

LLOYD'S LAW REPORTS

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

PART 1

The "Kyzikos"

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HOUSE OF LORDS

June 23, 1988

SEACRYSTAL SHIPPING LTD.
v.
BULK TRANSPORT GROUP SHIPPING
CO. LTD.
(THE "KYZIKOS")

Before Lord BRIDGE OF HARWICH,
Lord BRANDON OF OAKBROOK,
Lord TEMPLEMAN, Lord ACKNER and Lord
OLIVER OF AYMERTON

Charter-party (Voyage) — Demurrage — Commencement of laytime — Vessel tendered notice of readiness — Discharging berth available but vessel unable to proceed to it because of fog — Whether laytime commenced when notice of readiness given — Effect of "WIBON" provision — Whether owners entitled to rely on words "always accessible berth(s)".

By a charter-party dated Oct. 26, 1984 the owners' vessel *Kyzikos* was fixed to load a cargo of steel and/or steel products in Italy for discharge in Houston.

The charter which was on the Gencon form provided inter alia:

Discharging port or place — 1/2 safe always afloat, always accessible berth(s) each port . . .

5 Loading . . . cargoes are to be . . . discharged free of expense and risk for Owners.

Time to commence at 2 p.m. if notice of readiness . . . is given before Noon and at 8 a.m. next working day if notice given during office hours after noon . . . Time lost in waiting for berth to count as loading time . . .

Time to count as per Clause 5 Wipon/Wibon/Wifon/Wcon . . .

Clause 6 provided inter alia that time lost in waiting for a berth to count as discharging time.

Kyzikos arrived within the discharging port, Houston, at 06 45 hours on Dec. 17, 1984. Notice of readiness was tendered between 06 45 hours and

noon. At all material times the berth to which the vessel was destined, and at which she ultimately discharged, was available. The vessel was however unable to proceed immediately to it because of fog which resulted in the pilot station being closed. The vessel arrived at her berth at 14 50 hours on Dec. 20 and discharging was completed at 17 00 hours on Jan. 11, 1985.

The owners claimed that laytime commenced at 14 00 hours on Dec. 17 and the vessel was on demurrage for a total of 14 days nine hours and 16 minutes. The charterers denied liability and the dispute was referred to arbitration.

The arbitrator concluded that the reference in cl. 5 to "wibon" had the effect of making the charter into a port charter and he held that the owners' claim succeeded in full.

The charterers appealed. The owners were given leave to contend that the award should be upheld on the alternative ground that in breach of the charter the berth nominated by the charterers was not always accessible and that the charterers were liable in damages for detention in a like sum to demurrage.

—Held, by Q.B. (Com. Ct.) (WEBSTER, J.), that (1) the "wibon" provision did not override the primary obligations created by the charter or those obligations as modified by the express exceptions and it did not affect, in principle as distinct from detail, the question where the risk was to fall in the event of delay affecting the vessel; the arbitrator was wrong in his conclusion and laytime did not commence until the vessel arrived at the berth; the charterers were under no outstanding liability to the owners;

(2) even if the "wibon" provision had the effect of converting a berth charter to a port charter, the vessel was not an arrived ship at the port because she was not at that time at the immediate and effective disposition of the charterers even though she was not being used for the owners' purposes;

(3) the arbitrator's award must be set aside unless the owners could successfully rely on the words "always accessible berth(s) each port";

(4) the word "accessible" meant "capable of being approached" in the sense of having an unobstructed way or means of approach and the expression "always accessible" was an adjectival

description, descriptive of the berth, and meant only that the berth was capable of being approached;

(5) the owners could not establish that the charterers were in breach of their absolute obligation to nominate a berth which was always accessible; the award would be set aside.

On appeal by the owners:

—Held, by C.A. (LLOYD and GLIDEWELL, L.J.J. and Sir JOHN MEGAW), that (1) the reason why the provision "whether in berth or not" was originally included in berth charters was to cater for the case where the port was congested and a berth unavailable; but there was nothing in the wording which limited its operation to such a case; the wording was quite general and notice of readiness could be given whether in berth or not so that such notice could be given before the vessel had reached its destination; if a limit was to be placed it was better that the limit be by reference to the place at which notice of readiness could be given rather than the reason why the vessel was unable to proceed to her berth;

(2) the provision "whether in berth or not" enabled a valid notice of readiness to be given once the vessel had arrived in port even though the reason why she was prevented from proceeding further was not the unavailability of a berth but bad weather;

(3) the effect of the "whether in berth or not" clause was to turn a berth charter into a port charter so that time started to run when the vessel was waiting in the named port of destination to proceed to berth; she was in a fit state to proceed to her berth and discharge; thus the owners were entitled to give notice of readiness provided that she was at the immediate and effective disposition of the charterer;

(4) it was conceded by the charterers that a vessel could be at the immediate and effective disposition of the charterers despite a temporary obstruction in the fairway preventing her getting to her berth when vacant; there was no difference in principle between a temporary obstruction of the fairway and the temporary closing down of the pilot station by reason of fog; the Reid test was convenient and practical for ascertaining where the place was in determining whether a vessel had arrived or not; it would be much less convenient and practical if in addition to ascertaining where that place was one had also to enquire as to the circumstances prevailing at the moment when the vessel arrived at that place; the appeal would be allowed.

On appeal by the charterers:

—Held, by H.L. (LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK, LORD TEMPLEMAN, LORD ACKNER and LORD OLIVER OF AYLERTON) that (1) the phrase "whether in berth or not" had over a long period of time been treated as shorthand for what would be "whether in berth (a berth being available) or not in berth (a berth not being available)"; and the context in which the acronym

"wibon" appeared in the charter supported that view (*see p. 6, cols. 1 and 2*);

(2) although the phrase "in berth or not" did not of itself indicate that being in berth or not was related to the availability or unavailability of a berth it was not possible, when interpreting a phrase which had been regularly included in berth charter-parties over a long period, to disregard established authority as to the purpose intended by it; the purpose of the phrase was to deal with the problem of a ship under a berth charter-party arriving at her port of destination and finding no berth available for her; there was no authority to suggest that the phrase was intended to deal with the problem of a ship under a berth charter-party arriving at a port where a berth was available for her but being prevented by bad weather from proceeding to it (*see p. 7, col. 2*);

—*Northfield Steamship Co. v. Compagnie L'Union des Gaz*, [1912] 1 K.B. 434, applied

(3) the effect of the phrase was to convert a berth charter-party into a port charter-party but only in relation to a case where a berth was not available for the ship on her arrival; there was no good reason for applying that effect to a wholly different kind of case where a berth was available for the ship on her arrival but she was prevented by bad weather from proceeding to it (*see p. 7, col. 2*);

—*The Johanna Oldendorff*, [1973] 2 Lloyd's Rep. 285, considered

(4) it was desirable that in contracts containing expressions commonly in use there should be certainty of interpretation; the decision that the phrase "whether in berth or not" only took effect when a berth was not available did not provide any less certainty than a decision that it also took effect when a berth was available but was unreachable by reason of bad weather; (*see p. 7, col. 2; p. 8, col. 1*);

(5) the phrase "whether in berth or not" should be interpreted as applying only to cases where a berth was not available and not to cases where a berth was available but unreachable by reason of bad weather; the appeal would be allowed (*see p. 3, col. 1; p. 8, col. 1*).

The following cases were referred to in the judgment of Lord Brandon:

Aello, The (H.L.) [1960] 1 Lloyd's Rep. 623; [1961] A.C. 135;

Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A. (The Maratha Envoy), (H.L.) [1977] 2 Lloyd's Rep. 301; [1978] A.C. 1;

Northfield Steamship Co. v. Compagnie L'Union des Gaz, (C.A.) [1912] 1 K.B. 434;

Oldendorff (E.L.) & Co. G.m.b.H. v. Tradax Export S.A. (The Johanna Oldendorff), (H.L.) [1973] 2 Lloyd's Rep. 285; [1974]

A.C. 479; (C.A.) [1972] 2 Lloyd's Rep. 292; [1974] A.C. 479.

This was an appeal by the charterers Bulk Transport Group Shipping Co. Ltd. from the decision of the Court of Appeal ([1987] 2 Lloyd's Rep. 122) allowing the appeal of the owners Seacystal Shipping Ltd. from the decision of Mr. Justice Webster ([1987] 1 Lloyd's Rep. 48) given in favour of the charterers and holding inter alia that the charterers were not liable to the owners for demurrage.

Mr. Martin Moore-Bick, Q.C. and Mr. Charles Friday (instructed by Messrs. Middleton Potts) for the owners; Mr. Anthony Diamond, Q.C. and Mr. Bernard Eder (instructed by Messrs. Holman Fenwick & Willan) for the charterers.

The further facts are stated in the judgment of Lord Brandon of Oakbrook.

Judgment was reserved.

Thursday Oct. 20, 1988

JUDGMENT

Lord BRIDGE OF HARWICH: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. I agree with it and, for the reasons he gives, I would allow the appeal.

Lord BRANDON OF OAKBROOK: My Lords, by a voyage charter-party dated Oct. 26, 1984 the appellants ("the charterers") chartered the m.v. *Kyzikos* ("the ship") owned by the respondents ("the owners") to carry a cargo of steel and/or steel products from Italy to the U.S. Gulf. The ship was ordered to discharge at the port of Houston. She arrived and anchored there at 06 45 on Dec. 17, 1984, and at some time before 12 00 the master gave notice of readiness to discharge. Then, and all material times afterwards, the berth at which the ship was to discharge was available for her use. She was, however, prevented from proceeding to it immediately because of fog, which resulted in the pilot station being closed. Because of this the ship did not arrive in her berth until 14 50 on Dec. 20, 1984.

A dispute arose between the owners and the charterers with regard to the liability of the latter for demurrage at the port of discharge. The owners claimed U.S.\$30,435.72 in respect of a balance of demurrage remaining unpaid. The charterers denied liability. The essential

question governing the validity of the claim was whether time for discharging counted during the period for which the ship was prevented from proceeding to her berth by reason of fog.

The dispute was referred, pursuant to a London arbitration clause contained in the charter-party, to Mr. Bruce Harris as sole arbitrator. By a reasoned award dated Nov. 26, 1985 the arbitrator decided that the owners' claim succeeded in full. The charterers obtained leave to appeal against the award and on July 30, 1986 Mr. Justice Webster in the Commercial Court gave a reserved judgment [1987] 1 Lloyd's Rep. 48 allowing the appeal and dismissing the owners' claim. The owners appealed with the leave of Mr. Justice Webster to the Court of Appeal (Lloyd and Glidewell, L.JJ. and Sir John Megaw). That Court on May 15, 1987 gave reserved judgments [1987] 2 Lloyd's Rep. 122; [1987] 1 W.L.R. 1565 allowing the appeal and restoring the arbitrator's award. The charterers now bring this further appeal against the decision of the Court of Appeal by leave of your Lordships' House.

The charter-party was on the Gencon (Box Layout) 1974 printed form, which contains 21 boxes, each with a printed heading, followed by a series of printed clauses. Typed entries were made in the boxes and typed amendments were made to a number of the printed clauses. A large number of typed clauses were also added by the way of rider. The material provisions, with typed entries and typed amendments indicated by underlining, were as follows:

Box 11. Discharging port or place (Cl. 1)
1/2 safe always afloat, always accessible berth(s) each port — 1/2 safe port(s) U.S. Gulf excluded Brownsville and no port North of Baton Rouge.

Box 15. Laytime allowed for loading (Cl. 5)
See clause 17

Box 17. Laytime allowed for discharging (Cl. 6)
See clause 17

Box 18. Demurrage rate (load and disch) (Cl. 7)
USD. 3,000, — per day/pro rata . . .

Clause 1. . . the vessel shall proceed to the discharging port or place stated in Box 11 or so near thereto as she may safely get . . .

Clause 5. Loading . . . Time to commence at 2 p.m. if notice of readiness to load is given before noon and at 8 a.m. next working day if notice given during office hours after noon . . . Time lost in waiting for berth to count as loading time. Time to count as per

Clause 5 Wipon/Wibon/Wifpon/Wcon and master to have the right to tender notice of readiness by cable, both in the loading and discharging port(s).

Clause 6. Discharging Cargo to be received by merchants . . . and to be discharged in the number of running working days stated in Box 17. Time to commence at 2 p.m. if notice of readiness to discharge is given before noon and 8 a.m. next working day if notice given during office hours after noon. Time lost in waiting for berth to count as discharging time.

Clause 7. Demurrage at the rate stated in Box 18 per day or pro rata for any part of a day to be allowed at ports of loading and discharging.

Clause 17: . . . The cargo to be loaded . . . and discharged . . . within 18 total weather working days of 24 consecutive hours, Saturdays/Sundays/Holidays excepted, unless used, in which case actual time used to count half . . .

The acronyms used in cl. 5 have the following meanings: "wipon" — whether in port or not, "wibon" — whether in berth or not, "wifpon" — whether in free pratique or not, "wcon" — whether cleared customs or not. Clause 17 is one of the additional typed clauses referred to in box 21.

Much of the argument in this case has revolved round the difference between two kinds of voyage charter-party, a port charter-party on the one hand and a berth charter-party on the other. The characteristics of a port charter-party are these. First, the contractual destination of the chartered ship is a named port. Secondly, the ship, in order to qualify as having arrived at the port, and therefore entitled to give notice of readiness to discharge, must satisfy two conditions. The first condition is that, if she cannot immediately proceed to a berth, she has reached a position within the port where waiting ships usually lie. The second condition is that she is at the immediate and effective disposition of the charterers. By contrast, the characteristics of a berth charter-party are these. First, the contractual destination of the chartered ship is a berth designated by the charterers within a named port. Secondly, the ship, in order to qualify as an arrived ship, and therefore entitled to give notice of readiness to discharge, must (unless the charter-party otherwise provides) have reached the berth and be ready to begin discharging.

The basis of the arbitrator's decision in the

present case is to be found in par. 7 of his reasons where he said:

Box 11, as completed, appeared to make this a berth charter . . . But the point is of no significance since, on well established authority, the reference in clause 5 to "wibon" (whether in berth or not) has the effect of making the charter into a port charter.

It is common ground that the charter-party here concerned is, as the arbitrator said that it appeared to be, a berth and not a port charter-party. With regard to the "well established authority" referred to by the arbitrator, it will be necessary later to examine what exactly was decided by that authority, and whether it supports the conclusion which he reached on the basis of it.

It was no doubt because the arbitrator expressed the ground of his decision in the way stated above, and also because the case was argued before him on the basis that the arbitrator had correctly identified the essential question for decision, that Mr. Justice Webster, when he gave the owners leave to appeal from his decision, formulated the question of law for decision by the Court of Appeal in the way in which he did. That question, as formulated by him in par. 4 of his order dated July 31, 1986, was —

whether the provision "whether in berth or not" has the effect of converting a berth charter-party into a port charter-party in circumstances where a berth is available for the vessel.

In my view this formulation of the question, while agreeably succinct, and derived, as I have indicated, from authority, tends to telescope the legal issues involved. Lord Justice Lloyd who gave the leading judgment in the Court of Appeal considered [1987] 2 Lloyd's Rep. 122 at p. 123; [1987] 1 W.L.R. 1565 at p. 1568, that the appeal raised, potentially at least, two questions in relation to a voyage charter-party which it was common ground was a berth and not a port charter-party, but contained a provision allowing the ship to give notice of readiness to discharge "whether in berth or not." The first question was whether the ship could give a valid notice of readiness to discharge when, on her arrival in the discharging port, a berth for her was vacant but she was prevented from reaching it by bad weather, in this case fog. The second question, which only arose if the first question was answered in the affirmative, was whether the ship, in the situation postulated, could properly be said to be at the "immediate and effective disposition of the charterers" as

would be required to enable her to qualify as an arrived ship under a port charter-party.

I agree with this analysis and it will be convenient to examine what Lord Justice Lloyd described as the first question first. In doing so I shall treat the amendment to cl. 5 of the charter-party (loading) as applying also to cl. 6 (discharging). That it was intended to do so appears to have been accepted by both sides at the arbitration. The contrary view seems to have been raised, to some extent at least, before Mr. Justice Webster who was not impressed by it. Before the Court of Appeal and in your Lordships' House the matter was common ground.

Two views have been advanced, at each stage of the proceedings, with regard to the meaning of the phrase "whether in berth or not" in a berth charter-party. One view, put forward by the charterers and accepted by Mr. Justice Webster is that the phrase covers cases where the reason for the ship not being in berth is that no berth is available, but does not cover cases where a berth is available and the only reason why the ship cannot proceed to it is that she is prevented by bad weather such as fog. The other view, put forward by the owners and accepted by the arbitrator and the Court of Appeal, is that the phrase covers cases where a ship is unable to proceed to a berth either because none is available or because, although a berth is available, the ship is prevented by bad weather such as fog from proceeding to it.

The proposition that the inclusion in a berth charter-party of the phrase "whether in berth or not" has the effect of converting it into a port charter-party appears to have had its origin in the judgment of Lord Justice Roskill in the Court of Appeal in *E. L. Oldendorff & Co. G.m.b.H. v. Tradax Export S.A. (The Johanna Oldendorff)*, [1973] 2 Lloyd's Rep. 285; [1974] A.C. 479. That case was concerned with the question of what conditions need to be satisfied to enable a ship to qualify as an arrived ship under a port charter-party when no berth is available for her in the discharging port. The decision of the House on that question was of the greatest importance because by it the House altered the law as it had earlier declared it to be in *The Aello*, [1960] 1 Lloyd's Rep. 623; [1961] A.C. 135. For present purposes, however, the only significance of the case lies in certain observations made by Lord Justice Roskill in his judgment in the Court of Appeal. He said [1972] 2 Lloyd's Rep. 292 at p. 312; [1974] A.C. 479 at p. 515:

The phrase "whether in berth or not" was designed to convert a berth charter-party into

a port charter-party and to ensure that under a berth charter-party notice of readiness could be given as soon as the ship had arrived within the commercial area of the port concerned so that laytime would start to run on its expiry. It has no proper place in a port charter-party.

It has since been said that there was a difference of view between Lord Justice Roskill and Lord Justice Buckley with regard to that point. However, for the reasons given by Lord Justice Lloyd in the present case [1987] 2 Lloyd's Rep. 122 at pp. 125-126; [1987] 1 W.L.R. 1565 at pp. 1571-1572, I agree that no real difference can be established.

In evaluating the observations of Lord Justice Roskill cited above it is essential to appreciate that he made them, and made them only, with reference to a case where no berth was available for the ship concerned on her arrival at the port of discharge. It follows that, when he said that the phrase "whether in berth or not" was designed to convert a berth charter-party into a port charter-party, he was saying it only in relation to a case where no berth was available for the ship on arrival. He had no reason to consider whether the words which he used would have been appropriate in a case where a berth was available for the ship on arrival but she was prevented by bad weather such as fog from proceeding to it. I do not, therefore, consider that his observations are of any assistance in answering the first question in the present case.

In order to answer that question it is, in my view, necessary to have regard to two considerations. The first consideration is the meaning which has been given to the phrase "whether in berth or not" in the authorities relating to it. The second consideration is the context in which the acronym "wibon" is to be found in the charter-party which your Lordships are here concerned.

So far as the authorities are concerned, they present two aspects, one positive and the other negative. The positive aspect of the authorities is that in them the phrase "whether in berth or not", when used in a berth charter-party, has uniformly over a long period been interpreted as relating to the availability or unavailability of a berth. In other words the phrase has been interpreted as dealing with the problem of congestion in ports, and putting on the charterers rather than the owners the risk of delay caused by such congestion.

In *Northfield Steamship Co. v. Compagnie L'Union des Gaz*, [1912] 1 K.B. 434 a ship was chartered under what would today be called a

berth charter-party. On arrival at the port of discharge she was unable to go to a berth because all the berths were occupied by other ships. The master gave notice of readiness to discharge, relying on a clause in the charter-party which provided —

... time to commence when steamer is ready to unload and written notice given, whether in berth or not.

It was held by the Court of Appeal, affirming Mr. Justice Hamilton, that the notice of readiness was effective to start laytime running. Lord Justice Farwell said, at p. 440:

There was no berth vacant at Savona at which the steamer could be unloaded until four days after her arrival, and accordingly she did not get a berth until the fifth day . . .

In my opinion the words "whether in berth or not" were inserted to meet this very case.

In *Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A. (The Maratha Envoy)*, [1977] 2 Lloyd's Rep. 301; [1978] A.C. 1 the House was concerned with questions arising out of a charter-party which, although a port charter-party and not a berth charter-party, contained in relation to the commencement of laytime the phrase "whether in berth or not". Referring to that phrase Lord Diplock, after pointing out that it was surplusage in a port charter-party, went on to say, at pp. 308 and 14:

The effect of this well-known phrase in berth charters has been settled for more than half a century. Under it time starts to run when the vessel is waiting within the named port of destination for a berth there to become vacant.

The negative aspect of the authorities is this. The phrase "whether in berth or not" has been used in berth charter-parties at least since 1909, the date of the charter-party in *Northfield Steamship Co. v. Compagnie L'Union des Gaz*, [1912] 1 K.B. 434. Yet Counsel for the owners was unable to point to any reported case in which it had ever been contended that the phrase covered a case where a berth was available for a ship but she was prevented by bad weather from proceeding to it.

The inference which it seems to me to be right to draw from these two aspects of the authorities, the one positive and the other negative, is that the phrase "whether in berth or not" has over a very long period been treated as shorthand for what, if set out in longhand, would be "whether in berth (a berth being available) or not in berth (a berth not being available)." There is, in my view, nothing

unusual in commercial men, knowing the purpose for which a phrase is inserted into a particular type of contract, expressing their common intention in a shorthand form in this way.

I turn to the context in which the acronym "wibon" is to be found in the charter-party here concerned. There are, as it seems to me, two significant features about that context. The first significant feature is this. The general procedure followed when making typed amendments to the printed clauses of the charter-party was to delete so much of the printed clauses as was modified or replaced by such amendments. Examples of this general procedure can be seen in cl. 2 (partial deletion of lines 25 and 26), cl. 4 (total deletion) and cl. 5 (deletion of the first two paragraphs, lines 57-67). The final line of cl. 5 as printed (line 72) reads: "Time lost in waiting for berth to count as loading time". The final line of cl. 6 as printed (line 80) reads: "Time lost in waiting for berth to count as discharging time". If the introduction of the acronym "wibon" in the typed addition to cll. 5 and 6 had been intended to modify or replace the two final lines of those clauses to which I have referred, one would have expected those lines to have been similarly deleted. In fact, however, those lines were not deleted but left in place. The inference to be drawn is that the introduction of the acronym "wibon" by the typed addition to cll. 5 and 6 was not intended to modify or replace the final lines of those two clauses as printed.

The second significant feature about the context in which the acronym "wibon" is to be found is the close association in the typed addition to cll. 5 and 6 of that acronym with the three other acronyms, "wibon", "wifpon" and "wcccon". These last three acronyms all seem to me to be directed at the problem of congestion in the loading or discharging port, rather than the problem of delay to the ship due to bad weather. It is therefore reasonable to infer that the acronym "wibon" is similarly directed.

These two features of the context in which the acronym "wibon" is to be found appear to me to support the view which I expressed earlier about the inference to be drawn from the authorities as to the effect in a berth charter-party of the phrase "whether in berth or not".

Lord Justice Lloyd, with whom both Lord Justice Glidewell and Sir John Megaw agreed, explained his decision on the first question in this way [1987] 2 Lloyd's Rep. 122 at pp. 124-125; [1987] 1 W.L.R. 1565 at pp. 1570-1571:

I do not doubt that the reason why the provision was originally included in berth charters was to cater for the case where the port is congested and a berth unavailable. But there is nothing in the wording of the provision which limits the operation to such a case. The wording is quite general. Notice of readiness may be given whether in berth or not. Ex hypothesi, therefore, notice of readiness may be given before the vessel has reached its contractual destination. Some limit must, of course, be placed on the provision. Nobody suggests that notice of readiness can be given while the vessel is still at sea (I say nothing as to the effect of "whether in port or not", which was also included in this charter-party, but as to which we heard no argument).

If then a limit is to be placed on the clause, it is to my mind better that the limit should be by reference to the *place* at which notice of readiness may be given rather than the *reason* why the vessel is unable to proceed to her berth. Certainty, as has been said so often, is of great importance in these matters. The traditional view of "whether in berth or not" has always been that it becomes operative so as to enable a valid notice of readiness to be given as soon as the vessel has arrived in port, provided the other conditions of a valid notice of readiness are satisfied. The traditional view is preferable as a matter of construction and affords a greater degree of certainty in practice. I would hold that "whether in berth or not" enables a valid notice of readiness to be given once the vessel has arrived in port, even though the reason why she is prevented from proceeding further is not the unavailability of a berth but bad weather.

In this passage Lord Justice Lloyd supports the conclusion which he reaches by reference to three main matters. The first matter is the absence of any words of qualification in the phrase "whether in berth or not". The second matter is what he described as the traditional view of the effect of the phrase. The third matter is the importance of certainty in relation to a commercial contract of the kind here concerned. I shall address myself to each of these matters in turn.

First, as to the absence of any words of qualification. I accept, of course, that the phrase "in berth or not" does not of itself indicate that being in berth or not is related to the availability of a berth. I do not, however, think it possible, when interpreting a phrase which has been regularly included in berth charter-parties over a long period, to disregard long-

established authority as to the purpose intended to be served by it. The authorities to which I referred earlier show that, since 1912 at least, it has been recognized that the purpose of the phrase was to deal with the problem of a ship chartered under a berth charter-party arriving at her port of destination and finding no berth available for her. There is further no reported case prior to this one in which it has ever been suggested that the phrase was intended to deal with the problem of a ship chartered under a berth charter-party arriving at a port where a berth is available for her but being prevented by bad weather from proceeding to it. As I indicated earlier, the phrase has been treated as shorthand for what, if set out in longhand, would be "whether in berth (a berth being available) or not in berth (a berth not being available)". The phrase has been interpreted and applied in that way for so long that I think that it should continue to be so interpreted and applied.

Secondly, the traditional view of the effect of the phrase. Lord Justice Lloyd said that this view had always been that the phrase became operative so as to enable a valid notice of readiness to be given as soon as the vessel has arrived in the port provided that the other conditions of a valid notice are satisfied. I cannot accept this generalisation as correct. So far as cases where no berth is available when the ship arrives are concerned, that has certainly been the traditional view. But, so far as cases where a berth is available for the ship on arrival but unreachable by reason of bad weather are concerned, no traditional view has ever been established, for the simple reason that the question of the effect of the phrase in that situation has never previously arisen from decision by any Court. As I said earlier, Lord Justice Roskill's statement in *E. L. Oldendorff & Co. G.m.b.H v. Tradax Export S.A.*, [1972] 2 Lloyd's Rep. 292 at p. 312; [1974] A.C. 429 at p. 515, that the effect of the phrase was to convert a berth charter-party into a port charter-party was made, and made only, in relation to a case where a berth was not available for the ship on her arrival, and I can see no good reason for applying that statement to the wholly different kind of case where a berth is available for the ship on her arrival but she is prevented by bad weather from proceeding to it.

Thirdly, the need for certainty. I accept that certainty of interpretation is a most desirable characteristic of any contract, especially a commercial contract containing expressions commonly in use. I cannot see, however, that a decision that the phrase "whether in berth or

not" only takes effect when a berth is not available provides any less certainty than a decision that it also takes effect when a berth is available but is unreachable by reason of bad weather.

With great respect to Lord Justice Lloyd and the other members of the Court of Appeal who agreed with him, I do not consider, in the light of the examination which I have made of the three main matters relied on by Lord Justice Lloyd, that they provide the support for his conclusion which he regarded them as providing. On the contrary, I am of opinion, having regard to the authorities to which I referred earlier and the context in which the acronym "wibon" is to be found in the charter-party here concerned, that the phrase "whether in berth or not" should be interpreted as applying only to cases where a berth is not available and not also to cases where a berth is available but is unreachable by reason of bad weather.

Since I have reached that conclusion on what Lord Justice Lloyd described as the first question, what he described as the second question does not arise.

In the result I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of Mr. Justice Webster.

Lord TEMPLEMAN: My Lords, for the reasons given by my noble and learned friend, Lord Brandon of Oakbrook, I would allow this appeal.

Lord ACKNER: My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Brandon of Oakbrook, and I would allow this appeal.

Lord OLIVER OF AYLERTON: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Brandon of Oakbrook. I agree with it and would allow the appeal for the reasons which he has given.

HOUSE OF LORDS

June 27, 28, 29, 30, July 4, 5 and 6, 1988

ESSO PETROLEUM CO. LTD.

v.

HALL RUSSELL AND CO. LTD.

(THE "ESSO BERNICIA")

Before Lord KEITH OF KINKEL
Lord BRANDON OF OAKBROOK,
Lord TEMPLEMAN, Lord GOFF OF CHIEVELEY
and Lord JAUNCEY OF TULLICHETTLE

Negligence — Oil pollution — Vessel under compulsory pilotage — Tug boat assisting vessel to berth at oil terminal — Tug boat became disabled — Vessel damaged, and damaged by, mooring dolphins — Plaintiffs paid sums to crofters and operators of terminal — Whether tug boat negligently designed and built — Whether plaintiffs could recover sums paid from tug boat builder and designer — Whether Shetland Island Council vicariously responsible for acts or omissions of pilot.

Late on Dec. 13, 1978 the pursuers' vessel *Esso Bernicia* was being berthed at No. 2 jetty at the oil terminal in Sullom Voe with three tugs in attendance. One of these tugs *Stanechakker* had a towing line secured to the stern of the vessel. At about 23 33 hours the coupling blew out of a hydraulic pipe above the starboard engine exhaust of the tug, the escaped hydraulic oil caught fire and the towing line was cast off. *Bernicia* was then no longer under the full control of the remaining two tugs and she came into contact with a number of mooring dolphins whereby she and the dolphins sustained damage and bunker oil escaped in large quantities.

At the time of the incident there was a pilot on board *Bernicia*, Sullom Voe being a compulsory pilotage area. *Stanechakker* was designed and built by the defenders, (Hall Russell) for the purpose of berthing tankers at the Sullom Voe oil terminal.

Esso brought an action against inter alia Hall Russell for the recovery by Esso from Hall Russell of sums paid out by Esso in satisfaction of claims in respect of oil pollution damage (or the removal of the threat of such damage) which Esso claimed it was bound to pay under the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP). Esso had paid £527,278.06 to crofters in respect of damage to sheep due to pollution of the foreshore; and £3,727,589.02 to BP Petroleum Development Ltd. (BP) as the operators of the Sullom Voe terminal in respect of operations carried out by BP to deal with the pollution caused by *Bernicia* pursuant to an arbitration award dated Oct. 15, 1985.

Esso further claimed a declarator that in the event of any body or person recovering from them by or in consequence of any process in any Court of law the costs of repairing and reinstating the No. 2