LLOYD'S LAW REPORTS

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LLOYD'S LAW REPORTS

Editor: Miss M. M. D'SOUZA, LL.B., Barrister
Consulting Editor: G. M. HALL, Barrister

COURT OF APPEAL
Mar 8 and 9, 1977

ARTA SHIPPING CO. LTD.
v.
THAI EUROPE TAPIOCA SERVICE LTD.
(THE " JOHNNY ")

Before Lord DENNING,[1] M.R.,
Lord Justice ORR and Sir DAVID CAIRNS

Charter-party (Time)—Hire—Redelivery—Vessel chartered for 11/13 months—Charterers fixed vessel for legitimate last voyage Continent to Karachi—Vessel redelivered 29 days late—Whether hire for 29 days to be based on market rate for a time charter " trip " or market rate for an 11/13 months time charter—Baltimore charter-party, cl. 7.

In August, 1973, the owners let their vessel *Johnny* to the charterers for minimum 11/maximum 13 calendar months from the time the vessel was delivered and placed at the charterers' disposal. The charter was on the Baltimore form, cl. 7 of which provided (inter alia):

> Should the vessel be ordered on a voyage by which the Charter period will be exceeded, the Charterers to have the use of the vessel to enable them to complete the voyage, provided . . . but for any time exceeding the termination date of the Charter the charterers to pay the market rate if higher than the rate stipulated herein.

Johnny was delivered at 17 15 hours on Oct. 7, 1973, and the " maximum 13 calendar months " expired at 17 15 hours on Nov. 7, 1974. On Sept. 19, 1974, the charterers fixed *Johnny* for a voyage from the Continent to Karachi. She loaded at Rotterdam between Oct. 2 and 18 and was redelivered on Dec. 7, 29 days later.

The parties were unable to agree a rate of hire for the 29 days, the owners contending that the relevant market rate was that for a time charter ".trip ", i.e. a single voyage on time charter terms while the charterers argued that the relevant market rate was the market rate for an 11/13 months time charter, the fixture in each case being made between Oct. 2, 1974, and Dec. 7, 1974.

The dispute was referred to arbitration, and the learned umpire found in favour of the owners but stated his award in the form of a special case, the question for decision being

Whether the relevant market rate is that for a time charter trip or whether it is the market rate for an 11/13 months time charter.

———*Held*, by Q.B. (Com. Ct.) (DONALDSON, J.) that, (1) time charter rates of hire were always fluctuating but if the question " Is the vessel currently chartered at above or below the market rate? " was addressed to either the owners or the charterers, during the charter period the answer would not be based upon the particular trip or voyage on which the vessel was engaged but upon market rates for similar time charters then being fixed or capable of being fixed;

(2) what had to be ascertained was the daily rate for an identical charter and the fact that the charterers were going to redeliver the vessel at Karachi was immaterial since the relevant market rate was not that for a succeeding fixture with delivery in Karachi but was the current market rate for a twin of this time charter;

(3) unless the parties could agree a rate, the award would be remitted to the umpire to enable him to determine the appropriate rate in the light of the judgment.

On appeal by the owners:

———*Held* by C.A. (ORR, L.J., and Sir DAVID CAIRNS; Lord DENNING, M.R., dissenting), that (1) in determining what was the appropriate " market rate " for the remainder of the voyage it was essential that so far as possible like should be compared with like and that this object was most closely achieved by the rate adopted by the learned Judge (*see* p.4, col. 1; p.5, col. 1);

(2) the use of the words " if higher than the rate stipulated herein " in cl.7, pointed to a comparison between time charter rates at different times and not to a comparison between the stipulated rate and the rate for a single voyage on time charter terms (*see* p. 4, col. 1; p. 5, col. 1);

(3) there was no reason why the rate ought to be linked to the rate for a voyage to Karachi, since the charterers had a right under the charter-party to redeliver there and that would have been taken into account in fixing the original rate of hire (*see* p. 4, col. 1; p. 5, col. 1);

Appeal dismissed.

Per Lord DENNING, M.R. (at p. 3) . . . This is just one of those cases where the decision of the Umpire should be given great weight. Regard should be had to the agreement which provides that it shall

1 Dissenting

be " final and binding upon both parties ". I say this because cl.7, and especially the words " market rate " is to be interpreted in a commercial setting against a commercial background. This is known to the umpire by reason of his commercial expertise: and is not known to the lawyers.

The following cases were referred to in the judgments:

Dione, The, (C.A.) [1975] 1 Lloyd's Rep.115;
Hector Steamship Co. Ltd. v. V/O Sovfracht, (1945) 78 Ll. L. Rep. 275; [1945] K.B. 343.

This was an appeal by Arta Shipping Co. Ltd. of Nicosia, the owners of the vessel *Johnny* from the decision of Mr. Justice Donaldson, ([1977] 1 Lloyd's Rep. 257) given in favour of the charterers Thai Europe Tapioca Service Ltd. and holding in effect that the relevant rate of hire for the 29 days in excess of the charter period was the current market rate for a twin of this time charter.

Mr. Anthony Diamond Q.C. and Mr. Michael Collins (instructed by Messrs. Holman Fenwick & Willan) for the plaintiff appellant owners; Mr. Robert S. Alexander, Q.C. (who also appeared in the Court below) and Mr. J. Havelock-Allan (instructed by Messrs. Clyde & Co.) for the defendant respondent charterers.

The further facts are stated in the judgment of Lord Denning M.R.

Judgment was reserved.

Friday, Mar. 25, 1977

JUDGMENT

Lord DENNING M.R.: The facts are short and stated in the special case. So I will go straight to the point.

Clause 7 is the usual continuation clause in the Baltime form of time charter. It is designed so as to allow the charterer a small extension beyond the 13 months maximum: but to insist that, if he does so, he cannot get away with it at the low charter rate as in *Hector v. Sovfracht* (1945) 78 Ll. L. Rep. 275; [1945] K.B. 343. He must pay the market rate for the extended time.

The continuation clause only applies to a short extension. The charterer is allowed to order the vessel on a last voyage if it can be reasonably calculated that it will allow redelivery " about " the end of the 13 months. I should think "about" would be only two or three days. But he is not allowed to order the vessel on a last voyage if it is likely to be late by more than two or three days.

In view of the concession made by the parties that cl. 7 applies to this case (see cl. 4 of the special case), we must assume that when this vessel was ordered on her last voyage to Karachi, it could reasonably be calculated that she would be redelivered at Karachi " about " the end of the 13 months, that is, " about " Nov. 7 1974—that is by, say, Nov. 10, 1974. In point of fact she was, for some reason or other, delayed for a much longer time. It was for nearly 30 days until Dec. 7, 1974. But, in view of the concession, cl. 7 must be applied to 30 days, just as it would be to three days.

In testing the position, I propose to take a case where the last voyage was not covered by cl. 7 at all. Assume that, at the time when the vessel was ordered on her last voyage, it was plain that she would be 30 days late after the 13 months had ended. Suppose that, at the time of this last order, the market rates had risen, and the charterer sought to take advantage of them so as to profit from those rates. That would be an illegitimate last voyage. The owners could have refused to take the vessel on it. If they did not refuse, but allowed the vessel to perform that illegitimate last voyage, it is plain the owners could recover either damages or a quantum meruit—see *The Dione* [1975] 1 Lloyd's Rep. 115 at p. 118. In either case the amount would be assessed at the market rate then ruling for a time charter trip for that voyage at that time. That is for a time charter for the period of time occupied by such a voyage based on spot rates for the voyage charter but adjusted to a time charter basis. That would obviously be fair and just. The charterer, by sending her on that illegitimate last voyage, would have received the high market rate then ruling and should pay damages based on that rate for that voyage, that is, for the remainder of it after the 13 months had expired.

Now take the case where the last voyage was covered by cl. 7. That means that, at the time when the vessel was ordered on her last voyage, it was calculated that she might be two or three days late, but no more. The effect of cl. 7 is that the owners could not refuse to take the vessel on that voyage. They would have had to perform it. But otherwise the effect would be the same as in the previous illustration. The charterer would have to pay for the two or three extra days at the market rate then ruling for a time charter trip for that voyage at that time. That again is only fair and just. The charterer, by sending her on that extended last voyage, would have received the high market rate then ruling for the whole voyage, to the port of Karachi taking into account the unpopularity of that port. He would still retain much benefit from this last voyage. Right up to the last day of the 13 months, he would only have to pay hire to the owners at the charter rate. Then he would have to pay the

market rate — the higher rate — only for the two or three days.

Those illustrations seem to me to give a fair and just interpretation of the charter: and I am confirmed in this view by the fact that the umpire himself so decided.

The opposite view seems to me to be very legalistic. It goes like this: Under the original charter for 11/13 months the hire was assessed on a time charter basis. It follows that under any lawful extension of that time charter, the hire should be assessed on a like basis. Especially as the concluding words of cl. 7 draw a comparison between " the rate stipulated herein " and " the market rate ". Like must be compared with like. So the extended time should be paid for on a strictly time basis and not on a voyage basis. If it is asked, On what time basis? How long a time charter? Six weeks? Or six years? The answer is said to be 11/13 months because that is the nearest comparable time charter to this one. So the question becomes: What rate of hire would be quoted for a further 11/13 months time charter at the end of the first 13 months?

That seems to me to be a lawyer's argument. It is utterly divorced from commercial reality. I am quite sure that the umpire was right to reject it.

There is a practical point, too, which Mr. Diamond mentioned. It was this: If " market rate " is different for an illegitimate last voyage from an extended voyage under cl. 7, it would provoke conflicts of a most undesirable kind as to whether the last voyage was legitimate or illegitimate. There would be uncertainty and disputes which would be avoided by the simple solution provided by the umpire.

I would add this: This is just one of those cases where the decision of the umpire should be given great weight. Regard should be had to the agreement which provides that it shall be " final and binding upon both parties ". I say this because cl. 7, and especially the words " market rate " is to be interpreted in a commercial setting against a commercial background. This is known to the umpire by reason of his commercial expertise: and is not known to the lawyers. I would, therefore, restore the award of the umpire. I would allow the appeal, accordingly.

Lord Justice ORR: The question at issue in this case is as to the meaning of the words " market rate " in cl. 7 of the charter-party. Before the arbitrators the rival contentions of the parties were, on behalf of the charterers, that these words denote the rate for a time charter for a period of minimum 11/maximum 13 calendar months in the charterers' option with delivery U.K./Continent or alternatively with delivery India/Pakistan, and on behalf of the owners that the words denote the rate for a time charter trip either from U.K./Continent to Karachi or alternatively from Karachi to U.K./Continent, U.S. Gulf or Japan. The arbitrators disagreed and the umpire's award was that the " market rate " denotes the rate for a time charter trip from U.K./Continent to Karachi, and that the owners' claim therefore succeeded in full but he expanded the question of law agreed between the parties to include, as a further alternative market rate, the rate " for some other employment of the vessel and if so what employment ", and gave as his reason for this addition that a round time charter trip rate, although not raised in argument, had some appeal to him inasmuch as it would be a median rate between the very high outward and the very low inward time charter rates. This alternative was not, however, pursued in argument before the judge.

In his judgment Mr. Justice Donaldson pointed out that at any time during the charter period it would be possible to pose and receive an answer to the question "Is the vessel chartered at, above, or below the market rate?" but that whether the answer was addressed to the owner or the charterer, it would not be based on the particular trip or voyage on which the vessel was employed but on market rates for time charters then being fixed or capable of being fixed, and in his judgment the market rate to be adopted for the purposes of cl. 7 was the daily rate for a time charter similar to that granted to the charterers, providing for redelivery world-wide subject to the same exceptions as were contained in the original charter.

The effect of this decision is that up to Nov. 7, 1974, when the ship was off the coast of southern Africa on her way to Karachi, the rate applicable would be that contained in the charter-party, the owners being responsible for bunkers and port charges, and that for the remainder of the voyage the rate payable would be a daily rate calculated from the provisions of the assumed new charter and on the same basis as to bunkers and port charges.

Against this decision the owners now appeal and Mr. Diamond on their behalf has advanced two arguments. He claims in the first place that the effect of the judgment is that for the second part of the voyage the charterers will pay substantially less than they would have had to pay if there had been no cl. 7 and the voyage had been an illegitimate one as defined in *The Dione*, [1975] 1 Lloyd's Rep. 115, or had been a lawful voyage without any provision as to the rate of remuneration during the second part of it. Whether the voyage in question would, in the absence of cl. 7, have been illegitimate has not been determined or agreed, but on the assumption that it might have been illegitimate I am unable to accept this argument. The voyage

in question clearly was, by reason of the provisions of cl. 7, a legitimate and contractual voyage, and it is misconceived, in my judgment, to argue that a higher rate should be adopted because under a different charter-party a larger sum would or might have been payable, and largely for this reason I have not been able to derive any assistance from the cases to which Mr. Diamond referred us.

On the contrary I accept the argument of Mr. Alexander that the ship's employment until Nov. 7, 1974, was under the terms of the charter-party; that in determining what is the appropriate " market rate " for the remainder of the voyage it is essential that, so far as possible, like should be compared with like; and that this object is, among the various candidates, most closely achieved by the rate adopted by the Judge. I also accept that to adopt the rate contended for by the owners would involve an obvious injustice to the charterers in that they would, in respect of part of a legitimate and contractual voyage, be made to pay twice over for the disadvantage to the owners of the ship being redelivered at Karachi rather than in Europe, since that disadvantage must be taken, in my judgment, to have been covered by the original charter-party rates.

For these reasons I would reject Mr. Diamond's first argument but he also advanced an alternative argument that the matter here in issue is not one which should be left to be determined as a question of fact by arbitrators or an umpire and that we should therefore reverse the Judge's decision and uphold the umpire's. Mr. Diamond accepted that this argument could lead to a situation in which different arbitrators or umpires might come to different conclusions in essentially similar cases, and that this could happen is clear from the fact that in the present case the arbitrators disagreed. I have listened to the argument with the greatest respect for the arbitrators and umpires in this field and mindful of the very high regard in which they are widely held, but Mr. Justice Donaldson in the judgment under appeal pointed out that cl. 7 is a sensible clause in that it avoids disputes as to whether a last voyage is legitimate and as to the tolerance involved. These disputes potentially costly and uncertain in their outcome, and quite apart from the circumstance that the question now at issue is, at least in part, one of law, I should be sorry if those disposed to use the clause now in question were to be deterred from doing so by reason of uncertainty as to the effect that will be given to it.

For these reasons, and with great respect for the judgment delivered by Lord Denning, M.R., I would dismiss this appeal.

Sir DAVID CAIRNS: I agree with Lord Justice Orr that this appeal should be dismissed.

I accept Mr. Diamond's propositions as to the effect of cl. 7 as follows: (1) It gives the charterers an express tolerance for re-delivery after 17 15 on Nov. 7, 1974; (2) it compels the owners to perform a voyage which is within that tolerance but which would be non-contractual without it; (3) it provides for the owners to be remunerated for that voyage at the contract rate up to 17 15 on Nov. 7, 1974, and at market rate thereafter.

In considering what is meant by " market rate " I do not derive any assistance from considering what would be payable on a quantum meruit if the latter part of the voyage had been lawful but with no provisions as to the rate of remuneration, or what would have been payable by way of damages if the use of the vessel by the charterers for the latter part of the voyage had been a breach of contract. None of the cases cited affords any assistance in deciding what is meant by " market rate " in a clause which provides expressly for the rate of remuneration for part of a voyage which is lawful under the contract.

" Market rate " must in my judgment be ascertained by postulating a charter-party which corresponds as closely as possible with the actual charter-play under which the voyage is performed, except of course that the hypothetical charter-party must be supposed to be entered into at the time from which the market rate is to be assessed.

Exact correspondence is impossible but in my view a charter providing for delivery one port East Coast India in owners' option, redelivery world-wide subject to the same exceptions as occur in the actual charter, was the right form of charter to take.

I reject the owners' contention that the right measure would be the rate for a single voyage on time charter terms U.K./Continent to Karachi because I am satisfied that what cl. 7 requires is a comparison of like with like. The use of the words " if higher than the rate stipulated herein " point to a comparison between time charter rates at different times and not to a comparison between the stipulated rate and the rate for a single voyage on time charter terms. The rate to be ascertained is one appropriate to the time for which the charterers are to have the use of the vessel after the primary redelivery date: it is not a rate for a voyage but for the time taken over part of a voyage. There is no reason why the rate should be linked to the rate for a voyage to an unpopular port such as Karachi, seeing that the charterers had a right under the charter-party to redeliver there and that that would be taken into account in fixing the original rate of hire. I also reject the alternative suggested by Mr. Diamond because, although it was one that had some

attraction for the umpire, it was not a rate relied on either before him or before the Judge and there is no logical basis for it. I recognize the weight that should be given to the opinion of an experienced commercial umpire but I also take account of the weight of the contrary opinion of an experienced commercial Judge and for the reasons which I have given, and those given by Lord Justice Orr, I would dismiss the appeal.

[Order: Appeal dismissed with costs. Leave to appeal to the House of Lords refused.]

COURT OF APPEAL

Jan. 11, 12, 13, 14 and 17, 1977

PORT SUDAN COTTON CO.
v.
GOVINDASWAMY CHETTIAR & SONS

Before Lord DENNING, M.R.,
Lord Justice BROWNE and
Sir JOHN PENNYCUICK

Sale of goods (f.o.b.)—Non-delivery—Validity of contract—Goods to be shipped " Destination India "—Buyers intended goods to be shipped to Rumania—Sellers refused to ship goods—Whether buyers entitled to have goods shipped irrespective of destination—Whether cables between buyers and sellers varied contract—Whether sellers estopped from relying on clause " Destination India ".

In 1965, the Republics of India and Sudan entered into a trade agreement by which P (the Sudan State Cotton Marketing Authority) operated a quota or allocation system giving some degree of preference to cotton destined for India.

On Apr. 16, 1973, P offered a quantity of Sudanese long staple cotton for sale and invited bids. On Apr. 18 the buyers sent P and the sellers the following cable

> Please confirm 1000 4VS 3000 6VS 1000 2B 3000 4B 1000 6B total 9000 bales Buyers Radhakrishna Group Mills Tamilnadu Cooperative Group Mills TNTC Group Mills Fareast Mills Advising individual unit names at shipment time Kindly cable confirmation

The sellers and P accepted the offer on May 5, and the contracts dated May 12, which the buyers received on June 12, contained the clause " 4 Destination India" the sellers having inserted the word " India ".

On June 12 the buyers cabled the sellers to the effect

> Received your contracts. . . . Destination mentioned India Please refer our cables . . . advising our intention selling Fareast Mills Also Kindly confirm cable allowing Destination India or any Fareast Ports.

The sellers replied on June 14 by cable which read

> YC12 will allow destination elsewhere if payment foregian currency outside Sudan Indo Agreement.

Between July 2 and 12, the buyers nominated the vessel *Varvara* (or *Barbara*) to load 2250 bales of cotton at Port Sudan on July 15, 1973, for delivery in Rumania. The sellers refused to ship the cotton contending that they were under no obligation to ship otherwise than on a vessel bound for India. The buyers argued that they were entitled to the shipment irrespective of the destination and in any event the contracts had been varied by the buyers and sellers' cables of June 14, 1973. Alternatively the sellers'

reply had involved a promise not to rely upon cl. 4, the contracts were signed and dispatched upon that reliance as was the nomination of the vessel, and the sellers were therefore estopped from relying on the clause and were in breach of contract.

The dispute was referred to arbitration in Liverpool in accordance with the rules of the Liverpool Cotton Association. The umpire found in favour of the buyers. The sellers appealed to the Board of directors of the Association who found in favour of the sellers but stated their award in the form of a special case the questions of law for decision of the Court being (inter alia)

Whether on the facts found and on the true construction of the documents

1. (i) the written contract document dated May 12 1973 constitutes the whole contract between the parties and if not

(ii) is there evidence of acceptance by the sellers of any variation of the terms of the said written contract, and if so,

(iii) what documents comprise the contract (if any) between the parties and what terms express or implied are incorporated therein

2. The buyers or sellers were in breach of their obligations under the contract (if any) so found.

The buyers issued a notice of motion to set aside or remit the award on the grounds of the Boards' technical misconduct, error of law on the face of the award and acting without jurisdiction.

———*Held*, by Q.B. (Com. Ct.) (DONALDSON J.) that (1) the buyers' nomination of a vessel destined for Rumania was invalid since the word " elsewhere " in the sellers' cable of June 14 was to be construed in a limited sense and the sellers were entitled to refuse to ship;

(2) the contract forms received by the buyers on June 12 were in law to be regarded as offers, the acceptance of which was expected by the sellers to be the merest formality;

(3) the sellers cable of June 14 had no clear meaning, and there was no finding to the effect that P accepted payment and/or performance as falling outside the trading agreement;

(4) the negotiations for the contracts never reached a point at which a clear offer by one party could be accepted by the other and there was no concluded contract, if there was a concluded contract on the terms of the forms signed by the parties there was no sufficiently clear promise or representation by the sellers to estop them from relying upon the destination clause.

Buyers claim failed.

With regard to the buyers notice of motion to remit or set aside the award (1) the buyers complaint that the Board failed to distinguish between matters of fact and law and purported to make findings of fact upon questions of law or mixed fact and law was without foundation;

(2) the buyers could only rely upon error of law on the face of the award as a ground for remission or setting aside if it arose without prior opportunity for the parties to make submissions about it and was not covered by the questions submitted to the Court;

(3) the Board was a trade tribunal and entitled to take judicial notice of the fact that P would give preference to bids on behalf of Indian interests within the trade agreement even though there was no evidence to support the findings;

(4) there was no obligation on the arbitrators to make unnecessary findings of facts and they were entitled to rely upon the parties including all necessary findings of facts when lists of proposed findings were submitted to the arbitrators.

Notice of motion dismissed.

On appeal by the buyers:

———*Held*, by C.A. (Lord DENNING, M.R., BROWNE, L.J., and Sir JOHN PENNYCUICK), that (1) the contract was contained in the letters, the contract forms and the cables passing between the parties from May 12, 1973 to July 2, 1973 (*see* p. 10, col. 2; p. 14, col. 2; p. 15, col. 1);

(2) the document of May 12, 1973 was an offer and not a contract the terms of which were varied by the cables of June 12 and 14 (*see* p. 10, col. 2; p. 12, cols. 1 and 2; p. 13, col. 2; p. 14, col. 2; p. 15, col. 1; p. 16, col. 1); it was inconceivable that the buyers, having obtained a concession as to the destination by the sellers' cable of June 14, intended to bind themselves to a contract in the terms of the form as it originally stood (i.e. destination India only) (*see* p. 12, col. 2; p. 15, col. 2); and the contract was concluded on July 2, 1973, when the buyers posted the signed contract (*see* p. 10, col. 2; p. 13, col. 1; p. 14, col. 2; p. 15, col. 1; p. 16, col. 1);

(3) the word "elsewhere" in the sellers cable of June 14 meant " elsewhere " (i.e. other than India) in the Far East (*see* p. 8, col. 2; p. 12, col. 2; p. 15, col. 2);

(4) there was no misrepresentation in the buyers' cable of Apr. 18, in that the meaning of the cable was, as a matter of construction, that the buyers intended and hoped to resell any cotton they were allocated in part to the three named Indian mills and in part to other mills in the Far East in unspecified proportions (*see* p. 8, col. 2; p. 14, col. 2; p. 16, col. 2) and the sellers were in breach for refusing to ship to any destination other than India (*see* p. 11, col. 2; p. 17, col. 1).

Appeal allowed. *Leave to appeal to House of Lords refused.*

Per Lord DENNING M.R. (at p. 11): . . . . it has been said in the House of Lords that " it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made " . . . but I believe it is contrary to the rule in every other civilized system of law including the other countries of the Common Market. It is a pity that, when contracts cross the frontiers so much nowadays, we should have different rules of interpretation. But although we have to exclude subsequent contracts and the construction of contracts, I see no reason to extend it any further . . . if a party, by words or conduct, admit at a later date that a contract was concluded between him and the other; or admits that it contained such and such a term; then that admission is receivable in evidence and be given such weight as the Court thinks proper.

The following cases were referred to in the judgments:

Brogden v. Metropolitan Railway Co., (1877) App. Cas. 666;

Ferguson v. John Dawson & Partners (Contractors) Ltd., (C.A.) [1976] 2 Lloyd's Rep. 669; [1976] 1 W.L.R. 1213;

Household Fire Assurance v. Grant, (1879) L.R.4 Ex. D. 216;

Hussey v. Horne-Payne (1874) 4 App. Cas. 311;

Scammel (G.) & Nephew Ltd. v. Ouston, [1941] A.C. 251;

Slatterie v. Pooley, (1840) 6 M. & W. 665;

Whitworth Street Estates (Manchester) v. James Miller and Partners, (H.L.) [1970] 1 Lloyd's Rep. 269; [1970] A.C. 572;

Wickman Machine Tool Sales Ltd. v. Schuler A.G. (H.L.) [1973] 2 Lloyd's Rep. 53; [1974] A.C. 235.

This was an appeal by the buyers, R. Govindaswamy Chettiar & Sons of Coimbatore from the decision of Mr. Justice Donaldson ([1977] 1 Lloyd's Rep. 166) given in favour of the sellers Port Sudan Cotton Company of Khartoum and holding in effect that the sellers were entitled to refuse to ship cotton sold to the buyers on the grounds that they were not obliged to ship otherwise than on a vessel bound for India.

Mr. Mark Saville Q.C., Mr. Anthony Colman, Mr. Michael Collins and Mr. B.I. Anchi (instructed by Messrs Norton, Rose, Botterell & Roche, agents for Messrs Weightmans of Liverpool) for the plaintiff respondent sellers; Mr. Anthony Diamond Q.C. and Mr. A. G. S. Pollock (instructed by Messrs Hill Dickinson & Co.) for the defendant appellant buyers.

The further facts are stated in the judgment of Lord Denning, M.R.

Judgment was reserved.

Tuesday, Mar. 8, 1977

JUDGMENT

Lord DENNING, M.R.: In the old days, when Lancashire made cotton goods for the world, the bales of raw cotton came through the port of Liverpool. Since then disputes in the cotton trade have been resolved by the Liverpool Cotton Association. It has its own rules and procedures. The disputes are settled by experts in the trade. Not by lawyers. Rarely is there recourse to the Courts. Now the Directors of the Association—I will call them "the arbitrators"—have stated an award in the form of a special case for the opinion of the Court. I can well understand the reason. It raises difficult points which are better suited for determination by lawyers than by experts in the trade.

The parties come from afar. The sellers are the Port Sudan Cotton Company of Khartoum. I will call them the Sudanese sellers. The buyers are Chettiar & Sons of Coimbatore, India. I will call them the Indian buyers. These Indian buyers were buying agents for a Liverpool firm of cotton merchants—A. Meredith Jones & Co. Ltd. I will call them the Liverpool merchants.

Throughout the transactions, it must be borne in mind that there has for some years been a trade agreement between India and Sudan. It is called the Indo-Sudan Trade Agreement. Under it Sudan was to export to India its special commodities, including raw cotton: and India was to export to the Sudan tea, jute, and textiles, including cotton piece-goods. The unit of account was to be pounds sterling. But the intention was to have a special account in which the cross dealings could be set one against the other: and cancel out as far as possible. So that there would be no need for either country to have to buy foreign exchange, such as sterling or dollars.

Another thing to bear in mind is that the sales of cotton from the Sudan are under the control of the Government of the Sudan. There is a government authority called the Cotton Public Corporation. In February of each year it announced its cotton-marketing policy. It offers to sell cotton to all-comers at a stated price F.O.B. It receives tenders from buyers all over the world. Then it operates a quota system, by which it allocates so much to such buyer. In making the allocation, the corporation has special regard to Indian buyers so as to implement the Indo-Sudan trade agreement. But when the actual contracts are made, the Cotton Public Corporation nominates a subsidiary company to be the actual party to the contract as seller. There are four subsidiaries. In the present case the nominated subsidiary was the Port Sudan company of Khartoum.

Now I will outline the dispute in the present case. In 1973 the Indian buyers made a contract with the Sudanese sellers. This was for 9000 bales of cotton for shipment F.O.B. from Port Sudan. The Sudanese sellers say that these were sold for "Destination India" so as to implement the Indo-Sudan agreement. So they could only be shipped to India. But the Indian buyers say that there was no such limitation. The contract was