LLOYD'S LAW REPORTS

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1978

Volume 2

PUBLISHED BY LLOYD'S OF LONDON PRESS LTD. (LEGAL PUBLISHING & CONFERENCES DEPARTMENT), 16-17 BRIDE LANE, LONDON, EC4Y 8EB. PRINTED BY LLOYD'S OF LONDON PRINTING SERVICES LTD., LLOYD'S, LIME STREET, LONDON, EC3M 7HA.

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COURT OF APPEAL

Feb. 10, 1978

LOGS & TIMBER PRODUCTS (SINGAPORE) PTE. LTD.
v.
KEELEY GRANITE (PTY) LTD.
(THE "FREIJO")

Before Lord Justice MEGAW and Lord Justice ROSKILL

Charter-party (Voyage) — Laytime — Notice of readiness given soon after vessel arrived at pilot station — Port congested — Free pratique granted about 18 days later — Date of commencement of laytime.

The owners' vessel *Freijo* was let to the charterers to go to one or two safe ports Lourenco Marques and there load a cargo of granite blocks for carriage to Yokohama. The charter, which was in the Mediterranean iron ore form (C. Ore 7 form) provided inter alia:

> 5. The cargo to be shipped at the rate of 1000 tons and to be discharged at the rate of 1000 tons per clear working day of 24 consecutive hours weather permitting, Sundays and holidays always excepted unless used in which case only half such actual time used to count . . .
>
> 6. Time for loading to count from 8 a.m. after the ship has reported as ready and in free pratique whether in berth or not and for discharging from 8 a.m. after the ship has reported in every respect ready and in free pratique whether in berth or not. Steamer to be reported during official hours only. In case shippers can arrange to load or discharge on Sundays or holidays or before time commences to count, Captain to allow work to be done; half such time used to count. Time between noon Saturday and 8 a.m. Monday . . . not to count unless used in which case half such time actually used to count.
>
> 26. If through congestion at the port of Discharge and loading steamer is kept waiting off the port lay days are to commence to count as per Clause 6, but not until 36 hours from arrival (Sundays and holidays excepted).

The vessel arrived and was anchored at the Lourenco Marques pilot station at 14 30 on July 12, 1974, and gave notice of readiness five minutes later. However owing to the congestion at the port, the vessel remained at the pilot station until 06 20 on Aug. 1, 1974, when she moved to the inner anchorage arriving at 08 10.

At Lourenco Marques, free pratique was granted only when the vessel had reached the limits of the inner anchorage at which time health, customs and immigration authorities were brought on board by launch by the local agent. Free pratique was granted at 09 15 on Aug. 1.

The dispute between the owners and the charterers as to the commencement of laytime was referred to arbitration and the arbitrator held, subject to the opinion of the Court, that laytime began to count at 02 30 on Monday July 15, 1974, i.e., 36 hours after the arrival at the pilot station, Sundays excepted.

———— *Held* by Q.B. (Com. Ct.) (DONALDSON, J.), that (1) under cl. 6, time would only run if (a) the vessel was within the port, (b) she had reported, (c) she was in every respect ready to load and (d) she was in free pratique; and in this case when the vessel lay at the pilot station anchorage she was not within the port nor was she in free pratique and time therefore could not begin to run under cl. 6;

(2) cl. 26 provided alternative criteria which if met caused laytime to commence, i.e., the vessel had arrived off the port of Lourenco Marques and she was kept waiting there by congestion at the port; and laytime began to count 36 hours from arrival if those criteria were met;

(3) the phrase "clause 6" in cl. 26 governed the word "count" and not the words "commence to"; and viewed as a commercial point, the parties had contemplated two possibilities (a) that the vessel might sail straight into port and thus comply with cl. 6 and time would begin to count at most 24 hours later; (b) that the vessel might be kept waiting outside the port due to congestion and the first 36 hours of delay but no more was to be to the owners' account;

(4) it was the obligation of the shipowner to have the vessel ready to load cargo including having the vessel in free pratique as soon as the charterer was ready to load and if he was in breach of this

obligation the charterer would have a cross-claim which would extend the laytime or extinguish the demurrage for the period of delay;

(5) laytime therefore began to run at 02 30 hours on Monday, July 15, 1974.

Judgment for the owners.

On appeal by the charterers:

Held, by C. A. (MEGAW and ROSKILL, L.JJ.), that (1) on the construction of cll. 6 and 26, the arbitrator and the learned Judge were right in the conclusion which they reached that reporting as being ready and obtaining free pratique was not a condition precedent to the operation of cl. 26 so as to make laytime count long before the vessel got to the inner anchorage and could give the relevant notice under cl. 6 (*see* p. 3, col. 2; p. 4, col. 1);

(2) it was plain that the burden of waiting time through congestion, as a result of which the ship could not get to the inner anchorage to commence loading was by cl. 6 cast upon the charterers (*see* p. 3, col. 2; p. 4, col. 1);

(3) the parties had chosen to advance the time for the commencement of laytime and therefore laytime commenced to count notwithstanding that the ship had neither reported nor was ready nor had received free pratique under cl. 6 (*see* p. 3, col. 2; p. 4, col. 1);

Appeal dismissed.

Per MEGAW, L.J. (at p. 4): . . . the time has come when the statutory provision [s.21(1) (b) which provides an appeal to the Court of Appeal as of right without the necessity of leave from anyone] ought to be reconsidered. If it were then decided that leave to appeal to this Court were to be required in such a case it would not mean that such appeals could never be brought. There are . . . awards in the form of a special case, commercial or otherwise, in which it is appropriate there should be an appeal to this Court or beyond. But I can see no valid reason why it should not be left in the first instance to the discretion of the learned Judge of the Commercial Court to decide whether he regards it as an appropriate case in which to grant leave; and, if he were to refuse leave, there would always be the opportunity of applying to this Court to grant leave notwithstanding the view of the learned Judge . . .

This was an appeal by the charterers, Keeley Granite (Pty) Ltd. from the decision of Mr. Justice Donaldson ([1978] 1 Lloyd's Rep. 257) given in favour of the owners, Logs & Timber Products (Singapore) Pte. Ltd. and holding in effect that the laytime had commenced at 02 30 hours on Monday, July 15, 1974. The vessel had arrived at Lourenco Marques pilot station at 14 30 hours on July 12, 1974 and had given notice of readiness five minutes later. Owing to congestion at the port the vessel remained at the pilot station until 06 20 on Aug. 1, 1974 when she moved to the inner anchorage. Free pratique was granted at 09 15. The dispute as to commencement of laytime was referred to arbitration and the arbitrator, Mr. Cedric Barclay, found in favour of the owners. Mr. Justice Donaldson upheld that finding and the charterers appealed.

Mr. Anthony Diamond Q.C. and Mr. B. Sommerville (instructed by Messrs. Culross Lipkin & Co.) for the appellant respondent charterers; Mr. Andrew Longmore (instructed by Messrs. Norton Rose Botterell & Roche) for the respondent claimant owners.

The further facts are stated in the judgment of Lord Justice Roskill.

JUDGMENT

Lord Justice MEGAW: We need not trouble you, Mr. Longmore. I will ask Lord Justice Roskill to deliver the first judgment.

Lord Justice ROSKILL: This appeal from a judgment of Mr. Justice Donaldson given on Oct. 31, 1977, (see [1978] 1 Lloyd's Rep. 257), raises a very short point of construction under a charter-party in the Mediterranean Iron Ore C (Ore) 7 form, dated June 25, 1974.

The matter came before Mr. Justice Donaldson in an interim award stated in the form of a special case by Mr. Cedric Barclay sitting as sole arbitrator under the arbitration clause in that charter-party. The vessel — the *Freijo* — was chartered by the charterers from the managing owners of the ship. She was to go to one or two safe berths Lourenco Marques and there load a full and complete cargo of granite blocks for carriage to one or two safe berths Yokohama. According to the facts found by the arbitrator she arrived off Lourenco Marques' pilot station at 14 30 hours on July 12, 1974, and, as has been known to happen before at Lourenco Marques, she was then delayed, and delayed for quite a long time. In fact she gave notice of readiness — whether orally or in writing is not quite plain — at 14 35, five minutes after she had so arrived, but because of the delay she did not get to the inner anchorage until Aug. 1. She then — and I take this from par. 18 onwards — anchored in the stream at the inner anchorage and at 09 15 on the morning of that day she was granted free pratique. Loading, even then, did not begin until 21 00 hours on Aug. 9; the dispute between the managing owners and the charters raised the time-honoured question who had to pay for the delay while waiting to enter the inner anchorage at Lourenco Marques.

The charter-party deals with this problem expressly and it is necessary to look at three clauses, but I think no more, cll. 5, 6 and 26, 26 being the all-important clause.

I need not read 5 in full. It simply provides that the cargo is to be:

> . . . shipped at the rate of 1,000 tons per clear working day of 24 consecutive hours (weather permitting) Sunday and Holidays always excepted unless used . . .

and then follows a long list of exceptions.

Clause 6 provides:

> Time for loading to count from 8 a.m. after the Ship is reported and ready, and in free pratique (whether in berth or not . . .) [— then I leave out some words —] Steamer to be reported during official hours only. [— I need not read the next sentence.] Time between noon Saturday and 8 a.m. Monday and between midnight preceding a holiday and 8 a.m. on the day following a holiday not to count, unless used, in which case half such time actually used to count.

Finally, cl. 26:

> If through congestion at the Port of Discharge and loading [— and I emphasise that the words "and loading" have been added in type —] steamer is kept waiting off the port lay days are to commence to count as per Clause 6, but not until 36 hours from arrival (Sundays and holidays excepted).

The short point is this: notwithstanding that cl. 26 says, in what one might have thought, even for a charter-party, was crystal clear language, that if the steamer were kept waiting off the loading port through congestion at the loading port lay days are to commence to count, it is argued that nonetheless lay days should not commence to count under the charter-party until the ship got into the inner anchorage, had been reported and was ready and free pratique had been obtained in accordance with cl. 6. The argument for the charterers — which was rejected by Mr. Cedric Barclay and again by Mr. Justice Donaldson — is that when you take cl. 6 and cl. 26 together it is nonetheless a condition precedent to laytime, whether under cl. 6 or under cl. 26, to begin to count that the ship should be reported and ready and in free pratique. It was pointed out by Mr. Diamond that if the ship is loading at a port — and Lourenco Marques is obviously such a port — in which she cannot get free pratique until she has got into the inner anchorage, then cl. 26 can never operate.

If one looks at par. 10 of the special case one finds this finding:

> At Lourenco Marques free pratique is granted only when a vessel has reached the limits of the inner anchorage, at which time Health, Customs and Immigration Authorities are brought on board by launch by the local agent. According to local ruling, free pratique covers clearance by all Authorities including Immigration. A vessel is adjudged in free pratique only after compliance with the usual inward formalities by the Authorities concerned. This is at variance with custom in other parts of the world, but it was the custom in the former territories of Mozambique and Angola.

In other words in Lourenco Marques — whatever else it may be in other parts of the world — the obtaining of free pratique is not what, if my memory serves, in some of the cases has been called "an idle formality".

In my judgment, the arbitrator and the learned Judge were absolutely right in the conclusion which they reached and that reporting and being ready and obtaining free pratique is not a condition precedent to the operation of cl. 26 so as to make laytime count long before the vessel gets to the inner anchorage and can give the relevant notice under cl. 6. I arrive at that conclusion simply as a matter of the construction of the clauses in this case. Mr. Diamond urged upon us that this was very harsh on the charterers and it might be that a ship would get the benefit of laytime running when she was at the outer anchorage when, had she been able to go straight in, some relevant exception might then have stopped laytime from counting. That may be so in some cases, but if it happens that is because of the language of the particular charter-party. The problem may have arisen (I do not know) because cl. 26 in its printed form was obviously designed not for time lost through congestion and inability to get into the inner harbour at ports of loading of this kind. But these parties to this charter-party (which was drawn up in Johannesburg) thought it right to add the words "and loading" in cl. 26 and one has to give effect to them. Therefore one has to do the best one can to construe these various clauses as a whole and reach a conclusion in accordance with what one believes to be the true construction.

Mr. Diamond laid some stress upon the words "commence to count" in cl. 26 as distinct from the words "time for loading to count" in cl. 6. With respect — and also with respect to what the learned Judge said about this at p. 263 of [1978] 1 Lloyd's Rep. — I do not think there is all that difference between the two phrases. If one looks at cl. 6 as a whole one finds the phrases "time to count" and "time to commence to count" used in the same clause.

It seems to me, looking at this charter-party as a whole, that it is plain that the burden of waiting time through congestion, as a result of which the ship cannot get to the inner anchorage to commence loading, is cast by this clause upon the charterers. I accept what Mr. Diamond said, that the language of this clause is different from the language of other clauses in other charter-parties, of which, perhaps, the classic example is the well-known "time lost waiting for berth" clause. But we are dealing here not with that type of time but with laytime. The parties have chosen to advance the time for commencement of laytime and, in those circumstances, it seems to me that laytime commences to count notwithstanding that the ship has neither reported nor is ready nor has received free pratique under cl. 6.

I would only add this: I do not find it necessary

to express any view what the position is under this charter-party as regards giving notice of readiness at the loading port. Clause 6, as my Lord pointed out during the argument, is silent on that point. It is found as a fact here, as I have already mentioned, that the ship did give notice of readiness. What the position would have been if she had not done so does not arise. I would dismiss this appeal.

Lord Justice MEGAW: I agree that this appeal should be dismissed for the reasons given by my Lord. What I am about to add is in no way a criticism of the very clear and careful submissions made by Mr. Diamond on behalf of the appellant charterers. Mr. Diamond has said, clearly and carefully, everything that could possibly be said in support of this appeal.

In this appeal, on a question of construction which everybody agrees is a very short question relating to the words of a charter-party, the commercial arbitrator who decided the dispute decided it in favour of the shipowners. On a special case — which was no doubt properly asked for — the Commercial Judge, Mr. Justice Donaldson, decided the dispute in favour of the owners and upheld the view which the commercial arbitrator had taken. Is it right, in those circumstances, that there should be an appeal as of right to this Court in such a matter?

The answer at the moment is that the statute provides that there shall be an appeal as of right, without the necessity of seeking leave. That arises out of s. 21 of the Arbitration Act, 1950. Section 21(1) provides for two forms of special case. Section 21(1) (a) provides for the stating of any question of law arising in the course of a reference. Section 21(1) (b) provides for the stating of an award, or any part of an award, in the form of a special case. So far as (a) is concerned, the provisions of s. 21(3) make it clear that an appeal to the Court of Appeal is only by leave; but the same sub-section also makes it clear that, under 21(1) (b). an award in the form of a special case, there is an appeal to this Court as of right, without the necessity of leave from anyone.

I am strongly of opinion that the time has come when that statutory provision ought to be reconsidered. If it were then decided that leave to appeal to this Court were to be required in such a case it would not mean that such appeals could never be brought. There are unquestionably awards in the form of a special case, commercial or otherwise, in which it is appropriate there should be an appeal to this Court or beyond. But I can see no valid reason why it should not be left in the first instance to the discretion of the learned Judge of the Commercial Court to decide whether he regards it as an appropriate case in which to grant leave; and, if he were to refuse leave, there would always be the opportunity of applying to this Court to grant leave notwithstanding the view of the learned Judge. As I say, I think the time has come when that legislation ought to be reconsidered.

Lord Justice ROSKILL: May I say I entirely agree with what has fallen from my Lord on the question of special cases and the position as to appeals at the present time? It does seem to me this case illustrates what can happen, with all respect to Mr. Diamond's very clear argument, when settlement of what I would regard as an almost unanswerable claim is delayed by a series of hopeless appeals from one tribunal to another.

Mr. LONGMORE: In those circumstances, my Lord, I ask that this appeal be dismissed with costs?

Lord Justice MEGAW: So be it.

[*Order: Appeal dismissed with costs.*]

COURT OF APPEAL

Dec. 15 and 16, 1977

SHELL INTERNATIONAL PETROLEUM LTD.
v.
SEABRIDGE SHIPPING LTD.
(THE "METULA")

Before Lord DENNING, M.R.
Lord Justice ROSKILL
and Lord Justice BROWNE

Charter-party (Voyage) — Freight — Vessel loaded 190,415 tons of petroleum — Vessel stranded — Part of cargo lost — Vessel delivered 138,195.3 tons — Whether freight payable on intaken quantity, quantity delivered or quantity delivered + 5 per cent — Exxonvoy 1969.

The disponent owners (Shell) let their vessel *Metula* to the charterers under a voyage charter in the Exxonvoy 1969 form. The charter provided that the vessel should load a full and complete cargo of petroleum and/or its products in bulk and further provided (inter alia) that:

> 2. *Freight.* Freight shall be at the rate stipulated . . . and shall be computed on intake quantity . . . Payment of freight shall be made by Charterer without discount upon delivery of cargo at destination . . . No deduction shall be made for water and/or sediment contained in the cargo.
>
> 3. *Deadfreight.* Should the Charterer fail to supply a full cargo the Vessel may . . . proceed on her voyage . . . In that event, however, the deadfreight shall be paid at the rate specified . . . on the difference between the intaken quantity and the quantity the Vessel would have carried if loaded to her minimum permissible freeboard for the voyage.

In July, 1974, *Metula* loaded 190,415 long tons of Arabian light oil at Ras Tanura for carriage to Chile. During the voyage she stranded in the Magellan Strait, and part of the cargo was lost. In the event the vessel only delivered 138,195.3 tons.

The charterers paid the freight on the delivered quantity + 5 per cent. but the owners claimed a further sum of £178,602.38 on the basis that freight was payable on the intaken quantity.

———*Held,* by Q.B. (Com. Ct.) (DONALDSON, J.), that (1) the concept of freight being payable on the shipped weight of such part of a bulk cargo as was actually delivered did not seem to make sense, at least in the case of petroleum products since the cargo actually delivered could not be specifically identified and could only be measured by weight or volume; and when measured what was delivered could not be related to what had been shipped other than by making assumptions as to normal transit losses;

(2) the freight due was to be calculated upon the intaken quantity and was payable "upon delivery of cargo at destination"; and the full freight became payable when *any* of the intake quantity of cargo beyond a minimal amount was delivered;

Judgment for the owners.

On appeal by the charterers:

———*Held,* by C. A. (Lord DENNING, M.R., ROSKILL and BROWNE, L.JJ.), that (1) the purpose of having the computation being made on the intake quantity was that the freight should be ascertained then, although payable later when the ship arrived at its destination (*see* p. 7, col. 1; p. 8, col. 2; p. 9, col. 2); and there were no provisions whatsoever for subsequent adjustments or calculations being made at the port of destination (*see* p. 7, col. 1; p. 8, col. 2; p. 9, col. 2);

(2) on the true construction of cl.2, although this was not a lump sum freight properly so called, it had the characteristics of a lump sum freight in that the freight was computed on the intake quantity and was to be paid on that quantity even though there was a shortage (*see* p. 7, col. 2); and the learned Judge was right in his conclusion (*see* p. 7, col. 2; p. 9, cols. 1 and 2).

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

The following cases were referred to in the judgments:

Christie v. Davis Coal & Coke Co., (1899) 95 Fed. Rep. 837;

Dakin v. Oxley, (1864) 15 C.B. (N.S.) 646;

London Transport Co. Ltd. v. Trechmann Bros., [1904] 1 Q.B.635; 90 L.T.132.

This was an appeal by the charterers, Seabridge Shipping Ltd., from the decision of Mr. Justice Donaldson ([1977] 2 Lloyd's Rep. 436) given in favour of the owners, Shell International Petroleum Ltd. and holding in effect that the owners were entitled to a further £178,602.38 being freight payable on the basis of the intake quantity. The *Metula* had stranded in the Magellan Strait while carrying 190,415 long tons of Arabian light oil from Ras Tanura to Chile and part of her cargo had been lost. In the event only 138,195.3 tons had been delivered and the charterers had paid freight on this amount + 5 per cent.

The charterers submitted that appeal should be allowed on the grounds that:

"1. That the Learned Judge failed to give sufficient weight to the general rule that freight is earned by the carriage of goods to and their delivery at their destination, and that insofar as they do not arrive freight is not earned or payable.

2. That the Learned Judge failed to give sufficient weight to the facts that this rule has never been departed from save in the case of a lump sum freight, and that (as he correctly held) the Charterparty in the present case did not provide for a lump sum freight.

3. That the Learned Judge was wrong in holding that the fact that the Charterparty was for the carriage of a bulk cargo of oil sufficed to distinguish this case from *THE LONDON TRANSPORT COMPANY LIMITED v. TRECHMANN BROS.* (1904) 1 K.B. 635.

4. That the Learned Judge placed a disproportionate emphasis on the supposed need to give 'real effect' to the Inspector's Certificate of Inspection referred to in Clause 2 of the Charterparty: he should have regarded that Certificate as being intended only to determine and place beyond argument the intaken quantity of oil.

5. That the Learned Judge should have held that where, as in this case, part of the intaken quantity of oil is lost during the voyage then the Certificate ceases to be relevant to the calculation of freight, unless, and insofar as, it certifies the intaken quantities as regards individual tanks from which no oil was lost.

6. That the Learned Judge should have held on the facts of this case that the Defendants were on the true construction of the Charterparty liable to pay freight at the agreed rate only on the outturn quantity of oil alternatively on that quantity grossed up to allow for normal losses in transit.

7. That the Learned Judge's judgment was wrong and cannot be sustained, on the true construction of the freight provisions in the Charterparty as a whole."

Mr. Anthony Hallgarten (instructed by Messrs. Waltons & Morse) for the plaintiff respondent owners; Mr. David Johnson (instructed by Messrs. Norton Rose Botterell & Roche) for the defendant appellant charterers.

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

JUDGMENT

Lord DENNING, M.R.: In July, 1974, a huge super tanker called the *Metula* loaded in the Persian Gulf a cargo of Arabian light oil. It was to be carried to Chile. The amount of the cargo loaded — the intake quantity — was measured, and an inspector's certificate was given, making it come to 190,415 long tons. Unfortunately, as the vessel went through the Magellan Strait, she stranded, and a large quantity of the oil was lost. One-third of it was lost: two-thirds was transferred to other tankers and carried through to the destination in Chile.

When that oil was landed in Chile, the total amount was 138,195.3 long tons. Thereupon the shipowners claimed that they were entitled under the terms of the charter-party to the full amount of the freight on the intaken quantity. The freight was on the World Scale of $7.64 a ton. On that basis on the intaken quantity of 190,000-odd long tons, they were entitled to £625,170 sterling. But the charterers said, "No; we are not going to pay on the intake quantity. We are only going to pay on that which was delivered", and they paid only £446,567 sterling. Thereupon the shipowners claimed the balance. They claimed £178,602 sterling, because they said they were entitled to be paid on the intaken quantity. They said they were not liable for the stranding or the loss because they were protected by the exceptions.

This issue depends on the interpretation of the charter-party and one or two clauses in it. It is on the Exxonvoy form for a tanker voyage charterparty. It is a form in use both in New York and in London — providing for arbitration in either place according to where the parties choose. So it is very desirable that the interpretation of this charter-party should be the same whether it is being considered in New York or in London. It is for four consecutive voyages. There is a provision in part I for freight on the World Scale. Clause 2 of the printed form reads as follows:

> Freight shall be at the rate stipulated in Part I and shall be computed on intake quantity (except dead-freight as per Clause 3) as shown on the Inspector's Certificate of Inspection . . .

So it is clear that it is computed on the intake quantity as shown on the inspector's certificate. That sentence deals with computation. The next sentence reads:

> . . . Payment of freight shall be made by Charterer without discount upon delivery of cargo at destination, less any disbursements or advances made to the Master or Owner's agents at ports of loading and/or discharge and cost of insurance thereon . . .

That sentence deals with payment. There is to be payment upon delivery of cargo at destination. The third sentence reads:

> . . . No deduction of freight shall be made for water and/or sediment contained in the cargo. [— That contemplates that some of the oil which was put on board also contained water or sediment. There is to be no deduction of freight on that account. The fourth sentence reads: —] The services of the Petroleum Inspector shall be arranged and paid for by the Charterer who shall furnish the Owner with a copy of the Inspector's Certificate.

So the charterer has to get it and then furnish the owner with the certificate.

Clause 3 deals with deadfreight. The first sentence reads:

> Should the Charterer fail to supply a full cargo, the Vessel may, at the Master's option, and shall, upon request of the Charterer, proceed on her voyage, provided that the tanks in which cargo is loaded are sufficiently filled to put her in seaworthy condition. [— The second sentence reads: —] In that event, how-

ever, deadfreight shall be paid at the rate specified in Part I hereof on the difference between the intake quantity and the quantity the Vessel would have carried if loaded to her minimum permissible freeboard for the voyage.

That deadfreight provision makes it quite clear that the owners stipulate that they are to be paid the full amount on the full intake quantity even though the charterers do not fuel her to that extent.

Those are the sentences to be considered. The argument for the owners is that the freight — although not a lump sum freight it has many characteristics similar to it — is computed on the intake quantity and it is to be paid on the delivery of cargo at the destination. It does not mean the full cargo has to be delivered or that if it is short-delivered they get less. The full payment has to be made when cargo is delivered. Of course, if more of it is delivered, they may not be entitled to their freight; but if some is delivered, they are entitled to the full quantity even though short.

The question in this case seems to me to be simply one of construction of this charter-party. (I may say that bills of lading were issued, but they do not affect this case and I need not further refer to them.) We have been referred, as usual, to other cases on similar clauses. We have been referred in particular to a case in the United States: *Christie v. Davis Coal & Coke Co.*, (1899) 95 Fed. Rep. 837. That case went to the Court of Appeals, and was affirmed straightaway. The principal English case which was cited to us was the decision of Lord Alverstone in *London Transport Co. Ltd. v. Trechmann Bros.*, [1904] 1 Q.B. 635, and which is more fully reported, including the judgment of Mr. Justice Walton in 90 L.T. 132.

I do not propose to analyse all the words in those cases or the distinctions which can be taken from them. I put this question in the course of the argument:

> If the freight is payable only on such part of the cargo as is delivered, why is special provision made in this charter-party that it has been computed on the intake quantity?

I never received any satisfactory answer to that question. It seems to me the very purpose of having the computation being made on the intake quantity is that freight should be ascertained then, although payable later when the ship gets to its destination. There is no provision whatsoever for subsequent adjustment or calculations being made at the port of destination. Furthermore, as Mr. Hallgarten pointed out, such a procedure would involve very difficult calculations which could arise both as to temperature and specific gravity, and goodness knows what else in order to assess the sum payable at the port of destination.

As to the *Trechmann* case, it was a very near thing as a matter of construction. Lord Justice Romer gave a very valuable dissenting judgment, and Mr. Carver, who argued the case, when he came to publish a further edition of his book pointed out in a useful note that *Trechmann's* case on its construction was difficult to explain. It makes the important word "shipped" indicate only the time of weighing and not the weight of the goods loaded. To my mind the more apposite case is the United States' case in 1899, *Christie v. Davis*. I do not propose to go into it further except to say that in my opinion on the true construction of this clause, although this is not a lump sum freight properly so-called, it has the characteristics of a lump sum in that the freight is computed on the intake quantity. When the cargo is delivered, it is to be paid on that intake quantity. Even though there is a shortage, that full freight has to be paid.

I think the Judge was right, and I would therefore dismiss the appeal.

Lord Justice ROSKILL: In this appeal a very large sum of money, taking interest into account not far short of a £¼ million, turns upon the construction of a few words in cl. 2 of the standard form of tanker charter-party which goes under the code name "Exxonvoy 1969". Lord Denning, M.R., has read the relevant words, (*see* p. 6 ante), and I will not repeat them. The appeal, if I may say so, has been admirably argued on both sides, and I confess that my mind has fluctuated as to the right construction of the crucial words.

I start, as Mr. Johnson invited this Court to start, by what I am going to call the basic rule regarding earning of freight which was laid down beyond all doubt and with the highest authority by the Court of Common Please in *Dakin v. Oxley*, (1864) 15 C.B. (N.S.) 646. The crucial passage is in the judgment of Mr. Justice Willes at pp. 664 to 665:

> . . . It ought to be borne in mind, when dealing with such cases, that the true test of the right to freight, is, the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and, according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the ship-owner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carries part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried unless the charterparty makes the carriage of the whole a condition precedent to the earning of any freight — a case which has not within our experience arisen in practice.

At the outset of his argument this morning,