**AECTRA REFINING AND MARKETING INC**

**v.**

**EXMAR NV**

COURT OF APPEAL, CIVIL DIVISION

9, 10 JUNE, 22 JULY 1994

**LEX (1994) – 1 ALL E.R. 641**

**OTHER CITATIONS**

3PLR/1994/8 (SC)

[1995] 1 All ER 641

**BEFORE THEIR LORDSHIPS:**

HIRST LJ., HOFFMANN LJ.

**BETWEEN**

AECTRA REFINING AND MARKETING INC – Appellant

AND

EXMAR NV - Respondent

**ORIGINATING COURT**

HIGH COURT (Hobhouse J., Presiding)

**REPRESENTATION**

ANGUS GLENNIE QC and KAREN MAXWELL (instructed by LAWRENCE GRAHAM) - for the Defendants

RICHARD SOUTHERN (instructed by MIDDLETON POTTS) - for the Plaintiffs

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMIRALTY AND MARITIME LAW- CHARTER PARTY:- Time charters – Liabilities arising from disputes thereto – How treated

ADMIRALTY AND SHIPPING/MARITIME LAW:- Claim under a charterparty for the stipulated daily rate of hire in respect of specific off-hire periods – Whether qualifies as a liquidated debt which was capable of being a legal set-off against the plaintiff's claim in an unrelated dispute, notwithstanding that disputed issues as to quantum had been raised by the defence

DEBTOR AND CREDITOR LAW:- Claim for Set-offs – Duty to show the existence of adverse claims to debts or liquidated demands – What qualifies as ascertainable claims admissible as legal set-off – Whether claims still subject to arbitration proceeding can qualify for set-off

DEBTOR AND CREDITOR LAW – SET-OFF:- Independent set-off – Whether did not require any relationship between the transactions out of which the cross-claims arose - What must be shown to succeed – Whether entitles the defendant to require that the merits of an unrelated cross-claim be tried in the same action and converts the plaintiff's original cause of action into the right to a balance due on the taking of an account

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION:- Claims subject to a yet to be determined arbitration proceedings – Whether can form a legal basis for a set-off against credit due and payable to a party to the arbitration by the other party and arising from a separate transaction

**CASE SUMMARY**

In 1987 to 1988 the plaintiff chartered two vessels from the defendant under time charterparties. The charterparties subsequently led to 2 unrelated disputes. The parties settled the first dispute by the defendant agreeing to pay the plaintiff $US120,000 by a set date. In the second unrelated dispute the arbitrator made an interim award of $US42,070·63 in favour of the defendant, but the defendant had another claim yet to be settled i.e the amount in dispute was not yet ascertained.

When the $US120,000 due in settlement of the first dispute fell due for payment the defendant, with the plaintiff's permission, deducted the $US42,070·63 and then wished to retain the outstanding balance as security for its remaining claim but the plaintiff refused that request and issued a writ seeking summary judgment for the amount outstanding.

DECISION APPEALED AGAINST

The judge entered summary judgment for the plaintiff, holding that the defendant's cross-claims (which were subject to a mandatory stay under s 1 of the Arbitration Act 1975) were not claims to debts or liquidated demands that could be set off against the debt claimed by the plaintiff so as to entitle the defendant to leave to defend the action.

By a notice of appeal dated 25 May 1993 the defendants, Exmar NV, appealed from the decision of Hobhouse J on 30 April 1993, ordering summary judgment under RSC Ord 14 for the plaintiffs, Aectra Refining and Marketing Inc, in the sum of $US76,889·37 on the grounds that their remaining claims in a second unrelated charter party dispute were sufficiently ascertainable to be admissible as a set-off under RSC Ord 18, r 17 and that they were thereby entitled to leave to defend. By a respondent's notice dated 15 June 1993 the plaintiffs contended inter alia that even if the defendants' cross-claims were liquidated, the set-off pleaded was not actionable since the claims there raised were the subject of pending arbitration proceedings. The facts are set out in the judgment of Hirst LJ.

ISSUES FOR DETERMINATION OF APPEAL

1. Whether the cross-claims were sufficiently ascertainable to be admissible as a legal set-off; and

2. If so, whether the set-off pleaded was actionable in view of the fact that the claims there raised fell within an arbitration clause and were the subject of pending arbitration proceedings.

DECISION OF COURT OF APPEAL, CIVIL DIVISION

**Held –**

(1) A claim under a charterparty for the stipulated daily rate of hire in respect of specific off-hire periods was a liquidated debt which was capable of being a legal set-off against the plaintiff's claim in an unrelated dispute, notwithstanding that disputed issues as to quantum had been raised by the defence. Accordingly, the legal set-off pleaded by the defendant was sound in principle BICC plc v Burndy Corp [1985] 1 All ER 417 applied.

(2) Independent set-off did not require any relationship between the transactions out of which the cross-claims arose and it was not, as such, a substantive defence to the plaintiff's claim but rather, a procedure for taking an account of the balance due between the parties (in accordance with the requirements set out in RSC Ord 18, r 17) which entitled the defendant to require that the merits of an unrelated cross-claim be tried in the same action and converted the plaintiff's original cause of action into the right to a balance due on the taking of an account. It was of the essence of independent set-off, therefore, that the defendant was entitled to have the merits of his cross-claim tried by the court in which he had been impleaded and if the defendant was faced with a procedural bar to having his claim determined, for example because he had agreed to the jurisdiction of another tribunal, he could not then assert an independent set-off. Since the defendant's cross-claims were subject to a mandatory stay they could not be adjudicated by the court and accordingly they could not be set off against the plaintiff's claim for the $US120,000. It followed that the defendant was not entitled to leave to defend and, as a result, the appeal would be dismissed (see p 653 *g*, p 654 *f* *g*, p 655 *h j*, p 656 *f* to *j* and p 657 *g* to *j*, post); dictum of Lord Campbell CJ in *Walker v Clements* (1850) 15 QB 1046 at 1050 explained.

It entitles the defendant to require that the merits of an unrelated cross-claim be tried in the same action and converts the plaintiff's original cause of action into the right to a balance due on the taking of an account.

**MAIN JUDGMENT**

22 July 1994. The following judgments were delivered.

**HIRST LJ**. [DELIVERING THE JUDGMENT OF THE COURT]

This is an appeal by the defendants, Exmar NV, against the order of Hobhouse J dated 30 April 1993 in which he gave judgment for the plaintiffs, Aectra Refining and Marketing Inc, in the sum of $US76,889·37 plus interest and costs under RSC Ord 14.

There are two questions at issue: the first is whether the defendants have an arguable case sufficient to defeat an application for summary judgment on the ground that they are entitled in principle to set off certain claims against the plaintiffs' claim in the action. The set-off on which they seek to rely is a legal set-off, and the key question under this head is whether these cross-claims are liquidated so as to fall within the rules as to legal set-off. The judge held that they were not, and in consequence awarded summary judgment in the plaintiffs' favour. Should the defendants succeed on this point, there arises a second question, which it was unnecessary for the judge to decide, namely whether, as the respondent's notice contends, the set-off pleaded is not actionable, seeing that the claims there raised fall within an arbitration clause and are the subject of pending arbitration proceedings.

The first question turns on whether claims sought to be set off fall within the classic definition of Cockburn CJ in *Stooke v Taylor* (1880) 5 QBD 569 at 575 that `this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained'. It is common ground that this definition applies to the present case, but there is acute controversy between the two sides as to its interpretation, and as to its application to the proceedings in the present case.

The second question (if it arises) raises a point of considerable importance which, so far as counsel's researches show, is not directly covered by any decided authority.

The action arises out of the settlement of an arbitration claim by the plaintiffs against the defendants which arose out of a charterparty dated 12 April 1988 of the vessel New Vanguard. The terms of the settlement are immaterial, save to note that the plaintiffs agreed to pay the defendants $US120,000 within three months, the settlement having been made on 7 October 1992, and payment being due on 7 January 1993.

However, by a telex despatched at 1750 hours on the latter date, the defendants' solicitors informed the plaintiffs' solicitors as follows:

`Please note that we have still not received all the settlement monies due under the settlement agreement entered into between the parties dated 5th October 1992 but in the meantime, we should ask you to note that our clients, Exmar, are owed various sums by your clients under a charterparty of a vessel called the "Pacifica" dated 30th October 1987. The claim is being handled on behalf of Aectra by Holmes Hardingham under reference MGC/JSP/JVT/AEO27. Our client has recently been awarded an interim payment of [$US] 42070·63 plus the arbitrator's costs of [£] 675 and as of today's date, that award remains unsatisfied by your clients. We should be grateful if you could take instructions from your clients and obtain their confirmation that we may deduct from the settlement monies due the sum of [$US] 42070·63 plus the arbitrator's costs and something by way of interest and legal costs involved in connection with obtaining the interim award. We are hoping very shortly to agree a figure for interest and costs with Holmes Hardingham. The claims which our clients have against your clients under the "Pacifica" charterparty far exceed the [$US] 120,000 due to your clients under this settlement. We have in the past asked your clients for security but so far none has been supplied. One of the ways we could obtain this is by [maraevaring] the balance of the settlement monies, once they are received, in our accounts but this would involve unnecessary additional expense and we should be grateful, therefore, if you could get your clients to confirm that our clients may hang on to the balance of the [$US] 120,000. The sum could, alternatively be paid into an escrow account pending the outcome of the "Pacifica" proceedings. In the further alternative your clients could propose some other method of security for the "Pacifica" claims. We should warn you that even if your clients do not agree, our clients would have a right of set off in any event and may well instruct us to hold on to the funds. But we would prefer to resolve this amicably.'

As a result, the plaintiffs issued a specially indorsed writ claiming the sum of $US76,889·37 plus interest, ie the original agreed settlement sum of $US120,000 less the interim award in the Pacifica arbitration referred to in the telex.

The Pacifica charterparty was a time charterparty on the Shell-Time 3 form dated 18 December 1987, whereby the defendants as disponent owners chartered the vessel to the plaintiffs for a period of 90 days, subject subsequently to very substantial extensions. The vessel was delivered under the charter on 22 December 1987 and redelivered on 9 December 1989.

The relevant clauses of the charterparty are as follows, retaining for convenience their original numbering:

`7. Subject as herein provided Charterers shall pay for the use and hire (Incl. overtime) of the vessel at the rate of United States dollars 10.000 per day per ton of 20 cwts. on the vessel's total deadweight on summer freeboard, as assigned at the date hereof, commencing at and from the time and date of her delivery as aforesaid, and pro rata for any part of a month, and continuing until the time and date of her redelivery to Owners. Hire payable to a bank designated by Owners every 14 days in advance.

8. Payment of the said hire shall be made monthly in advance ...

21. In the event of loss of time (whether arising from interruption in the performance of the vessel's service or from reduction in the speed of the performance thereof or in any other manner) (i) due to deficiency of personnel or stores, repairs, breakdown (whether partial or otherwise) of machinery or boilers, collision or stranding or accident or damage to the vessel or any other cause preventing the efficient working of the vessel; or (ii) due to strikes, refusal to sail, breach of orders or neglect of duty on the part of the master, officers or crew; or (iii) for the purpose of obtaining medical advice or treatment for or landing any sick or injured person (other than a passenger carried under clause 15 hereof) or for the purpose of landing the body of any person (other than such a passenger); hire shall cease to be due or payable from the commencement of such loss of time until the vessel is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced ...

40. (a) This charter shall be construed and the relations between the parties determined in accordance with the law of England. (b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree whatever their domicile may be: Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force. Such election shall be made by written notice by one party to the other not later than 21 days after receipt of a notice given by one party to the other of a dispute having arisen under this charter ...

45. All annual and special survey, with falls due under the currency of this charter, owners agree to execute after consultation of charterers program. Subject to the foregoing, owners undertake that approximately twelve months after the vessel was last drydocked and at the expiry thereafter of each twelve months [continuous] use under this charter, will at [its] expense drydock, clean and paint vessel's bottom, if necessary, as well as maintain and repair tankcoating in cargo tanks, if necessary, and make all overhaul and other necessary repairs, for which purpose charterers shall allow vessel to proceed to an appropriate port, owners shall be solely responsible therefore, and also for gas freeing vessel, upon each such occasion. [All] towage, pilotage, fuel, water and other expenses incurred while proceeding to and from and while in drydock, shall be for owners account. [If] such drydocking pursuant to this article takes place at a port where vessel is to load, discharge or bunker, under charterers' order, hire shall be suspended from the time vessel receives free practique on arrival, if in ballast, or upon completion of discharge or cargo, if loaded, until vessel is again ready for service. in case of drydocking at a port other than where vessel loads, discharges, or bunkers, payment of hire shall cease from time of deviation until vessel is again in the same or equivalent position.'

The parties appointed Mr Mark Hamsher as sole arbitrator under the arbitration clause, and by their points of claim dated 1 September 1992 the defendants as claimants in the arbitration particularised their claims as follows:

`A. Lake Charles-24th March 19880830 to 28th March 1988 12.15-hire net of commission [$US] 39,260·04. The Respondents have deducted hire for a period which they say the vessel was unable to load cargo at Lake Charles because she had no US coastguard certificate which would permit loading of the caustic soda. The claimants deny that they are in breach of contract but state that even if they are in breach, the respondent charterers have failed to prove that they have suffered any damages as a result of the alleged breach. Owners therefore require to be reimbursed for the hire deducted.

B. Dry Docking Voyage-Lagos/Rotterdam 13th July 08.00 LT (07.00 GMT) to 11th August 1989 21.45 LT (07.00 GMT)-[$US] 315,394·96. Clause 45 of the charter gives the owners the right to dry-dock the vessel on a regular basis with owners to be responsible for the costs of so doing. The clause goes on to provide that if the vessel dry docks "... at a port other than where vessel loads, discharges, or bunkers, payment of hire shall cease from time of deviation until the vessel is again in the same or equivalent position". The "PACIFICA" discharged her last cargo prior to dry docking at Lagos and left that port for her dry docking voyage at 0700 hours GMT on 13th July 1989. She proceeded to Rotterdam to dry dock and after dry docking, went to Sarroch to load her next cargo. Wrongly and in breach of clause 45 of the charter, the Respondents have deducted from hire the whole period between 0700 hours on 13th July 1989 until the "PACIFICA" presented at Sarroch at 2045 on 11th August 1989 under her new fixture i.e., a period of 29·5729 days. The owners will however say that the vessel did not deviate for the purposes of dry docking until 21st July 1989 at 1600 hours and she came back on hire on 8th August 1989 at 0300 hours when she reached an equivalent position on her way to Sarroch to the point at which she deviated. Owners accept that during the period 13th July to 11th August the vessel was off hire, for 17 days 11 hours but no longer. Charterers have deducted the sum of [$US] 315,394·96 from hire (nett of commission). The claimant owners will accept that the only deduction they could have made amounts to:-17·4583 days x [$US] 10,800 = [$US] 188,549·64 or [$US] 186,192·77 nett of commission. Owners therefore claim a balance of hire of [$US] 129,202·19.

C ... Bunkers supplied by owners-[$US] 86,623·79. During the period July/August 1989 the owners put on board the vessel 904·10 tonnes IFO and 52·94 tonnes MDO. These bunkers should have been paid for by the respondent charterers in accordance with their obligations under clause 6 of the governing charterparty. Bunker prices are calculated as follows:-

800 FO at [$US] 88·00

[$US] 70,400·00

104.1 FO at [$US] 84·75

[$US] 8,822·48

50 DO at [$US] 140·00

[$US] 7,000·00

2.94 DO at [$US] 136·50

[$US] 401·31

Total to be paid by charterers

[$US] 86,623·79

This claim has already been taken into account and subsumed in the final hire accounts between the parties referred to in paragraph D below.

D. Balance of hire due to owners-[$US] 128,694·42. As mentioned above, the "PACIFICA" was on hire to the Respondents from the 22nd December 1987 at 0225 GMT to 9th December 1989 at 0240 GMT. Attached at annexure 2 is owners' final hire statement which demonstrates that there is a balance of hire due to owners of [$US] 297,156·65. Some of this balance can be attributed to claims A and B mentioned above. Claim C (bunkers), as has already been mentioned, has already been deducted from the permissible off-hires appearing in paragraphs 2A to D of the off-hire statement. Therefore, after excluding claims A and B from the balance due, the resulting position between the parties is as follows:

Balance due to owners in Hire Statement

[$US] 297,156·65

Less:

A. Lake Charles Hire

[$US] 39,260·04

B. Lagos/Rotterdam claim

[$US] 129,202·19

Balance due to owners

[$US] 128,694·42'

It will be observed that, as frequently occurs in arbitration proceedings, the presentation of the claims to some extent foreshadows and seeks to meet in advance the defences on which the plaintiffs as respondents in the arbitration are expected to rely. These are elaborated in much greater detail in the points of defence, and may be summarised as follows, using the same lettering.

A. This is an off-hire dispute arising under cl 21 of the charterparty, on which the arbitrator will have to make findings of fact as to the allegation that the vessel did not have a certificate of compliance for the carriage of caustic soda and to assess how much time was in fact lost by reason of the matters complained of.

B. The dry-docking voyage raises an off-hire dispute, arising under cl 45 of the charterparty, on which the arbitrator will have to make findings of fact as to when the vessel deviated, when the vessel was again in the same or an equivalent position, and how much time was in fact lost during that period.

C. This claim is related to the off-hire period in dispute, in particular the dry-docking voyage.

D. This raises numerous detailed issues between the parties on disbursements.

In addition the plaintiffs as respondents in the arbitration have counterclaimed in respect of several other items in dispute which arose during the course of the Pacifica charterparty. At the present juncture discovery in the arbitration is about to be completed, but no hearing date has as yet been fixed.

The judge's analysis was as follows:

`The relevant criteria have been laid down in *Axel Johnson Petroleum AB v MG Mineral Group AG, The Jo Lind* [1992] 2 All ER 163, [1992] 1 WLR 270, where a defence of legal set-off was upheld by the Court of Appeal on an Ord 14 dispute. Leggatt LJ, with whose judgment the other members of the court agreed, said ([1992] 2 All ER 163 at 166, [1992] 1 WLR 270 at 272): "In my judgment it is important to distinguish between a dispute about a right on which a claim or cross-claim is based and a dispute about the sum to which the right entitles the person who enjoys it. There can in this case be no dispute about the sum to which the defendants are entitled, once they have made good the contractual right which they claim. The plaintiffs cannot, as it seems to me, by disputing the defendants' right prevent the defendants from relying on it by way of set-off for the purposes of Ord 14." The position he identifies is to be contrasted with the present case. There, there was a dispute as to the entitlement to the sum, but no dispute as to its quantification. Here, the whole essence of the matter is quantification, although it involves an assessment of the respective rights and liabilities of the parties under the time charter. Loss of time is essentially a matter of quantification and, until the loss of time has been determined, no one can say how much hire ought to have been paid in respect of the relevant period or periods. Similarly, with regard to the deviations that were necessary to carry out the periodic drydocking, the essence of the matter is identifying the point in time at which hire should be suspended and the time at which hire should again have become payable. So the position here is not the establishment of a right to hire in principle but of the quantification of the hire liability under the charterparty, having regard to the provisions for off-hire and suspension of hire due to periodic drydocking-similarly the question of bunkers, and indeed all matters-the question of taking the accounts under the charterparty, setting off sums one against the other, and arriving at a net figure which may or may not be payable one way or the other. Unless and until the arbitration has been concluded, no one can say what is the quantification of the liability of the parties under the charterparty. They are all items, subject possibly to questions of hire, which are capable of being set off against each other. I have not been addressed about the extent to which questions of hire would be subject to set-off but they are all the subject of arbitration and it is anticipated that at the end of the arbitration there will be an award which will produce a net liability. Applying the criterion stated by Leggatt LJ, this falls on the wrong side of the line. The essential dispute is quantification, not entitlement.'

He then quoted the well-known passage of Cockburn CJ in *Stooke v Taylor* cited above, and concluded as follows:

`These sums of money are not ones which can readily and without difficulty be ascertained with certainty at the time the pleading was delivered. They will only be ascertained after the conclusion of the arbitration. One must not confuse things that are immediately ascertainable with things that can be the subject of allegation. Of course a pleader can plead a specific sum and allege that that is the right sum. But if the accuracy of the allegation can only be substantiated after, for example, the holding of an arbitration, then it is not immediately or readily ascertainable at the time of pleading. That is the essence of the matter. These figures have been pleaded, but whether or not those are the figures which are at the end of the day going to prove to be the right figures is speculative. It would be remarkable if the result of the arbitration was to produce precisely those figures. It might but it probably will not. There probably will be significant differences in the figures awarded. They are not readily ascertainable and are not ascertained at this date. They do not fall within the principle of a legal set-off either in spirit or in law and therefore they do not provide a defence to this action. Therefore there is no reason why an Ord 14 judgment should not be given for the plaintiffs for the reduced amount which they are claiming.'

*The defendants' submissions*

Mr Angus Glennie QC submitted that this set-off is a claim for a liquidated debt under cl 7 of the charterparty which specifies a daily rate of hire. As a matter of principle, the proper approach is to focus exclusively on the claim, and decide whether or not it falls within the established test; if it does, then that in itself is sufficient to qualify it as a legal set-off, and it is irrelevant that there may be disputed issues as to quantum raised by the defence, which, he submits, cannot affect the intrinsic nature of the claim retrospectively.

# **Thus, for example, a clam for the price of goods sold, which is manifestly a claim for liquidated debt, does not cease to be liquidated because of some dispute affecting quantum, eg an allegation in the defence of short delivery.**

This analysis, he submitted, is borne out by the contrast drawn between set-off and counterclaim by Cockburn CJ himself in *Stooke v Taylor* (1880) 5 QBD 569 at 576 as follows:

`In a case of set-off the claim being for liquidated damages, its existence and its amount must be taken to be known to the plaintiff, who should have given credit for it in his action against the defendant. This reasoning does not apply to a counter-claim, the effect of which, as distinguished from a mere set-off, is altogether different. It is, as I have already pointed out, to all intents and purposes an action by the defendant against the plaintiff. It is not confined to debts or liquidated damages. It is not even necessary that the claim should be analogous to that of the plaintiff. A claim founded on tort may be opposed to one founded on contract, or vice-versa. But the most striking difference is that the counter-claim operates not merely as a defence, as does the set-off, but in all respects as an independent action by the defendant against the plaintiff. To the extent to which the damages accruing to the defendant on the counter-claim may be in excess of those accruing to the plaintiff on his claim, the defendant becomes entitled to judgment, with this additional advantage that, having been obliged to meet the plaintiff on the forum chosen by the latter, he is not bound, as to costs, by the conditions on which the plaintiff depends for obtaining them. And there is this further essential difference between these two forms of procedure, that when the defendant's claim is for liquidated damages, in other words, one of set-off, the plaintiff in his claim can give credit for the amount, and so avoid the costs of the set-off, whereas, when the claim is for unliquidated damages, he is unable so to protect himself.'

In support of his argument Mr Glennie relied on a number of other authorities. In *Seeger* (*or Seegur*) *v Duthie* (1860) 8 CBNS 45, 141 ER 1081 the plaintiff shipowners claimed freight against defendant charterers, who sought to set off a claim for delay, for which they claimed liquidated damages under the demurrage clause which provided `if the ship be not ready either on the owner's or the charterers' part at the above-named dates, then demurrage to be paid by the party in default, at the rate of £7. per diem ...' Erle CJ, with whom Byles and Keating JJ agreed, held that the delay alleged did not fall within the scope of the demurrage clause, and that consequently the set-off was not maintainable.

This was upheld in the Court of Exchequer Chamber in which Martin B, with whom Bramwell and Channell BB concurred, stated as follows, having quoted the demurrage clause (8 CBNS 72 at 76-77, 141 ER 1091 at 1093):

`The charterparty stipulates that "forty running days are to be allowed the said charterers, Sundays and holidays excepted (if the ship be not sooner dispatched,) for loading the said ship, to commence from the date of her being ready at her loading-berth to receive cargo." That is the obligation which the charterers take upon themselves. "The owner further agrees that the ship shall be ready to sail for her destined port at the expiration of the said laying days, or sooner if required by the charterers." What is the meaning of that stipulation? It means that the ship shall by the time mentioned be provided with a competent crew and be in every respect fitted to sail for her destined port. Then comes the provision, that, "if the ship be not ready, either on the owner's or charterers' part, at the above-named dates, then demurrage to be paid by the party in default, at the rate of 7l. per diem." The default there contemplated on the owner's part is in the ship's not being ready to sail. Here, the ship was ready to sail, but the charterers insisted that she could carry more cargo, and the master that she could not; and so some days were consumed in disputes between them. It may be that the owner may be liable for not having taken a full cargo when offered him; but for this he is not liable upon the stipulation last adverted to, so as to constitute a ground of set-off.'

Blackburn J stated (8 CBNS 72 at 77, 141 ER 1091 at 1094):

`... I am now satisfied that the construction put upon this part of the charterparty by my Brother Martin is the correct one. The plaintiff, whatever may have been his delinquency in other respects, has not been guilty of this breach, so as to entitle the defendants to the stipulated damages. Consequently they are not entitled to the set-off or deduction they claim.'

In *Biggerstaff v Rowatt's Wharf Ltd, Howard v Rowatt's Wharf Ltd* [1896] 2 Ch 93 a company called Harvey Brand AND Co sought to set off against a claim for rent of a wharf due from them to a limited company, then in liquidation, a claim for short delivery of barrels under a contract for the sale of those barrels at a stipulated price. If there was a legal set-off, that would of course go in diminution of the claim for rent; if on the other hand there was no set-off, they would have been left only with a claim in the liquidation.

In his judgment Lindley LJ stated as follows ([1896] 2 Ch 93 at 101):

`It is urged against this, that their only claim on account of the short delivery is for unliquidated damages for breach of contract. But this is not an action of trover: the barrels had never become the property of Harvey, Brand AND Co., and their claim is a liquidated claim to have back, on the ground of total failure of consideration, the price of those barrels which the company failed to deliver.'

Lopes and Kay LJJ delivered concurring judgments.

In *BICC plc v Burndy Corp* [1985] 1 All ER 417, [1985] Ch 232 the Court of Appeal by a majority (Dillon and Ackner LJJ, Kerr LJ dissenting) restated the principle laid down by Cockburn LJ in the passage quoted above that the explanation of the basis of the doctrine of legal set-off is that `the existence and amount of such a set-off must be taken to be known to a plaintiff who should give credit for it in his action against the defendant' (see [1985] 1 All ER 417 at 425, [1985] Ch 232 at 248 per Dillon LJ).

Mr Glennie submitted that all these cases supported his contention that the point of focus is the claim and that, provided the claim intrinsically falls within Cockburn CJ's test, the issues raised by the defence which may affect quantum, and on which the judge relied in granting leave to defend, are irrelevant.

The *Axel Johnson* case was, he submitted, fully consistent with his argument, since the set-off on which the defendants relied (and on which the grant of unconditional leave to defend in the Ord 14 proceedings was based) was a claim for a liquidated debt, namely the difference between two specified sums, as the facts summarised in the headnote demonstrate ([1992] 1 WLR 270):

`Pursuant to a joint venture arrangement between the parties, the plaintiffs bought a cargo of oil from the defendants at a price to be computed by adding a fixed amount per metric tonne to the price paid by the defendants to the suppliers. The plaintiffs paid a price which was U.S. $148,972·85 less than the price as calculated by the defendants. The defendants pleaded that balance as a set-off to a claim by the plaintiffs' against the defendants of U.S. $89,915 for demurrage in relation to a later contract under the joint venture arrangement.'

Finally, he submitted that the second part of Cockburn CJ's test (`or money demands which can be readily and without difficulty ascertained') referred to closely analogous demands (eg under an account stated) which can be easily ascertained, and he cited in support of that submission a passage from the judgment of Farwell LJ in *Lagos v Grunwaldt* [1910] 1 KB 41 at 48, [1908-10] All ER Rep 939 at 942 as follows:

`I think the words [in the Rules of Court relating to signing judgment] "debt or liquidated demand" point to the old division of common law actions to be found in Bullen and Leake ... The old indebitatus counts "which have from time to time been rendered more and more concise are designated with little difference of meaning by the terms indebitatus counts, money counts or common counts; the expression common counts or common indebitatus counts being often used to designate those of most frequent recurrence, viz., where the debt is for goods sold and delivered, goods bargained and sold, word done, money lent, money paid, money received, interest, and upon accounts stated; and the expression money counts being sometimes used to particularize those for money lent, money paid, and money received. The most appropriate name seems to be indebitatus counts." And the learned authors go on to say, "there were also formerly in use counts known as quantum meruit and quantum valebat counts, which were adopted where there was no fixed price for work done or goods sold, AND c. These counts, however, have fallen into disuse, and have been superseded by the general application of the indebitatus counts." In my opinion that is the true view; everything that could be sued for under those counts comes within the description of debt or liquidated demand.'

Mr Southern submitted that the judge's approach was correct, and that a mere claim for a liquidated debt is not enough; the nature of the claim is not the answer; it is essential that its quantification should be also be easily ascertainable, and not subject to any reduction; consequently it is essential to wait and see what the defence says to ascertain whether the quantum claimed is unchallengeable, as in the *Axel Johnson* case, where, provided the defendants succeeded on liability, there was no scope for debate as to quantum.

Comparing the *Biggerstaff* case, he submitted that if the set-off related to a claim for short delivery of 10 barrels and there was a dispute as to 5, there would be no set-off, though he was constrained to accept that if the set-off related to an alleged non-delivery of a single barrel there would be a set-off, since the amount of the claim could then be ascertained with certainty.

In support of his argument Mr Southern relied on the case of *Crawford v Stirling* (1802) 4 Esp 207, [1775-1802] All ER Rep 553, where Lord Ellenborough, having stated that the alleged set-off was one for unliquidated damages under a contract of indemnity, concluded that the set-off was inadmissible, and stated ((1802) 4 Esp 207 at 209, 170 ER 693 at 694):

`To make the sum admissible as a set-off, the sum must be settled in monies numbered, which was not the case here ...'

In the present case, he submitted the sum was not settled in monies numbered, in view of the manifold disputes raised in the defence in the Pacifica arbitration.

Finally Mr Southern relied on *B Hargreaves Ltd v Action 2000 Ltd* [1993] BCLC 1111, in which the plaintiff claimed sums due under a building contract, and the defendant sought to set-off claims under other building contracts entered into with the plaintiffs, which were accepted by the defendants as not constituting liquidated debts. Balcombe LJ, with whom Nolan LJ and Sir Christopher Slade agreed, stated as follows ([1993] BCLC 1111 at 1115):

`From these figures it seems to me clear that in each of the cases on which Mr Sheridan seeks to rely-and I have used those two cases as examples only and the same point can be made in relation to the others-the sum claimed by way of set-off depends upon Mr Austin's valuation of the work done, his estimation of what had been omitted, his estimation of whether certain work had been done inadequately and the value he attributed to that inadequate work (which is the way Mr Sheridan prefers it to be put rather than what I think is the normal way, which is the cost of making good the defects). All this makes it clear to me that it is impossible to bring these claims within the way in which it was put by Cockburn CJ in *Stooke v Taylor* (1880) 5 QBD 569 at 575, "money demands which can be readily and without difficulty ascertained". These claims can only be ascertained by litigation or arbitration, and to say therefore that they were readily ascertainable at the relevant date-and it is common ground that the relevant date was the date upon which notice of the appointment of a receiver was given-seems to me to be quite impossible and indeed, as I think Mr Sheridan might concede, would suggest that the courts have been labouring for the last 150 years, if not longer, under a misapprehension as to the nature of set-off at law.'

Mr Southern submitted that precisely the same applied here mutatis mutandis, and that these claims could only be ascertained by litigation or arbitration.

It is only with considerable hesitation that I differ from the judge, who has such great experience of this class of case, but I have come to the conclusion that this is in principle a valid legal set-off, substantially on the grounds advanced by Mr Glennie, which included a number of authorities not cited to the learned judge.

Cockburn CJ's test refers to `*claims* [for] liquidated debts', clearly indicating that the focus is on the claim as such, which seems to me strongly borne out by the statement in the following passage of his judgment ((1880) 5 QBD 569 at 576) (reiterated by the Court of Appeal in the *BICC* case), that the existence and amount of a liquidated claim must be `taken to be known by the plaintiff' (not, be it noted, objectively established) so that he can give credit for the amount and so avoid the costs of set-off. It is also noteworthy that at the end of that passage Cockburn CJ describes the defendant's claim for liquidated damages as being "in other words one of set-off" which is inconsistent with Mr Southern's submissions that the nature of the claim does not provide the answer. This view is strongly supported, in my judgment, by *Seeger v Duthie*, and by *Biggerstaff'*s case, both of which show that the test is whether the claim is truly one for liquidated damages; in the former case there was no set-off because the claim did not fall within the scope of the demurrage clause which specified a liquidated daily rate, whereas in the latter case there was a valid set-off, since, as Lindley LJ stated `[the claim] is a liquidated claim to have back, on the ground of total failure of consideration, the price of those barrels which the company failed to deliver' ([1896] 2 Ch 93 at 101).

The *Axel Johnson* case does not in my judgment avail the plaintiffs, seeing that the set-off successfully relied upon in answer to the Ord 14 proceedings was for a claim in liquidated debt, namely the difference between two specified amounts. *Crawford v Stirling* and the *Hargreaves* case, on the other hand, are not in my judgment of assistance since in both cases the claim was unliquidated. In the present case the pleaded set-off is undoubtedly one for a liquidated debt for the stipulated daily rate of hire in respect of the four identified periods. That in my judgment is sufficient to bring it within the test.

I should add for completeness that, in my judgment, Mr Glennie's explanation of the latter part of Cockburn CJ's test is correct, and that when Cockburn CJ spoke of `money demands which can be readily and without difficulty ascertained', he was referring to ascertainment of the quantum of the demand, and not to the amount which might ultimately be held recoverable after all the defences put forward had been considered.

This conclusion seems to me to be in accordance with the requirements of justice since, otherwise, a legal set-off could only be validly asserted if the ultimate quantum of the liquidated debt claimed (subject of course to liability) could be established virtually to Ord 14 standards.

For all those reasons the legal set-off pleaded in the present case is in my judgment sound in principle.

It thus becomes essential to decide the second point, on which I agree with the judgment which Hoffmann LJ is about to deliver. It follows that this appeal will be dismissed, albeit on different grounds than those relied upon by the judge.

**HOFFMANN LJ.**

In 1987-88 the plaintiff chartered two vessels from the defendant. `MT Pacifica' was time chartered under a charterparty dated 18 December 1987 and redelivered on 9 December 1989. `MT New Vanguard' was chartered under charterparties dated 17 November 1987 and 12 April 1988. All the charterparties led to disputes which were referred to arbitration. On 5 October 1992 the parties settled the New Vanguard arbitration. The defendant agreed to pay the plaintiff $US120,000 on 7 January 1993. In the Pacifica arbitration, points of claim had been delivered on 15 September 1992. These made a claim of $US297,156 for unpaid hire at the contractual rate of $US10,000 a day and for bunkers supplied. On 22 December 1992 the Pacifica arbitrator made an interim award of $US42,070 to the defendant as indisputably due. The rest remains disputed, the plaintiff contending that the ship was off hire during the relevant periods and that nothing was due for bunkers.

On 7 January 1993, when the $US120,000 due under the New Vanguard settlement was due to be paid, the defendant's solicitor sent a telex to the plaintiff's solicitors, asking, first, whether they could deduct the $US42,070 and costs which was due under the Pacifica interim award. This was conceded. Secondly, they asked whether they could `hang on to the balance' of the New Vanguard settlement money as security for the remaining claims in the Pacifica arbitration. The alternative, they said, was to apply for a Mareva injunction over the fund in their hands.

The plaintiff was not receptive to this suggestion. It issued a writ on 26 January 1993 for $US76,889 (giving credit for the interim award) and a summons for judgment under Ord 14. The defendant did not apply for a Mareva injunction. Instead, it pleaded its claim in the Pacifica arbitration as a set-off and asked for leave to defend. Hobhouse J said that the claim was not sufficiently ascertainable to be admissible as a set-off. He therefore held that the defendant had no arguable defence to the claim and gave judgment under Ord 14.

For the reasons given by Hirst LJ, I agree that in principle the claims for hire and bunkers in the `Pacifica' arbitration were liquidated claims capable of being set off at common law. The fact that they were disputed on grounds which could not easily be resolved does not in my judgment affect their liquidated nature. But the plaintiff challenges the claim to set-off on another ground, which the judge did not find necessary to decide. It says that to be available as a set-off, a claim must be capable of being litigated in the court in which the set-off is pleaded. This claim, it is said, did not qualify for set-off because the parties had agreed that it should be submitted to the decision of an arbitrator.

This is a difficult point on which there is no authority. The answer must be deduced from first principles. For this purpose it is necessary to distinguish between what Philip Wood, in his valuable book *English and International Set-Off* (1989) calls `independent set-off' and `transaction set-off'. Independent set-off, as its name suggests, does not require any relationship between the transactions out of which the cross-claims arise. In English law it is based upon s 13 of the Insolvent Debtors Relief Act 1729 (2 Geo II c 22) as amended by the Debtors Relief (Amendment) Act 1735 (8 Geo II c 24). The only requirements are that the cross-claims must both be due and payable and either liquidated or capable of being quantified by reference to ascertainable facts which do not in their nature require estimation or valuation. Transaction set-off, on the other hand, is a cross-claim arising out of the same transaction or one so closely related that it operates in law or in equity as a complete or partial defeasance of the plaintiff's claim. The category covers a common law abatement of the price of goods or services for breach of warranty, as explained by Parke B in *Mondel v Steel* (1841) 8 M AND W 858 at 870, [1835-42] All ER Rep 511 at 515 and equitable set-off, as explained by Morris LJ in *Hanak v Green* [1958] 2 All ER 141, [1958] 2 QB 9. At common law, as Parke B said ((1841) 8 M AND W 858 at 872, [1835-42] All ER Rep 511 at 516), the purchaser `defend[s] himself by shewing how much less the subject-matter of the action was worth' and in equitable set-off the defendant asserts what Morris LJ called ([1958] 2 All ER 141 at 147, [1958] 2 QB 9 at 19) `an equity which went to impeach "the title to the legal demand"'.

The question of actionability or jurisdiction can arise in different ways, of which the most common will be where, as in this case, the cross-claim is subject to an arbitration clause or where, by reason of a foreign jurisdiction clause, it is subject to the jurisdiction of the courts of another country. There is of course an important difference between, on the one hand, an arbitration clause or a foreign jurisdiction clause in a non-Convention case and a choice of jurisdiction under art 17 of the Brussels Convention. In a non-Convention case, the court is not deprived of jurisdiction. It has a discretion under its inherent jurisdiction or s 4 of the Arbitration Act 1950 or it is obliged by s 1 of the Arbitration Act 1975 to stay the proceedings. But the stay may be lifted and the court may exercise its supervisory jurisdiction. Under art 17, the court is bound to decline jurisdiction. In each case, however, the effect is that the court refuses to try the merits of the dispute. Procedurally, the claim cannot be litigated while the stay remains. To this extent there is in my view a strong analogy between arbitration clauses and foreign jurisdiction clauses, whether or not subject to art 17.

In the case of transaction set-off, the authorities are in favour of allowing the set-off to be pleaded, notwithstanding its submission to arbitration or a different jurisdiction. *Gilbert-Ash* (*Northern*) *Ltd v Modern Engineering* (*Bristol*) *Ltd* [1973] 3 All ER 195, [1974] AC 689 concerned the question of whether a *Mondel v Steel* abatement for defective work could be pleaded as a defence to a claim by a builder for payment under an architect's certificate. The House of Lords decided that it could, notwithstanding that the contract provided for arbitration on the question of whether the work was defective. Lord Diplock ([1973] 3 All ER 195 at 217, [1974] AC 689 at 720) said that the contractor could apply for the stay of his own action pending arbitration but if he did not, `the court would have to decide on the evidence adduced before it whether the defence was made out.' Lord Salmon said ([1973] 3 All ER 195 at 223, [1974] AC 689 at 726) that it would `emasculate' the right of set-off if the courts were to say to the defendant `Pay up now and ... arbitrate later'. Likewise in *Meeth v Glacetal Sarl* Case 23/78 [1978] ECR 2133 the European Court decided that a German buyer of glass, sued for the price in a German court by the French seller, could plead a set-off for delays and defaults by the seller notwithstanding a choice of jurisdiction clause valid under art 17 which said that each party could be sued only in his own jurisdiction.

In cases of transaction set-off, this obviously makes good sense. *Mondel v Steel* is, as Lord Diplock emphasised in the *Gilbert-Ash* case, `no mere procedural rule designed to avoid circuity of action but a substantive defence at common law' (see [1973] 3 All ER 195 at 215, [1974] AC 689 at 717). The same is true of set-off in equity. The defendant is pleading a confession and avoidance to the plaintiff's claim. He is saying that although the facts alleged by the plaintiff entitle him to judgment for the amount claimed, a wider examination of related facts would show that the claim is wholly or partly extinguished. It would be quite unreasonable for a plaintiff who has chosen to sue in one forum to rely upon an arbitration or jurisdiction clause to confine the court to the facts which he chooses to prove and prevent it from examining related facts as well.

This argument is not nearly so strong in the case of independent set-off, which is not a substantive defence to the claim but a procedure for taking an account of the balance due between the parties. It would not be entirely true to say that transaction set-off was substantive while independent set-off was procedural, because independent set-off does operate as a substantive reduction or extinction of the debt owed to the plaintiff. But it arrives at this result by procedural means. It entitles the defendant to require that the merits of an unrelated cross-claim be tried in the same action and converts the plaintiff's original cause of action into the right to a balance due on the taking of an account.

The procedural basis of independent set-off is reflected in the rule that the mere existence of liquidated cross-claims does not automatically extinguish the smaller debt. It operates only by express or implied agreement or through the judicial process by which the account is taken. As Jessel MR said in *Talbot v Frere* (1878) 9 Ch D 568 at 573, `there could not be a set-off until action brought and set-off pleaded'. Section 13 of the 1729 Act is expressed in procedural terms:

`... where there are mutual Debts between the Plaintiff and the Defendant ... one Debt may be set off against the other, and such Matter may be given in Evidence upon the General Issue, or pleaded in Bar, as the Nature of the Case shall require ...'

So in *Absolon v Knight and Barber*(1743) Barnes 450, 94 ER 998, the Court of Common Pleas held that a set-off under the statute could not be relied upon in answer to a distraint for rent. The reason was purely procedural: a distraint had to be challenged by an action of replevin, which was an action in tort, to which the defendant pleaded the rent owing by way of justification. The statute, on the other hand, contemplated a general issue or plea in bar to an action for a liquidated sum. This could not be made to fit into the procedure for challenging a distraint. Today, however, the disappearance of the forms of action means that equitable set-off may be relied upon as a defence to a distraint: see *Eller v Grovecrest Investments Ltd* [1994] 4 All ER 845.

Another facet of the procedural operation of the statute was that a defendant could not rely upon a cross-claim if it was statute-barred or unenforceable under the Statute of Frauds or on grounds of infancy. In none of these cases would the debt have been extinguished or avoided. It would merely not have been actionable. But the courts have always held that the cross-claim has to be actionable. In *Francis v Dodsworth* (1847) 4 CB 202 at 220, 136 ER 482 at 489, Wilde CJ said `no debts can be used by way of set-off under [the 1729 Act] except such as are recoverable by action'.

In my view it is of the essence of independent set-off in English law that the defendant should be entitled to have the merits of his cross-claim tried by the court in which he has been impleaded. The machinery of the 1729 Act simply cannot operate unless this is possible. This, I think, is the meaning of Lord Campbell CJ's gnomic observation in *Walker v Clements* that `The set-off is substituted for a cross action' (see (1850) 15 QB 1046 at 1050, 117 ER 755 at 757). If, therefore, the defendant is faced with a procedural bar to having his claim determined; for example, because he has agreed to the jurisdiction of another tribunal, he cannot assert an independent set-off.

In this case the cross-claim was subject to a mandatory stay under s 1 of the Arbitration Act 1975. (If the arbitration had been domestic, the question would have depended upon the outcome of a summons for a stay under s 4 of the Arbitration Act 1950.) The defendant says that the arbitration need cause no difficulty. It is quite willing for its cross-claim to proceed, as it has been proceeding, by arbitration. Unless the plaintiff insists, it does not propose to take any further steps in the action until the arbitration has been concluded. But what the defendant is seeking in this appeal is not a stay of the action or the execution of the plaintiff's judgment but *leave to defend*. This must mean the right to have its cross-claim adjudicated by the court. But the defendant has no such right.

This conclusion seems to me to follow in principle from the nature of independent set-off in English law. Does it conflict with the policy of the statutes of set-off? Independent set-off enables the parties to have their various disputes tried in one action instead of two or more. But since they are ex hypothesi unrelated to each other, this is a modest advantage. It is not essential to a fair determination of the dispute, as it will usually be in a case of transaction set-off. As a policy it seems to me to be outweighed by the desirability of giving effect to an agreement to submit a particular dispute to arbitration or the jurisdiction of a foreign court. Suppose, for example, that parties enter into a contract which gives rise to a liquidated claim and is expressed pursuant to art 17 to be subject to the exclusive jurisdiction of the German courts. It would in my view be strange if a party had to submit to having a dispute about this claim adjudicated by an English court merely because he brought a wholly unrelated action for a liquidated sum against the other party in this country. In *Spitzley v Sommer* *Exploitation SA* Case 48/84 [1985] ECR 787 at 793 Sir Gordon Slynn Advocate General said that a plaintiff who was defendant to a counterclaim or set-off `can always challenge jurisdiction by relying on the agreement [under art 17]' and that-

`This protection in particular is available where the dispute raised by the counterclaim or set-off relates to facts other than those in issue in the claim.'

The effect of such a jurisdictional challenge would in my judgment be that in English domestic law the cross-claim would not be available as an independent set-off.

The original purpose of s 13 of the Insolvent Debtors Relief Act 1729 was to prevent debtors from being cast into prison for failure to meet a judgment when, on a full taking of accounts, they might not be indebted at all. But, as Staughton LJ pointed out in *Axel Johnson Petroleum AB v MG Mineral Group AG, The Obelix* [1992] 2 All ER 163 at 168-169, [1992] 1 WLR 270 at 275, it was not necessary for this purpose that the cross-claims should always have to be tried in the same action followed by the taking of an account. Equally efficacious would have been a stay of execution on the judgment until determination of the cross-claim and such a stay could have been either compulsory (as, in effect, it is under the 1729 Act) or discretionary, enabling the judge to take into account matters such as the strength of the cross-claim, the means of the plaintiff to repay and the needs of the parties for cash.

Whatever might have been the position in 1729, the court today has adequate powers to prevent injustice to a debtor by staying proceedings or execution pending the determination of a cross-claim in arbitration or another jurisdiction. So one would not be subverting the original policy of the 1729 Act by holding that it applied only to cases in which the independent cross-claims were both subject to determination on their merits by the court. And in other respects, this seems to me to produce a fairer result.

In my judgment therefore the defendant's claims in the Pacifica arbitration cannot be pleaded as independent set-off. If the defendant's object was to obtain security for those claims it could, as it had suggested, have applied for a Mareva injunction. No doubt for good reason it did not. It could have applied for a stay of execution of the plaintiff's judgment. Again it did not. On the facts of this case, I am not altogether surprised. But it was not in my judgment entitle to leave to defend. So, for reasons which are not the same as those of the judge, I would dismiss the appeal.

*Appeal dismissed.*

*Leave to appeal to the House of Lords refused.*

**Cases referred to in judgments**

*Absolon v Knight and Barber* (1743) Barnes 450, 94 ER 998.

*Axel Johnson Petroleum AB v MG Mineral Group AG, The Jo Lind* [1992] 2 All ER 163, [1992] 1 WLR 270, CA.

*BICC plc v Burndy Corp* [1985] 1 All ER 417, [1985] Ch 232, [1985] 2 WLR 132, CA.

*Biggerstaff v Rowatt's Wharf Ltd, Howard v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA.

*Crawford v Stirling* (1802) 4 Esp 207, [1775-1802] All ER Rep 553, 170 ER 693, KB.

*Eller v Grovecrest Investments Ltd* [1994] 4 All ER 845, CA.

*Francis v Dodsworth* (1847) 4 CB 202, 136 ER 482.

*Gilbert-Ash* (*Northern*) *Ltd v Modern Engineering* (*Bristol*) *Ltd* [1973] 3 All ER 195, [1974] AC 689, [1973] 3 WLR 421, HL.

*Hanak v Green* [1958] 2 All ER 141, [1958] 2 QB 9, [1958] 2 WLR 755, CA.

*Hargreaves* (*B*) *Ltd v Action 2000 Ltd* [1993] BCLC 1111, CA.

*Lagos v Grunwaldt* [1910] 1 KB 41, [1908-10] All ER Rep 939, CA.

*Meeth v Glacetal Sarl* Case 23/78 [1978] ECR 2133.

*Mondel v Steel* (1841) 8 M AND W 858, [1835-42] All ER Rep 511, 151 ER 1288.

*Seeger* (*or Seegur*) *v Duthie* (1860) 8 CBNS 45, 141 ER 1081, CP and Ex Ch.

*Spitzley v Sommer Exploitation SA* Case 48/84 [1985] ECR 787.

*Stooke v Taylor* (1880) 5 QBD 569, DC.

*Talbot v Frere* (1878) 9 Ch D 568.

*Walker v Clements* (1850) 15 QB 1046, 117 ER 755.

**Cases also cited or referred to in skeleton arguments**

*Bulk Oil* (*Zug*) *AG v Trans-Asiatic Oil Ltd SA* [1973] 1 Lloyd's Rep 129.

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*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664, [1993] AC 334, HL.

*Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309, CA.

*Doleman AND Sons v Ossett Corp* [1912] 3 KB 257, CA.

*Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1973] 3 All ER 589, [1974] QB 233, CA.

*Lloyd v Wright* [1983] 2 All ER 969, [1983] QB 1065, CA.

*Morley v Inglis* (1837) 4 Bing NC 58, 132 ER 711.