AS Nordlandsbanken and Another v Nederkoorn
[2000] SGHC 272

Case Number : Suit 2040/1994

Decision Date : 14 December 2000

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Michael Hwang SC and Christine M Chan (Allen & Gledhill) for the plaintiffs; Thomas Tan (Haridass Ho & Partners) for the defendant

Parties : AS Nordlandsbanken; Another — Nederkoorn

Admiralty and Shipping – Carriage of goods by sea – Time charterparties – Refusal to take delivery under time charter – Operating ships on spot market – Sale of ships – Owners incurring losses – Assessment of damages – Applicable principles

Credit and Security – Guarantees and indemnities – Time limitation of guarantor's liability – Recital of guarantee stating limitation – Applicable principals on binding effect of recitals

: ***The opening***

The genesis of this case are two time-charters for the charter of two tankers: The Sangstad (The `Tamar Song`) and The Sommerstad (The `Tamar Summer`). The names in the brackets were assigned to the tankers by the charterers, Tamar Shipping (Bermuda) Ltd. The tankers were vegetable oil and chemical carriers.

The mind that moved Tamar Shipping (Bermuda) Limited was a Singapore citizen: Mr Robin Hoddle Nederkoorn. He is the defendant in this case.

The owners of `The Tamar Song` and `The Tamar Summer` were two single purpose Norwegian limited partnerships. The partners were professionals with little or no experience in shipping. They ventured into shipping as investment opportunities. Not having been initiated in the esoteric business of shipping they entrusted the operation and management of the tankers to those with expertise and experience in the field: AF Klaveness & Co of Norway.

In each case, the charter was for three years with an option for a fourth year plus/minus 30 days in charterers` option. The rate of hire of each vessel was $11,500 per day for the initial three years. [All amounts here and hereafter are in United States Dollars.]

The charters were signed on 25 October 1991. Both vessels were mortgaged to the present plaintiffs.

The defendant agreed to guarantee the due performance of the charters for a period of 24 months from the date of the delivery of the vessel. On 11 December 1991 he executed a guarantee in respect of each vessel. The guarantees provided that `If the charterers failed to execute the charterparty or commit any breach of their obligations under it the Guarantor will indemnify the Owners and their personal representatives against all losses, damages, costs and expenses which may be incurred by them by reason of any default on the part of the Charterers in performing and observing the agreements, obligations and provisions on their part contained in the Charterparty.` The present action is based on the guarantees.

The assignments

The owners of each vessel on 16 December 1991 by a document called `Assignment of Guarantee` transferred and assigned to the plaintiffs in this action all benefits of `The Robin Nederkoorn Guarantee`. The assignment of guarantee stated that `by a Floating Loan Facility Agreement dated 6 December 1989 and as Addendum No 1 dated 16 December 1991 made between the Borrower (ie the Owner of the tanker), a syndicate of banks (ie the lenders) and the Agent (ie the Assignee) the Banks have agreed to make available to the Borrower a loan in the amount of USD6,100,000`. Notice of the assignment was given to the defendant on 16 December 1996.

The repudiation

Even as the defendant, Robin Nederkoorn, signed the guarantees, things had gone wrong for him. He was the alter ego and principal shareholder of a Singapore company called Nederkoorn Pte Ltd. This company had entered into a joint venture with Canadian Pacific (Bermuda) Limited. The joint venture first floundered and eventually foundered. In connection with that both the defendant and his company, Nederkoorn Pte Ltd, were sued in Singapore by Canadian Pacific (Bermuda) Limited. On 17 June 1991 a Mareva injunction was issued against them both. That is another story. It is to be found in:

1 **Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd & Anor** [1992] 1 SLR 659

2 **Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd & Anor** [1998] 3 SLR 309

3 **Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd & Anor** [1999] 2 SLR 18

As a result of the foundering of the joint venture the defendant and Tamar Shipping found themselves in deep trouble. In the result, Tamar Shipping failed to take delivery of the The `Tamar Song`. The owners took this as repudiation of the charter. Tamar Shipping took delivery of the The `Tamar Summer` on 7 January 1992 but threw it up on 10 April 1992. Once again the owners took the Tamar Shipping`s act as a wrongful repudiation of the charter.

Repossession of the vessels

Following the repudiation the owners were in possession of the vessels. Next the owners found themselves in rough waters. They expected the charters to be `lie on the beach` contracts yielding regular revenue. Now they had to find employment for them. They did not find new charters for them. For some eight months they operated the vessels on the spot market by appointing managers. They did this because their advisers convinced them that they could earn more than $12,000 per day if they operated the vessels in the direct freight market instead of chartering them out on time charters. Once again things did not go the way they planned. Consequently there was no repayment of the bank loans. In the event the mortgagees took possession of both vessels and sold them on 22 December 1992. Each vessel yielded $4.25m. The proceeds were insufficient to off-set the bank loans. So the banks decided to enforce the personal guarantees of the defendant to recover from him damages for breach of contract by Tamar Shipping. Hence this action.

The action

The action was filed by the plaintiffs, AS Nordlandsbanken and Skandinaviska Enskilda Banken (London Branch) on 22 December 1994. A defence was filed on 14 February 1995 and liability was denied. He

made a counterclaim. It came up for trial before me on 30 June 1997. There was no trial, however. The defendant consented to interlocutory judgment being entered against him. The counterclaim fell to the ground. Damages were directed to be assessed. I conducted the assessment proceedings. This judgment is in respect of the assessment of damages.

Owners` claim before the action

It would be edifying to state now the evolution of the claims. The owners` P & I Club, that is the insurers of the owners, put forward a claim in a letter dated 29 April 1992. It is the function of the P & I Club to give advisory and financial support to the owners in respect of litigation. They evaluated the market rate for a three year charter at $8,750 per day. It was the mean of two rates given by brokers. Their formulation appears in the ensuing paragraph.

Owners` claims in abortive actions

Long before the present action an action was instituted in the name of the owner of each vessel against the present defendant in Singapore. They were Suit 1722/92 by K/S Sangstad and Suit 1723/92 by K/S Sommerstad. Both actions were filed on 27 August 1992. This was when they were operating the vessels for their own account with the expectation of at least $12,000 per day.

The amended statement of claim in respect of the `Tamar Song` repeated the claim formulated by the P & I Club as follows:

Charter-hire per day at USD11,500 Less 1.25% commission	USD	11,365.25
Less market evaluation (USD 9,000+ USD 8,500) 2	USD	8,750.00
Loss per day to Owners USD 2,606.25 x 730 days	USD	2,606.25
Calculated on 2 year times charter	USD	1,902,562.00
Discounted to Net Present Value at 12%	USD	1,722,710.00

The claim in respect of the `Tamar Summer` was stated in the amended statement of claim as follows:

Remaining period 1st year	271 days		
365 days less 94 days	365 days		
Remaining 2nd year	636 days		
Charter-hire per day at USD 11,500 less 1.25% commission		USD	11,365.25

Less market evaluation(USD 9,000 +USD 8,5000) 2		USD	8,750.00
Loss per day to Owners		USD	2,606.25
USD 2,606.25 x 636		USD	1,657,575.00
Discounted to Net PresentValue at 12%		USD	1,500,822.00
Loss from 7/1-111/4 1992		USD	660,299.00
		USD	2,161,121.00

These two actions did not proceed to judgment because it was brought in the name of the owners and not the assignees. The owners having divested the claim by assigning their rights and benefits to the present plaintiffs they had no claim to assert against the charterers or the defendant.

The original claims of the plaintiffs

In the present action the original claims set out in the statement of claim were as follows:

The `Tamar Song`	:	$3,209,125.07
The `Tamar Summer`	:	$3,092,015.66

The present claims of the plaintiffs

Then the claims were amended. The final claims set out in the amended statement of claim and asked for a total of $7,249,492.84 for both charters. This was particularised as follows:

`Tamar Song`	:	$3,540,105.66
`Tamar Summer`	:	$3,749,387.18
		$7,249,492.84

The total claim put forward by the owners was $3,883,831. Now it ballooned into $7,289,492.84. This was a increase of 87%. If the plaintiffs get judgment for the amount they have claimed that would be a lottery for them. The amount due to them from the owners is far below the claims. The owners do not exist any longer. The plaintiffs assert that they have an absolute assignment and are entitled to the entire amount. How did the claims escalate? I shall explain.

The first explanation lies in the fact that the owners` claim against the defendant was asserted on the defendant`s obligation under the guarantees for two years. The plaintiffs asserted an obligation for three years. The new assertion was a `lawyer`s point`. Counsel for the plaintiffs said that it was his conception.

The next explanation lies in the numbers that were used to arrive at the nett loss. The owners used $2,605.25 as the loss per day ($11,365.25 - $8,750). The plaintiffs asserted a loss of about $7,000 per day. According to them the revenue had fallen to approximately $4,500 per day. It is a fall of approximately 60% as opposed to the estimate of about 20% by the P & I Club.

The defendant took the basic position that the owners should not be awarded any damages. This was on the basis that the owners could have operated the vessels without any loss. He further said that there should be no claim after the sale of the vessels. He had a fallback position in case his basic position was rejected by the court. Under this stance, he said that the defendant`s liability was limited to a two year period. He argued for much higher market rates. Also he claimed some credits.

Some salient facts

`Tamar Summer`

It is to be remembered that the `Tamar Summer` was under charterers operation from 7 January 1992 until 10 April 1992. Then it reverted to the owners until it was sold on 22 December 1992. When the `Tamar Summer` reverted to the owners they did not place it on the charter market. Instead they engaged managers and operated the ship for their own account. The reason for this was that they were made to believe that in that way the vessel could earn more than the charter rate, that is to say $12,000 per day as against the nett charter rate of $11,270. As events turned out their operation proved to be a disaster. Their operation on the spot market produced a nett income of $956,111.06 for a period of 230 days. That was $4,157 per day and not $12,000 per day.

As to the remaining period 22 December 1992 to 7 January 1994 there was an off-hire period of 38.6953 days yielding 342.3047 days. For this period the present plaintiffs want $1,270,806.15.

`Tamar Song`

Remember, the charterers never took delivery of the `Tamar Song`. Once again the owners operated this vessel for their own account until it was sold on 22 December 1992. Excluding off-hire of 29 days it gave an operation period of 232 days. The income for this period was $1,622,763.94 or $5,001 per day and not $12,000 per day.

The total claim as pleaded in the statement of claim dated 22 December 1994 was as follows:

Tamar Summer`		$3,209,125.07
`Tamar Song`		$3,092,015.66
Total		$6,301,130.73

First amended claim (July 1997)

On 28 July 1997 the claims in this action were amended. The result of the amendment reduced the claim in respect of the `Tamar Summer` to $3,187,687.45. There was no change in respect of the

`Tamar Song`.

Final claims (July 1999)

`Tamar Summer`

The final claims of the present plaintiffs in respect of the `Tamar Summer` falls into four phases:

Phase I (Accrued but not fully paid)		
07.01.92 to 10.04.92	$	294,117.09
Phases II (Repudiation to Sale)		
10.04.92 to 22.12.92	$	1,622,763.94
Phase III (Sale to end of two years)		
23.12.92 to 07.01.94	$	1,270,806.15
Phase IV (Third year)		
08.01.94 to 07.01.95	$	561,700.00
Total	$	3,749,387.18

There was no dispute on Phase I.

`Tamar Song`

Phase I:		
Does not apply. There was no delivery.		
Phase II (Repudiation to Sale)		
05.04.92 to 22.12.92	$	1,440,855.66
Phase III (Sale to end of 2 years)		
22.12.92 to 04.04.94	$	1,544,400.00
Phase IV (Third year)		
05.04.94 to 04.04.95	$	554,850.00
Total	$	3,540,105.66

Thus the total gross claim in respect of the two vessels is $7,289,492.84.

The plaintiffs` computation on `Tamar Summer` gives the following daily rates on the events and dates mentioned:

Charter (25.10.91)	$	11,500
Repudiation (10.4.92)	$	4,157
Sale (22.12.92)	$	7,500
Third year (5.4.94)	$	9,500

Duration of guarantee

It would be convenient to deal with the claims in the reverse order. So, I shall first consider the point on the duration of the guarantees. The material part of the guarantees given by the defendant reads as follows:

> *Whereas*
>
> *This agreement is supplemental to the charterparty (the `Charterparty`) dated 25 October 1991 for the time charter of the chemical carrier M/T `Iver Chaser` to be renamed `Tamar Summer` call sign LAFH2 (the `vessel`), made between Tamar Shipping (Bermuda) Limited, a corporation duly organized and existing under the laws of Bermuda (the `Charterers`) and the Owners whereby the Charterers agreed and undertook to time charter the vessel for the sum of US$11,500/day.*
>
> *The guarantor has agreed to guarantee the due performance of the Charterparty for a period of 24 months from the date of delivery of the vessel.*
>
> *In consideration of the Owners entering into the Charterparty with the Charterers it is now agreed as follows:*
>
> *Guarantee*
>
> *If the Charterers (unless relieved from the performance by any clause of the Charterparty or by statute or by the decision of a tribunal of competent jurisdiction) in any respect fail to execute the Charterparty or commit any breach of their obligations under it the Guarantor will indemnify the Owners and their personal representatives against all losses, damages, costs and expenses which may be incurred by them by reason of any default on the part of the Charterers in performing and observing the agreements, obligations and provisions on their part contained in the Charterparty.*
>
> *This Guarantee shall be an irrevocable and unconditional guarantee and be binding on Guarantor and shall not be determinable by the Guarantor until all obligations or liabilities hereby guaranteed are fully discharged.*

Indemnity

The Guarantor hereby irrevocably and unconditionally undertakes to indemnify the Owners in full against all losses, damages, liabilities, claims, costs and expenses whatsoever which the Owners may sustain or incur as a result of or arising in connection with the Charterparty as well as all legal costs as between solicitors and clients and all other costs and disbursements incurred for or in connection with demanding and enforcing this Guarantee and/or any of the covenants, undertakings, terms, conditions or provisions of the Guarantee.

In witness whereof the Guarantor has set his hand the 11th day of December 1991.

Signed and delivered by:

Robin Nederkoorn

The present plaintiffs` claim that notwithstanding the specific stipulation of 24 months in the recital the defendant is answerable for the period of three years. The owners themselves did not assert this position. Also the owners` protection and indemnity club did not make that assertion. When the actions were commenced in the name of the owners, albeit wrongly, guarantees for 24 months were positively asserted. More than that, in the present action the original (unamended) statement of claim asserted a liability for 24 months. In respect of the `Tamar Summer` it was from 7 Jaunary 1992 to 7 January 1994. In respect of the `Tamar Song` it was from 5 April 1992 to 4 April 1994. The change was made on the advice of counsel for the plaintiffs.

The basis upon which the present plaintiffs amended to assert a claim for three years is point of law. It is based on their construction of the guarantees. Put simply they contend that because the 24 months limitation was in the recital it must be ignored. Put in another way, their contention is that recital is inconsistent with the body of the guarantees. They relied on the rule of construction that where the operative part of a document is clear, anything in the recital inconsistent with it must be ignored. If the opening is inconsistent with the end, then the end must prevail.

The law on recitals

The Modern Contract of Guarantee Odgers` Construction of Deeds and Statutes Having surveyed the authorities I find the following to be the salient points of the law. The law relating to recitals in a forward document:

1 The scope of the surety`s liability must be gathered from the whole instrument in which his obligation is contained. This includes the recitals in the instrument. In the words of by O`Donovan and Phillips (3rd Ed, 1996) at p 220:

> *As the recital is part of the guarantee, it is clearly admissible as an aid to interpreting the scope of the guarantor`s liability. Indeed, ... the words of the recital may even contain a condition upon which the guarantee is based.*

2 The recitals in the instrument may be used to discover the intention of the parties. In the words of

(5th Ed, 1967) at 150:

> *A recital may be effective as a covenant in the absence of an express covenant in the deed.*

3 When the body of the instrument is specific about what the parties have agreed, inconsistent words in the recital cannot control or modify the idea in the operative part.

4 Where the recital states a specific point of agreement, there being nothing inconsistent in the operative point, the parties are bound by the agreement evidenced by and contained in the recital. As Parke B put it in **Carpenter v Buller** [1841] 151 ER 1013 at p 1014:

> *If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital., ... and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed, is found in the case of **Lainson v Tremere** where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of Â£170, and the defendant was estopped from pleading that it was Â£140 only, and that such amount had been paid.*

Put in another way, the rule of estoppel and the doctrine of sanctity of contract say that parties and their privies are not allowed to contradict what they have stated in a written contract.

Cases in point

There are many cases in the books which establish this principle: Where the body of a bond is open-ended as to duration because there is no specific stipulation as to duration, it will be limited to the predetermined boundary in the recital of the bond: See cases in Note (h) to **Lord Arlington v Merricke** [1672] 85 ER 1215 at p 1226. Note (h) says, inter alia, that **Liverpool Water Works v Atkinson** [1805] 102 ER 1382 and **Wardens of St. Saviour`s, Southwark v Bostock** [1800] 127 ER 590:

> *established a rule that where **the time** for which the sureties are to be liable is marked in the recital of the condition, it is not to be extended by any subsequent general words.*

In **Australian Joint Stock Bank v Bailey** [1899] AC 396, Bailey the defendant gave a joint and several guarantee to the plaintiff bank limited to Â£2,500 in respect of overdrafts by a co-operative association which was a customer of the bank. Later he gave a joint and several bond to the bank. The bond was for Â£4,000. The bond had a recital to the effect that it was for the purpose of obtaining credit advances and accommodation `in addition to the sum of Â£2,500 and secured by the guarantee`. The body of the bond contained these words:

> *it has been agreed that all the debts interest and liabilities thence to arise shall be secured by the above written bond of the association and their sureties therein named, ` **with the following condition**.` Then comes the condition of*

the bond. Stated shortly, it is to the following effect. If the association or their sureties or any or either of them should from time to time and at all times reimburse and pay to the bank `all moneys whatsoever` which the association should borrow from the bank, and all other moneys which the bank should advance for the accommodation of the association `or otherwise on their account,` or in which they should `in any manner whatsoever become indebted` to the bank, and, further, should from time to time pay to the bank all moneys which should be due and owing from the association to the bank by reason of any such advances and transactions as aforesaid `or otherwise,` according to an account current to be made up from the books of the bank, to be signed by the manager or accountant of the bank (which account was to be taken as primÃ¢ facie evidence of the matters therein set forth) the bond should be void, but otherwise should remain in full force and virtue. Then it was provided that the bank should not be bound to give the full amount of the contemplated accommodation `or any larger part thereof` than might from time to time be deemed expedient by the bank; and, further, that the liability of the sureties under the bond should not extend to more than the sum of Â£2000, interest and costs.

The bank sued Bailey to recover Â£5,082 being Â£2,783 due on the guarantee and Â£2,299 due on the bond. Bailey succeeded in establishing that the guarantee was invalid as against him. Then he contended that the condition in the body of the bond was restrained by the recital in it. His liability was confined to advances over and above the amount which the letter of guarantee purported to cover. In other words the amount appearing to be due to the bank on current account ought to be reduced by deducting the amount which the letter of guarantee, if valid, would have secured.

It was held by the Privy Council that the bond was not a bond of only for the excess of advances over Â£2,500, but it was to secure the repayment of all moneys according to an account current to be made up from the books of the bank. There was no inconsistency between the condition on the body of the bond and the recital by which the condition was introduced. It was an ***all money guarantee*** . Accordingly Bailey was liable for the full amount of Â£2,299.

The significant feature of this case was that the bond was specific in that it was an ***all money*** undertaking for advances in addition to those under the guarantee but subject to the limit of Â£2,000 plus interest. No limit was mentioned in the recital. There was therefore no inconsistency.

The decision on guarantee period (Phase IV)

Applying the law I am bound to reject the plaintiffs contentions against the two year limit to the undertaking expressed in crystal clear words in the recital. The defendant signed the guarantee on the basis of a 24 months` limit. I would even put it as high as this: it was a pre-condition to the guarantee. That is why it was inserted right at the threshold point of the guarantee. It was part of the document and the document must be read as a whole. No part of it may be ignored. In fact the operative parts of the guarantees would make no sense if the recitals were ignored. The owners having signed the document are bound by everything that is included in it. The plaintiffs as assignees cannot be in a better position than the owners.

Additionally, there is a fundamental flaw in the plaintiffs` contention of internal inconsistency in the document. A limitation clause in a guarantee as to amount or time is not inconsistent with the undertaking to be answerable for the breach of the principal debtor. Limitation clauses as to amount and time are a commonplace in contracts of suretyship. If the time limit had been included in the body

there would have been no inconsistency. Why should it create an inconsistency merely because it was inserted in a recital. What matters is that it is there as an integral part of the document. The recital clarifies and qualifies the duration of the guarantee. There is nothing in the body of the guarantees to indicate that it is an open-ended undertaking as to time.

In the case of ***Australian Joint Stock Bank*** , there was a limit in the body as to the money guarantee: `the liability of the sureties under the bond should not extend to more than the sum of Â£2,000, interest and costs`. There was nothing specific in the recital as to the amount of liability. There was therefore no internal inconsistency. In this case there is nothing specific as to duration in the body of the guarantee. The recital is specific as to a two year duration. There can therefore be no question of inconsistency.

For all these reasons, the defendant at all events is not liable for more than 24 months. The Phase IV claim accordingly is rejected.

The law of damages

It is a fitting moment to outline the legal principles on the issue of damages as applicable to the present case. The basic rule of law that applies in the case of non-acceptance of goods sold equally applies to refusal to take delivery of ship under a time charter. The Sale of Goods Act (Cap 393) rule [in s 50] is this:

> *(1) Where the buyer wrongfully neglects or refuses to accept, and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.*
>
> *(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer`s breach of contract.*
>
> *(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.*

In a straightforward situation the quantum of damages recoverable by the owner or a charterer in case of a wrongful repudiation is the difference between the contract rate and the market rate at the time of breach provided the latter is lower.

**The Elena d`amico** [1980] 1 Lloyd`s Rep 75 is a seminal case in point. It arose out of a three year time-charter. The owners repudiated the contract contained in the charter three months after delivery. The charterers sought damages from the owner. After the repudiation, there was a substantial rise in the freight rates in the second year of the charter. After the repudiation the charterers did not actually secure a substitute vessel. They claimed the lucre they would have reaped had the owners not repudiated the charter. The owners, however, argued that the charterers were only entitled to the difference between contract and market prices. Evidence established that at the time of termination of the charter a vessel was available to charter as a substitute vessel. The

decision of the charterers not to charter it was a judgment in their own business interest. Goff J held that the proper measure of damages was the difference between the cost of the chartered ship and the cost of chartering a similar vessel on the market. The judge said:

> *The normal measure of recovery in cases of premature wrongful repudiation of a time charter by the owners, ... is that, if there is at the time of the termination of the charter-party an available market for the chartering in of a substitute vessel, the damages will generally be assessed on the basis of the difference between the contract rate for the balance of the charter-party period and the market rate for the chartering in of a substitute vessel for that period.` (See p 87.)*
>
> *... If, at the date of breach, there is an available market, the normal measure of damages will be the difference between the contract rate and the market rate for chartering in a substitute ship for the balance of the charter period. If however the time charterer decides not to take advantage of that market then, generally speaking, that will be his own business decision independent of the wrong; and the consequences of that decision are his. If he judges the market correctly, he reaps the benefit; if he judges it incorrectly, then the extra cost falls upon him.` (See p 89.)*

The correctness of the decision and the principle enunciated by Goff J is beyond question. It is in accord with a wider and higher principle called the rule of least benefit to the plaintiff. I will explain it later.

Next, comes the case of **The Wave** [1981] 1 Lloyd`s Rep 521. Mustill J added a gloss to the principle enunciated by Goff J in the case of ***The Elena d`amico*** :

> *In principle the applicable measure of damages is the difference between the hire which would have been payable in accordance with the fixture and the hire which the plaintiffs would have had to pay if they had entered into a kindred fixture on or shortly after the date when the contract was repudiated. I add the gloss `or shortly after` to the principle adopted in **The Elena D`Amico** [1980] 1 Lloyd`s Rep. 75, because in practice it would not have been possible to obtain a replacement fixture immediately after the repudiation took place.*

In the above two cases the repudiating party was the owner and not the charterer. Such cases in general are simple and straightforward. Where, however, the repudiating party is the charterer the law becomes a little complicated. Why it is so will soon be seen.

The rule of assessing damages recoverable by the owner upon repudiation by the charterer is based on loss of revenue. It takes into account two fundamental assumptions: First that a large amount of capital is tied up in a ship on time-charter with the expectation that it will produce revenue. That capital is not available for a better investment. Secondly, when holding on to the ship, the owner will incur expenses. Such expenses must be paid out of the revenue from the charter. If the owner converts the ship into cash both assumptions are gone and with them the revenue basis of assessment of damages must also go. If the premise is gone the logic cannot remain. The appropriate basis for assessing damages after the sale would be loss of profits which must be pleaded and proved by adducing reliable evidence.

The following illustration explains the logic. Take an owner who plans to purchase a ship and makes a

three year charter. The charterer cancels the charter before the delivery date. The owner abandons the plan to purchase. Can he insist on the charter revenue? The answer must be a clear `No`. The owner is entitled to the profits he would have made, if any. He must prove the profits. In calculating the profits he must give credit for all the expenses he would have saved and the profits he would make by applying the unused capital in a better investment. Otherwise there would be double profit.

There is a clear recognition of this important principle in hire-purchase cases. In a masterpiece of common sense Master Jacob gave expression to the principle in **Yeoman Credit Ltd v McLean** [1962] 1 WLR 131. The decision was the product of his own labour. The defendant had no counsel. Master Jacob`s decision is reported as a note in [1962] 1 WLR 131. He said at p 133:

> *The accelerated receipt of Â£310, the proceeds of sale of the motor-car, reduces the amount of the capital laid out by the plaintiffs and this, in my view, has the necessary effect of increasing the amount of the plaintiffs` profit. It seems to me, therefore, that, in assessing the damages suffered by the plaintiffs as a result of the defendant`s breach of the hire-purchase agreement, the court should make a reasonable allowance or discount for the accelerated receipt by the plaintiffs of part of their capital outlay, a sum which represents a reasonable percentage on the amount of the capital received in respect of the period between the date of its receipt and the date of the expiry of the agreement.*
>
> *Moreover, the accelerated receipt of the proceeds of sale represents moneys in the hands of the plaintiffs which they would, in the ordinary course of their business as a finance company, put to use again to earn a further profit or interest; it is difficult to imagine or believe that the plaintiffs would allow these moneys in their hands, however small in amount, to remain idle. If, therefore, in assessing the damages suffered by the plaintiffs, no reduction is to be made in the amount of their hire charges, the plaintiffs would, in effect, be receiving two amounts of profit or interest at the same time on the same sum of money. In my view, it would be wrong in principle to award damages which would produce this result, for the plaintiffs would be getting as damages more than the amount of the loss they have in fact suffered.*

The soundness of the law stated by Master Jacob received the unanimous approval of the Court of Appeal in **Overstone Ltd v Shipway** [1962] 1 WLR 117.

It must be added at once that in a hire-purchase situation the nominal owner (the hire-purchase company) does not incur huge monthly expenses as the owner of a ship under time-charter. By selling the ship he, in addition to collecting the capital for better investment, saves huge monthly expenses. It is noteworthy here that when the P & I Club computed the claim they partially recognised this principle of having in hand the damages as capital well in advance. They discounted 12% from their gross computation.

The rule of minimum legal obligation

It is fitting now to state the rule of least benefit to the plaintiff mentioned in [para] 40. It is also called the rule of minimum legal obligation. The basis of the rule is fairness to the contract breaker and to ameliorate harshness. In general, civil law, unlike criminal law, does not set out to punish the wrong-doer. It seeks to compensate the wrong on a just and fair basis. The plaintiff is not entitled to a windfall. It is based on the public policy principle that litigation must not be turned into a lottery. It

was stated and applied by arbitrators in **The Mihalis Angelos** [1971] 1 QB 164. Robert Goff QC and Michael Mustill QC were counsel in this case. Mustill J expounded the rule in **Paula Lee Ltd v Zehil & Co Ltd** [1983] 2 All ER 390 at p 394:

> *The court is to look at the range of reasonable methods, and select the one which is least unfavourable to the defendant, bearing in mind, of course, that in deciding what methods qualify as reasonable the question must be approached with the interests of both parties in mind.*

There is then the principle of proportionality. Damages that are wholly disproportionate to the loss or damage will not be awarded. See **Ruxley Electronics and Construction Ltd v Forsyth** [1996] AC 344. Litigation must not be turned into a lottery.

Where therefore the contract-breaker has a choice of two methods of performance, damages will be awarded on the basis of minimum legal obligation - that is to say the method least onerous to the defendant and least beneficial to the plaintiff will be preferred: See **Bunge Corp v Tradax Export SA** [1981] 1 WLR 711 and ***Paula Lee Ltd v Robert Zechil & Co Ltd*** . This principle would clearly apply in respect of the option to extend the charters for a fourth year. In assessing damages the law will exclude the optional fourth year. The plaintiffs agreed that it would be so.

Logic decrees that the principle would equally apply to the converse situation: When the shipowner has a choice of two or more reasonable methods of damage control upon charterer`s repudiation the court must apply the least unfavourable to the plaintiff and most favourable to the defendant. See ***The Mihalis Angelos*** .

In this regard courts go even to the extent of taking into account anticipated events and not merely events that have occurred. The case of ***The Mihalis Angelos*** illustrates the point. The charterer in that case committed an anticipatory breach of contract by cancelling a tonnage contract. It was held that notwithstanding the breach the owners were entitled only to nominal damages because the charterers would have been able to cancel the charter rightfully relying on an event which had not occurred but was bound to occur. The arbitrators in holding that the owners were entitled to nominal damages only reasoned that the owner`s `claim for damages must be based on that method of performing the contract which would have been least profitable to him.` (Quoted by Megaw LJ at p 209B). That view of the arbitrators eventually prevailed. The Court of Appeal unanimously endorsed the law and the finding of the arbitrators. Davies LJ put it at p 202:

> *One must look at the contract as a whole, and if it is clear that the innocent party has lost nothing, he should recover no more than nominal damages for the loss of his right to have the whole contract completed.*

It was in consensus in that even if the owners were entitled to substantial damages (which they were not) they were only entitled to damages on the basis of `the least unprofitable alternative charter available`. On that basis it was Â£4000 - which was loss of profit. Even so, it was held that the owners suffered no loss from the repudiation by the charterer.

Law as to the state of facts

It is a well-established practice that, when assessing damages, courts take the facts as they stand

at the date of judgment and do not shut their eyes and plug their ears to post injury events. ***McGregor On Damages*** (16th Ed, 1997) at para 1537 succinctly sums up the law as follows:

> *There is today universal acceptance of the sensible and realistic rule that trial courts must look at the position at the time of their judgments and take account of any changes of circumstances which may have taken place since the injury was inflicted. This applies both to change which increases the plaintiff`s loss and to change which diminishes it.*

The law stated above enables the court to adjudge the plaintiff`s conduct as to mitigation and avoidance of the loss altogether. It also enables the courts to ensure that litigation is not turned into a lottery. This rule has been applied in numerous negligence cases. There can be no doubt that it equally applies to breach of contract. Counsel for the plaintiffs agreed that it does. The plaintiffs in fact based their claim on events that occurred after the repudiation.

Phase III claims (after sale of vessels)

By the logic of the above reasoning I reject the revenue claim after the sale of the vessels. No case for loss of profits was pleaded. Loss of profits were incapable of calculation because the relevant facts and figures were not pleaded before the court. There was a hint, and only a hint, that the sale of the vessels was due to the breach of the charterers. No claim was pleaded on that basis. In any event, the sale of the vessels was a direct result of the disastrous decision of the owners to operate the ships on the spot market instead of chartering them out which is the fundamental basis of assessing damages in the present case. Trading on the spot market was a risky business. They embarked on it at risk to themselves because they could have easily chartered out the ship with a guaranteed hire revenue. They cannot download the blame on to charterers and the defendant.

Furthermore, after the sale and the capital returned to them there was a substantial saving of expenses. These savings were payments to managers and crew, drydocking and insurance premiums.

Phase II (after repudiation)

I shall now consider the claims from the time of repudiation till the time of sale of the ships - that is Phase II.

In respect of Phase II of the `Tamar Summer` it was based on 230 days:

11.04.92 to 22.12.92	:	256 days
Less drydocking	:	26 days
Nett	:	230 days

The plaintiffs calculate the nett charterhire (after deducting commission) for Phase II as follows: $2,578,875.

In respect of Phase II of the `Tamar Song`, it was based on 232 days:

05.04.92 to 22.12.92	:	261 days
Less offhire and drydocking	:	29 days
Nett	:	232 days

After deducting commission the plaintiffs calculated the nett hire for the period as $2,601,300.

The next step in the computation was to reduce the nett hire by deducting the nett income earned by the ships in the spot market. This was as follows:

Tamar Summer	:	$ 956,111.06 ($4157/day)
Tamar Song	:	$1,160,444.34 ($5001/day)

The bottom-line numbers for Phase II claims were as follows:

Tamar Summer	:	($2,578,875-$956,111.06) [equals]
		$1,622,763.94 ($7,055/day)
Tamar Song	:	($2,601,300-$1,160,444.35) [equals]
		$1,440,855.66 ($6,210/day)

I hold that the calculation of the nett hire for Phase II was appropriate. However, the deduction of the spot market earnings was inappropriate. It was an imposition of the least favourable method on the charterers and the defendant and not the least unfavourable method. It was unreasonable and unfair and against the principles applied to determine the liability of a defendant. The owners in placing the ships in the spot market which is always wrought with high risk were not mitigating their losses. They embarked on a speculative venture. Time-charters and tonnage contracts traverse different terrains. Their expectations went wrong. This was in part due to the appalling condition of one of the vessels. It would be dreadful to visit those huges losses on the defendant. It was the wrong method of calculating their losses.

The defendant, on the other hand, wanted the expected income of $12,000 to be applied. That would not be fair or appropriate because it was based on expectations and not market rate that obtained at the time of renunciation of the charters. It belonged to a different terrain. It was not based on any principle. It was an arbitrary decision. Neither party can rely on it. By the same logic I reject the defendant`s offers of bareboat charters to the owners. They belong to a different terrain.

The appropriate method is to take the market at the time of the repudiation for a three year charter. That was what the P & I Club did on behalf of the owners. It equally applies to the plaintiffs. The appropriate rate applicable is $9,000 per day. I would not allow the owners and their assignees (the plaintiffs) resile from the information contained in the P & I Club`s letter and computation. $9,000 was

the higher rate mentioned by the P & I Club. It is the least unfavourable rate to the defendant. It was also the estimate made by the neutral witness Mr Per Hann for a three year time-charter.

The rate of $9,000 per day would have been the applicable rate if I had assessed the damages soon after the renunciation.

Now I am looking at the claims with the benefit of considerable relevant evidence about the market conditions. I am unable to make a positive finding that there was an available market for 3 year time-charter in April-May 1992. The owners failed to place the vessels in the charter market. That was because their intention at that time was to trade the tankers on the spot market. It did not matter to them whether or not there was a market for a three year charter. They were not interested in a three year charter. It was their belief at that time that they could earn $12,000 or more per day on the spot market. So why go for $9,000 when you could get $12,000. There was an offer from Petrobas for a one year charter for both vessels at $10,500 per day. Owners were not interested in it because they were fixated on $12,000 per day on the spot market even though it is risky market. If the owners had accepted the Petrobas offers, they would have had a guaranteed income of $10,500 for at least one year. That would have also put them within one of the acceptable methods of basing their claim against the owners. But that did not happen. I would accordingly ignore what happened in the spot market and the Petrobas offer . To adopt the words of Goff J, if owners chose not to take advantage of the available market represented by the Petrobas time-charters and work on the spot market, that was their own business decision independent of the wrong and the normal rule of assessing damages. The consequences must be theirs. If they made $12,000 it would have been theirs. If they did not, as it turned out to be the case, the loss must also be theirs. All that had nothing to do with mitigation. If they went into the spot market at $12,000 per day they should not have made any claim against the defendants. But they did on the basis of the information obtained by the P & I Club.

I find that the vessels could have been chartered at a minimum rate of $9,000 per day for a three year charter. This gives a loss of $2,500 per day ($11,500 - $9,000). For the `Tamar Summer` the loss is $575,000 ($230 x $2,000). For the `Tamar Song` it is $580,000 (232 x $2,500).

In summary the gross actual and notional claims are as follows:

Phase I	`Tamar Summer`	:	$ 294,117.09
Phase II	`Tamar Summer`	:	$ 575,000.00
Phase II	`Tamar Song`	:	$ 580,000.00
Total (Gross)		:	$1,449,117.09

The credits

In respect of the `Tamar Summer` the defendant sought a number of deductions. I shall now consider them.

Deduction No 1 (Durban claim)

In respect of the `Tamar Summer`s` call at Durban the defendant claimed a credit of $30,000. The

plaintiffs conceded to this.

Deduction No 2 (assignment of freight)

According to the defendant the charterers assigned to owners freight payable to charterers by a party named Nidera. The amount of assignment was $563,550. The owners, however, were paid only $261,736.98. The balance amount of $301,813.02 was not received by them. The defendant wanted credit for the full amount. I cannot agree with the defendant. Under the charter, the charterers assumed the unconditional obligation to pay hire. It was therefore their duty to make all the necessary and effective arrangements to discharge their obligation. They must have ensured that what they assigned what was real. If the owners were not paid the owners had a recourse against the charterers. Accordingly, the charterers, and therefore the defendant were entitled to a credit of only $261,736.98. Credit for this has already been given.

Deduction No 3 (Methanol claim)

The defendant contended that the charterers wanted to load a methanol cargo of 8,222.493 mt. The master shut out this cargo. As a consequence the charterers had to charter in alternative tonnage and suffered a loss of $269,188.74. There was nothing in the `Tamar Summer` charterparty which disentitled the charterers from loading this cargo. According to the charterers the owners in fact agreed to load this.

All the admissible evidence pointed to only one inference, namely that the owners were in breach. Otherwise why would the charterers engage another vessel to convey the methanol cargo. Accordingly I allow this claim for credit in full.

Deduction No 4

In respect of `Tamar Song` the defendant contended that the plaintiffs` claim should be reduced by $500,000. His contention was as follows. Clause 63 of the `Tamar Song` charter required the owners to re-coat the cargo tanks with Sigma Phenguard up to a maximum of 8000 square metres in Spring 1992. The clause further provided that the charterers would co-operate to enable as much recoating work as possible to take place during voyages. Since the charter was cancelled owners saved the cost of re-coating and additional drydock time. This should be deducted from the damages in respect of the `Tamar Song`.

The plaintiffs did not dispute the principle of this contention. They argued for a deduction of $250,000. They relied on the provision about re-coating being done at sea during voyages. In my view that was only an expectation of a favour. The clause did not stipulate that all the re-coating would be done at sea during voyages. That would not have been practical. In addition there was evidence from a neutral witness that re-coating at sea would be unsatisfactory. In fact, in respect of the `Tamar Summer` there was a similar re-coating requirement and re-coating was done at dry-dock and not at sea. The plaintiffs conceded that if done at dry-dock the estimate of $500,000 would be correct. Accordingly, I allow the full estimated amount of $500,000 to be deducted.

Conclusion

The bottom-line position of the claims is as follows:

Gross claims allowed ([para] 68)	$	1,449,117.09
Deductions ([para] 70, 72, 73, 74 and 75)	$	799,188.74
Nett amount	$	649,928.35

Accordingly there will be judgment in favour of the plaintiffs for $650,928.35.

I shall hear the parties on interest and costs.

Outcome:

Order accordingly.