Reading it in isolation, Mocatta J's statement of that proposition might seem a conclusion of his rather than a statement by him of the argument, but I think it was only the latter, given the basis on which Mocatta J proceeded to decide the case, as summarised next.

73. At 176 lhc, Mocatta J encapsulated the different reasoning in *Reidar v Arcos*, as he had first done some 25 years earlier as Editor of *Scrutton* (see paragraph 94 below), saying that the net loss of freight in that case "*can be concisely stated to have been held recoverable by Lord Justice Bankes as damages for failure to load in the agreed time; by Lord Justice Atkin as damages for failure to load a full and complete cargo in the agreed time; and by Lord Justice Sargant as damages for failure to load a full and complete cargo. The reasoning of Mr Justice Greer had been similar to that of Lord Justice Sargant.*" Then at 177 lhc-178 lhc, Mocatta J reasoned, in summary, that:

    (i) the loss suffered by the owner was to his mind "*indistinguishable in principle from that suffered by a shipowner under a single voyage charter when his ship is detained beyond her lay days*";

    (ii) the distinguishing feature in *Reidar v Arcos* was that the delay in loading affected the quantity of cargo that could be carried on the very voyage in which the delay arose, a loss for which the demurrage rate could not compensate as distinct from compensating, as it did, for the ship's loss of time;

    (iii) the absence of such a loss meant the owner could not say that its claim "*either in substance or in form, [was] one other than for damages for detention*" so as to bring itself within the minority *ratio* in *Reidar v Arcos*, *per* Bankes LJ, accordingly "*the general principle agreed by all members of the Court of Appeal must apply, namely that, for a claim for detention by a shipowner due to the laytime provisions in a charter being exceeded, the demurrage provisions quantify the damages recoverable*".

74. In the judgment of Mocatta J in *Suisse Atlantique*, therefore, again I agree with Mr Bird that one sees a focus on the type of loss for which the owner was claiming and on the demurrage rate being, and being only, a liquidation of an owner's loss of freight caused by delay to the ship after expiry of laytime. Mocatta J did not choose sides as to the soundness of Bankes LJ's minority *ratio*, although if he took it to be *unsound* it is surprising that he included no such *caveat* when expressing himself in the way I have just quoted.

75. Adopting Mocatta J's reasoning in the present case, there would be, firstly, a question whether the fact that delay in discharging caused damage to the cargo carried on the very voyage in which the delay occurred was a distinguishing feature like the impact on cargo quantity in *Reidar v Arcos*, then, secondly, a question whether (if so) K-Line could say its claim was not a claim for detention due to the laytime being exceeded for which the damages were quantified by the demurrage rate. To my mind, both questions would fall to be answered in the affirmative.

76. In the Court of Appeal, Sellers LJ, like Mocatta J at first instance, first set out why *prima facie* the owner was making a straightforwardly bad claim, noting that demurrage "*is an agreed sum to be paid for the detention of vessels over the lay days … based on a rough and agreed estimation of the owner's loss through the vessel not being able to earn freight elsewhere*" and that on the facts the owner could claim "*for delay only and that the vessel was detained. The remedy for that delay is the liquidated damages which had been agreed and fixed by the demurrage rate*", [1965] 1 Lloyd's Rep 533 at 538 rhc.

77. At 539 rhc, Sellers LJ distinguished *Reidar v Arcos* on the basis that there the damages awarded "*were for a separate breach of contract and were wholly independent of the detention of the vessel, although it was of course the delay beyond the lay days that created the inability to perform … the obligation … to load a full and complete cargo, which could have been loaded … according to summer standards. The dead freight claim which the Court allowed was an additional and independent loss unrelated to the loss of use. The length of detention was not relevant to the loss from failure to load a full and complete cargo, which was loss of a different kind. If the vessel had sailed within her laytime with 300 tons short the claim for dead freight would still have succeeded. I do not find that … Reidar v Arcos … supports the argument which is advanced here – that there is some damage to be assessed on a separate ground or as a separate head by reason of the detention of the vessel.*" Again, there is the focus on the type of loss, the idea that the demurrage rate only seeks to put an agreed monetary value on the owner's loss of the use of his ship, and in the last sentence a possible acceptance that there being a 'separate head [of loss]' would have been sufficient, all of which favours K-Line in the present case. On the other hand, the separate breach in *Reidar v Arcos* also features prominently, and as against the penultimate sentence it cannot be said in the present case that if the ship had sailed within the laytime having discharged damaged cargo, the same damages claim as now pursued could have succeeded. There is therefore something for either side of the debate before me in Sellers LJ's reasoning.

78. For Harman LJ, at 540 lhc-rhc, the case was one of breach that consisted in taking longer in loading and discharging cargo, and: "*That is the only breach. It is a breach of detention. For breaches of that kind the parties have entered into a conventional figure for damage, which is called demurrage. That being so, there is no room for saying that damages are at large.*" Mr Wright argued that this is language favourable to Priminds; but the important linking sentence, "*It is a breach of detention*", enables Mr Bird to contend that the 'kind' of breach for which Harman LJ was saying that damages cannot be at large is a breach that consists only of a detention of the ship beyond the laydays, so that the type of harm resulting and for which a claim is made is again central to the understanding being expressed of what demurrage covers.

79. Diplock LJ, as he was then, at 540 rhc, took *Reidar v Arcos* as having established that detaining a ship after expiry of her lay days is a breach and "*that demurrage is liquidated damages for the detention involved. The nature of the damage of which the parties have estimated the quantum in their agreed sum for demurrage is that during the period of detention the vessel is unable to earn freight; and in so far as the complaint … here is that the vessel has been unable to earn freight, it is covered, in my view, by [the claimants'] own assessment of the damage to be payable, namely, the daily demurrage rate.*" That meant, as Diplock LJ set out at 541 lhc-rhc, the

decision in *Reidar v Arcos* could not assist the owner in *Suisse Atlantique*. Its only claim was "*that the vessel was detained [and] during the period of detention she could not earn freight, she could not be used as a freight-earning instrument … For that head of damage the parties have agreed … the figure that the defaulting charterers shall pay*" (my emphasis). That fits well Mr Bird's submission that the predominant focus is on the type of loss, because a demurrage rate is by nature targeted at a type of loss, rather than whether there was a separate breach over and above the failure to load or discharge within the laydays.

80. Before the House of Lords, the argument for the successful charterer was put on the basis that a demurrage rate is an agreed measure of the loss to an owner in being deprived of the opportunity of using the ship to earn profit under a next engagement, citing *Scrutton* and Devlin J in *Chandris*, quoted above: see [1967] 1 AC 361, at 378E-379C. That is important context for any attempt to consider the implications of what little was said on the point in their Lordships' speeches – it was not being suggested that the demurrage provision would shut out a claim for loss that was different in kind. For completeness, it is right to note that, if it mattered, the charterer did also submit that Bankes LJ was wrong to say that there was only one breach of charter in *Reidar v Arcos*, but that is not quite the same thing: *ibid*, at 380G-381A. For the owner, the contention as to *Reidar v Arcos* was that it was "*a clear example of a case where two types of damage flowed from the same act, one of which was covered by the demurrage clause and the other was not, although both were the result of the detention of the vessel*": *ibid*, at 386B-C.

81. Viscount Dilhorne expressed agreement with the judgments below and, after saying it was not necessary to add to them, added this: "*If in this case the appellants had been able to establish a breach of the charterparty other than by the detention of the vessel, then … Reidar v Arcos … is authority for saying that the damages obtainable would not be limited to the demurrage payments. In my opinion, they have not done so.*" Viscount Dilhorne's 'breach of the charterparty by the detention of the vessel', to which he referred again at the end of his speech at 395G-396A, has the same flavour, and gives rise to the same issue of interpretation of Viscount Dilhorne's meaning, as Harman LJ's 'breach of detention' (see paragraph 78 above).

82. Lords Reid and Wilberforce in their speeches dealt only with the 'fundamental breach' argument, as regards the other points in the case Lord Reid stating simply that he agreed the owner could not succeed and Lord Wilberforce stating that he agreed with Mocatta J and the Court of Appeal.

83. Lord Hodson, at 407E-408B, agreed with the judgments below on those other points, and took the view that *Reidar v Arcos* did not assist the owner because there was in that case "*a breach separate from although arising from the same circumstance as the delay, and it was in these circumstances that damages were awarded*". At at 414B, he referred with approval to *Scrutton*'s definition of demurrage, and Mocatta J's reliance on it, as liquidated damages for delay.

84. Lord Upjohn at 417G-418C agreed with Mocatta J and the Court of Appeal that "*there was only one breach by the charterers, namely, a breach of the obligation to load and discharge at an agreed rate and the detention of the ship in a port beyond that date was a breach of contract for which the parties had agreed damages*." Here again, as in Harman LJ's judgment and Viscount Dilhorne's speech, in expressing

what is understood to be covered by the demurrage rate, the language is of a (type of) breach but it is characterised by the (type of) harm, namely the detention of the ship; and Lord Upjohn agreed with Mocatta J's reason for saying that the approach of Bankes LJ in *Reidar v Arcos* did not assist the owner, which was that the only (type of) loss suffered was the loss of use of the ship.

85. Thus, there is in the speeches in the House of Lords in *Suisse Atlantique*, to the extent they touched on this aspect, again a certain focus, consistent with the arguments put forward in that case, upon the type of loss suffered and/or intended to be measured (liquidated) by demurrage. It is not suggested by any of their Lordships that Bankes LJ's approach in *Reidar v Arcos* was unsound for a case of one breach resulting in both the loss of the use of the ship for a period of detention and additional loss to the owner different in kind; but nor was that approach in terms approved, the point being moot since there was no different kind of loss. What was said about the nature of demurrage and what it covers does *not* amount to any conclusion, even *obiter*, that a separate and different breach of contract is required before unliquidated damages may be recovered for loss additional to and different in kind than the loss of the use of the ship for earning freight.

86. In *Dias Compania Naviera SA v Louis Dreyfus Corporation* [1978] 1 WLR 261, at 263-264, Lord Diplock referred to demurrage likewise in terms broadly supportive of K-Line's submission that it liquidates the owner's loss of use claim resulting from delay after expiry of the laydays:

> "*If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages. But unless the delay … is so prolonged as to amount to a frustration of the adventure, the breach by the charterer sounds in damages only. The charterer remains entitled to continue to complete the discharge of the cargo, while remaining liable in damages for the loss sustained by the shipowner during the period for which he is being wrongfully deprived of the opportunity of making profitable use of his ship. It is the almost invariable practice nowadays for these damages to be fixed by the charterparty at a liquidated sum per day and pro rata for part of a day (demurrage) which accrues throughout the period of time for which the breach continues.*"

That passage was quoted by Lord Brandon in *The Lips* as one source confirming the nature of demurrage as damages for breach rather than debt, so perhaps indicates that though his own *dictum* was in more general terms, Lord Brandon likewise understood demurrage to liquidate only the loss of profitable use claim (*cf* paragraph 26 above).

87. Finally, Leggatt J (as he was then) said this in *The John Michalos, President of India v N G Livanos Maritime Co* [1987] 2 Lloyd's Rep 188 at 191 lhc: "*… Mr Collins [for the owner] referred … to Reidar v Arcos as an example of a case in which it is possible to obtain more than demurrage payments for the detention of a vessel. But that case for this purpose is nullified by dicta of the House of Lords in Suisse Atlantique …, per Viscount Dilhorne …, Lord Hodgson [sic.] … and Lord Upjohn …*". The point in *The John Michalos* was whether a particular voyage charter exceptions clause exempted the charterer from liability for demurrage in respect of delay caused by a strike for which it had no responsibility and over which it had no

control even though the ship was already on demurrage before the relevant strike started. Leggatt J held that it did and so allowed an appeal by the charterer from an arbitration award that had concluded that the clause was not clear enough to displace the maxim 'once on demurrage, always on demurrage'. *Reidar v Arcos* appears to have been referred to in passing as part of a convoluted argument for the owner that the exceptions clause should not be read as protecting against liability for demurrage because it might have in mind other liabilities. What was recovered in *Reidar v Arcos* was not damages for the detention of the ship, but damages for the short-shipment of cargo, and on no view is Leggatt J's comment any kind of considered conclusion on the issue before me, which had no bearing on the point before Leggatt J and was not argued.

88. Overall, I agree with Mr Bird that the preponderance of views evident in *dicta* discussing or describing the nature of demurrage is that it serves to liquidate loss of earnings resulting from delay to the ship through failure to complete loading or discharging within the laytime allowed by the charter. When those in this field speak of damages for detention, or a claim for the detention of the ship, they are referring to that loss or a claim in respect of it. If there had been no demurrage provision, or the laytime/demurrage regime did not apply (for example, because the breach was one that caused delay and prevented laytime from commencing), and the cargo had been damaged with consequent loss to K-Line, as alleged, K-Line's resulting claim for (unliquidated) damages for the breach in question would be described as a claim for (a) damages for the detention of the ship and additionally (though founded on the same breach) (b) damages for the deterioration of the cargo.

The Textbooks

89. I start with *Scrutton on Charterparties*. I quoted from the current edition, 24th Ed. (2020), in paragraph 3 above, at that stage ignoring footnotes. The second quotation, touching directly the point at issue and suggesting that K-Line is right on it, is relatively recent (by the standards of *Scrutton*), dating back to the 20th Edition (1996), when Lord Burrows JSC and Foxton J (as they now are) became Editors. The first quotation, *Scrutton*'s definition of demurrage, is much older, although there is a wrinkle as to that in the footnotes.

90. *Reidar v Arcos* is not noted by *Scrutton* only in the chapter on demurrage. The long-standing text on the full load obligation includes this (at 9-128 in the 24th Ed.): "*Where a vessel is chartered as of a certain capacity, and the charterer undertakes to load a "full and complete cargo", he cannot limit his obligation to the capacity named in the charter, but must load as much cargo*[295] *as the ship will carry with safety.*[296]"

91. Footnote 296 cites various authorities for the proposition stated in the text and continues as follows: "*Where the cargo contracted for varies in size or weight or condition according to the time of year, the charterer will fulfil his obligation by supplying a full and complete cargo of the goods in the normal condition at the time of shipment: Isis Co v Bahr [1900] A.C. 340. But where charterers, having contracted to load a full and complete cargo, fail to load the ship within the laydays with the result that she can only carry a winter instead of a summer cargo, they are guilty of a breach of contract for which the damages are the difference between the freight*

earned by a summer and that earned by a winter cargo: Aktieselskabet Reidar v Arcos [1927] 1 K.B. 327."

92. The first edition of *Scrutton* after *Reidar v Arcos* was the 13th Ed. (1931), edited by (as they would later be) Lord Porter and McNair J. What was then Section IX, Demurrage, Article 128, opened with the basic definition (and this time I shall not ignore the footnotes): "*Demurrage (a) ... is a sum agreed by the charterer to be paid as liquidated damages (b) for delay beyond a stipulated or reasonable time for loading or unloading.*" Footnote (b), qualifying or explaining the sense in which, or extent to which, demurrage liquidated damages, was as follows: "*There may be other additional damages, as where the failure to load in the agreed time has meant that the ship can carry only a winter instead of a summer deckload and so has lost freight : Aktieselskabet Reidar v. Arcos, (1927) 1 K.B. 352.*" The decision in *Reidar v Arcos* was also noted for its confirmation that the expiry of the laydays without loading having been completed was a breach of contract, i.e. time on demurrage was not merely additional laytime that had to be paid for.

93. Thus, the view currently expressed by *Scrutton* favouring K-Line on the point at issue is the view the then Editors took when *Reidar v Arcos* first fell to be taken into account, and the discussion under Article 128 ended with this Case Note summarising the decision:

> "*Case.–A. chartered his ship to B. to load a full and complete cargo of timber for the United Kingdom. The charter provided for loading in a fixed time and for demurrage at a fixed rate per day thereafter. By default of B. the fixed time for loading was exceeded and demurrage became payable. If the ship had been loaded within the fixed time, the ship could have loaded and earned freight on a summer deck load. In fact, owing to the delay, she sailed with a winter deck load only. Held (1) that on expiration of the fixed lay-days B. was in breach; (2) that A., in addition to demurrage at the fixed rate, was entitled to recover the difference in freight between a summer and a winter deck load as damages for failure to load in the agreed time (m).*" (my emphasis – footnote (m) simply gave the case citation for *Reidar v Arcos*).

94. Lord Porter went to the High Court Bench in November 1934 and from there directly to the House of Lords in March 1938. The next edition of *Scrutton*, 14th Ed. (1939) was edited by (as they later became) McNair and Mocatta JJ. The definition of demurrage in Article 128 continued to be in the same terms, complete with footnote (b) based on *Reidar v Arcos*. However, the end of the closing Case Note was shortened to "*... Held ... (2) that A, in addition to demurrage at the fixed rate, was entitled to recover the difference in freight between a summer and a winter deck load as damages (n).*"; and footnote (n) now contained the elegant and concise summary of the three judgments that Mocatta J would later use in his judgment in *Suisse Atlantique* (see paragraph 73 above):

> "*Aktieselskabet Reidar v. Arcos, [1927] 1 K.B. 352 : per Bankes, L.J., as damages for failure to load in the agreed time; per Atkin, L.J, as damages for failure to load a full and complete cargo in the agreed time; and per Sargant, L.J, as damages for failure to load a full and complete cargo.*"

95. That is how the matter stood for the next three editions of *Scrutton*, 15th Ed. (1948, McNair & Mocatta), 16th Ed. (1955, McNair & Mocatta) and 17th Ed. (1964, McNair, Mocatta & Mustill, i.e. Lord Mustill (as he would become)), except that (i) Article 128 was now Article 131, (ii) in the 17th Ed. footnote (n) had become footnote (o), and (iii) the 16th and 17th Eds. now also footnoted *Chandris*, *supra*, by adding to footnote (b), "*Cf. Chandris v. Isbrandtsen-Moller [1951] 1 K.B. 240, where dangerous cargo was shipped in breach of contract and caused delay in discharge, but no damage to the ship. As the shipowner had not treated the charterer's conduct as repudiation, but had carried the cargo under the charter, he was limited as regards delays in discharge to the demurrage figure.*", and by adding to footnote (n)/(o), just "*Cf. Chandris v. Isbrandtsen-Moller [1951] 1 K.B. 240*".

96. Thus, the *Scrutton* view remained squarely favourable to K-Line for over 40 years, across five editions, all but one of them edited by *inter alia* Mocatta J (as he would become before the 18th Ed.).

97. The 17th Ed. was McNair J's last as Editor. For the 18th Ed. (1974), Mocatta J and Mustill QC (as they were then) were joined as Editors by Stewart Boyd. To complete the roll-call, the 19th Ed. (1984) was Edited by Sir Alan Mocatta after his retirement from the Bench in 1981, with Mustill J and Boyd QC (as they had by then become); the 20th Ed. (1996) by Boyd QC, Burrows and Foxton (as they were then).

98. In the 18th Ed., the first *Scrutton* after *Suisse Atlantique*, the basic definition of demurrage became Article 151, and footnote (b) within that definition was now footnote 2, stating:

> "*See Note 2, post. See Navico A.G. v. Vrontados Naftiki Etairia P.E. [1968] 1 Lloyd's Rep. 379 for a discussion of the commercial basis of demurrage. A clause providing for an agreed sum by way of demurrage is not an exceptions clause: Suisse Atlantique … .*"

I referred above to the description of demurrage by Donaldson J in *Navico v Vrontados* to which this refers; as I noted, it favours K-Line.

99. The *Reidar v Arcos* Case Note itself was the same; but what had been footnote (o), now footnote 19, lost Mocatta J's elegant summary of the judgments in *Reidar v Arcos*, even though he had used them in *Suisse Atlantique* without disapproval from the Court of Appeal or House of Lords. The Case Note now came at the end of a new Note 2 to Article 151, and footnote 19 simply gave the case citation for *Reidar v Arcos*, plus "*: see Note 2, supra.*" The text of the new Note 2 was as follows:

> "*The provisions as to demurrage quantify the whole of the damages arising from the charterer's breach of contract in delaying the ship beyond the agreed time and the charterer's liability for such damages is limited to the amount of demurrage: cf. Chandris v. Isbrandtsen-Moller, where dangerous cargo was shipped in breach of contract and caused delay in discharge, but no damage to the ship. As the shipowner had not treated the charterer's conduct as repudiation, he was limited as regards delay in discharge to the demurrage figure. Similarly in Suisse Atlantique …, where the charterer under a consecutive voyage charter deliberately delayed the ship beyond the agreed lay-days on a number of the voyages, thereby reducing the number of voyages which could be performed*

> *under the charter, the shipowner's claim for lost freight was limited to the amount of demurrage.*
>
> *However, the delay may give rise to breaches of further obligations, e.g. to load a full and complete cargo, for which damages are recoverable, as in Aktieselskabet Reidar v. Arcos, the facts of which are given below.*";
>
> and that is how the *Reidar v Arcos* Case Note was now introduced.

100. This recognised, more clearly than before, that there was a majority in *Reidar v Arcos* for the proposition that in that case there had been two breaches, i.e. that Bankes LJ was in the minority in thinking that the full load obligation had not been broken. But it does not say, nor would it have been accurate to say, that *Reidar v Arcos* decided that the additional breach was necessary; and that would have run counter to the adoption of Donaldson J's general description of the nature of demurrage, indicating as it does that the purpose of demurrage is only to liquidate the owner's loss of earnings.

101. Save that the numbering changed again – to Article 153 – the 19th Ed. (1984) was the same as the 18th Ed.; and the 19th Ed. was current when *The Altus*, *The Adelfa* and *The Bonde* were decided. As I noted in paragraph 89 above, the most explicit statement of view by *Scrutton* in favour of K-Line's position before me then appeared with the 20th Ed. in 1996, and has remained since.

102. Overall, therefore, the view given by *Scrutton* was squarely favourable to K-Line between 1931 and 1974, and has been even more explicitly favourable to K-Line since 1996. Between 1974 and 1996, the years covered by the 17th to 19th Eds., the position taken by *Scrutton* was perhaps less clear, with Note 2 (as quoted in paragraph 99 above) possibly seeming to favour Priminds, but not clearly so if considered carefully and there was also an endorsement of the description of demurrage in *Navico v Vrontados* suggesting that the Editors' view remained favourable to the approach advocated by K-Line.

103. I quoted the relevant passage from *Voyage Charters* in paragraph 4 above. It was new for the 4th Ed. (2014). Previous editions recorded, accurately, that if there were a separate breach beyond the failure to load or discharge within the laydays, causing an additional type of loss, damages other than demurrage could be recovered for that loss, and did not take a view on the contentious question whether such separate breach was necessary. The text now expressly prefers the view taken by Potter J in *The Bonde* that a separate breach *is* necessary before damages for loss other than loss of use may be recovered where there is a demurrage clause. It does so on the basis that the authors read Mocatta J and the Court of Appeal in *Suisse Atlantique* as having taken that view, and that it is therefore validly a criticism of *The Altus* that *Suisse Atlantique* was not referred to. As will already be apparent, I disagree with that reading of *Suisse Atlantique*, and I deal below with that criticism of *The Altus*, being a criticism also levelled at it by Potter J in *The Bonde*. I do not see that *Voyage Charters* adds anything to the debate or gives reason to follow *The Bonde* if otherwise I were persuaded, contrary to the authors' view, that it was wrongly decided.

104. I have also mentioned *Schofield* already (see paragraph 55(i)(c) above). At 6.43, the author refers to *Reidar v Arcos* and *Suisse Atlantique* as the leading cases on the issue

of '**Damages in addition to demurrage**' and summarises accurately what was actually decided by the former, read with the latter, namely that "*where there has been a breach of the charter laytime provisions by the charterer failing to load and discharge in the period allowed, resulting in a detention of the ship and a consequent loss of earnings to the shipowner, then the only damages payable are the liquidated damages, i.e. demurrage provided for in the charter. If, however, the shipowner can prove a separate breach of charter, although arising from the same circumstances, then he may recover damages at large if he can show that the consequences extended beyond the detention of his vessel.*" That leaves unanswered what happens in the case that sits in between of consequences beyond the detention of the ship but no separate breach of charter. On that question: at 6.47, the author notes that on the approach taken by Bankes LJ in *Reidar v Arcos*, damages for the other type of loss would be recoverable, and refers to *The Altus* and *The Bonde* as containing detailed analyses of the judgments in *Reidar v Arcos*; at 6.48 to 6.50, he refers to the *dicta* in *Chandris* and *Suisse Atlantique* touching on the point; at 6.56 to 6.59, he summarises *The Altus* and *The Bonde* without taking a view which is to be preferred.

105. Counsel referred me to *Carver on Charterparties* (2017), at 12-202, where the view appears to be that after *Reidar v Arcos*, *Suisse Atlantique* in the House of Lords, *The Bonde*, *The John Michalos* and *The Luxmar* [2006] 2 Lloyd's Rep 543, [2007] 1 Lloyd's Rep 542, settled the law in favour of the view that "*In order to advance a claim for unliquidated damages for detention, … the shipowner must ordinarily establish two matters. First, … that the loss in question has been caused by a breach additional to or separate from that of failing to load or discharge cargo within the laytime … . Second, … that the loss is of a different kind to the loss of use for which it is intended to be compensated by the demurrage provisions.*" The subject matter, though, is an owner's "*claim for detention (loss of use) [which] will usually also include ordinary expenses which are incurred by the shipowner and wasted by reason of the detention, such as crew wages and fuel*": *ibid* at 12-201, reading in the associated f.n.514. On any view, that claim is liquidated by the demurrage rate, for delay encompassed by the laytime/demurrage calculation, and hence the authors' focus in the rest of 12-202 on delay prior to the commencement of laytime or after the completion of cargo operations (if not included in the demurrage calculation). The controversy surrounding *Reidar v Arcos* does not concern claims for detention (loss of use); and I question the suggestion that *a claim for damages for detention for delay after completion of cargo operations but caused by a failure to load or discharge at the required rate* would ordinarily fail where the demurrage clause provided for demurrage only to the completion of cargo operations in the absence of some separate, additional breach. I do not regard *Carver*, 12-202, as helpful for present purposes, although it might be said that it appears to acknowledge that what a demurrage rate is intended to compensate is the owner's loss of the use of his ship, which is helpful to K-Line.

106. The passage in *Carver* to which I should have been referred, and which is helpful to Priminds, is 12-170 to 12-171, where the authors deal with the issue of losses different in kind. *Reidar v Arcos* is noted as having decided that if the result of failing to load within the laydays is that the charterer fails, in breach of contract, to load a full cargo, then the owner may recover both demurrage in respect of the detention and unliquidated damages for the short-loading. The authors identify that the contentious issue has been whether damages for a loss different in kind from the loss of the use of

the ship are recoverable only if there is also a causative breach of an obligation other than the obligation to load or discharge within the laytime. The authors say (12-171 at f.n.435) that the view that such an additional breach is necessary "*now appears to be established*", citing *The Bonde* and *The Luxmar*, which I consider below. By the text at and content of the previous footnote (12-170 at f.n.434), the authors suggest that *Suisse Atlantique* and *The John Michalos* (as well as *The Bonde* and *The Luxmar*, as to which see below) treated *Reidar v Arcos* as authority for that proposition. I respectfully disagree, as will be apparent from my discussion of those two cases above.

107. Even more recent than *Carver* is *Baughen*, "*Shipping Law*" (2019), in which the approach taken favours K-Line, focusing on whether "*losses that fall outside the demurrage provisions*" have been caused, even if only by delays in loading or discharging. However, the discussion in the text is very brief, it is not acknowledged that this is a contentious point, and none of the cases after *Reidar v Arcos* is mentioned other than *Chandris*.

108. *McGregor on Damages*, 20th Ed. (2018), at 16-024, states the proposition that where there is a liquidated damages provision in a contract, the claimant will "*be entitled to sue for unliquidated damages in the ordinary way, in addition to suing for the liquidated damages, if other breaches have occurred outside those which fall within the ambit of the liquidated damages provision or, it seems, if only part of the loss arising from a single breach is regarded as falling within the provision's ambit*", and illustrates by *Reidar v Arcos* and *The Altus*. There is no discussion of the correctness of *The Altus*, and no mention of *The Bonde*, but the second part of *McGregor*'s proposition seeks only to state the consequence of a conclusion that "*only part of the loss arising from a single breach is regarded as falling within the [liquidated damages] provision's ambit*". The issue before me, on which *The Bonde* differed from *The Altus*, is whether that is the correct conclusion for a demurrage provision such as that of the Norgrain form with which I am concerned, and *McGregor* is not purporting to deal with that.

109. Thus, *McGregor* does not assist either party directly on the issue I have to decide. It does though provide support for the view I have already taken that Priminds' initial line of argument begs the question (see again, paragraphs 23 to 25 above).

110. *Chitty on Contracts*, 33rd Ed. (2019), cites *Reidar v Arcos* at 26-192 (f.n.1068) as an example of a case where "*parties to a contract fix a sum as liquidated damages in the event of one specific breach, and leave the claimant to sue for unliquidated damages in the ordinary way if other types of breach occur*". As with *McGregor*, this is to use *Reidar v Arcos* in a general contract text to illustrate a possible type of case described at a high level of generality. It does not add anything to the specific debate before me as to what precisely is liquidated by agreeing a demurrage rate.

The Bonde

111. I turn then, finally, to a detailed consideration of the trio of first-instance decisions in *The Altus*, *The Adelfa* and *The Bonde*, and the one significant recent case, *The Luxmar*, for the purpose of the determinative judgment I must make whether or not to follow *The Bonde*.

112. In *The Altus*, the agreed demurrage rate was a variable rate increasing with the quantity loaded under a voyage charter obliging the charterer to load at least 40,000 m.t. of cargo. In breach, the charterer loaded 34,447.411 m.t., and so the daily demurrage rate under the agreed formula was US$4,750 whereas on 40,000 m.t. it would have been US$5,925. Clause 3 of the charter provided expressly for deadfreight to be paid at the freight rate specified by the charter if the ship sailed following an under-shipment that nonetheless left the cargo tanks sufficiently filled to render the ship seaworthy for the laden voyage. There were disputes over the laytime/demurrage calculation on the actual cargo quantity loaded that are not relevant for my purposes.

113. In addition, the owner claimed unliquidated damages for the loss caused by the demurrage rate being lower as a result of the short-shipment than it would have been if at least 40,000 m.t. had been shipped. That appears to have been a straightforwardly good claim, there being nothing in the language of the deadfreight clause to suggest it could not be made; and there being no argument available (nor was any argument made) that the demurrage clause could be intended to liquidate the damages payable for the rendering of the demurrage clause itself, by breach of charter, less favourable to the owner than it should have been.

114. Webster J, however, upheld the claim by a more circuitous route, as follows, [1985] 1 Lloyd's Rep 423 at 432*ff*:

(i) The defence was that the deadfreight clause was a liquidated damages clause. That did not seem right to Webster J, but he proceeded on an assumption in the charterer's favour that the deadfreight clause was to be treated as a liquidated damages clause like a demurrage clause.

(ii) On that basis, the owner's argument was that the deadfreight clause "*define[d] the damages payable for the loss of freight arising out of the breach, and not for any other consequence, in particular loss of demurrage because of the difference in rates*." Webster J saw that as indistinguishable from the argument that a demurrage clause defines only the damages payable for the loss of freight caused by detaining the ship beyond the laydays.

(iii) There was in the instant case (see at 433 rhc) "*undoubtedly only one breach*", so that for Webster J the issue had become whether, "*in a case of this kind, damages are only recoverable if a breach has occurred other than that which entitles the shipowner to the benefit of the liquidated damages clause*". On Webster J's terms, he was correct, with respect, to say that there was only one (relevant) breach, although in the case as a whole there was both (a) a breach of the minimum load obligation and also (b) a breach of the obligation to load that which was in fact loaded within the laytime allowed. The latter did not cause the reduction in the demurrage rate; that resulted solely from the self-same breach, the short-shipment, that triggered the deadfreight clause that Webster J had chosen to assume was a liquidated damages provision to which he should give the same answer as he would give for a demurrage clause to the question whether a separate breach was necessary for damages to be recovered for a different type of loss.

(iv) In *Reidar v Arcos*, Atkin LJ decided the case on the basis that "*the charterers had committed one breach – failure to load a full cargo within the laydays*", giving the owner "*two distinct claims, one for detention of the vessel and one for loss of freight*" (see at 435 rhc).

(v) That meant (*ibid*) that the *ratio* of *Reidar v Arcos*, binding Webster J, was that "*where a charterer commits any breach, even if it is only one breach, of his obligation either to provide the minimum contractual load or to detain the vessel for no longer than the stipulated period, the owner is entitled not only to the liquidated damages directly recoverable for the breach of the obligation to load (deadfreight) or for the breach of the obligation with regard to detention (demurrage), but also …, in the first case, to … damages flowing indirectly or consequentially from any detention of the vessel (if it occurs) and, in the second case, to damages flowing indirectly or consequentially from any failure to load a complete cargo if there is such a failure.*"

(vi) Therefore, "*the defendants' defence to the plaintiffs' claim for damages fails, either because the deadfreight clause is not a liquidated damages clause at all, or because, if it is such a clause, the point raised by their defence has been decided adversely to them by the Court of Appeal in Reidar v Arcos.*"

115. Even after correcting for the obvious error in the passage quoted in paragraph 114(v) above, namely that Webster J stated his first and second cases the wrong way round, it is, with respect, not an accurate or satisfactory analysis of *Reidar v Arcos*. Bankes LJ was in the minority in concluding that there was no breach by the charterer of the full load obligation in that case. The pithy summary of the judgments in *Reidar v Arcos* that had appeared in the 14th to 17th Editions of *Scrutton* (see paragraph 94 above), and which was used by Mocatta J at first instance in *Suisse Atlantique* (see paragraph 73 above), was echoed by Webster J just before the passage quoted in paragraph 114(v) above, as the basis for his conclusion there stated as to the majority *ratio* in *Reidar v Arcos*. However, Webster J's version of the pithy summary included a gloss on the original, namely that in deciding for the owner on the basis of "*failure to load a full cargo within the laydays*", Atkin LJ was finding only one breach of contract. In my view, and with respect, that is just wrong. The plain effect of Atkin LJ's judgment, I think, is that the full load obligation in *Rediar v Arcos* was broken, not only the loading rate obligation.

116. Furthermore, the point on loss raised in *Reidar v Arcos* (because of *Inverkip*) was not one of direct versus indirect or consequential loss, but whether the loss for which unliquidated damages were claimed was loss additional to and different in kind from an owner's loss of income through being deprived of the use of the ship to earn freight. The point on loss, if the deadfreight clause was to be given treatment equivalent to that given to a demurrage clause (being the approach taken by Webster J), was whether its scope was confined to the loss of freight arising out of the short-loading breach and so did not extend to other types of loss resulting from the same breach. I would say the deadfreight clause was so confined, without the need to engage in any detailed analysis of *Reidar v Arcos*. That is to say, I also disagree, with respect, with the second step in Webster J's analysis which held that the point on what losses were covered by the deadfreight clause had to be answered in the same way as would be answered the equivalent point on the demurrage clause (paragraph 114(ii) above).

117. In my view, therefore:

(i) *The Altus* was correctly decided, that is to say the claim for damages for the wrongfully reduced demurrage rate rightly succeeded, but on the simple basis that, whatever be the correct answer to the point about demurrage now before me, on no view did the deadfreight clause in that case have effect to preclude that claim.

(ii) Webster J, with respect, was wrong to conclude that *Reidar v Arcos* decided (so as to bind him to decide) that unliquidated damages may be recovered, in addition to any demurrage payable under the charter, as damages for a voyage charterer's failure to load or discharge within the laydays where it causes loss to the owner additional to and different in kind from the loss of the use of the ship as a freight-earning vessel.

118. However, the fact that *Reidar v Arcos* is not authority for that proposition does not mean it is authority for the contrary proposition that such damages are *not* recoverable, but rather damages in respect of the additional loss, different in kind, may only be recovered if there is an additional and different breach, also causative of the additional loss. As I explained in my initial consideration of *Reidar v Arcos* (see paragraph 37 above), the conclusion of the majority that there was in that case an additional and different breach, also causative, that sufficed for the owner's deadfreight claim to succeed, was not a conclusion that such a breach is *necessary*. That question only arose on the minority approach of Bankes LJ that there was *no* additional and different breach, and he decided it in favour of the owner; the question did not arise for the majority, and they did not decide it or express a view on it *obiter*, whether agreeing or disagreeing with Bankes LJ.

119. So *The Altus* is not satisfactory authority for the proposition that *Reidar v Arcos* decided that an additional and different breach of contract is not necessary. The judgment in *The Altus* is therefore not a sound basis for endorsing that proposition. Given the approach he took, it is an unknown how Webster J would have decided the point if he had seen himself as free to decide it for himself.

120. *The Adelfa* was a case with factual similarities to the present case but also significant differences. A cargo of maize carried to Tripoli under a voyage charter arrived trivially wet-damaged. With most of the cargo still on board, the receivers arrested the ship and the local authorities banned the cargo from being landed ashore. The receivers' claims were upheld by the court in Tripoli, imposing liability on the owner to pay US$3.7 million. After negotiations, matters were settled with the receivers for a payment of US$2.5 million, the ship was released, and the cargo was carried to and discharged at Singapore.

121. The owner claimed in arbitration under the voyage charter damages for or restitution in respect of the losses caused to it by the receivers' claim. That claim failed, the findings in the arbitration being that the receivers' claim had been wholly unjustified, the voyage charter was frustrated by the ban on discharge at the latest when judgment was entered locally against the owner, and the losses claimed against the voyage charterer flowed from matters for which they had no responsibility. There had been a prolonged delay awaiting discharge, resulting in a demurrage claim in the arbitration that was settled in the course of the reference, and that caused a certain inevitable

wetting and discolouration of top layer bags in each hold, but that was not causative of the owner's relevant losses.

122. Evans J dismissed the owner's appeal, there being no error of law in the award as regards responsibility for the receivers' actions, or as regards frustration or causation. The discussion of *Reidar v Arcos*, [1988] 2 Lloyd's Rep 466 at 472 lhc-rhc, was *obiter*. Evans J noted that where an owner seeks damages in addition to demurrage for loss caused by a failure to load or discharge within the laydays, "*There must, of course, be a proved head of loss which is recoverable as damages for that breach and which is distinct from the loss of the use of the vessel, for which on any view of the matter demurrage is the agreed rate of liquidated damages.*" Evans J was prepared to assume without deciding that where there is such a distinct head of loss, damages may be recovered in addition to demurrage for the failure to load or discharge within time. But that was not the case because even on that basis, "*The plaintiffs must prove that the loss ... was caused by the charterers' failure to discharge ... within the laytime and that it is not too remote in consequence of that breach. There is no finding to this effect, and in my judgment no such conclusion can be drawn from the findings which the umpire has made. ... Even if the arrest was based on the assumption ... that the cargo suffered serious damage during the period of waiting off Tripoli, it is impossible to say, as a matter of law or in fact that the loss was caused by the charterers' breach, which had occurred ... when the laytime expired.*"

123. I do not think it right to treat Evans J's preparedness to assume the recoverability in principle of damages in addition to demurrage in a 'one breach' case as indicating more than that in his view it was arguable, but a matter for another day, that such damages could be recovered. He did though add this, after noting that there was support for the recoverability of damages in such a case in *Chandris* and *The Altus*: "*Authoritative statements of the law [i.e., I take it, as to the nature of demurrage] are found in Suisse Atlantique ..., likewise in the judgments of Mr Justice Mocatta, and the Court of Appeal in that case, but these in my respectful view do not necessarily preclude the submission on behalf of the shipowners that an independent head of damage may be recovered in the circumstances of a particular case.*" As will be apparent from my review of *Suisse Atlantique*, that is also my view. What was said in *Suisse Atlantique* that might be thought to touch on the issue was not decisive either way and was in any event *obiter*. Specifically, it did *not* amount to endorsement, even *obiter*, of the proposition that an additional and different breach is required before damages for a separate and distinct head of loss may be recovered.

124. So I return at last to *The Bonde*, recalling the conclusion I have already reached that it *is* authority for the proposition that an additional and different breach is necessary, so that to find for K-Line in the present case requires me to conclude that *The Bonde* was wrongly decided and should not be followed.

125. The basic argument of Mr Havelock-Allan (as he was then) for the seller, so for my purposes effectively the argument for K-Line, as to what a demurrage rate is and what, therefore, a demurrage clause does not preclude, appears from the judgment, [1991] 1 Lloyd's Rep 136 at 140 lhc. It was that a demurrage clause provides an estimate of the loss of prospective freight likely to be suffered if the ship is kept beyond the laydays, and therefore "*demurrage is not and/or should not be the exclusive compensation where failure to load within the contractual laytime has consequences other than the detention of the ship. As agreed compensation for*

detention of a ship, it does not cover … the separate and independent head of loss represented by the necessity to pay carrying charges for the excess time taken in loading." In my view, that argument was sound in principle, accorded with the preponderance of views expressed in the authorities as to the nature of a demurrage rate, and was an argument that Potter J was free to adopt so as to decide the case before him in favour of the seller.

126. From 140 lhc to 142 lhc, Potter J considered the principal prior authorities I have also considered, namely *Reidar v Arcos, Chandris, Suisse Atlantique, The Altus* and *The Adelfa*:

(i) As regards *Reidar v Arcos*, Potter J concluded, and I agree, that Atkin LJ, and therefore the majority, decided that there had been an additional and different breach, *viz.* a breach of the full load obligation, not only a breach of the loading rate obligation, and dismissed the appeal upon that premise. That was Potter J's own reading of Atkin LJ's judgment, fortified by the fact that it was also how that judgment had been understood by the Court of Appeal in *Suisse Atlantique*. He did not regard Devlin J in *Chandris*, reading the judgment in that case as a whole, as supporting the view that Atkin LJ was a 'one breach' man.

(ii) However, as may now be repetitive, that does *not* mean, and *Reidar v Arcos* did *not* decide, that an additional and different breach was in law required before damages for a separate and different head of loss may be recovered.

(iii) Next, and critically, Potter J read Viscount Dilhorne, Lord Hodson and Lord Upjohn in *Suisse Atlantique* as saying that the effect of the majority judgments in *Reidar v Arcos* was "*that it was necessary for a party to establish a breach of the charter-party other than by the detention of the vessel if damages are to be obtainable over and above the demurrage payments*". As will be apparent from my discussion of *Suisse Atlantique*, with respect I disagree. To my mind, that is a plain misreading of the speeches in the House of Lords in *Suisse Atlantique*, and I agree with Mr Bird that it is explicable only on the basis of faulty reasoning to the effect that if Atkin LJ found there to have been two breaches, so that Bankes LJ was in a minority on that issue, that means or implies a majority *ratio* to the effect that if there had been only one breach, as Bankes LJ found, the claim should have failed and the appeal in *Reidar v Arcos* would have been allowed.

(iv) As regards *The Altus*, Potter J regarded Webster J's analysis of *Reidar v Arcos* as unreliable, because it took Atkin LJ as a 'one breach' man, and because, so Potter J concluded, *Suisse Atlantique* had not been drawn to the attention of Webster J. The latter point, if correct (the report of *The Altus* does not include a list of cases referred to the court but not mentioned in the judgment), does not take matters beyond the issue whether Bankes LJ was in the majority or in the minority in holding that there was only one breach in *Reidar v Arcos*, unless *Suisse Atlantique* is decisive or persuasive against the soundness in law of Bankes LJ's approach for a 'one breach' case. So again one finds that the critical element of Potter J's reasoning is his reading, in my view an incorrect reading, of the speeches in the House of Lords in *Suisse Atlantique*.

(v) Finally, noting that Evans J had expressed no concluded view in a passage that was *obiter*, Potter J said that *The Adelfa* "*does not dissuade me from the opinion which I have formed upon analysis of the cases which is that, where a charter-party contains a demurrage clause, then in order to recover damages in addition to demurrage for breach of the charterers' obligation to complete loading within the lay days, it is a requirement that the plaintiff demonstrate that such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation.*" However, no prior case decided that such a requirement existed; and apart from Potter J's misreading (as I think it was) of the speeches in the House of Lords in *Suisse Atlantique* there is no analysis of the prior authorities in *The Bonde* that could found the opinion that it did. That Potter J expressed himself as he did reinforces, I think with respect, the conclusion that his analysis was premised on the faulty reasoning that if the majority view in *Reidar v Arcos* was that it was a 'two breach' case, it followed that Bankes LJ's approach was wrong in law for a 'one breach' case.

(vi) The conclusion stated by Potter J also, with respect, misstates what would be the law if his premise were correct that the law requires an additional and different breach. Were that the law, it would have to be on the basis that a demurrage rate liquidates the damages recoverable, whatever the nature of the loss suffered, in respect of a breach of the obligation to load or discharge within the laytime. There would never be, as Potter J's conclusion has it, "*damages in addition to demurrage <u>for breach of the charterers' obligation to complete loading within the lay days</u>*" (my emphasis); rather, on Potter J's premise, the law would be that damages in addition to demurrage:

(a) may never be awarded for a breach of the obligation to load or discharge within the laytime;

(b) may not be awarded for a breach of an obligation other than the obligation to load or discharge within the laytime in respect of the loss of the use of the ship due to detention after the commencement of laytime.

127. The result is that in my judgment the reasoning in *The Bonde* is clearly faulty. As I noted, the basic argument for K-Line on the issue before me was put to Potter J by Mr Havelock-Allan (see paragraph 125 above). In *The Altus*, having concluded that *Reidar v Arcos* bound him to a certain view, Webster J did not consider for himself the soundness or unsoundness of that argument. In my judgment, Webster J was wrong to think himself bound to a certain view by *Reidar v Arcos*, but that does not affect the correctness of the decision in *The Altus*, since that does not depend upon the soundness of the basic argument. In *The Bonde*, having concluded that *Reidar v Arcos*, read with *dicta* in *Suisse Atlantique*, established a proposition contrary to the conclusion of the basic argument, Potter J likewise did not consider for himself its soundness or unsoundness. In my judgment, Potter J was wrong to conclude that *Suisse Atlantique* affected, decisively or persuasively, the question whether *Reidar v Arcos* is authority against the basic argument, and his judgment is explicable only if a *non sequitur* lies at its heart.

128. In those circumstances, and other things being equal, I would regard myself as free to conclude, since it is my firm view that K-Line's basic argument is sound, that *The Bonde* was wrongly decided and should not be followed. Even if the rule of precedent as stated in *Colchester Estates* applies (i.e. assuming in Priminds' favour that I should treat myself as a third judge of first instance, *cf* paragraph 54 above), I would not follow *The Bonde*. Looked at from that perspective, this is a case in which Potter J was clearly wrong, in my view, to jump from the valid criticism that Webster J in *The Altus* had put Bankes LJ in the majority in *Reidar v Arcos*, which was the substance of Webster J's reasoning, to a conclusion that Bankes LJ's approach in *Reidar v Arcos* was unsound, or had been rejected by *Suisse Atlantique*, for a 'one breach' case, so that damages beyond demurrage could not be recovered in such a case, whatever the loss for which such damages were claimed.

129. The question arises whether I should not take that course because *The Bonde* has now stood for nearly 30 years and/or because of the extent to which it has been followed.

130. That brings me, firstly, to *The Luxmar*, which concerned a contract for the sale of gasoline f.o.b. Priolo. The buyer purported to terminate the contract after its nominated ship had arrived in time for a 29-30 May 2004 laycan but loading had not commenced by 3 June 2004 due to technical problems at the refinery. The seller treated that as a wrongful repudiation by the buyer, contending that the time for delivery was not of the essence, there being only a laycan (LAY –laytime not to commence before, CAN – cancellation right if ship not arrived by). Langley J held for the seller and the Court of Appeal dismissed an appeal.

131. The contract was priced on market prices across 25 May to 1 June 2004. The market price fell between 31 May and 3 June 2004, so the seller suffered loss on re-selling the quantity it would have been obliged to deliver to the buyer as against the contract price the buyer would have had to pay.

132. On the premise, held to be correct, that the buyer had wrongfully repudiated the contract, *the buyer* claimed that *the seller* was liable in damages for the difference in the market value of the cargo the buyer did not receive between the expiry of the laytime and when loading would in fact have completed if the seller had not terminated the contract (see *per* Langley J, [2004] 2 Lloyd's Rep 543 at [4]). This was a counterclaim by the buyer (*ibid*, at [4]), and the trial upon which Langley J gave his judgment was limited to "*liability issues and the issue of principle whether or not [the buyer] is entitled to set off general damages for late delivery*" (*ibid*, at [5]).

133. The counterclaim was plainly a bad claim. The buyer did not suffer from the fall in the value of cargo because it did not buy or take delivery of the cargo; and it did not buy or take delivery of the cargo because it wrongfully repudiated the contract and the seller terminated the contract on that basis. The point I have to determine simply did not arise.

134. Langley J, however, did not dismiss the counterclaim on that basis, but by reference to *The Bonde*. His judgment on the point is very brief, there does not appear to have been any argument about the correctness of Potter J's decision, only a suggestion that Langley J rejected that the demurrage provision in *The Luxmar* was unusual, and none of the other authorities was considered (save that Langley J referred to *Inverkip*, *ibid*

at [44(iv)] and [51]-[52], as part of showing why the buyer's repudiation was wrongful). The judgment on the counterclaim is this single paragraph, *ibid* at [58]:

> "*In the context of my decisions on the terms of the contract, there is no basis on which [the buyer] can claim general damages for delay. The counter claim must be limited to demurrage (which is conceded). In The Bonde …, Potter J held that, in order to advance such a claim for general damages for delay in an FOB contract, there had to be a breach additional to or separate from that of failing to load within the lay days and/or at an agreed rate of loading, so as to establish a separate right not circumscribed by the right to demurrage. Mr Bright [for the buyer] submitted that the demurrage clause in this agreement was unusual or to be construed as addressing only the case where [ship]owners did claim demurrage from [the buyer] and nothing more. I do not agree. The clause is, as it says it is, a "demurrage" clause, and uses the word in its ordinary sense. [The buyer], no doubt, regrets its limitations but that is no reason to give it a meaning it does not have.*"

135. This reliance on *The Bonde* in a case where, on a true analysis, the point it decided did not arise and where its correctness was not debated, is not in my view reason to follow *The Bonde* where I have been persuaded that otherwise it is right not to do so. If anything, with respect, the starkness of the result of treating it as correct, as stated by Langley J, only reinforces the view that it is, on reflection, wrongly decided. Where in an f.o.b. contract a delivery date is stated, as such, but time is not of the essence (either on the proper construction of the particular contract or because the buyer does not choose to terminate for late delivery though entitled to do so), and the seller delivers late on a falling market, the buyer will have a claim for damages for late delivery unaffected by any laytime/demurrage clause. There is to my mind no rational basis for saying that the position is different merely because the effectively warranted delivery date is a function of the laytime provisions rather than a delivery date separately stated as such. The idea that by agreeing also a demurrage clause, typically referable to the charterparty demurrage rate, the buyer is agreeing to forgo his normal late delivery claim under s.53 of the Sale of Goods Act 1979 is startling and, in my respectful view, not at all likely to be the intention of traders agreeing f.o.b. sales.

136. For completeness as to *The Luxmar*, I note again that what was considered was a *counterclaim by the buyer*, for damages for the failure to load within the laytime allowed, laytime having expired prior to the buyer's repudiation of the contract. The correct measure and quantification of *the seller's damages* was not part of the trial before Langley J (see again paragraph 132 above). In relation to the seller's damages, it may be the buyer could have attempted the argument that but for its wrongful repudiation (as it was held to have been) the seller would have been obliged to deliver in circumstances where it would incur by doing so a liability for late delivery. Then, as it seems to me, the point before me would have arisen, and for the reason given in the previous paragraph in my view it ought then to have fallen to be decided in favour of the buyer. That is why I said in paragraph 133 above only that the buyer could not say it had suffered loss, and not that the lower market value when the contract was terminated represented a gain for the buyer because it had been saved from paying a higher contract price for it. The latter would have begged the question whether the seller could maintain in the face of s.53(1)(a) of the 1979 Act that if the buyer had not

repudiated, so that the seller would have been obliged to effect a late delivery, the seller would have been entitled to be paid in full the contract price fixed by the higher market prices in the week to 1 June 2004.

137. In the Court of Appeal, Longmore LJ, with whom Buxton LJ and Sir Martin Nourse agreed, also dealt with the buyer's counterclaim very briefly, [2007] Lloyd's Rep 542 at [24]-[25]. The first two sentences of [24] were sufficient to dispose of the counterclaim, consistently with paragraph 133 above: "*... it has never been made clear what loss the buyers have suffered as a result of the delay. There is no claim for loss of market which is unsurprising since the market moved in the buyers' favour.*" Accordingly, whilst Longmore LJ went on to say that Langley J had "*rightly held that, where a demurrage figure is contained in a contract it is intended to cover loss for delay and general damages for delay cannot be awarded as well*" (later in [24], and see [25] for a brief elaboration), it seems to me he had in mind (I think, with respect, correctly) that the buyer had not identified any harmful consequence other than the delay to the ship that it could say it had in fact suffered, for the purpose of what was its counterclaim, and was not dealing with any argument about the seller's damages.

138. For these reasons, I do not think *The Luxmar* is reason to follow *The Bonde* where I have been persuaded that it was wrongly decided and should not be followed.

139. As well as relying on *The Luxmar*, Mr Wright referred me to two arbitration decisions reported in the London Maritime Law Newsletter as *London Arbitration 23/07, (2007) 730 LMLN 2* and *London Arbitration 1/09, (2009) LMLN*. They appear to relate to the same voyage, under which a ship carried on Gencon terms a cargo of sodium sulphate in bags from Zhenjiang, China, to Vitoria, Brazil. I infer that the two arbitration references were under a head voyage charter and sub-charter, and it seems from the reports that they were on materially identical terms. The references do not appear to have been consolidated or dealt with concurrently, but some or all of the arbitrators may have been the same, and it would not be right to treat the two reports as adding separate weight, the one to the other, to any argument that *The Bonde* has become so accepted that I ought not to depart from it.

140. The LMLN reports of these arbitration awards indicate that the arbitrators considered *The Altus*, *The Bonde* and *Suisse Atlantique* so as to ascertain the true *ratio* of *Reidar v Arcos*, and concluded that "*the owners needed to find a separate breach of a further obligation by the charterers to entitle them to recover for the costs of the watchmen and wharfage during the period in question, costs which the owners otherwise accepted were their liability*" (quoting from *London Arbitration 1/09*). On any view, the port costs for which damages were being claimed were within the purview of demurrage. Had the arbitrators disagreed with *The Bonde*, the result would have been the same; and although it seems that they agreed with it, at the risk of reading too much into briefly reported decisions in arbitration, their approach does not appear to have been that *The Bonde* settled the matter such that further thought was not required on their part. These two arbitration awards do not give me cause to refuse to depart from *The Bonde* if otherwise it be right to do so.

141. Finally on this aspect of what has been made of *The Bonde* since it was decided, I come back to the textbooks. In the period since *The Bonde* was decided, practitioners (and their owner, charterer and insurer clients, if they do not rely only on external

legal advice) will have turned first to *Scrutton* and *Voyage Charters*, also it may be to *Schofield*. As I found in my review, there they would have found: in *Scrutton*, support for K-Line's position that has been present ever since *Reidar v Arcos*, most explicitly so for the last 25 years; in *Voyage Charters*, support for Priminds' position but only since 2014, previously no view having been expressed; in *Schofield*, a summary of the cases without any view being taken. As I also said in my textbook review, I do not regard *McGregor* or *Chitty* as significant for present purposes. Finally, as it seems to me *Carver* and *Baughen* are too recent for any claim that they might have generated a settled wisdom. Anyone needing to consider the point would also be expected to be aware of, or to find, *Gay*, the detailed and careful analysis of the authorities within which would show any serious reader that there was at all events real room for argument whether *The Bonde* was rightly decided, and that the point was or might well be still contentious.

142. I expressed surprise that *Scrutton* expresses a view without referring to *The Bonde*, and I would not hesitate to differ from that view, if I felt it right to do so, particularly so perhaps given the failure to acknowledge *The Bonde*. But that is not the position; and for the immediate point the greater significance is that *Scrutton* has expressed the view it has, favouring K-Line in the argument before me, throughout the relevant period. What I take from the textbook review (*pace Carver*, see paragraph 106 above), is that it has not become settled wisdom that *The Bonde* is correct; and that anyone with a need to consider the issue at all seriously should have found or been advised that it remains contentious.

143. It is a strong thing for a judge of first instance to refuse to follow a prior decision at first instance that has stood without direct criticism in later case-law for a substantial period of time. However, the point raised before me and previously decided by Potter J in *The Bonde* is a specific, narrow, point, in a specialist field, that does not arise often, on which equally there has not been a fully considered later decision agreeing with Potter J.

144. In the event, though it is now 30 years since *The Bonde* and over 90 since *Reidar v Arcos*, I apprehend this may have been the first occasion on which the arguments of principle have been aired fully and the prior authorities up to and including *The Bonde* examined in detail so as to expose as flawed (i) the notion that if the majority in *Reidar v Arcos* held there to have been two breaches, that makes *Reider v Arcos* authority for the proposition that two breaches are required and that Bankes LJ's approach is wrong in law for a 'one breach' case, rather than merely not authority for the proposition that Bankes LJ's approach is correct for such a case, and in consequence (ii) the idea that what was said about *Reidar v Arcos* in *Suisse Atlantique* could or does amount to persuasive authority for such a proposition. In the intervening years, it cannot be said that the view taken by Potter J in *The Bonde*, on what I have concluded, with respect, was erroneous reasoning, has become the settled wisdom, or that the point has by reason of *The Bonde* been treated as no longer controversial.

145. In those circumstances, since I have come to the firm and clear view that *The Bonde* was wrongly decided, I have decided the right course is to say so in terms, and not to follow Potter J on the point.

Implied Indemnity

146. Mr Bird's first submission on K-Line's claim for an indemnity in respect of the loss it suffered, on the assumed facts, was that the court cannot decide whether there is any relevant implied indemnity obligation as that is a matter for the arbitration. If by that he meant only that the answer given by the court to the implied indemnity question as put to it on the assumed facts could not create an estoppel *per rem judicatam* between the parties as to the existence of an implied indemnity on different facts, if different facts were pleaded and proved before the arbitrators, that may be right – it is not necessary to take a view. But if he meant that the court could not decide the question actually put to it, I disagree.

147. That said, the question of implied indemnity would only matter if K-Line had lost on the question about demurrage. Indeed, on reflection, and bearing in mind that the purpose of coming to court under s.45 was to test the viability in law of K-Line's claim before the arbitrators, it might have been better to articulate the question as whether on the assumed facts K-Line is entitled to recover the loss in question (a) by way of damages for not loading at the required rate, *if not* (b) under an implied indemnity. That way, the answer if the court were with K-Line on demurrage would be (a) Yes, (b) N/A.

148. In the event, I *have* sided with K-Line on the demurrage issue, so that (subject to any appeal against my decision) K-Line's claim is viable and will proceed in the arbitration if not now settled. I have not been able to identify how it might affect the outcome in the arbitration whether the claim might also be put as an indemnity claim; it is ultimately a matter for my discretion whether to answer a question of law under s.45; and the strong policy of English law under the 1996 Act that the court should interfere in the arbitral process only where justice truly demands is still in play even though the parties came to court jointly invoking s.45. In those circumstances, seized as I am only of this preliminary legal argument, I decline in my discretion to give a final answer to part (b) of the question, which will therefore be for the arbitrators to consider if somehow it might make a difference (and hence my reference at the outset – paragraph 7 above – to a qualification upon my view that it was appropriate to give a determinative ruling under s.45).

149. Therefore, the answer I shall give to the question of law put to the court under s.45 is: (a) Yes; (b) Not Answered.

150. For completeness, though, I should indicate how I would have answered the indemnity question had I been against K-Line on demurrage. On that basis, it would have been necessary to answer part (b), if it could properly be answered as a preliminary point, in order to decide whether K-Line had a viable claim to pursue, and the justice of the court deciding the point upon the parties' joint request would have been clear. Furthermore, in my judgment, the answer itself would have been clear: (a) No; (b) No.

151. On the premise of the previous paragraph, the position would have been that the parties by the demurrage clause had agreed to liquidate, whereby to limit K-Line's recovery for, all the consequences of the pertinent delay at the discharge port. It would be inconsistent with that element of the express bargain to imply an indemnity rendering Priminds responsible for one of those consequences. That would be an

implied indemnity inconsistent with what was effectively an express exclusion of Priminds' liability for the very claim now brought. That was the logic of Mr Wright's primary argument in response to the indemnity claim, were he right about demurrage. Mr Bird had no answer to it, in my judgment, nor have I identified any.

Conclusion

152. For the reasons given above, I conclude that:

(i) It is possible, and appropriate as a matter of discretion, to answer part (a) of the question of law put to the court by the parties jointly pursuant to s.45 of the 1996 Act, concerning the demurrage clause; and it is to be answered in the affirmative. In that regard, it is my particular conclusion that *The Bonde* was wrongly decided, and that it is both open to me and right in the circumstances to depart from it, and so I have not followed it.

(ii) I have not identified how part (b) of the question put to the court, on implied indemnity, will not be academic, and I prefer to leave that, and the question itself, to be considered within the arbitration, if K-Line pursues the implied indemnity claim although it has succeeded as to the scope of the demurrage clause.

(iii) The question of law as put to the court will therefore be answered: (a) Yes; (b) Not Answered.

(iv) For completeness, were I wrong about the demurrage clause, it would have been possible and appropriate to answer both parts of the question of law as put, and I would have answered: (a) No; (b) No.