HELLENIC LINES LTD.,

Plaintiffs,

v.

ARTEMIS Co. LTD.,

Defendants,

(*Admiralty Action No.* 13/65).

Shipping—Demurrage—"Arrived ship"—Lay days—No berthing space—Time lost waiting for berth—Loading interrupted by Port Authorities—No demurrage payable—Fault of the ship owner or of those for whom he is responsible.

Shipping—Lay days—Calculation—Begin from time ship is at berth and are counted consecutively.

Shipping—Contract of carriage by sea—Charter party—Construction—Principles applicable—Clause whereby shipper agrees to load the cargo within fixed period otherwise demurrage to be payable at a fixed sum per "weather working day"—This is an absolute and unconditional engagement—For the non-performance of which he is answerable to the shipowner, whatever be the nature of the impediment—Unless such impediments are covered by exceptions in the contract or arise from the fault of the shipowner or of those for whom he is responsible.

Arrived ship—See above.

Charter Party—See above.

Carriage by sea—Contract of—Construction of—See above.

Demurrage—See above.

Lay days—See above.

Lay time—See above.

Words and Phrases—Arrived ship—Lay days—Lay time—See above.

In this action the plaintiffs (shipowners) claim from the defendants, a firm of exporters, demurrage amounting to

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HELLENIC LINES LTD.,
v.
ARTEMIS CO. LTD.

£337.600 mils arising out of the delay in loading the aforesaid shipowners' vessel "Germania" at Famagusta Port. The defendants denied liability. The defendants booked shipping space in the "Germania" to carry a cargo of 1,000 tons of potatoes; loading to be effected at Famagusta on 16/20 May, 1964, the cargo to be discharged at the port of Southampton or Ipswich, at 90/- per ton "Liner terms" "two days loading", otherwise demurrage to be payable at the rate of £250 per "running weather working day".

On the morning of May 14, 1964, the "Germania" arrived at Famagusta but owing to the congestion of shipping at the port, she anchored in the roadstead outside the port waiting for instructions from the port authorities to enter into a loading berth; she remained there until the 17th. On May 18, 1964 at 7.00 hours the "Germania" entered into the port and proceeded to a loading berth. The port Authorities allowed it to get in as aforesaid because there was a bigger ship which could not enter in that particular berthing space, but it was made quite clear to all concerned that the "Germania" was bound to evacuate the berth during the night of the 18th May, because the berth was required for other ships to be able to leave. The plaintiffs (shipowners) agreed to this because they wanted to gain time. Be that as it may, the loading of the cargo started at about 8.40 a.m. of the same day (the 18th May), the shippers (defendants) using 3 gangs of men, and continued till 18.30 hours in the afternoon; an amount of 288 tons of potatoes has been thus loaded, when the port authorities instructed the "Germania" to vacate the loading berth and leave the port. She returned and anchored again in the Roadstead. She remained lying there until May, 21, having to wait its turn to enter into the port. On May 21, the "Germania" entered again the port and proceeded to berth at 7.15 hours in the morning. The loading then started, with three gangs of men, and continued until 19.15 hours when loading was completed. At 19.45 hours of the same day the "Germania" left for England.

On those facts the plaintiffs (shipowners) claimed that the vessel was on demurrage as from the 18th May at 001 hours till the 21st May, at 19.15 hours when the loading was completed. The parties agreed that the "Germania" should be considered as an "arrived ship" in accordance with the custom of the port, when she entered in the port and was at the berth ready to load the cargo on May 18, as aforesaid.

Dismissing the action, the Court:

Held, (1). The main question to be decided in this case is the construction of the contract between the parties. In my view the contract must be construed in the light of the course of business which was well known to the contracting parties in view of the state of affairs prevailing at the port of Famagusta, particularly during the month of May.

(2) Of course to some extent decisions reached by the Courts on a given charterparty or contract may help by way of analogy and illustration in the decision regarding another contract; but, however similar the contracts may appear, the decision as to each must depend on the language used in a particular contract read in the light of the material circumstances of the parties in view of which the contract is made.

(3) It is now settled that when in a charterparty or in a contract of carriage days are fixed for loading, the promise made by the freighters is for the benefit of the shipowners. And when days are spoken without qualification as in the present contract, they are understood to mean consecutive days (see *Nielsen* v. *Wait* [1885–86] 16 Q.B.D. 67, at p. 73 per Lord Esher M.R.)

(4) By the terms of the contract in this case the shipper has agreed to load the cargo of potatoes within the fixed period of two consecutive days otherwise demurrage amounting to £250 to be paid per "weather working day". I take the view that this is an absolute and unconditional engagement, for the non-performance of which he is answerable to the shipowner, whatever be the nature of the impediments which prevent him (the shipper) from performing it; unless such impediments are covered by exceptions in the contract or arise from the fault of the shipowner or of those for whom he is responsible.

(5) After reviewing the authorities and in the light of the evidence of the plaintiffs' agent, I would like to reiterate that the parties have contracted on the footing that the risk would fall on the shipowners when the port was crowded and their ship "Germania" would be prevented from entering into a loading berth; and that lay time would commence as soon as the ship entered into a loading berth ready to receive the cargo and to go on with the loading continuously until it was com-

pleted in accordance with the established practice of the port known to the parties.

(6) On the evidence, I am satisfied that the defendants (shippers) succeeded in the circumstances of this case to show that the removal on the 18th May, 1964, of the "Germania" from the port and their failure to load a complete cargo within the stipulated lay days, arose through the fault of the plaintiffs or their agents for whom they are responsible. As we do now know, the regular turn of the "Germania" to enter into a loading berth was the 21st May; and as the shipowners' agent frankly admitted he accepted the arrangement with the port authorities to interrupt the lay days on the 18th May as aforesaid in order to save more time and to avoid further complaints against his principals, having always in mind the interest of the plaintiffs. In my opinion, therefore, lay time has not continued to run against the defendants as claimed by the plaintiffs after 18.40 hours of the 18th May, 1964, when the vessel left the port provisionally and anchored in the roadstead where she remained until May, 21.

Action dismissed with costs.

Cases referred to:

Cantiere Navale Triestina v. *Russian Soviet Naphtha Export* Agency [1925] 2 K.B. 172;

Aktieselskabet v. *Arcos* [1927] 1 K.B. 352;

Nielsen v. *Wait* [1885–86] 16 Q.B.D. 67, at p. 73 per Lord Esher M.R.;

Reardon Smith Line Ltd. v. *Ministry of Agriculture Fisheries and Food* [1963] A.C. 691;

Compania Crystal de Vapores of Panama v. *Herman & Mohatta (India) Ltd.* [1958] 2 All E.R. 508;

Houlder v. *Weir* [1905] 2 K.B. 267;

Budgett and Co. v. *Binnington and Co.* [1891] 1 Q.B. 35 at p. 37 per Lord Esher M.R.;

George S. Galatariotis and Sons Ltd. v. *Atlas Levante Linie* A.G. of Bremen, 23 C.L.R. 170.

Admiralty Action.

Admiralty action for demurrage amounting to the sum of £337.600 mils arising out of the delay in loading the vessel "Germania" at Famagusta Port.

A. Michaelides, for the plaintiffs.

M. Montanios, for the defendants.

Cur. adv. vult.

The following judgment was delivered by:

HADJIANASTASSIOU, J.: In this action the plaintiffs claimed from the defendants demurrage amounting to the sum of £337.600 mils arising out of the delay in loading the shipowners' vessel "Germania" at Famagusta Port. The defendants denied liability and counterclaimed for a declaration that they were entitled to an amount of £550 special damages because of certain breach committed by the shipowners.

The defendants, Artemis Co. Ltd., of Famagusta, by cables exchanged between them and the agent of the plaintiffs Hellenic Lines Ltd., of Greece, contracted in booking shipping space in the "Germania" to carry a cargo of 1,000 tons of potatoes; loading to take effect at Famagusta on 16/20 May, and to be discharged either at the port of Southampton, Ipswich or Boston in the United Kingdom, at 90/- per ton "Liner terms" two days loading, otherwise demurrage to be payable at the rate of £250 per weather working day. The ship "Germania" is owned by the plaintiffs and their agents in Cyprus at all material times to this action were S. Ch. Ieropoulos and Co. of Limassol.

As the telegrams admittedly form the terms of the contract of carriage between the parties, I consider it constructive to read them:

On May 6, 1964, defendants cabled to the agent of the shipowners. I quote:

"REFERENCE TELEPHONE CONVERSATION WE OFFER FIRM 24 HOURS 800 TO 1000 TONS POTATOES IN BAGS SS GERMANIA LOADING 16–20 MAY CUSTOM OF THE PORT 90/- TON LINER TERMS FAMAGUSTA SOUTHAMPTON OR IPSWICH OR

BOSTON OUR OPTION STOP FOR ANY QUANTITY IN BASKETS OF CASES 10/- TON EXTRA ARTEMISCO".

It would be observed, that the words "Artemisco" is the telegraphic address of the defendant Company.

On May 7, Ieropoulos replied:

"REFERENCE YOUR YESTERDAYS FIRM OFFER GERMANIA 16/20 MAY OWNERS ACCEPT MINIMUM 1000 TONS POTATOES INBAGS FAMAGUSTA ONE PORT SOUTHAMPTON IPSWICH OR BOSTON YOUR OPTION 90/- PER TON LINER TERMS TWO DAYS LOADING OTHERWISE DEMURRAGE 250 POUNDS PER RUNNING WEATHER WORKING DAY NO DESPATCH STOP FOR ANY QUANTITY IN BASKETS OR CASES 95/- PER TON LINERS PLEASE CONFIRM URGENT".

On the same day the agents of the plaintiffs, cabled to defendants the following:

"GERMANIA FURTHER OURS TODAY OWNERS NOW INFORMED US BOSTON UNSUITABLE FOR THEIR VESSELS WHICH PLEASE NOTE ACKNOWLEDGE".

Later on the defendants replied:

"REFERENCE BOTH YOURS TODAY GERMANIA ACCEPTED EXCLUSIVELY TO US AND CONDITION ELECTRICALLY VENTILATED".

Immediately Ieropoulos cabled:

"YOURS TODAY GERMANIA CONFIRMED".

On the morning of May 14, 1964, the "Germania" arrived at Famagusta but owing to the congestion of shipping at the Port, she anchored in the roadstead outside the Port waiting for instructions from the port authorities to enter into a loading berth; she remained there being anchored until the 17th.

On May 15, 1964, the agents wrote to the defendants in these terms:

"We hereby beg to inform you that s.s. "GERMANIA" arrived at Famagusta yesterday morning for loading your 1000 tons potatoes to Southampton or Ipswich. Owing to congestion there is no to day berth alongside the quay but we are closely following this matter and we shall let you know at once in writing and by telephone.

Meantime please inform us whether the destination of your potatoes will be Southampton or Ipswich".

In the meantime what has happened is this: As the month of May was considered to be an extremely busy month because of the big exports of potatoes and other vegetables abroad, there was always a congestion of shipping at the port because of the limited berthing facilities and, in order to facilitate the loading of ships and cut waiting time the port authorities put into effect a scheme for vessels arriving to load. I quote from the evidence of Mr. S. Ieropoulos:

"In view of the shortage of space at that time in the port, the port authorities had given priority to the ship which arrived there first and the other ships had to follow their turn according to the time of arrival.

The arrangements with the port authorities are that once a ship went in and started loading the loading should go on until it was completed.

On the 18th May, when our ship "Germania" went into the port and it berthed it was not actually its turn. The port authorities allowed it to get in mainly because there was a bigger ship which could not enter in that particular berthing space, and it was made clear then that we were bound to evacuate the berth during the night; because it was required for other ships to be able to leave. We agreed to this because we wanted to gain one day....."

Pausing there for a moment, I would observe that there was no question that the agent of the shipowners did not realise or appreciate the fact that when the port authorities informed him that a loading berth would become vacant on May 18, which the ship could have had out of her turn for there were other ships ahead of her, that it was only for a limited space of time and that the vessel had to interrupt the loading and leave the port during the night.

On May 17, 1964, the agents following the undertaking they have given to the port authorities, wrote to the defendant:

"s.s. 'GERMANIA'

Further to our letter 89/64 15th May, 64 above vessel will berth tomorrow alongside the quay and will be ready to load your cargo of 1000 tons potatoes immediately after berthing.

Please take note and oblige".

On May 18, 1964, at 7.00 hours in the morning, the "Germania" entered into the Port and proceeded to a loading berth. As the shipper was ready with the cargo the loading started at about 8.40 hours using 3 gangs of men and continued till 18.30 hours in the afternoon, loading an amount of 288 tons of potatoes. At about 18.40 hours of the same day the port authorities instructed the "Germania" to vacate the loading berth and leave the port. She returned and anchored again in the roadstead. She remained lying there till May 21, having to wait its turn to enter into the port. In the afternoon of May 20, the agents of the plaintiffs, were informed by the Harbour Master that the "Germania" could enter again the port and berth on the following morning. Mr. Ieropoulos wrote to defendant Company:

"We hereby inform you that s.s. "GERMANIA" will berth alongside the quay to morrow 21st May, 1964 and will be ready to receive the balance of your parcel of 1000 tons potatoes.

Please take note and oblige.

p.s. s.s. Germania will be ready to receive commence loading at 0800 hours".

On May 21, the "Germania" entered again in the port and proceeded to berth, at 7.15 hours in the morning. The loading started at 7.45 hours, with three gangs of men, and continued until 19.15 hours, loading on that day 788 tons of potatoes in bags. At 19.45 hours the "Germania" left for England with a load of 1076 tons. I must add, that all expenses for loading the cargo on the "Germania" were born by the shipowners in accordance with their agreement.

On May 22, 1964, the agents wrote to the defendants:

"1000 tons potatoes booked for shipment per s.s. "Germania" 16/20 May 1964 loading in two days from Famagusta to Southampton or Ipswich.

With reference to the above quantity of potatoes loading of which was completed yesterday by yourselves as well as by Messrs. E. Hadjisotiriou & Sons Ltd. and Messrs. Thomaides Bros. (Cyprus) Ltd. as indicated by you, we have to inform you that according to cable we received from the owners loading time started 16/5 at 001 hrs. and ended 17/5 at 2400 hrs.

According to the above statement of our principals the vessel is on demurrage as from 18/5 at 001 hrs. till yesterday when the vessel completed, and we have been instructed by them not to deliver the Bills of Lading before collecting the freight and before the demurrage claimed be deposited in a Bank in joint name Hellenic Lines and yourselves, and to be released to the party the Arbitrators will decide.

Please acknowledge and oblige".

On the same date Mr. Montanios, the advocate of the defendants cabled an urgent telegram to the agent of the shipowners:

"ACTING BEHALF ARTEMISCO STOP REFERENCE YOUR TODAYS LETTER GERMANIA CLIENTS ABSOLUTELY DENY YOUR CLAIM FOR DEMURRAGE AND STRONGLY OPPOSE YOUR RIGHT RETAIN BLADING UNTIL PAYMENT DEMURRAGE STOP INSIST YOU DELIVER BLADING FORTHWITH CLIENTS WILLING PAY FREIGHT STOP WARNING YOU IF BLADING NOT DELIVERED SERIOUS CONSEQUENCES WILL FOLLOW AS CREDITS WILL BE UNUTILIZED AND CLIENTS LOSSES ENORMOUS STOP HOLDING SHIPOWNERS AND YOURSELVES PERSONALLY FULLY RESPONSIBLE AND WILL APPLY ADMIRALTY COURT SEIZE COMPANYS SHIPS STOP LEGAL AUTHORITIES GIVE YOU NOT RIGHT RETAIN BLADING STOP I AM INDEED ASTONISHED WHY YOU REFUSE DELIVERY BLADING WHICH IS ABSOLUTELY UNLAWFUL AND ARBITRARY STOP TREAT MATTER VERY URGENT".

As a result of this telegram, a settlement was reached between the parties, and on payment of the amount of the

freight the bills of lading (*Exhibit* 10) duly signed by the agent of the shipowners were delivered to the defendants on May 25, 1964, plaintiffs reserving their rights to claim £1000 demurrage. See letter exhibit 13.

The case as pleaded by the plaintiffs appears in paras. 7 and 9, of the petition:

> "7. The said vessel "GERMANIA" berthed at Famagusta harbour at 0700 hours on Monday the 18th May, 1964, she being then in all regards ready to load, and loaded on that day only 288 tons of potatoes. At 1840 hours of the same day the said vessel was ordered by the Famagusta Port authorities to vacate the berth and she returned to the roadstead off Famagusta harbour.
>
> .....
>
> 9. Plaintiffs contend that laytine began at 0700 hours on Monday the 18th May, 1964, and accordingly the vessel was at demurrage for 1 day 12 hours and 15 minutes, for which the defendants are responsible to plaintiffs for demurrage at the rate of £250 per day".

It would be observed from the contents, of *Exhibit* 11 that although the shipowners have treated the "Germania" as an "arrived ship" and loading time commenced on 16th May, nevertheless in para. 7, they have conceded that lay time has commenced on the 18th.

The defendant company in their defence stated in paras. 2(1) and 6 the following:

> "2. The defendants admit paragraph (3) of the petition subject to the qualifications that:
>
> (i) it was an implied term of the litigants' agreement that the two days loading time mentioned therein was to be two continuous and/or consecutive days.
>
> 6. The defendants deny paragraph (9) of the petition and allege that they completed the loading of the 1000 tons of potatoes in two days and accordingly they are not liable towards the plaintiffs for any demurrage. The interruption of the loading on 19 and 20.5.1964 was due to Port congestion and/or the general political situation and/or to the Order of the Famagusta Port Authorities mentioned in

paragraph (7) of the plaintiffs' petition – matters over which the defendants had no power and control.

.....

Further and/or in the alternative, the defendants allege that it was the duty of the plaintiffs to have their said vessel available to them for accepting the 1000 tons of potatoes on two continuous and/or consecutive days and also to have it exclusively loaded by the defendants; in breach of this duty, the plaintiffs did not have their vessel available for two continuous and/or consecutive days and they also allowed other Merchants and/or Exporters to load their cargoes on the vessel".

Counsel for the defendant Company has conceded during the hearing of the case, that he was not disputing the amount in case the defendant Company were found liable to pay demurrage. He further intimated that he was not pursuing their counterclaim.

The plaintiffs in pursuance to their claim, called two witnesses, the Chief Officer of the "Germania" and Mr. Ieropoulos. He stated, *inter alia*, in his evidence:

"I agree that a two days period was what I consider the ordinary period for loading the load of 1,000 tons of potatoes. We inserted further the minimum of demurrage in case the loading did not finish within the specified period of two. With the two days loading we meant that when the ship berthed along the quay the defendants should have been ready to go on with the loading of the ship and complete it within the term.

.....

As a matter of fact I want to make it more clear that we never intended to charge the defendants for the delay in loading if the delay was not the fault of the exporter".

Then he goes on:

"I have already stated earlier and I want to make it clear that it was never our intention to bind the defendant company for the loss of time i.e. from the time we entered into the berth and the time the port authorities asked us to go out and were bound to wait until our new turn came".

In re-examination he stated:

"As a matter of fact the port authorities during the busy loading period used to call all representatives and agents of the ships in order to try and find the best way of saving time for everybody. In this particular case of the 18th May my manager attended the meeting of the port authorities when we took this extra concession for our ship to go in. Although I was not at the meeting to hear the actual terms I have given earlier, my manager was there and he communicated those terms to me, which I have accepted. The chance was given to "Germania" to berth and load and of course we could not leave our clients as long as the chance was given to them to load, because then the Hellenic Lines would have more complaints. It was to the benefit of the plaintiffs and the defendants. If we have not taken that chance as things proved we would have entered into the quay on the 21st and would have continued with the 22nd as well. This means that the ship would have waisted more time".

Then the witness goes on:

"The reason why I did not specifically seek instructions about the terms 'loading two days' was that it is obvious to me because having entered into a liners terms contract this was well known both to me and my principals that we were not going to charge the defendants, with any delay due to any other cause, except delay, due to his own fault. I have taken that stand because I know and everybody knows, including my principals, that on the liners terms two days loading does not include delay beyond the control and without the fault of the shipper. As a matter of fact the same incident which happened in this case of the defendants, happened before and everybody knows that when the delay is due to the port authorities because of congestion, the costs for delay were paid by shipowners. I further say that by 'liners terms' we mean that the expenses of loading and unloading will be paid by the shipowners and that there was no chartered party attached to the loading. To put it in simple language it is a liner ship; not chartered specifically for that particular voyage.

There is no notice of readiness in the case of a liner ship. We receive information from the ship when it arrived and

we communicate it to the persons interested for loading. Because of the term 'two days loading' we notified the defendants of the arrival of the ship".

The evidence of the Chief Officer of the "Germania" Mr. Costas Gregoriou was to the effect that he had no information that once the ship berthed in the port on May 18, that it was for a limited space of time only.

Pausing there for a moment, it would be observed, from the evidence of the agent that not only there was no objection raised by him but, on the contrary he agreed to interrupt the running of lay time, irrespective of the fact that he has also taken the view that the parties have contracted upon the footing that on "Liner terms" the lay time of two days does not include delay in loading beyond the control and without the fault of the shipper.

Counsel for the plaintiffs, relying mainly on the authority of *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* [1925] 2 K.B. p. 172, has contended (a) that the agreement reached between the parties is contained in five telegrams exchanged between them and that the period of lay days commenced at 6 a.m. of May 18, and continued to run notwithstanding the fact that the "Germania" left the Port—not because of the fault of the shipowners but—due to an order given by the port authorities; (b) that the expression "two days loading" referred to in the agreement should not be interpreted as being two consecutive days; and (c) that the evidence of the agent of the plaintiffs should be disregarded as being immaterial to the present issues, in view of the agreement reached by the parties.

The main question to be decided in this case is the construction of the contract of the parties. In my view the terms of the contract must be construed in the light of the course of business which was well known to the contracting parties in view of the state of affairs prevailing at the port of Famagusta, particularly during the month of May. Of course to some extent decisions reached by Courts on one charterparty or contract may help by way of analogy and illustration in the decision of another contract but, however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made.

I would like to begin by saying that the task of the Court has been simplified as far as the problem of construction is concerned, because the parties have finally agreed that the "Germania" was considered as an "arrived ship", in accordance with the custom of the port when she entered in the port and was at the berth ready to load the cargo, that is to say, on May 18.

I find it convenient to deal first with the second point raised by counsel on behalf of the plaintiffs.

It is now settled that when in a charterparty or in a contract of carriage days are fixed for loading, the promise made by the freighter is for the benefit of the shipowners. In the present case in addition however to allowing two days for loading the contract allows the shipper to occupy additional days—without fixing the number of days—on payment to the shipowners, the amount of £250 demurrage "per weather working day". In *Aktieselskabet* v. *Arcos* [1927] 1 K.B. 352, Atkins L.J. said at p. 363:

> "The result of the authorities appears to be that in a contract fixing a number of lay days and providing for days at demurrage thereafter, the charterer enters into a binding obligation to load a complete cargo within the lay days subject to any default by the shipowner or to the operation of any exceptions, matters which do not arise in this case. If the lay days expire without a full cargo having been loaded the charterer has broken his contract. 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. For correlative to the ship's right to receive the agreed damages is the charterer's right to detain the ship for the purpose of enabling him, if possible, to perform his broken contract and so mitigate any further damage".

When days are spoken without qualification as in the present contract, they are understood to mean consecutive days. Lord Esher, M.R. has this to say, in *Nielsen* v. *Wait* [1885–86] 16 Q.B.D. 67 at page 73:

> "Having arrived at this conclusion, I must consider how are lay days—not 'running days'—to be calculated. They must begin from the time, when the ship is at her berth in the usual place of delivery, where she can deliver. They

must begin then, and they are to be counted, unless something appears to the contrary, consecutively. That is not because the phraseology says that they are consecutive, but because it is taken as a necessary implication of the meaning both parties, that the moment the ship begins to unload they are to go on consecutively each day to unload her, and they must not either of them at their option take a holiday without the leave of the other. If 'working days' are put in, on the face of it, in a manner, that consecutiveness is spoilt, because that phrase does not include Sundays. With 'running days' or with 'days' only there is nothing to take out the consecutiveness in the mere phraseology. In either of these cases the work must go on day after day consecutively. If in the charterparty it is provided that it shall be running days except Sundays, then upon the face of the charterparty the consecutiveness is spoilt, and although there are to be running days yet Sundays are excepted. What is the meaning of that? The meaning is that if the exception had not been put in, the phrase would have included Sundays, but by putting in the exception Sundays are taken out. That can be done in express language. Now comes the question, is the phraseology of 'running days' contradicted by proof of a custom which says that some intermediate days, such as Sundays, are at the port in question to be taken out? It does not seem to me that there is any contradiction. It is an explanation how the running days in the charterparty are to be worked, and they are not to be worked consecutively if the custom is contrary".

See also the case of *Reardon Smith Line Ltd.*, v. *Ministry of Agriculture, Fisheries and Food* [1963] A.C. 691 particularly the speech of Lord Devlin who has explained how the Law is developed on this point.

Pausing there, it would be observed that this is in line with the facts of this case, adduced on behalf of the plaintiffs as regards the loading of the cargo governed by the custom of the port of Famagusta. Having reached this conclusion I would dismiss the contention of counsel on this point.

With regard to the first contention of counsel it is clear that by the terms of the contract the shipper has agreed to load the cargo of potatoes within a fixed period of two consecutive days otherwise demurrage amounting to £250 to be paid per

weather working day. I take the view that this is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever be the nature of the impediments which prevent him from performing it, unless such impediments are covered by exceptions in the contract or arise from the fault of the shipowner or those for whom he is responsible.

In *Cantiere Navale Triestina* (*supra*) the headnote reads as follows:

> "A charterparty of an Italian ship provided that 216 running hours (Sundays and holidays excepted), weather permitting, should be allowed the charterers for loading and discharging, and that the lay days should commence from the time the steamer was ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth. The exceptions clause excepted 'restraint of princes, rulers and people'. The ship arrived at Batoum, and notice of readiness to load was given, and the lay days began to run. Owing however to a dispute between the Russian and Italian Governments the ship was ordered by the port authorities to leave Batoum and also Russian waters, and accordingly the ship went to Constantinople, subsequently permission was obtained to load the ship at Batoum and she returned after being absent from the port a little over a fortnight. The owners subsequently claimed dumurrage from the charterers, on the basis that the lay days continued to run during the period the ship was absent from Batoum".

Pollock M.R., had this to say on appeal, at p. 196:

> "The contract contained in the charterparty is absolute. It contains the phrase: 'The laying days shall commence from the time the steamer is ready to receive or discharge her cargo.....berth or no berth'. Hence the vicissitudes which are incurred are *prima facie* deemed to be at the risk of the charterers. Mr. Raeburn cited three cases which establish that proposition, if cases are needed to establish such a principle: *Thiis* v. *Byers* 1 Q.B.D. 244; *Budgett & Co.* v. *Binnington & Co.* [1891] 1 K.B. 35; and *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa*, [1920] A.C. 88. The rule as to liability generally is stated in the last named case by Lord Finlay as follows

(1920) A.C. 88, 94: 'If the charterer has agreed to load or unload within a fixed period of time.....he is answerable for the non-performance of that engagement, whatever the nature of the impediments unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible' ".

This case has been explained and distinguished in *Compania Crystal de Vapores of Panama* v. *Herman & Mohatta (India) Ltd.* [1958] 2 All E.R. at 508. The headnote reads:

"By a charterparty dated Apr. 24, 1954, the charterers chartered a vessel from the owners to load a cargo at Calcutta for dicharge at Kobe. Having arrived at Calcutta on Apr. 26, the vessel was ordered by the charterers to berth at No. 1 Garden Reach Jetty. There was no evidence to show that this was an unsafe berth. Conditions at the port of Calcutta were that, from time to time during the year, there were bore tides of varying severity. Notice of readiness was tendered and lay time began at 1300 hours on Apr. 29. Loading began on Apr. 27 and continued till noon on Apr. 30, when the harbour master ordered the vessel to leave Garden Reach Jetty, having formed the opinion that, by reason of her overall length and the mooring facilities available at the jetty, she could become a danger during the bore tides which were expected. Loading was discontinued and the vessel shifted to king George Dock Buoys where she remained until May 6 (a period of six days) when she returned to Garden Reach Jetty where loading was resumed. If the six days were included in the lay days the charterers would be liable to pay demurrage".

Devlin, J., after quoting in his judgment from the decision of Channell J, in *Houlder* v. *Weir* [1905] 2 K.B. at p. 267, had this to say:

"The principle that CHANNELL, J., is there laying down is not, in my judgment, confined, as counsel for the charterers would have me confine it, to cases where what is being done by the shipowner is necessary for the safety of the cargo as well as of the ship. Of course, the safety of the cargo is threatened by any threat to the safety of the ship, and that is as much true in this case in relation

to the cargo that was on board before she was moved as in the case which CHANNELL, J., was considering. In my judgment the principle which CHANNELL, J., was laying down is quite independent of that: he is saying that the mere fact that the shipowner had, by some act of his, prevented the discharge is not enough to interrupt the running of the lay days; it is necessary for charterers to show also that there was some fault on part of the shipowner and, if the act of removal by the shipowner or the intervention with the lay days is caused by something that is beyond his control and not his fault, then the laytime is not interrupted".

In *Houlder* v. *Weir* (*supra*) Channell J., delivering the judgment of the Court had this to say at p. 271:

> "The remaining question is whether the days on which the vessel was taking in ballast as well as discharging cargo should be reckoned as whole days or not. I think they ought. When Lord Esher in *Budgett* v. *Pinnington* [1891] 1 Q.B. 35, at p. 38, said that 'if the shipowner by any act of his has prevented the discharge, then, though the freighter's contract is broken, he is excused', he was referring to a case in which the shipowner's act preventing the discharge was in breach of his obligation to give the charterer all facilities for the discharge. But here the act of the shipowner which delayed the discharge was not a breach of any obligation of his. The taking in of ballast in the course of the discharge was a thing necessary to be done. When part of the cargo has been discharged something must be done to keep the ship upright for the safety of the remainder of the cargo as well as of the ship itself. Under those circumstances the case stands on the same footing as that of the discharge of the cargo being prevented by some act beyond the control of the shipowner, and consequently though the charterers have been prevented from having the full benefit of those days, they must be treated as whole days".

In *Budgett & Co.*, v. *Binnington & Co.* [1891] 1 Q.B. p. 35, Lord Esher M.R., had this to say in his judgment at p. 37:

> "This is a contract by the freighter, by which he undertakes, under certain circumstances, to pay demurrage. It occurs in a document which is in constant use, and the

stipulation is in an ordinary form and has been construed frequently. It has been held that the demurrage contract, where a fixed number of lay days is mentioned, is a contract by the freighter, that if the ship is detained over those days he will pay demurrage for so long as the ship is in such a condition that she cannot be handed back for the use of the shipper. This has been called an absolute and independent contract, and it is obvious that a contract is intended to be drawn between such a contract and a conditional one, and that by an absolute contract is meant an unconditional one. The only condition attached to it is that the lay days shall have commenced and run out, and, that condition being fulfilled, the obligation arises. Directly the shipowner shews this state of facts, he has proved his case, and it lies on the other side to shew, not that there has been no breach of contract, but that he is excused from the performance—in other words, his case is one of confession and avoidance, and the whole burden of proof is on him. Speaking generally of all contracts, a breach is excused where the party committing the breach has been prevented by the other side from carrying out his contract. Here the condition is that the cargo should be out of the ship in a certain number of days; and if the shipowner, by any act of his, has prevented the discharge, then, though the freighter's contract is broken, he is excused. It is said in this case that the delivery of the cargo is the joint act of the shipowner and the consignee, and that, if so, the shipowner has not fulfilled his part, and so has prevented the performance of the contract of the consignee. The delivery of a cargo is undoubtedly the joint act of the shipowner and the merchant freighter: but naturally it is open to the parties to regulate the share in the discharge to be taken by either of them. In this case, the share to be taken has been regulated by custom, and the merchant freighter has not to begin his part, as is usually the case, when the cargo is brought to the rail of the ship".

Later on he says:

"That reduces the matter to the question whether there has been default by any persons for whom the defendants are responsible. The non-delivery, in fact, was occasioned, as was put by my brother Lopes in the course of the argument, by something which the defendants could not foresee and by the act of persons over whom they had no control.

It was caused by the act of the workmen employed by the stevedore, and by their breach of contract with their employers. The shipowner had no control over these workmen, and is not responsible for the consequences of their acts, and consequently there is nothing to relieve the consignee from the absolute contract to pay demurrage. This is no new principle of law, but only a question whether the facts bring this case within a recognized rule of law. I am of opinion that the Court below were right in their application of that rule, and that this appeal must be dismissed".

See also the case of *George S. Galatariotis & Sons Ltd.*, v. *Atlas Levante–Linie A.G. of Bremen*, 23 C.L.R. p. 170.

After reviewing the authorities and in the light of the evidence of Mr. Ieropoullos, I would like to reiterate once again that the parties have contracted on the footing that the risk would fall on the shipowner when the port was crowded and his ship "Germania" would be prevented from entering into a loading berth; and that lay time would commence as soon as the ship entered into a loading berth ready to receive the cargo and to go on with the loading continuously until it was completed in accordance with the established practice of the port known to both parties.

It is not now in dispute that when the "Germania" entered into a loading berth on the 18th, it was not her turn, and no one knew when it would be her regular turn. In the absence of evidence that the defendants knew of the arrangement made between the agents and the port authorities, it is right I think, to assume having read the letter written to the shipper dated the 17th, that the "Germania" would have been ready to receive the cargo on the 18th and to go on without interruption until the loading was completed. As it appears from the evidence, and I need not add that it is the evidence of a very reliable witness whose evidence binds his principals, that it has been made very clear, that he was responsible for the non-performance of the engagement of the shipper to load within the fixed period of time. In my view, therefore, it was not simply a question, as contended by counsel for the shipowners, that the "Germania" was compelled to leave the port by order of the port authorities; and this case does not come within the principle formulated in the case of *Cantiere Navale Triestina* (*supra*). Notwithstanding the absence of the ship from the

port the lay days do not continue to run against the shipper. As we do now know, the regular turn of the "Germania" to enter into a loading berth was the 21st; and as the agent has frankly admitted that in order to save more time and to avoid further complaints against his principals, he accepted the arrangement with the port authorities to interrupt the lay days having in mind the interest of the plaintiffs.

For the reasons I have endeavoured to explain, I am satisfied that the defendants have succeeded in the material circumstances of this case, to show that the removal of the "Germania" from the port and their failure to load a complete cargo within the stipulated lay days, arose through the fault of the plaintiffs or his agents for whom they are responsible. In my opinion, therefore, the running of lay time has not continued to run against the defendant company.

I would, therefore, dismiss the action of the plaintiffs, with costs in favour of the defendants. Counterclaim is also dismissed.

Action dismissed with costs; counterclaim also dismissed.