1988 August 23

(SAVVIDES, J.)

WORLD TIDE SHIPPING CORPORATION OF LIBERIA,

Plaintiffs,

v.

VASSILIKO CEMENT WORKS LTD.,

Defendants.

(Admiralty Action No. 64/75).

Admiralty — Practice — Whether possible to add by the petition a cause of action, not included in the writ of summons — Question determined in the negative — O.20, r.4 of the Old English Rules and O.20 Rule 1A of the Civil Procedure Rules.

Admiralty — Practice — Set off as a defence — Claim for despatch money — Defendants entitled to raise their claim by way of set off to plaintiffs' claims.

Carriage of goods by sea — Shortlanded goods, claim for — Who can raise such a claim — The holders and/or indorsees of the relevant bill of lading — Allegation by shipper that such holders and/or indorsees deducted from the price of the goods the amount of the relevant claim — In the absence of production of a deed of subrogation, shippers cannot recover.

Agency — Money paid to agent — Instructions by payer to release the amount to the principal — Retention of the money by the agent — Principal cannot claim from the payer, but only from his agent.

The plaintiffs' claim in the writ is for U.S. Dollars 345,053.70 being balance of freight and/or hire and/or demurrage relating to the carriage by the vessels «THERAIOS», «CHRYSSOPIGI 2», «ELENA» and «SOPHIE» of cement from Cyprus to port Harcourt, Nigeria, by virtue of an agreement concluded between plaintiffs and defendants on or about the 29th January, 1975.

By their petition the claim was reduced to 145,053.70, as, in the meantime the defendants had paid 200,000 U.S. Dollars.

However, the petition introduced a new cause of action for U.S. Dollars 255,212.50 damages for breach of the said contract by the defendants in that they refused to tender for loading or having refused to load 6675 metric tons of cement, balance of the agreed quantity under the contract.

The parties agreed the demurrages payable, if the plaintiffs succeed, at 315,000 U.S. Dollars less 200,000 U.S. Dollars paid as aforesaid. The defendants claimed further a deduction of 25,000 U.S. Dollars paid by them allegedly to plaintiffs' agents in Cyprus.

The parties, also, agreed that:

(a) The claim of the defendants for despatch money would be reduced to 17,000 U.S. Dollars.

(b) The balance of freight due by the defendants is 22,366 U.S. Dollars.

The quantity of the cement, which had been actually transported under the contract, was transported by four ships, THERAIOS, CHRYSSOPIGI, ELENA and SOPHIE. The defendants disputed liability for demurrages in respect of the last three ships.

The amount of 25,000 U.S. Dollars, hereinabove referred to, was paid by the defendants to the plaintiff' s agents in trust until clearance of some disputes. When, however, the defendants instructed the recipients of the money to release the funds to the plaintiffs, the recipients, who, in the meantime, had ceased to act as the plaintiffs' agents, retained the same on account of a claim of their own against the plaintiffs. The plaintiffs, as a result, instituted proceedings against their former agents for the recovery of the said sum.

The defendants claimed also to set off 17,000 U.S. Dollars despatch expenses allegedly payable by the plaintiffs to them. They also claim to set off a claim for short delivery of the goods. In this respect, the defendants alleged that the consignees of the goods deducted the relevant amount from the price payable by them.

Held, (1) It is not possible to introduce by the petition a new cause of action, which had not been included in the writ. It follows that the claim for damages for breach of contract has to be dismissed.

(2) The plaintiffs are entitled as per the agreement of the parties to 22,366 U.S. Dollars, balance of freight due.

(3) On the material before it, this Court is satisfied that plaintiffs have proved their entitlements to demurrages amounting to U.S. Dollars 315,000 out of which 200,000 have been paid, leaving a balance of U.S. dollars 115,000.

(4) When defendants instructed the plaintiffs' agents to release to the plaintiffs the 25,000 U S Dollars the plaintiffs were entitled to collect from their agents such amount irrespective of the fact that after the collection of such amount by the agents, they ceased to operate as agents If the plaintiffs had any claim in respect of such amount they should turn against their agents by taking judicial proceedings against them for misappropriation of this amount, as they rightly did by instituting an action against them but they had no right to refute payment of such amount by defendants

(5) In the light of the English Rules applicable to Admiralty actions the defendants could raise a claim such as the one for the despatch money by way of set off In the light of the evidence, this claim should be accepted

(6) What emanates from the evidence part of the cement was not delivered because it has become solid («caked») and remained in the holds of the vessel No evidence was adduced that the non-discharge of any quantity was due to any fault of the plaintiffs

The only persons entitled to claim for short landed good were the indorsees or holders of the relevant Bill of Lading Though the defendants alleged that the latter deducted the amount from sums due to the defendants, the latter can still not recover as they did not produce any deed of subrogation to the rights of the indorsees or holders of the bills

(7) The defendants failed to substantiate their counter-claims

Judgments for plaintiffs for U S Dollars 95,366 with interest at 9% as from the delivery of this judgment and costs Counterclaim dismissed with no order as to costs

Cases referred to

Cave v Crew, 62 L J Ch 530,

United Telephone Company Limited v Tasker, Sons and Co 59 L T 852

Admiralty action.

Admiralty action for the sum of U S Dollars 345,053 70 being balance of freight and/or hire and/or demurrage relating to the carriage by the vessels «THERAIOS», «CHRYSSOPIGI 2» and «SOPHIE» of cement from Cyprus to port Harcourt Nigeria

G Michaelides, for the plaintiffs.

M. Christofides, for the defendants.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Plaintiffs' claim in this action against the defendants is, according to the writ of summons, for the sum of U.S. Dollars 345,053.70 being balance of freight and/or hire and/or demurrage relating to the carriage by the vessels «THERAIOS», «CHRYSSOPIGI 2», «ELENA» and «SOPHIE» of cement from Cyprus to port Harcourt, Nigeria, by virtue of an agreement concluded between plaintiffs and defendants on or about the 29th January, 1975. On the writ of summons it is stated by plaintiffs that their claim is made with reservation of their rights for other claims they may have against the defendants.

By their petition dated 17th July, 1976 the plaintiffs reduced their aforesaid claim to U.S. Dollars 145,053.70 as in the meantime the defendants had paid U.S. Dollars 200,000 in December, 1975, but by paragraph 7 of their petition they introduced a new cause of action for breach of the aforesaid contract by the defendants in that they refused to tender for loading or having refused to load 6675 metric tons of cement, balance of the agreed quantity under the contract, for which plaintiffs claim damages amounting to U.S. Dollars 255,212.50.

By their answer and counterclaim the defendants deny that they are indebted to the plaintiffs in respect of any amount or that they were in breach of the agreement and they allege a breach of the agreement by the plaintiffs who failed to provide the necessary transport for the balance of the cement agreed to be transported. Their counterclaim is for damages for breach of contract, for services rendered by them at the request of the plaintiffs for expediting the collection of demurrages and damages in respect of shortlanded goods.

Before embarking on the issues before me I shall deal briefly with the additional cause of action introduced by paragraph 7 of the petition.

Paragraph 7 of the petition reads as follows:

> «7. In breach of the said agreement the defendants have not tendered for loading and/or have refused to load or offer to load the balance of the agreed quantity of cement i.e. 6675

metric tons (25000 - 18325) and in consequence the plaintiffs have suffered the following damages:

(a)	Loss of freight 6675 metric tons at U.S. $25.50 per metric ton	U.S. $170,212.50
(b)	Loss of demurrages at the discharging port.....	U.S. $175,000.00
	Total.....	U.S. $345,212.50
	Less plaintiff' s costs for the transport of this cargo.....	U.S. $90,000.00
		U.S. $255,212.50»

Under rule 1A of Order 20 of the Civil Procedure Rules «Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ.»

The said rule corresponds verbatim to rule 4 of Order 20 of the R.S.C. in England (the old rules in force in 1960; see Annual Practice 1960). In the relevant notes to the said rule we read the following in this respect at p.493:

> «Hence the plaintiff is permitted in his subsequent statement of claim, to alter, modify or extend his original claim to any extent, and to claim further or other relief, without amending his writ *(Large v. Large,* (1877) W.N. 198; *Johnson v. Palmer,* 4 C.P.D. 258); provided he does not completely change the cause of action indorsed on the writ without amending the latter *(Cave v. Crew,* 62 L.J.Ch. 530; *Ker v. Williams,* 30 S.J. 238); or introduce an entirely new and additional cause of action which cannot be conveniently tried with the original claim (*United Telephone Co. v. Tasker,* 59 L.T. 852) or introduce a claim which the Court has no jurisdiction to entertain - e.g. a claim which, if indorsed upon a writ, would not have been allowed to be served out of the jurisdiction: *Waterhouse v. Reid* (1938), 54 T.L.R. 332.»

In Bullen & Leake and Jacob' s Precedents of Pleadings, 12th ed. at p.70 it reads as follows under the heading: «Altering, modifying or extending claim indorsed on the writ.»

«Where the statement of claim is not indorsed on the writ, but is a separate document, whether served with the writ or later, it must, in general, confine itself to the causes of action mentioned in the general indorsement on the writ which itself consists of a concise statement of the nature of the claim made or the relief or remedy required in the action. Accordingly, the statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as or include, or form part of, facts giving rise to a cause of action so mentioned. Subject to such limitation, the plaintiff is permitted in his statement of claim to alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement. But this does not entitle the plaintiff completely to change the cause of action indorsed on the writ, or to introduce an entirely new and additional cause of action, or to introduce a claim which the court has no jurisdiction to entertain.»

In *Cave v. Crew*, 62 L.J.Ch. 530 a plaintiff indorsed his writ with a claim for an account of partnership dealings between himself and the defendant. By his statement of claim he charged the defendant with certain alleged misrepresentations, and claimed, besides the relief mentioned in the writ, return of the premium paid by him to the defendant. The defendant moved to strike out the statement of claim as embarrassing. Kekewich, J., in granting the application had this to say at p. 531:

«This motion raises a question of some little difficulty. On the one hand it is desirable to give a liberal construction to Order XX, rule 4, and one cannot shut one's eyes to the tendency to make pleadings less exact than they used to be. On the other hand, if there are to be pleadings at all, there is a great advantage in holding that they should define the issues between the parties, and that neither party should at any time be embarrassed by the pleadings of the other side. One is unwilling here to increase the costs by ordering a separate action to be brought, and one is unwilling also to prevent a reference to arbitration. It is diffucult to steer clear under these circumstances, and I hardly know how to do it. A writ here was issued of the simplest character. It does not ask for dissolution of the partnership, but it is obvious that that is implied. It asks for partnership accounts and other relief. There would be no

difficulty in getting a decree on that, but the defendant would be entitled to stay proceedings for the purpose of referring the matter to arbitration under the clause in the partnership articles, for, according to the well recognized rule, these accounts ought to be referred to arbitration. The statement of claim was delivered on the 20th of January, and, as framed, it would entirely prevent a reference to arbitration. I think that point affords a solution of the difficulty, which otherwise might appear greater than it really is. It is said that the statement of claim is not an 'alteration, modification, or extension' of the writ within Order XX, rule 4. Let us see what the statement of claim really is. (His Lordship read various paragraphs in the statement of claim, and continued:) On these statements which allege misrepresentation, the plaintiff asks for return of the premiums and damages. No indication of that claim is found in the writ. The rule does not, in my opinion, apply to an alteration by the claim which changes the whole character of the action. The claim here is not within the purview of the writ at all. I cannot settle the plaintiff' s pleading for him, and I cannot separate those parts of the claim which are covered by the writ from those which are not. I think the best thing to do is to strike out the statement of claim, giving liberty to the plaintiff to deliver within fourteen days another statement of claim pursuant to the indorsement of the writ».

In the case of the *United Telephone Company Limited v. Tasker, Sons and Co.*, 59 L.T. 852, an action was commenced by the plaintiffs in 1884 against the defendants for alleged infringement of the plaintiffs' patent. That action was, however discontinued in consequence of the evidence adduced by the defendants on interlocutory proceedings, and the plaintiffs paid the costs. The plaintiffs, in May, 1888, commenced another action against the defendants for the same object; and by their writ they claimed an injunction, delivery up of the infringing instruments, and an account, or damages and costs. The statement of claim in the second action contained an allegation that, since discontinuing the former action, the plaintiffs had discovered that the defendants' evidence which led to its discontinuance was false. The statement of claim then contained a claim (which did not appear in the writ) that the second action might be treated as supplemental to the previous action, and that the defendants might be ordered to repay the costs paid to them in the previous

action, and to pay the costs, charges, and expenses of the plaintiffs of that action as between solicitor and client.

Kay, J. in the circumstances of the case found that it was irregular to introduce into the statement of claim a different cause of action not mentioned in the writ; that the causes of action contained in the statement of claim were entirely separate and distinct; and that the two paragraphs above mentioned must be struck out, leaving the plaintiffs to bring a separate action.

In the present case plaintiffs' claim as per their indorsement is only in respect of balance of freight and demurrage due for cargo carried by certain specifically named ships. At the time of the filing of their writ they were aware of the existence of other independent claims against the defendants in respect of which they expressly reserved their rights for a separate action. By paragraph 7 of their petition they have introduced a different, separate and distinct cause of action not mentioned in the writ. This is clearly not a case of a mere alteration, modification or extension of the claim but an introduction of a new cause of action which is not within the purview of the writ at all and in the circumstances paragraph 7 of the petition and the consequential prayer based thereon has to be struck out, leaving the plaintiffs at liberty to bring a separate action if they so wish.

Evidence which was allowed to go in, in respect of such claim may be only relevant to the issue raised in the counterclaim alleging breach by the plaintiffs of their contract of carriage of defendants' s goods.

The plaintiffs are a limited company incorporated in Monrovia, Liberia and are carrying on shipping business in Greece and other parts of the world. The defendants are also a company of limited liability registered in Cyprus and they are manufacturers of cement. By an agreement concluded by telexes and telephone between the parties during the period 28.1.1975 - 15.2.1975, the plaintiffs undertook to transport by sea, 25,000 metric tons of cement (10% more or less at defendants' option, to be declared by the 15th February, 1975) from Larnaca or Limassol, to Port Harcourt, Nigeria, on account of the defendants. The terms of the contract, as alleged by plaintiffs, are as follows:

«(a) The freight was to be at the rate of U.S. $25.50 per

metric ton Bill of Lading weight FIOS payable upon signing of bill of lading.

(b) Discharge 'free out' was to be at an average 750 metric tons per weather working day of 24 consecutive hours shex even if used time to commence to count 24 hours after notice of readiness whether the vessel was in berth or not.

(c) Demurrage rate was to be at U.S. $0.40 per metric ton loaded, (bill of lading weight), with maximum U.S. $3,500 per day and the payment of demurrage, if any at discharging to be made by buyers/receivers - who were the Nigeria North Eastern State Government - upon presentation to them of Master' s Statement. If, however, above government authorities fail to effect payment same will be made by defendants within 30 days from the date that defendants receive statement of facts and time sheet duly signed by receivers, agents and masters.

(d)Despatch money was to be half the demurrage rate.»

According to the defendants the terms of the contract were as follows:

«(a) Shipment of the aforesaid quantity to be made within period 1st February, to 15th March 1975 (no more than one vessel to be accepted as ready for loading simultaneously) from Larnaca or Limassol to Port Harcourt, Nigeria.

(b) Loading free in at 200 metric tons per workable hatch with maximum 1,000 tons, per WWD of 24 consecutive hours. Time to commence to count at 08.00 hours at the next working day after Master tende[illegible] notice of readiness. Time from noon Saturday or day preceding a holiday to 08.00 hours on Monday or day following a holiday not to count even if used.

(c) Discharge 'free out' at average 750 tons per WWD of 24 consecutive hours SHEX even if used. Time to commence to count 24 hours after notice of readiness whether vessel in berth or not.

(d) Demurrage rate at both ends at U.S. Dollars 0.40 (forty U.S. Cents) per ton loaded (bill of lading weight) with maximum U.S. Dollars 3,500 per day, whichever is the lowest.

(e) Despatch money half the demurrage rate.

(f) Payment of demurrage, if any, at loading port to be made by Defendants as charterers/shippers together with freight on signing bill of lading.

(g) Payment of demurrage, if any, at discharging port to be made by buyers/receivers - which is the Nigeria North Eastern State Government - upon presentation to them of Master' s statement. If, however, above Government authorities fail to effect payment same will be made by the Defendants, as charterers, within 30 days from the date of receipt by them of statement of facts and time-sheet. duly signed by receivers,agents and Master: Provided that the Defendants shall not be liable to pay any demurrage (in case the aforesaid Government Authorities failed to effect payment) in respect of the first shipments, i.e. in respect of m/v «ELENA» and m/v «SOPHIE» and that the payment of such demurrage if any, at discharging port shall be arranged between the Plaintiffs and the Nigeria receivers directly.

(h) Freight: U.S. Dollars 25.50 per metric ton, bill of lading weight FIOS payable upon signing bill of lading.

(i) Otherwise GENCON Charterparty.»

It should be noted at this state that according to the contents of plaintiffs' telex dated 28th January, 1975, the plaintiffs expressly constituted as their agents in Cyprus in respect of this contract the Cyprian Seaways Agencies Ltd. of Limassol.

In compliance with the said contract a quantity of 18,325 tons of cement was loaded by the defendants on ships supplied by plaintiffs as follows:-

Vessel	Quantity
THERAIOS	5,200
CHRYSSOPIGI	4,850
ELENA	5,200
SOPHIE	3,075

Loading commenced on 21st February, 1975 and ended on the 21st March, 1975 (having been extended from the 15th March, 1975). It is alleged by the defendants that out of the above quantity

a quantity of 1043.9 tons was short-delivered to the knowledge of plaintiffs' agents in Nigeria. The freight and demurrages claimed by the plaintiffs, according to the particulars set out in the petition, amount to U.S. $345,053.70. After the institution of the action the defendants paid U.S. $200,000 on account of the said sum, thus leaving a balance of U.S. $145,053.70 which is claimed by the plaintiffs.

The defendants dispute the amount of demurrages and allege that the demurrages were as follows:

(a) THERAIOS, U.S. $61,498.74 instead of U.S. $65,918.74 claimed.

(b) CHRYSOPIGI, U.S. $112,540.50 instead of U.S. $127,196.68.

(c) ELENA, U.S. $106,457.10 instead of U.S. $107,086.72.

(d) SOPHIE, U.S. $21,709.50 instead of U.S. $27,425.56.

It is further alleged that in the case of CHRYSOPIGI the winches were not working properly and the Nigerian receivers deducted six days, one hour and 30 minutes from the demurrage time.

It is the contention of the defendants that according to the terms of the contract and in particular term (g) mentioned hereinabove they were only liable to pay demurrages in respect of the ship THERAIOS only and not liable for the other three ships.

It is further alleged by the defendants that in addition to the amounts admitted by the plaintiffs as having been paid to them, the defendants paid an additional sum of U.S. $25,000 through the Cyprus agents of the plaintiffs.

The defendants further allege that they are entitled to recover from the plaintiffs a sum of £6,193 being plaintiffs' share in expenses incurred by the defendant at the request of the plaintiffs to expedite the payment by the Nigerian receivers of the demurrages claimed by plaintiffs. Such amount is claimed in respect of expenses incurred by the defendants for instituting legal proceedings in the High Court of Justice in England, to recover demurrages and also for sending representatives to Lagos and London on three occasions, for such purpose.

In the course of the hearing counsel informed the Court that they reached an agreement on certain claims as follows:

(a) In case plaintiffs succeed in their claim the demurrages are agreed at 315,000 U.S. dollars as follows:

Vessel	ELENA	U.S.	Dollars	109,680
»	SOPHIE	»	»	24.885
»	CHRYSOPIGI	»	»	114,520
»	THERAIOS	»	»	65,914

Out of the above a sum of 200,000 U.S. dollars was paid as per para. 6 of the petition.

The defendants further claim to be entitled to a deduction of an additional sum of 25,000 U.S. dollars paid to plaintiffs' agents subject to their being successful in this respect.

(b) Defendants' claim for despatch money is reduced to 17,000 U.S. dollars.

(c) The amount of U.S. dollars 447,921.09 mentioned in paragraph 8 of the answer as rendered to plaintiffs for freight to be reduced by U.S. dollars 3,000 which is the difference which arose as a result of exhange differences.

(d) The balance of freight due by the defendants is agreed at U.S. dollars 22,366 a figure reached by deducting the amount of U.S. dollars 444,921.09 rendered by defendants from the amount of U.S. dollars 467,287.50 claimed by plaintiffs.

Having dealt with the facts of the case I am now coming to embark on the various issues before me.

(A) FREIGHT DUE: In the light of the statements and admissions made the plaintiffs are entitled to the sum of U.S. dollars 22,366 for balance of freight.

(B) DEMURRAGES: The amount of demurrages has already been agreed at U.S. dollars 315,000 out of which a sum of U.S. dollars 200,000 has been paid leaving a balance of U.S. dollars 115,000.

It is the allegation of the defendants that they are only responsible for the demurrages in respect of the ship THERAIOS which has already been agreed as being U.S. dollars 65,914 and deny any liability for demurrages of the other three ships amounting to 249,086 U.S. dollars. The defendants base their claim in this respect to the contents of the Bills of Lading issued with the

loading of the goods. If their allegation is accepted as correct then it means that though the defendants' liability for demurrages was only for U.S. dollars 65,914 (ship THERAIOS) they paid the plaintiffs on account U.S. dollars 200,000 an amount by far in excess to what they owed.

By his written address counsel for defendants in an attempt to explain why such amount was paid offered an explanation that as the defendants succeeded to collect from the Nigeria North Eastern State Government 77.5% of the demurrages, they paid this amount to the plaintiffs. The question however remains why once neither the receivers nor the defendants were liable for the payment of demurrages for the three ships they paid just for no reason such a big amount for demurrages. Were they doing it out of charity or because they were bound under the terms of their agreement?

On the material before me and the terms of the contract as may be deduced from all telexes exchanged between the parties and the oral evidence I find that the payment of demurrages at discharging port in respect of all consignments were payable by the buyers/receivers - The Nigerian North Eastern State Government - upon presentation to them of Master' s Statement. In case the said receivers failed to effect payment same would be made by defendants within 30 days from the date that defendants received statements of facts and time-sheet duly signed by receivers, agents and master. In fact such statements as aforesaid had been received by the defendants.

On the material before me I am satisfied that plaintiffs have proved their entitlements to demurrages amounting to U.S. dollars 315,000 out of which 200,000 have been paid, leaving a balance of U.S. dollars 115,000.

(C) PAYMENT OF AN ADDITIONAL SUM OF U.S. DOLLARS 25,000. It is the allegation of the defendants that they have paid this amount to the plaintiffs through plaintiffs' agents in Cyprus, namely, Cyprian Seaways Agencies Ltd.

It is common ground that the amount of U.S. dollars 25,000 was paid by the defendants to the plaintiffs' agents in Cyprus, the Cyprian Seaways Agencies Ltd. in October, 1975. According to the evidence of P.W. 1 the President of the Plaintiff Company and P.W 2 this amount was paid to plaintiffs' agents to be held in trust for both parties until the settlement of certain disputes after which

it would be released to the plaintiffs and be transmitted to them by their agents. Furthermore in the course of the hearing counsel representing both parties made a joint statement in this respect to the effect that the sum of U.S. dollars 25,000 was paid by the defendants through the Cyprian Seaways Agencies Ltd who at the time acted as the plaintiffs' agents for their vessels in Cyprus, into a joint account with the plaintiffs as a guarantee until the clearance of various disputes between the litigants. According to the evidence of P.W. 1 the defendants, some time later, instructed the Cyprian Seaways Ltd to pay to the plaintiffs the said sum but the said company, which in the meantime ceased to act as plaintiffs' agents, informed the plaintiffs that they would retain such amount themselves as they had to receive from the plaintiffs an equal amount. As a result plaintiffs brought an action against their agents for the collection of such amount.

It is clear that at the time the aforesaid amount was paid to the Cyprian Seaways Ltd., Cyprian Seaways Ltd. was the agent of the plaintiffs acting on their behalf and the amount of U.S. dollars 25,000 was paid to them as agents of the plaintiffs. When the defendants released this amount and instructed the Cyprian Seaways Ltd. to pay it to the plaintiffs, the plaintiffs were entitled to collect from their agents such amount irrespective of the fact that after the collection of such amount by the agents, they ceased to operate as agents. If the plaintiffs had any claim in respect of such amount they should turn against their agents by taking judicial proceedings against them for misappropriation of this amount, as they rightly did by instituting an action against them but they had no right to refute payment of such amount by defendants.

The defendants further claim to set off against the plaintiffs' claim an amount of U.S. dollars 17,000 as despatch expenses payable by the plaintiffs to them. Bearing in mind the fact that in Admiralty Actions the English Rules of the Supreme Court are applicable, the defendants are entitled to raise by their defence such a claim by way of set off.

In accordance with the terms of the agreement as embodied in the telexes, the defendants were entitled to claim from the plaintiffs despatch expenses at the point of loading at the rate of one-half of the agreed rate of demurrages. According to the statement made by Counsel on both sides, the amount of despatch expenses has been agreed at U.S. dollars 17,000. This amount has not been disputed either by the evidence of the plaintiffs or by

the written address of their counsel. In the result they are entitled to set off this amount against plaintiffs' claim.

A further claim which the defendants seek to set off against plaintiffs' claim is in respect of short delivered goods. This claim is based on the statements of facts which were signed by the parties' shipping agents in Nigeria and by the Master. What however emanates from such statements is that part of the cement was not taken by the Receivers because it had become solid («caked») and remained in the holds of the vessel. It is the allegation of the plaintiffs that the reason for that was the long stay of the ship in the Anchorage of the Nigerian Port due to humidity and through no fault of the plaintiffs. The defendants have not called any evidence that such situation arose as a result of any neglect or default on the part of the plaintiffs.

In the Statement of Facts for CHRYSOPIGI (exh. 1 (45)) the following Master' s remarks appear indorsed therein «Damaged cargo not discharged in spite of my protest reserving all owners rights».

In the case of ELENA in the Statement signed by the Master (exh. 5) the difference of 35 tons not discharged is explained as follows:

> «.....Thirty five tons sweeping cargoes in Hold No. 2 remain on board as Receivers have no more time to discharge due to the reason that the vessel shall undock 0700 hours May 17th as per Port Authorities order. Taken Certificate from Receivers duly signed that remaining cargoes or sweeping cargoes will be credited the vessel and they are not interested and no claim whatsoever may arise.»

In the case of SOPHIE page 4 of the Statement of Facts, Exhibit 1 (44) there is a discrepancy in the amount of the cargo discharged. The typewritten part says: «TOTAL QUANTITY DISCHARGED AS PER TALLY: 3,137 TONS» whereas the handwritten words say: «Tally as per NMS Tally 6052 bags Tons 3026 excluding a quantity of Re-bags».

In the case of THERAIOS no shortage is mentioned on the statement of Facts (Exhibit 1 (46)).

The defendants have not called any evidence that the non-discharge of any quantity was due to any fault of the plaintiffs and not due to the reasons stated by the Masters on the Statements of

Facts. Furthermore in the Charterparties which the defendants sent to the plaintiffs (Exhibits 1 (31), (32), (33), (34)) they themselves inserted the following clause: «Clause 18. Cargo to be discharged free of any risk and expense to the vessel. (Free out).....»

The receivers in Nigeria and/or their agents who were the holders and/or indorsees of the relevant Bills of Lading who were the only persons entitled to claim against the ship for short landed goods never raised any such claim against the ships either by arresting any of them or by claiming against the vessels' Protection and Indemnity Club nor did they assign to the defendants their right to collect any claim for shortages. It is the allegation of the defendants that the receivers deducted the alleged shortages from their dealings with the defendants. The defendants have not produced any deed of subrogation from the receivers of their rights to them so that they could raise any claim by subrogation.

In the result I find such claims as untenable in the present proceedings.

In view of my finding as above, I conclude that the plaintiffs are entitled on their claim to the following amounts:

Balance of freight	U.S. dollars	22,366
Balance of demurrages	»	115,000
TOTAL	U.S. dollars	137,366
Less:		
Paid by the defendants through the Plaintiffs' agents	U.S. dollars	25,000
Despatch expenses	»	17,000
TOTAL	U.S. dollars	42,000
Balance due	U.S. dollars	95,366

DEFENDANTS' COUNTERCLAIM

Having dealt with plaintiffs' claim, I come now to consider the counterclaim.

The first item claimed by the defendants is a sum of £6,193 as representing the plaintiffs' share in services rendered and expenses incurred by the defendants for sending representatives

to Lagos, Nigeria and London on three occasions and also for instituting legal proceedings in the High Court of Justice in England to recover demurrages due. The plaintiffs both by their answer to the Petition and by the evidence adduced denied that they ever authorized the defendants to act on their behalf in this respect. I accept the evidence of the plaintiffs that they never authorized the defendants to take any judicial proceedings for the recovery of the demurrages. In case of any failure of payment by the receiver of demurrages according to the terms of the contract the defendants would be rendered answerable for the payment of such demurrages to the plaintiffs. Therefore, it was in the interests of the defendants themselves to take judicial proceedings for the recovery of demurrages and not in the interests of the plaintiffs who, in any event, had as security for such demurrages the liability for payment by the defendants. The defendants' claim in this respect, therefore, fails.

The last claim raised by the defendants is the alleged breach of contract by the plaintiffs as a result of their failure to provide and/or nominate a suitable vessel or vessels for the transportation of a quantity of 6,675 tons of cement.

Having carefully considered all the contents of the telexes before me, I have come to the conclusion that the plaintiffs were always ready and willing to provide and/or nominate ships for the transportation of the quantity of cement mentioned by the defendants and even a larger quantity but it was as a result of the delaying tactics of the defendants in failing to reply in time to the plaintiffs' offers for the supply of ships or by unreasonably rejecting the various nominations made by the plaintiffs. I accept the plaintiffs' evidence in this respect and on such evidence I find that there was no breach of contract by the plaintiffs for the carriage of cement from Cyprus to Nigeria.

In the result defendants' counterclaim fails and has to be dismissed.

In view of my findings as above, I give judgment in favour of the plaintiffs against the defendants for the sum of U.S. dollars 95,365 with interest at 9% as from today and costs. The counterclaim is dismissed with no order for costs.

Judgment for plaintiffs for U.S. Dollars 95,366 with costs. Counterclaim dismissed.