In the Privy Council.

No. 27 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

REARDON SMITH LINE LIMITED ... (*Plaintiffs*) APPELLANTS

AND

AUSTRALIAN WHEAT BOARD ... (*Defendants*) RESPONDENTS.

CASE FOR THE APPELLANTS

RECORD

1.—This is an appeal by Special Leave, granted by Order in Council dated 1st February 1955, against the Order of the High Court of Australia (Dixon, C.J., and Webb and Taylor, JJ.), dated 2nd June reversing by a majority decision (Dixon, C.J. dissenting) the Order of the Supreme Court of Western Australia (Wolff, J.) whereby judgment was entered for the Appellants against the Respondents as to liability and as to the costs of the action including the costs of abortive Arbitration proceedings. p. 63 p. 62 pp. 35–36

2.—On the most material questions of fact there were as hereafter appears, concurrent findings by the Courts below. The question of law for decision is whether the charterer of a vessel is liable in damages to the shipowner if, being obliged by the terms of a voyage charterparty to nominate a safe port of loading, the charterer nominates an unsafe port and the vessel in consequence of entering such port suffers damage. This question was answered in the affirmative by Wolff, J. (the Trial Judge) and by Dixon, C.J. (dissenting in the High Court of Australia) and in the negative by Webb and Taylor, JJ. (the majority in the High Court of Australia). The *quantum* of any damages to which the Appellants may be entitled was not discussed in either Court below, the parties being agreed that a preliminary decision should be sought on the issue of liability. Accordingly all matters relating solely to *quantum* have been omitted from this Case.

3.—The Appellants are the owners of the m.v. "Houston City" (hereinafter called "the vessel") and the Respondents, who are a corporation created by the Australian Wheat Industry Stabilisation Act,

RECORD

1948 (Commonwealth) with power to sue and be sued and to charter steamers are exporters of wheat from Australia.

In pocket

4.—By a Charterparty dated 19th March 1951 the Respondents chartered the vessel from the Appellants for a voyage from Western Australia to the Continent between Antwerp and Hamburg. The charterparty provided (*inter alia*) as follows :—

> " 1. That the said Vessel . . . shall . . . proceed, as ordered
> " by the Charterers, to one or two safe ports Western Australia,
> " or so near thereunto as she can safely get, and there load . . .
> " at such safe dock, pier, wharves and/or anchorage, as
> " ordered, . . . a full and complete cargo of WHEAT in bulk
> " ex silo. . . ."

pp. 68–69 Exhibits GH. 2 and GH 3

p. 21, l. 3

5.—On 3rd July, 1951, the Master of the vessel telegraphed for loading port orders and on the same day the Respondents by wireless telegraphy ordered the vessel to proceed to Geraldton, in Western Australia, to load a full and complete cargo of wheat in bulk. In compliance with these orders the vessel arrived at Geraldton on 7th July, 1951.

p. 16, l. 4

p. 69, ll. 20–24

p. 9, ll. 14–29

p. 16, ll. 11–22

p. 16, l. 40

p. 21, ll. 9 and 5–20

6.—Geraldton is a port on the western coast of Australia about 200 miles North of Perth. There is only one wharf at Geraldton and this wharf runs East and West, ships being berthed on the northern side at one of three berths. The prevailing winds in July are Northerly. No. 1 berth is the only berth fitted with mechanical means of loading bulk wheat and it is at this berth that bulk wheat cargoes are always loaded. This berth is the most exposed to wind and swell from the North and West. Parallel with the face of the wharf are a series of buoys to which vessels can attach lines whereby they can be hauled off and held away from the face of the wharf should this be necessary to prevent them being blown or rolling against the wharf. At the time of the arrival of the vessel at Geraldton, No. 2 buoy, which would have been opposite the stern of the reach, as she was subsequently moored, was missing having been damaged in May 1951. Furthermore the face of the wharf, which was of concrete, was protected by two horizontal waling pieces of 12″ x 12″ timber, one 6″ to 12″ below the surface of the wharf and the other 6 feet below the first. At the time of the arrival of the vessel at Geraldton about 50 feet of the upper waling piece at No. 1 berth was missing and the berth had been in this state for some months.

p. 16, ll. 44–48

p. 17, l. 4
p. 25, l. 4
p. 67, l. 16

p. 8, l. 24
p. 9, l. 6

7.—The Respondents had maintained an office at Geraldton since 1948 and prior to July, 1951, had been chartering vessels to load wheat there at the rate of approximately 20 vessels per annum.

p. 21, l. 4

8.—The vessel was berthed by Capt. Sweett, the Harbour Master/Pilot, at No. 1 berth on the afternoon of 7th July 1951 with her starboard side to the quay. At the time of berthing Capt. Sweett informed the Master

RECORD

that the hauling-off buoy had been damaged and removed, but said that its return was imminent. The Master intended to run a line to this buoy as and when it was restored to its position and meanwhile he ran out the port anchor and moored the vessel with two 3″ wire springs, eight mooring ropes and two 4½″ wires. In view of the fine weather then prevailing the Master did not consider that any further precautions were necessary. It would have been possible at this time to have put out an anchor (variously referred to in the Record as a " stern " " stream " and " kedge " anchor), but this course was not suggested by Capt. Sweett and in evidence he said that he would not himself have taken this step.

p. 66, l. 39–p. 67, l. 6
p. 67, ll. 9–14, 43–46
p. 24, ll. 1–3

9.—Good weather continued from 9th to 11th July 1951 and the loading of the vessel proceeded. At the resumption of loading at 8 a.m. on 12th July, 1951, there was a moderate S.W. wind, but the weather report issued by the Perth Meteorological Office showed that the nearest disturbance was approximately 300 miles to the West and worse weather was not therefore expected. However at about 11.45 a.m. the wind freshened from the northward and soon increased to gale force. At this stage it was too late to put out a stern anchor. At about 1.10 p.m. the vessel began bumping heavily against the quay and despite all the efforts of the vessel's crew severe damage resulted both to the vessel and the quay. In the opinion of Capt. Sweett, who gave evidence for the Respondents, the damage was caused at the outset by the shoulder of the missing waling piece and there would have been no danger if the waling piece had been intact and the buoy there. No movement occurred in the case of the vessel moored at No. 2 berth where the waling piece was intact and the buoys in position.

pp. 71–2
p. 67, l. 26–p. 68, l. 15
Exhibits J and K, pp. 73–74
p. 23, ll. 12–19

10.—By a specially indorsed Writ dated 9th October, 1952, the Appellants claimed damages alleging that the Respondents committed a breach of their obligations under the charterparty in ordering the vessel to Geraldton and/or to No. 1 berth there in that both the port and berth were unsafe. In Particulars given under paragraph 10 of the Statement of Claim and further Particulars added at the trial the Appellants relied (*inter alia*) upon the facts that part of the waling piece and the hauling-off buoy were missing. Alternatively the Appellants claimed damages in negligence. By their Defence the Respondents alleged that (a) the port was at all times a safe port within the meaning of the charterparty, (b) No. 1 berth was a safe berth provided that the vessel put out anchors for purposes of hauling-off, (c) if for any reason the port or the berth was unsafe the Master was under no obligation to enter the port or berth the vessel and should have reported to the Respondents and asked for further orders, (d) the Master with full knowledge of the conditions prevailing freely and voluntarily accepted the risk of entering the port and berthing the vessel, and (e) any damage was caused wholly or in part by the negligence of the Master in failing to put out a stern anchor.

pp. 1–3
p. 3, ll. 18–22
pp. 4–7

11.—The action was tried by Wolff, J. on 11th and 12th December, 1952, and on 30th January 1953 a reserved judgment on the issue of liability

RECORD

pp. 15–20 was delivered in favour of the Appellants. Evidence was given by Captain C. R. Cox, a ship's Master and Marine Surveyor, that in his opinion Geraldton
p. 18, ll. 20–21 was an unsafe port in a number of respects and that No. 1 berth with the waling piece and buoy missing was unsafe in winter conditions. This
p. 17, ll. 36–37 witness did not consider that bow and stream anchors would be a safe means of holding a ship broadside on. Furthermore Captain Cox considered that to obtain the greatest efficiency it would be necessary to put out at
p. 17, l. 38– p. 18, l. 3 least 600 feet of line and the witness calculated that even this would not be effective against a winter gale, since the wire would probably break. If it did break a situation of great danger would be created. The Harbour Master/Pilot, called by the Respondents, gave evidence that in his opinion
p. 23, ll. 16–17 p. 24, ll. 1–2 there would have been no danger if the waling piece and hauling-off buoy had been in position and that he could find no fault with the failure of the Master to put out a kedge anchor. Mr. A. N. Boulton, the Deputy Director of Navigation, Western Australia, also called by the Respondents, had never seen a stream anchor used in such circumstances, but felt that its
p. 26, l. 10 use would have been justified. On the other hand he considered that there was a risk of the stream line breaking and he stated that it would take about 2 hours to get the stream anchor ready for use. Evidence was also given
p. 27, ll. 1–21 by the Respondents' Assistant Superintendent who stated that he had been sending vessels to Geraldton since 1919, that he was responsible for ordering the vessel to that port and that he would not have occasion to consider the question of the safety of the harbour it not being, in the opinion
pp. 66–8 of the witness, his responsibility. The affidavit of the Master of the vessel, to which reference has already been made, was also read at the trial.

12.—On the contested questions of fact or mixed law and fact the learned Judges who have considered this matter reached the following conclusions :—

(a) *That Geraldton was an inherently unsafe port by reason of its layout.*

This proposition was rejected by Wolff, J. and does not seem
p. 31, ll. 1–29 to have been specifically considered by the High Court of Australia.

(b) *That the Respondents impliedly ordered the vessel to No. 1 berth at Geraldton.*

Both Wolff, J. and Dixon, C.J. expressly held that, No. 1
p. 30, ll. 35–46 p. 50, ll. 22–27 berth being the only berth at which wheat in bulk could be loaded, the Respondents in ordering the vessel to load at Geraldton ordered
p. 53, ll. 40–47 p. 61, l. 44– p. 62, l. 3 her to load at No. 1 berth. A like assumption is made in the judgment of Webb and Taylor, JJ. although the view which they took of the law made it unnecessary for them to make any specific finding.

(c) *That the absence of the waling piece and of the buoy rendered No. 1 berth unsafe.*

p. 32, ll. 22–26 p. 50, ll. 19–21 p. 53, ll. 17–21 All the learned Judges held that in the circumstances No. 1 berth was unsafe.

RECORD

(d) *That the Master should have laid out an additional anchor.* p. 32, l. 44–p. 33, l. 41

This contention was rejected by all the learned Judges. p. 40, ll. 9–10; p. 50, ll. 28–46

(e) *That the Master should, on learning that the berth was unsafe, have required the vessel to be taken out of the harbour.* p. 53, ll. 24–31

This contention was expressly rejected by Wolff, J. Dixon, C.J., in holding that the damage was the direct and natural consequence of the Respondents' order, impliedly agreed with Wolff, J. Webb and Taylor, JJ. do not suggest that the Master should have taken this course and expressly state that no witness could suggest any precautionary step which could or might have been taken on berthing and which would have prevented or avoided damage to the vessel. p. 33, l. 42–p. 34, l. 13; p. 35, ll. 15–21; p. 50, ll. 43–46; p. 53, ll. 31–34

13.—In both the Courts below it was argued for the Appellants that the giving by the Respondents of an order to proceed to an unsafe berth was a breach of contract. Alternatively it was contended that in ordering the vessel to proceed to Geraldton the Respondents impliedly warranted that No. 1 berth was safe and that in breach of the warranty No. 1 berth was not safe. It was further argued that the loss sustained by the Appellants was the direct and natural consequence of that breach of contract or warranty. For the Respondents it was argued that the chain of causation was broken by the alleged unseamanlike conduct of the Master and that in any event (a) the Respondents did not warrant the safety of No. 1 berth and (b) the master being under no obligation to take his vessel to an unsafe berth, the loss flowed from his deciding to berth his vessel and that, this being a voyage charter, the act of the Master was, as between Owners and Charterers, that of the Appellants as Owners.

14.—On the main question of law Wolff, J. held, after considering the authorities, that there was no material distinction between the ordering of the vessel to an unsafe berth under a time charterparty and such an order given pursuant to a voyage charterparty. He therefore declined to follow the decisions in *West* v. *Wrights (Colchester) Ltd.* (1935) 40 Com. Cas. 186 (Branson, J.) and *Pass of Leny* (1936) 54 Ll. L.R. 288 (Bucknill, J.), preferring the decisions in *Ogden* v. *Graham* (1861) 1 Best & Smith 739 (Wightman and Blackburn, JJ.) *Hall Bros. S.S. Co.* v. *R. & W. Paul* (1914) 30 T.L.R. 598 (Sankey, J.), *Axel Brostrom* v. *Louis Dreyfus* (1932) 38 Com. Cas. 79 (Roche, J.) and *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (1950) 2 K.B. 387 (Devlin, J.). The learned Judge doubted whether the knowledge of the Respondents was relevant, but held that, if it was, they knew or ought to have known the condition of No. 1 berth at Geraldton. He therefore held that, the Master having reasonably obeyed the Respondents' order, the Respondents were liable to the Appellants for the loss sustained. p. 34, l. 14–p. 35, l. 26

15.—In the High Court of Australia Webb and Taylor JJ. based their judgment allowing the Respondents' appeal upon the absence from the

RECORD

charterparty of any employment and agency clause such as commonly occurs in time charterparties. In the absence of this clause they were of opinion that the act of the Master in berthing his vessel was the Appellants' own act and that the Appellants could not therefore recover any loss sustained thereby. Their judgment concluded :—

p. 61, l. 24–
p. 62, l. 6

" We have been unable to find any case where, in the " circumstances such as the present, a charterer has been held to " warrant the safety of a port nominated by him, or, where the " nomination of an unsafe loading port or berth pursuant to a " charterparty in the form of that which is before us has been " held to constitute a breach of contract giving rise to damages " where the master of the vessel has accepted the order and " proceeded to the port and there sustained damage. There is, " as we have already said, no doubt that a refusal or failure to " provide the stipulated cargo at a safe port is answerable in " damages but such a conclusion depends upon principles which do " not assist in the solution of the problem which arises in this case. " In all the circumstances we prefer to adopt the observations of " Greer, L.J., in the *Lensen Shipping Company's* case (*supra*) (1935) " 50 Ll. L.R. 62, and those of Branson, J. in *West's* case (*supra*) " (1935) 40 Com. Cas. 186, rather than those of Devlin, J. in " *Grace's* case (*supra*) (1950) 2 K.B. 387, and to hold that where " under a charterparty in the form of that which is before us an " unsafe port or berth is nominated by the charterer he does not, " merely by reason of such nomination, become liable for damages " sustained as a result of the master proceeding to such unsafe " port or berth. Nor, do we think, that in the circumstances of " this case there is any other ground upon which the charterer " should be held liable. Accordingly we are of the opinion that " the appeal should be allowed."

p. 40, l. 47–
p. 41, l. 22

16.—Dixon, C.J. in his dissenting judgment summarised the two views of the legal consequences of the naming of an unsafe port or berth by a Charterer as follows :—

" One is that he has simply failed to perform the condition " upon the fulfilment of which the ship must berth and load and " has failed to pursue the terms of the contract in providing " a cargo. On this view his only breach of contract is in failing " to supply a cargo in the appointed manner. The ship " may refuse to proceed to the port or the berth and treat " the charterer as in default in providing a cargo in accordance " with the conditions of the contract. But if the ship proceeds " to the unsafe port or berth that means that there is no breach ; " the shipowner has waived fulfilment of a condition precedent, " that is all. Having chosen to load the cargo, he cannot complain " that it was supplied at a place where he need not have taken it.

RECORD

" The other view of the legal consequences . . . is that . . " it also amounts to a breach of the shipowners' obligation to " direct the ship only to a safe port or berth. Of course the " master may disregard the order on the ground that the port or " berth is unsafe. But on this view, if the master acts on the " order, the charterer having broken a term of the charter in " directing the ship to an unsafe port or berth is liable in damages " for the consequence of the breach consisting in the giving of the " direction."

10 The learned Chief Justice rejected the suggested distinction between voyage and time charterparties on the grounds that it was difficult to find logical or verbal grounds for the distinction which satisfied the mind that it corresponded with any actual intention and that it was still more difficult to justify it as a matter of history or tradition. In his opinion the crucial question was whether, as he considered was the case, the giving of an order to proceed to an unsafe port was of itself a breach of obligation on the part of the charterer. The learned Chief Justice then showed by a very detailed and careful consideration of all the authorities that his conclusion was justified.

p. 42, ll. 19–22

p. 43, ll. 38–43

p. 43, l. 44–p. 49, l. 43

20 17.—Since judgment was given in the High Court of Australia in this action, a similar case (*Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* (1955) 2 Q.B. 68) has been decided in the English Courts. That case was tried by Devlin J. who, in a reserved judgment, reconsidered the authorities including the judgments appealed from, but confirmed the view which he had indicated in *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* (1950) 2 K.B. 387 that the nomination of an unsafe port was itself a breach of contract and that the charterer was therefore liable to indemnify the shipowner in respect of all loss directly and naturally caused by such breach, the nature of which loss would vary 30 according to whether the shipowner obeyed or refused to obey the order of the charterer. The charterers appealed and the Court of Appeal (Singleton, Hodson and Morris, L.JJ.) in reserved judgments unanimously affirmed the decision of Devlin, J. All of the learned Lord Justices (at pp. 93, 98 and 106) expressly approved the dissenting judgment of Dixon, C.J.

18.—As an alternative to their claim for damages for breach of contract the Appellants submit that they are entitled to recover in negligence against the Respondents on the grounds that the damage complained of in this action was the direct natural and probable consequence of the Respondents' breach of duty in ordering the vessel to load bulk wheat at 40 Geraldton where the only berth at which such loading could at the material time take place was unsafe for the vessel as was or ought to have been known to the Respondents or their agents.

19.—The Appellants respectfully submit that this Appeal ought to be allowed for the following amongst other

REASONS

1. BECAUSE the Respondents in ordering the vessel to Geraldton impliedly ordered her to No. 1 Berth at that port.
2. BECAUSE No. 1 Berth at Geraldton was at all material times unsafe for the vessel.
3. BECAUSE by so ordering the vessel the Respondents committed a breach of their obligations under the charterparty.
4. BECAUSE the loss suffered by the Appellants was the direct and natural consequence of the Respondents' breach of contract.
5. BECAUSE in the alternative the Respondents are liable to the Appellants in negligence in that they ordered the vessel to the said berth when they knew or ought to have known that the berth was unsafe for the vessel.
6. BECAUSE the decision of the majority of the High Court of Australia was wrong.
7. BECAUSE the judgments of Wolff, J. in the Supreme Court of Western Australia and of Dixon, C.J. (dissenting) in the High Court of Australia were correct and accordingly the order of the Supreme Court of Western Australia should be restored.

A. A. MOCATTA.
JOHN DONALDSON

In the Privy Council.

No. 27 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

REARDON SMITH LINE LIMITED
(*Plaintiffs*) APPELLANTS

AND

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CASE FOR THE APPELLANTS

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