1/1956

No. 27 of 1955.

45935

In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN :

REARDON SMITH LINE LIMITED *Appellants (Plaintiffs)*

AND

AUSTRALIAN WHEAT BOARD *Respondents (Defendants).*

Case for the Respondents.

RECORD.

1. This is an appeal by special leave from a judgment of the Full Court of the High Court of Australia (Mr. Justice Webb and Mr. Justice Taylor ; the Chief Justice of Australia, Sir Owen Dixon, dissenting) dated the 2nd June, 1954, allowing an appeal from a judgment of Mr. Justice Wolff in the Supreme Court of Western Australia pronounced on the 30th January, 1953, upon the trial of the action between the Appellants as Plaintiffs and the Respondents as Defendants. The parties had agreed to waive their right to have the dispute determined by arbitration under a charterparty containing an arbitration clause, and had further agreed that the question of the quantum of damages should remain in abeyance pending the Courts' decision on liability. By his judgment Wolff J. held that the Respondents were liable to the Appellants in respect of certain damage sustained by the Appellants' vessel M.V. " Houston City " at the port of Geraldton, in the State of Western Australia, and in respect of certain damage sustained by the wharf at this port as the result of the contact of the vessel therewith for which the Appellants were statutorily liable to the harbour authority. The learned Judge accordingly gave judgment with costs in favour of the Appellants. The Respondents appealed from the said judgment to the Full Court of the High Court by a Notice of Appeal and Grounds dated the 19th February, 1953. By its said judgment the High Court (by a majority) reversed the

p. 62.
pp. 51-62
pp. 39-50.
pp. 29, 35.
p. 30, ll. 11-12.
p. 35, ll. 22-24.
p. 35, ll. 22-24.
p. 36, ll. 7-17.
pp. 36-38.
p. 62, ll. 7-25.

said judgment of Wolff J. and ordered judgment to be entered for the Respondents with costs. Special Leave to Appeal to Your Lordships' Board was given on the 1st February, 1955.

pp. 63-65.

In pocket.

2. The dispute between the parties arises under a voyage charterparty dated the 19th March, 1951, in the form of the Australian Grain Charter whereby the Appellants chartered the " Houston City " to the Respondents for the carriage of a full and complete cargo of wheat in bulk ex silo from one or two ports in Western Australia to one port on the Continent between Antwerp and Hamburg, both inclusive. The broad issue raised by this appeal is whether under the said charterparty and on the facts of this case the Respondents are liable in damage to the Appellants on the ground that the loading berth used by the vessel in Geraldton was temporarily unsafe.

3. The material provisions of the charterparty are as follows :—

" (1) That the said vessel . . . . shall, with all convenient speed, after completion of her present voyage and discharge of her outward cargo (if any) proceed, as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereunto as she may safely get, and there load according to the custom of the port, always afloat, at such safe dock, pier, wharves, and/or anchorage, as ordered . . . from the Charterers or their agents, a full and complete cargo of wheat in bulk ex silo which the said Charterers bind themselves to provide . . . .

(7) If proceeding in ballast, the Master shall apply to Charterers . . . . for loading port orders by wireless 96 hours before arrival at the loading area nominated under clause 6, and orders for loading port shall be given by Charterers by wireless within 48 hours of receipt of Master's application.

(9) The cargo shall be loaded at not less than the average rate of . . . 1,500 tons for cargo in bulk per weather working day (Saturdays, Sundays and holidays excepted) provided the vessel can receive at this rate . . . At the first loading port the time for loading shall count (unless loading is sooner commenced) from twenty-four hours after Charterers or their Agents have received the Master's written or telegraphic notice between 9 a.m. and 5 p.m. on ordinary working days and between 9 a.m. and noon on Saturdays that the vessel is ready to load at such berth as may be ordered by Charterers, whether in berth or not . . .

(13) Should the vessel not be loaded at the rate herein stipulated, demurrage shall be paid at the rate of eightpence British sterling per gross registered ton per running day and *pro rata* for any part of a day. Such demurrage shall be paid day by day, when and where incurred . . . ."

4. The material facts (as to which there was substantially no dispute) may be summarised as follows :

(i) The " Houston City " is a single screw motor vessel of 7,287 gross registered tons, 422′ 11″ in length and 56′ 6″ in beam. p. 66, ll. 8, 9.

10 (ii) By a radiogram to the master of the vessel dated the 3rd July, 1951, the Respondents ordered the vessel to load a full and complete cargo of wheat in bulk at the port of Geraldton, Western Australia. p. 10, ll. 1-6.

(iii) The port of Geraldton lies at the southern extremity of Champion Bay. The Bay and the material parts of the port are described as follows in the Australian Pilot (Vol. V., 4th ed. at p. 314) : Exhibit " C " (plan). Exhibit " B " (chart). p. 69, l. 20–p. 70, l. 46.

" *Anchorage.*

Prohibited Anchorage.

20 The anchorage in Champion Bay is well sheltered from all winds except those between north-west, through north, to north-by-east, from which direction gales sometimes blow with strength between May and November. Vessels with good ground tackle and a long scope of cable have ridden out heavy gales in this bay. The wind, as a rule, hauls more quickly south-west than in gales experienced further southward. With the wind from west-south-west, at which point these gales are most severe, the sea breaks heavily on Four-fathom banks but these banks shelter the anchorage to a great degree. With a 30 falling barometer accompanied by an unusual rise in the sea level, a north-westerly gale may be expected.

Anchorage is prohibited in the Inner Harbour in an area northward and westward of an imaginary line drawn along the light structure on the head of the northern breakwater 233° for $3\frac{1}{2}$ cables, and thence 180° to the shore.

Berthing.

Geraldton Wharf, on the southern side of the Inner Harbour, is built of concrete and is 1,510 feet in length ; there are usually

three berths available, with a depth of 30 feet alongside in January, 1950. During bad weather it is necessary to keep vessels off the wharf by means of bow and stern hawsers to hauling-off buoys; No. 1 Berth is the most exposed . . . ."

p. 16, ll. 17-20. p. 21, l. 1. The wharf runs roughly in an east-west direction, with the harbour entrance to the north, approximately opposite No. 1 Berth.

(iv) The port of Geraldton has been used by grain ships for many years. The Assistant Superintendent of the Respondents said that he had sent several hundred vessels there since 1919 and that prior to this dispute no vessel had objected on the ground that the port was unsafe. The Appellants' vessels (including the "Houston City") had called at Geraldton on thirteen previous occasions since 1942, and their vessels used the port thereafter on six further occasions up to November 1952. The Harbour Master of Geraldton said that in the 10½ years of his experience about 1,100 vessels had used the harbour, including about 250 grain ships all of which had berthed at No. 1 Berth.

p. 27, ll. 8, 14, 15. p. 22, ll. 47-48; p. 23, ll. 1-2. p. 77. p. 20, ll. 39-40– p. 21, ll. 1-2.

(v) Of the three berths available at Geraldton Wharf, only one (No. 1 Berth) is equipped for loading wheat in bulk. It is accordingly not disputed by the Respondents that the order referred to in sub-paragraph (ii) above was in effect an order that the vessel should proceed to No. 1 Berth at Geraldton Wharf.

p. 9, ll. 11-29.

(vi) The vessel arrived at the entrance of the harbour on the 7th July, 1951, under the command of one Harvey as Master. The vessel was met by one Sweett, the Harbour Master, who directed the vessel to No. 1 Berth.

p. 66, ll. 20-23. pp. 66-68, l. 33.

(vii) The Master had taken vessels to Geraldton and loaded grain at No. 1 Berth on two previous occasions. His evidence was given on affidavit and shows that he was fully familiar with the port. It was further admitted by the Appellants through their Counsel that the Master was familiar with the Australian Pilot, which refers to the port of Geraldton in the terms set out in sub-paragraph (iii) hereof.

p. 66, ll. 26-29. p. 11, ll. 13, 14.

(viii) At the time when the vessel arrived at No. 1 Berth No. 2 stern buoy of this berth was missing. This is one of the hauling-off buoys referred to in the Australian pilot, and vessels are normally moored to this buoy by the stern. The buoy had been torn out by another vessel in about May 1951. The responsibility for replacing

p. 21, l. 9. p. 66, ll. 44-45. p. 70, l. 5. p. 21, l. 8. p. 21, ll. 15-21. p. 21, ll. 22-24.

it lay with the State of Western Australia which requested the help of the Commonwealth Lighthouse Services, who sent a vessel which arrived at 1 a.m. on the 12th July, 1951 (the "Cape Otway") to replace the buoy, as hereinafter referred to. A section of about 50′ of the upper horizontal fender (or "waling piece") which lined the wharf and formed a protection between the wharf and vessels lying alongside was also missing in the way of the centre of No. 1 Berth and had been missing for some months.

p. 21, ll. 12-13.
p. 67, ll. 16-17.

(ix) The Harbour Master pointed out the absence of the hauling-off buoy to Captain Harvey on the vessel's arrival, and (according to the Master's affidavit) informed the Master that its replacement was imminent. Captain Harvey was also aware of the absence of the section of the waling piece. He did not ask the Harbour Master for any advice as to what he should do in the circumstances. The vessel berthed with her starboard side to the quay and ran out her port anchor with about 5 shackles of chain leading in a north-westerly direction. Her stern was accordingly opposite the missing hauling-off buoy, and the Master's evidence was that he intended to run a line to this buoy as and when it had been restored, "which would have assisted in holding her off the quay in case of necessity". Extracts from the Chief Officer's Log were exhibited to the Master's affidavit and state that at 6.00 p.m. on the 7th July, 1951, the vessel was securely moored.

p. 21, l. 10.
p. 66, ll. 44-45.
p. 67, ll. 20-22.
p. 67, ll. 16-19.
p. 21, l. 11.
p. 66, ll. 39-40.
p. 67, ll. 4-5.
p. 71, l. 22.

(x) The vessel commenced to load on Monday, 9th July, and continued to load without incident until Thursday, 12th July, 1951. Throughout this period the weather was fine. At 1 a.m. on the 12th July the "Cape Otway" arrived to replace the missing hauling-off buoy. Work on this commenced at 10.30 a.m. on the same morning and proceeded until lunch time. At about noon on the 12th July the weather worsened, and by about 1 p.m. the wind had increased to gale force from a northerly direction. The vessel began to roll and to bump heavily against the wharf, and continued to do so for most of the afternoon, but without stopping to load. This resulted in damage to the vessel's plating and mooring ropes, and also in damage to the concrete decking of the quay. A survey of the damage was carried out on the following day by a Surveyor appointed by Lloyds Agents, who recommended temporary repairs to the vessel, which were carried out on the 15th July. Loading had been suspended pending the survey, but was resumed on the

p. 71, l. 36–p. 73, l. 10.
p. 21, ll. 25-36.
p. 21, ll. 37-38.
p. 67, ll. 26-31.
p. 73, l. 14.
p. 68, ll. 1-15, 27-28.
p. 73, ll. 15-31.
p. 14, ll. 30-39.
p. 73, l. 36–p. 74, l. 16.
p. 68, ll. 29-33.

following day. The vessel completed loading on the 17th July and sailed from Geraldton on the 18th July, 1951.

p. 23, ll. 46-47. (xi) The replacement of the missing hauling-off buoy was completed by the " Cape Otway " on the 13th July, 1951. If this
p. 22, l. 13. p. 67, ll. 1-3. buoy had been in position during the gale on the previous day the vessel could have been hauled off the wharf by means of a stern line.

(xii) There was no evidence to suggest that the Respondents had any direct or indirect knowledge at any material time of the temporary absence of the buoy and of part of the waling piece.

p. 3, ll. 4-22 and p. 4, ll. 7-21. 5. By their Statement of Claim the Appellants contended that the Respondents were in breach of the charterparty or alternatively negligent in ordering the vessel to load at Geraldton and/or at No. 1 Berth on the
p. 3, ll. 10-23. ground that the same were unsafe. They alleged that the unsafety was
p. 8, ll. 14-21. due to a number of permanent features of the port and berth as well as to the temporary absence of the buoy and of part of the waling piece.
p. 5, ll. 26-34. By their Defence the Respondents pleaded that they were at all material times unaware of the temporary absence of the buoy and waling piece, and denied that the port or berth were unsafe or that the loading order
p. 6, ll. 16-17, 21-22. given to the vessel was given in breach of the charterparty or negligently. The Respondents further pleaded (*a*) that if the port or No. 1 Berth were unsafe (which they denied) then the Master was aware thereof and was not obliged by the charterparty to enter the port or berth, and that it was his duty to report the circumstances to the Respondents and to ask
p. 6, ll. 1-10. for further instructions; and (*b*) that the Master freely and voluntarily
p. 6, ll. 12-15; 23-39. accepted the risk of entering the port and berthing at No. 1 Berth, and that the damage sustained by the vessel and wharf was caused or con-
p. 7, ll. 1-6. tributed to by the Master's negligence.

p. 16, ll. 1-32. 6. In his judgment Wolff, J. rejected the evidence called on behalf
p. 31, ll. 28-29. of the Appellants to the effect that the port of Geraldton and No. 1 Berth
p. 32, ll. 22-26. were generally unsafe, but held that the absence of the buoy and of the section of the waling piece rendered the berth unsafe " during the winter
p. 32, l. 44– p. 33, l. 41. months ". He considered that the damage could not have been averted by putting out a stream or kedge anchor aft, and that the Master " acted
p. 33, l. 42– p. 34, l. 13. for the best in staying where he was " when he realised that the buoy and waling piece were missing, having been told that the buoy would be replaced at any moment.

7. The learned judge then dealt with the legal position and prefaced his remarks with the statement that " the claim rests primarily on an allegation of breach of contract in that the charterer is said to have warranted the safety of the berth ". However, no such warranty was in fact relied upon by the Appellants in their pleading. The learned judge briefly referred to the authorities in which the liability of voyage and time charterers respectively in respect of unsafe ports and berths has been considered, as referred to in Paragraph 9 hereof, but then proceeded to decide the case on a different ground, viz., that the Respondents " knew or ought to have known of the condition of the berth where it was intended that the ship should go and to which it was compulsorily piloted ". In this connection the learned judge based his decision upon the following two passages in Carver's Carriage of Goods by Sea (9th ed. at pp. 691, 692) : " Where the person giving the order knows of the danger, or where it is to be considered as within his reasonable contemplation, he would on principle appear to be liable for loss caused in consequence of compliance with the order in any event ". And " where the charterer designates the berth he is bound to take reasonable precautions to ascertain that it is safe, and, if necessary, warn the Master ".

p. 34, ll. 14-15.

p. 34, l. 22–p. 35, l. 1.

p. 35, ll. 1-14.

8. Upon the Respondents' appeal to the High Court none of the learned judges who heard the appeal rested their decision upon the view taken by Wolff J., and the Respondents respectfully submit that this view cannot be supported either in law or on the facts of the case. As regards the facts, there was no evidence to suggest that the Respondents had any knowledge of the temporary absence of the buoy or of the section of the waling piece. In any event, it is respectfully submitted that the Respondents cannot be liable in damages for having failed to warn the Master of these facts. The Master's own affidavit shows that he was perfectly well aware of these facts as soon as the vessel arrived, and that the Harbour Master in fact expressly pointed out to Captain Harvey that the buoy was missing. As regards the position in law, the Respondents respectfully adopt the reasoning of Webb and Taylor JJ. in the majority judgment of the High Court, and respectfully submit that any liability under which the Respondents may be must rest upon a breach of the charterparty and not (as Wolff, J. appears to have considered) upon the commission of a tort.

p. 66, l. 43–p. 67, l. 3.

p. 67, ll. 16-19.

p. 54, l. 42–p. 55, l. 16.

9. In the majority judgment of the High Court, Webb and Taylor JJ. agreed with Wolff J. that the temporary absence of the buoy and of

p. 53, ll. 6-44.

part of the waling piece rendered the berth unsafe for the vessel " on the occasion in question ". The learned judges then summarised their views as to the Respondents' legal liability under the charterparty in connection with the nomination of a safe port and/or berth as follows :

p. 55, ll. 17-36.

> " Clause 1 of the charterparty appears to us to be designed to define the obligations of the shipowner with respect to loading ports and to prescribe, consequentially, a limitation upon the charterer's *rights* to designate such ports though, no doubt, under that clause and Clauses 6 and 7 the Appellant was bound to give appropriate loading orders and provide the stipulated cargo. There is, of course, ample authority for the proposition that a failure or refusal, pursuant to such a provision, to designate a safe port will sound in damages and the nomination of an unsafe port may well be involved in such a failure or refusal. But it by no means follows that where the nomination of an unsafe port is involved in such a failure or refusal the shipowner may recover not only the damages which flow from the failure or refusal but also the damages sustained by the vessel after proceeding to the designated port and as the result of its unsafe nature or condition. Such damages do not flow from a refusal to nominate a safe port. The provisions of Clause 1 do not purport to impose upon the charterer any obligation other than that already indicated and there is no reason why any implication should be made having the effect of imposing upon it an obligation to ascertain whether a port which it desires to designate is safe or not, or, of giving rise to a warranty that any designated port is in fact safe."

The learned judges then reviewed the principal authorities on this topic. They pointed out that their analysis of the legal position is supported by the decision of Branson J. in *Samuel West Ltd.* v. *Wright's (Colchester) Ltd.* (1935) 40 Com. Cas. 186 and of Bucknill J. in *The Pass of Leny* (1936) 54 Ll. L.R. 288, which were both cases involving consideration of the terms of voyage charters as in the present case. The learned judges then referred to three time charter cases—*Lensen Shipping Company Ltd.* v. *Anglo Soviet Shipping Company Ltd.* (1935) 40 Com. Cas. 320, *Limerick Steamship Company Ltd.* v. *W. H. Stott & Company Ltd.* [1921] 1 K.B. 566 and [1921] 2 K.B. 613 and *G. W. Grace & Company Ltd.* and *General Steam Navigation Company Ltd.* [1950] 2 K.B. 383— and followed the view of Greer L.J. in *Lensen's Case* (*supra*, at p. 330) in

p. 55, l. 36–p. 56, l. 42.

p. 56, l. 43–p. 59, l. 32.

p. 61, ll. 11-33.

drawing a distinction between time and voyage charters in this connection, on the ground that in the case of time charterparties the Master is placed under the charterers' orders as regards the vessel's employment, and that the time charterers thereunder expressly agree to indemnify the owners against all consequences flowing from compliance with the charterers' orders. The learned judges then reviewed the cases of *Hall Bros. Steamship Co. Ltd.* v. *R. & W. Paul Ltd.* (1914) 19 Com. Cas. 384 and *Axel Brostrom & Son* v. *Louis Dreyfus & Company* (1932) 38 Com. Cas. 79, in which shipowners recovered damages in respect of expenses incurred in entering ports of discharge to which their vessels has been ordered, and pointed out that the question of the nature and extent of the liability of charterers ordering a vessel to an unsafe port was not directly raised or argued before the Courts in those cases. The learned judges accordingly declined to follow the views of Devlin J., expressed *obiter* in *Grace's Case* (*supra*), doubting the correctness of the decisions in *Samuel West Ltd.* v. *Wright's* (*Colchester*) *Ltd.* (*supra*) and *The Pass of Leny* (*supra*), and then summarised their conclusion as follows :

p. 60, l. 38–p. 61, l. 11.

p. 61, l. 34–p. 62, l. 6.

" We have been unable to find any case where, in the circumstances such as the present, a charterer has been held to warrant the safety of a port nominated by him, or, where the nomination of an unsafe loading port or berth pursuant to a charterparty in the form of that which is before us has been held to constitute a breach of contract giving rise to damages where the master of the vessel has accepted the order and proceeded to the port and there sustained damage. There is, as we have already said, no doubt that a refusal or failure to provide the stipulated cargo at a safe port is answerable in damages but such a conclusion depends upon principles which do not assist in the solution of the problem which arises in this case. In all the circumstances we prefer to adopt the observations of Greer, L.J. in the *Lensen Shipping Company's* case (*supra*) and those of Branson J. in *West's* case (*supra*) rather than those of Devlin J. in *Grace's* case (*supra*) and to hold that where under a charterparty in the form of that which is before us an unsafe port or berth is nominated by the charterer he does not, merely by reason of such nomination, become liable for damages sustained as a result of the master proceeding to such unsafe port or berth. Nor, do we think, that in the circumstances of this case there is any other ground upon which the charterer should be held liable. Accordingly we are of the opinion that the appeal should be allowed."

10. In his dissenting judgment Dixon C.J. summarised what he considered to be the two views as to the liability of charterers ordering a vessel to an unsafe port in the following passage :

p. 40, l. 47–p. 41, l. 22.

> " Two views may be taken of the legal consequence of the naming of an unsafe port or berth by a charterer under obligation to provide a cargo at a safe port and safe berth to which he must direct the ship. One is that he has simply failed to perform the condition upon the fulfilment of which the ship must berth and load and has failed to pursue the terms of the contract in providing a cargo. On this view his only breach of contract is in failing to supply a cargo in the appointed manner. The ship may refuse to proceed to the port or the berth and treat the charterer as in default in providing a cargo in accordance with the conditions of the contract. But if the ship proceeds to the unsafe port or berth that means there is no breach ; the shipowner has waived fulfilment of a condition precedent, that is all. Having chosen to load the cargo, he cannot complain that it was supplied at a place where he need not have taken it.
>
> The other view of the legal consequences, under such a provision, of the charterers directing the ship to an unsafe port or berth is that it goes further than a mere failure to fulfil a condition precedent to the shipowner's obligation and further than failure to pursue the condition of the contract in providing a cargo ; it also amounts to a breach of the shipowner's obligation to direct the ship only to a safe port and a safe berth. Of course the master may disregard the order on the ground that the port or berth is unsafe. But on this view, if the master acts on the order, the charterer having broken a term of the charter in directing the ship to an unsafe port or berth is liable in damages for the consequence of the breach consisting in the giving of the direction."

p. 42, ll. 30-35. The learned Chief Justice considered that " of the two views I have described I think that which has the stronger support both in reason and in authority is that which interprets the restriction expressed in the words ' safe port or safe wharf or berth ' as imposing an obligation upon the charterer not to direct the ship to an unsafe port or wharf or berth, so that any loss caused by his doing so falls upon him ". In his reasons for this preference, which he based upon a review of all the cases on the subject, the learned Chief Justice accordingly agreed with the views expressed *obiter* by Devlin J. in *Grace's* case (*supra*) and dissented from

p. 43, l. 44–p. 49, l. 17.

the majority judgment of the High Court on the grounds that (*a*) the decision of Branson J. in *West's* case (*supra*) and of Bucknill J. in *The Pass of Leny* (*supra*) should not be followed; and (*b*) there was in his view no valid distinction to be drawn between voyage and time charterparties by reason of the special provisions as to employment and indemnity in the latter, as already referred to.

11. Since the decision of the present case by the Australian Courts, the legal issues involved in this case have again come before the English Courts (Devlin J. and the Court of Appeal) in the case of *Compania Naviera Maropa S.A.* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68 (hereinafter referred to for convenience as "The Stork") which concerned a voyage charterparty. Both Courts expressed the view that the decision of Dixon C.J. was correct and disagreed with the majority judgment of Webb and Taylor J.J. The Respondents respectfully submit, for the reasons referred to below, that this decision should not be followed by Your Lordships' Board, and that, in any event, the facts of *The Stork* are fundamentally different and distinguishable from those in the present case.

12. In the Respondents' respectful submission the present case in effect involves two main issues, one of law and one of fact, which may be summarised as follows:

(i) Are the Respondents liable in damages by reason of their order given on the 3rd July, 1951, that the vessel should proceed to Geraldton (and, by implication, to No. 1 Berth in that port) on the grounds (*a*) that the vessel complied with this order, and (*b*) that one of the hauling-off buoys and part of the waling piece of No. 1 Berth were missing when this order was given and when the vessel arrived on the 7th July, 1951, and that the berth remained in this condition for a further period of 6 days until the hauling-off buoy was replaced on the 13th July, 1951?

(ii) If the answer to (i) be in the affirmative, are the Respondents liable, on the facts of this case, for the damage sustained by the vessel and by the wharf during the storm which occurred on the 12th July, 1951?

13. With regard to the first of the issues referred to in Paragraph 12 hereof, the Respondents respectfully submit that the order given on the

3rd July, 1951, did not expose the Respondents to liability for damages on the grounds referred to, for the following reasons :

(i) It is respectfully submitted, first, that even if the temporary condition of No. 1 Berth is to be treated in law as having rendered this berth unsafe for the vessel at any material time, then the fact that the order was given and was complied with would not *per se* render the Respondents liable in damages. The Respondents respectfully rely upon and adopt the reasoning and conclusion of Webb and Taylor JJ. on this point and their analysis of the authorities, and respectfully submit that the decisions of Branson J. in *West's* case (*supra*) and of Bucknill J. in *The Pass of Leny* (*supra*) to the same effect are right and should be followed. The correct analysis, it is respectfully submitted, of the consequences of a vessel being ordered to an unsafe port is that this gives a right to the owners to treat the order as a nullity and to refuse to comply with it, and, further, to claim damages for breach of the charterparty if the charterers should thereafter persist in this invalid order and refuse to order the vessel to a safe port so as to enable it to perform the contractual voyage. If the charterers' failure to name a safe port results in delay to the vessel, then the owners are entitled to damages for detention : *Ogden* v. *Graham* (1861) 31 L.J. Q.B. 26.

p. 55, ll. 17-36.

(ii) The Respondents further respectfully submit that the *ratio decidendi* in *Axel Brostrom* v. *Louis Dreyfus* and *Hall Steamship Co.* v. *R. & W. Paul Ltd.* is not inconsistent with this view. Neither of these cases raised the point of principle which arises in the present case. Moreover, the question of the unsafety of the ports to which these vessels were ordered was entirely different from the present case, since the owners' claims in these cases were solely for additional towage and lighterage expenses incurred in reaching the ports and not in respect of physical damage sustained by the vessels after they had entered the ports.

(iii) It is further respectfully submitted that the Appellants' contention, that voyage charterers are liable for any damage sustained by a vessel which complies with an order to go to an unsafe port, necessarily involves the conclusion that the charterers must be deemed expressly or impliedly to have warranted the safety of the port. This was the view of Devlin J. in *The Stork* (*supra*, at pp. 76, 79). It is respectfully submitted, however, that no such

warranty can properly be inferred in law, for the following reasons :

(*a*) It would be wrong and contrary to principle to infer the existence of any such warranty from Clause 1 of the charterparty merely on the ground that this gives the charterers the contractual *right* to order the vessel to a safe port for loading.

(*b*) The inclusion of the words " or so near thereunto as she may safely get " strongly suggests that no such warranty was intended, but that the only effect of an order to proceed to an unsafe port is to enable the owners to refuse to enter the port, as submitted in sub-paragraph (i) above.

(*c*) The extent of such a warranty and the time during which the port must comply therewith would give rise to great difficulties of definition, which in themselves point to the conclusion that no such far-reaching warranty can have been intended by the parties.

(iv) It is further respectfully submitted that the legal liability of charterers in respect of damage sustained by a vessel which has complied with an order to proceed to an unsafe port is wholly different in a voyage charter such as the present from the liability imposed by the special provisions usually found in time charterparties. In time charterparties such as were considered in *Lensen's* case, *Limerick's* case and *Grace's* case (*supra*) the master was expressly placed under the charterers' orders as regards employment, and the charterers were expressly liable to indemnify the owners against all consequences and liabilities arising from the master's compliance with the charterers' orders. It is respectfully submitted that the charterer's liability in these cases for physical damage sustained by the vessel in an unsafe port to which the vessel had been ordered rests solely upon the effect of these provisions and not upon any principle which can be applied to charterparties in general.

(v) Finally, the Respondents respectfully submit on this part of their case that, as shown by the evidence, the unsafe condition of No. 1 Berth at Geraldton was only of a very temporary nature. The port of Geraldton and No. 1 Berth were generally perfectly safe for the vessel, but, owing to the temporary absence of a buoy, No. 1 Berth was unsafe for a period of six days after the vessel's arrival in the event of a strong northerly gale. It is respectfully submitted that a short period of unsafety of this nature is no more than an

ordinary marine hazard which vessels must expect to encounter in the normal course of events, and that a temporary condition of this nature is not such as to make the port or the berth unsafe in the legal sense of the word. The Respondents cannot be deemed to have warranted that the berth would be available immediately upon the vessel's arrival. It has been held that a temporary obstacle which does not involve a vessel in inordinate delay does not entitle a vessel to refuse to enter a port (*Metcalfe* v. *Britannia Iron Works Co.* (1877) 2 Q.B.D. 423 and *S. S. Knutsford* v. *Tillmans* (1908) A.C. 406), and consequently, it is respectfully submitted, such an obstacle does not have the effect of rendering a port unsafe in the legal sense : *per* Devlin, J. in *Grace's* case (*supra*, at p. 392). Moreover, the parties provided for the case where a safe berth was not immediately available by providing that the time for loading should commence " whether in berth or not " (see Clause 9 of the charterparty). The Respondents accordingly respectfully submit that the order to the vessel to proceed to No. 1 Berth at Geraldton was not an order to proceed to an unsafe port or berth, and consequently not a breach of the charterparty.

14. With regard to the second question referred to in Paragraph 12 hereof, the Respondents respectfully submit that even if the order to the vessel to load at No. 1 Berth, Geraldton, constituted an actionable breach of contract on the facts of this case, then the damage sustained by the vessel and the wharf did not flow from this breach but from the master's voluntary decision to berth at the wharf, notwithstanding the fact that he fully and precisely appreciated the risk involved in doing so. In this connection the Respondents respectfully refer to and rely upon two passages from the judgments of Devlin J. in *Grace's* case (*supra*, at p. 397) and *The Stork* (*supra*, at p. 78) in which the learned judge stated the position as follows :—

" There may be cases in which the charterer is innocent of any intention to break a contract and where the master deliberately decides to enter a port which he knows to be unsafe. Roche, J. on a rather similar point in *Portsmouth Steamship Co. Ltd.* v. *Liverpool & Glasgow Salvage Association* (1929) 34 Ll.L.R. 459 indicated that the master could not follow the instructions of the charterer if they lead to obvious danger. But these factors go to the question of causation only. The giving of an order does not necessarily cause the damage that flows from an act done in pursuance of it. Put

more specifically, the decision of the master to obey the order may in certain circumstances amount to a *novus actus interveniens* . . . ."

And

" To deny the Defendants' proposition does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. The damages for any breach of warranty are always limited to the natural and probable consequences. The point thus becomes one of remoteness of damage ; or if it is thought better to put it in Latin, the expressions *novus actus interveniens* and *volenti non fit injuria* are ready to hand. There is also the rule that an aggrieved party must act reasonably and try to minimise his damage. A master who entered a berth which he knew to be unsafe (and which perhaps the charterer had nominated in ignorance of its condition) rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble . . . ."

15. In the Respondents' respectful submission these passages are precisely in point in the present case. As mentioned in Paragraph 4 hereof, the master knew the port from previous visits ; he was fully aware of the temporary absence of the buoy and waling piece when the vessel arrived at the berth, and his knowledge of the Australian Pilot enabled him to assess exactly the risk which he was running in going into the berth without waiting for the buoy to be replaced. The Marine Surveyor who was called on behalf of the Appellants said in cross-examination : " If I knew of some temporary danger or obstruction in a port I would not enter . . . . Had I been in Harvey's place and seen the waling piece and buoy missing I would have objected and written a letter of protest." By reason of Clause 9 of the charterparty he could have cast the expense of awaiting the replacement of the buoy upon the Respondents. On the other hand, there was no evidence to suggest that the Respondents had any knowledge of these temporary defects in the berth, nor that they had any reason whatever for believing that the berth was in any way unsafe.

p. 20, ll. 12-17.

It is respectfully submitted that on this point the present case is wholly distinguishable from *The Stork* (*supra*). In the case of *The Stork*, the loading place to which the vessel was ordered, Tommy's Arm, was a rocky inlet on the east coast of Newfoundland which the Defendant charterers used for shipping their cargoes of pulpwood. Devlin J. said (at p. 72) that it was one of a number of loading places on this coast which could not " really be described as ports and only by courtesy as berths " ;

the report shows (at p. 88) that in order to moor the vessel it was necessary to fasten the moorings to trees and rocks. The master of the " Stork " allowed his fears as to the safety of this place to be allayed by the local pilot, who was employed by the charterers (at p. 70), and persuaded the master that " nothing will happen to your ship going in there . . . we have nothing to worry about " (at p. 79). In *The Stork* the charterers accordingly had detailed local knowledge of the safety or otherwise of the loading place ; the master relied expressly upon this knowledge and allowed his vessel to be moored under the charterers' directions. In the present case, on the other hand, the master relied solely upon his own judgment and knowledge of the port with a clear appreciation of the state of the berth which he found on his arrival, and the Respondent charterers took no part in the berthing.

It is respectfully submitted that in these circumstances the damage to the vessel and wharf in the present case did not flow from the order which the Respondents gave in ignorance of the state of the berth, but from the decision taken by the master with full knowledge thereof. The Respondents respectfully submit that it cannot have been in the contemplation of both parties, on the principles laid down in *Hadley* v. *Baxendale* (1854) 9 Ex. 341, that the master would take the vessel into a berth which he knew or should have known to be unsafe, without communicating with the Respondents and giving them the opportunity of sending the vessel to another port or of paying demurrage until the berth had been rendered safe by the replacement of the buoy. In *Limerick's* case (*supra*) this point was left undecided in the Court of Appeal, but it is noteworthy that the judgment of Scrutton L.J. contains the following passage (at p. 621) :

> " The question was argued before us whether the charterers who requested the ship to go to an unsafe or an ice-bound port, to which she was not bound to go, were liable if she went for damage sustained on her voyage. I desire to reserve my opinion on this point. The state of knowledge of shipowner and charterer may be material when the point has to be decided . . . . "

16. The Respondents accordingly respectfully submit that the master's decision to enter the berth in these circumstances constituted a *novus actus interveniens* and that the damages claimed by the Appellants are in any event too remote. Further or alternatively the Respondents respectfully submit that the Appellants are precluded from recovering the damages claimed by reason of the maxim *volenti non fit injuria*, or

alternatively that the Appellants waived any rights which they may have had in respect of the alleged unsafety of the berth by allowing the vessel to enter the berth with full knowledge of its condition.

17. The Respondents therefore respectfully submit that this appeal should be dismissed with costs and the judgment of the High Court of Australia affirmed for the following amongst other

REASONS

(1) BECAUSE the order to the vessel to load at No. 1 Berth, Geraldton, was not a breach of the voyage charterparty dated the 19th March, 1951.

(2) BECAUSE there was no evidence to suggest that the Respondents were negligent in giving the said order.

(3) BECAUSE upon the true construction of the said charterparty the giving of the said order and the Appellants' compliance therewith did not render the Respondents liable in respect of physical damage sustained by the vessel or by the wharf.

(4) BECAUSE the Respondents did not warrant the safety of No. 1 Berth, Geraldton, upon the true construction of the said charterparty or at all.

(5) BECAUSE the facts relating to No. 1 Berth, Geraldton, did not at any material time render the same unsafe for the vessel.

(6) BECAUSE the damages claimed by the Appellants do not flow from any breach of contract or negligence on the part of the Respondents and are too remote.

(7) BECAUSE at all material times the Respondents were ignorant of the temporary unsafety of the said berth whereas the Appellants were fully aware thereof.

(8) BECAUSE the master's decision to enter the berth with full knowledge of its condition constituted a *novus actus interveniens*.

(9) BECAUSE the Appellants are precluded from recovering damages on the principle *volenti non fit injuria*.

(10) BECAUSE by allowing the vessel to berth with full knowledge of its condition the Appellants waived any right which they may have had to treat the nomination of the said berth as a breach of the said charterparty.

(11) BECAUSE the decisions in *West* v. *Wright* and *The Pass of Leny* (*supra*) are correct and should be followed.

(12) BECAUSE the decision in *The Stork* (*supra*) was wrong and should not be followed, or alternatively because *The Stork* is on its facts distinguishable from the present case.

(13) BECAUSE the judgment of Wolff J. in the Appellants' favour was wrong.

(14) BECAUSE the judgment of the High Court of Australia was right and should be affirmed.

GARFIELD BARWICK.

MICHAEL KERR.

No. 27 of 1955.

In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

REARDON SMITH LINE LIMITED

AND

AUSTRALIAN WHEAT BOARD.

Case for the Respondents.

COWARD, CHANCE & CO.,
ST. SWITHIN'S HOUSE,
WALBROOK,
LONDON, E.C.4.

Waterlow & Sons Limited, London and Dunstable.