---

**Heath Steel Mines Ltd** (*Appellant*) v. **The "Erwin Schroder"** (*Respondent*)

Thurlow, Noël and Cattanach JJ. Ottawa, February 17, 18, 19, March 26, 1970.

*Shipping—Dangerous cargo—Ore concentrate liquefying in storm—Danger to ship—Hague Rules (U.S. Carriage of Goods by Sea Act), s.4(6)—Special precautions in charterparty—Whether waiver of carrier's immunity—Carrier's obligation as to seaworthiness.*

The *Erwin Schroder,* a dry cargo vessel of 3,500 tons, left Newcastle, N.B., for Rotterdam on November 27, 1962, carrying 3,300 tons of wet copper concentrate. On November 29, under heavy weather at sea, the concentrate liquefied and shifted to port, shifting boards in the ship's holds gave way, and the ship listed heavily to port. She was thereupon deviated to Halifax, the cargo discharged and its further carriage refused.

The ship had been chartered for the voyage by a charterparty made in New York which incorporated the U.S. clause paramount, *viz* that "this bill of lading" shall be subject to the *U.S. Carriage of Goods by Sea Act, etc.* The charterparty also provided that if the moisture content of the shipment exceeded a certain percentage (which it did), shifting boards as prescribed by Dept of Transport regulations must be installed under the master's direction as instructed by the port warden, labour and materials to be provided by the charterer, and the master and owner to be responsible for their correct fit as well as for proper stowage and safe delivery of the cargo and safety of the vessel.

Shifting boards were installed to the port warden's approval but did not meet the minimum standards of strength and rigidity prescribed by the Dept of Transport regulations issued for the guidance of port wardens.

Pottier D.J.A., dismissed the charterer's action for damages and allowed defendant's counterclaim. He found that the ship was in grave danger of capsizing before deviating to Halifax, that the real cause of the danger which developed was not the failure to install shifting boards strictly as prescribed by the Dept of

Transport regulations but rather the dangerous nature of the cargo with its peculiar characteristic of liquefying and shifting by sea action, and that the ship's master and owner neither knew nor could be expected to know of the danger involved in carrying such a cargo having regard to the state of expert knowledge at the time.

*Held,* the charterer's appeal must be dismissed.

*Per curiam:* The findings of the trial judge were supported by the evidence.

*Per* Thurlow J.: Section 4(6) of the *U.S. Carriage of Goods by Sea Act* justified the carrier in discharging the cargo and refusing its further carriage. The special provisions of the charterparty as to concentrates did not amount to a waiver under s. 6 of the carrier's immunity under s. 4(6). Moreover, the incorporation of the U.S. clause paramount must be taken to have excluded the operation of s. 6 because that section's provisions do not fit the charterparty. The question of the carrier's obligation as to seaworthiness of the ship did not arise.

*Per* Noël J.: The unseaworthiness of the ship was attributable solely to the peculiar nature of the cargo and not to the carrier's lack of diligence. The charterer, whose representative knew of the danger, was however negligent in not informing the master thereof.

*Per* Cattanach J.: The contract of carriage was not a special agreement but an ordinary commercial shipment made in the ordinary course of trade and accordingly s. 6 of the U.S. statute was inapplicable. The master's obligation was to install shifting boards to the port warden's satisfaction, and he did so.

*Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.* [1959] A.C. 133, applied; *Maxime Footwear Co. v. Can. Gov't Merchant Marine Ltd* [1959] A.C. 589; *Micada Compassia Naniera S. A. v. Texim* [1968] 2 Ll. L.R. 57; *Brass v. Maitland,* 119 E.R. 940; *Burley v. Stepney Borough Council* (1947) 80 Ll. L.R. 289; *Atlantic Oil Carriers Ltd v. British Petroleum Co.* [1957] 2 Ll. L.R. 55, referred to.

Appeal from the decision of Pottier J., District Judge in Admiralty for the Nova Scotia Admiralty District, dismissing with costs an action by the appellant (sometimes hereinafter referred to as charterer or shipper) for damages for breach of a charterparty made in New York with the respondent vessel (sometimes hereinafter referred to as the carrier) for the carriage of a cargo of copper and/or zinc concentrates from Newcastle, N.B., to Rotterdam, Holland, or Antwerp, Belgium, and allowing with costs a counterclaim by the respondent for damages.

The appellant claimed about $60,000 damages for prepaid freight, cost of stockpiling, storing and drying of the cargo at Halifax, and the further cost of sending it to its destination a year later. The respondent counterclaimed for $110,000, the balance of freight due, discharging costs, cost of reconditioning the vessel, storage costs at Halifax until the appellant assumed responsibility for the cargo, and for loss of use of the vessel for 42 days. The matter of damages due to the respondent was deferred until after disposition of this appeal.

*J. H. Dickey, Q.C.,* and *J. E. Gould* for appellant.

*D. A. Kerr, Q.C.,* for respondent.

THURLOW, J.—This is an appeal from the decision of Mr. Justice Pottier, Judge of the Nova Scotia Admiralty District, by which he dismissed the plaintiff's action and gave judgment in favor of the defendant on its counterclaim in an action for breach of a charterparty, made in New York on or about November 9, 1962, for the carriage of a cargo of some 3,300 long tons of copper concentrate from Newcastle, New Brunswick, to Rotterdam, Holland.

The defendant ship left Newcastle on November 27, 1962, with the cargo on board, but after encountering heavy weather in the eastern Atlantic on the 29th of November, during which the vessel developed a substantial list to port, she deviated from her course and put in to Halifax, Nova Scotia, where the cargo was later discharged and its further carriage was refused.

Before loading at Newcastle the vessel had been inspected by a Mr. Peter on behalf of the plaintiff and by the Port Warden and no objection had been raised as to her being in accordance with clause 35 of the charterparty or otherwise suited for the intended voyage. Certificates showing the transportable moisture limit of the copper concentrate to be loaded to be 11.25% and the moisture content thereof to be 14% had been delivered by the plaintiff to the Port Warden and the erection of shifting boards in all three holds had been undertaken under his supervision.

The shifting boards so erected (otherwise referred to as centreline bulkheads) met with the Port Warden's approval but they did not meet the minimum standards of strength and rigidity contemplated by a set of rules prescribed by the Department of Transport of Canada for the guidance of Port Wardens known as the Canadian Concentrates Code in that the steel uprights were not of the minimum size contemplated by the Code but, more importantly, in that they were fitted at each alternative hatch beam rather than at each hatch beam and in that most of the distances between the uprights, which were filled by wooden planking, were in excess of the eight foot maximum distance between uprights contemplated by the Code.

Following the installation of the shifting boards the cargo of concentrates had been loaded. It had been trimmed flat in holds 2 and 3 by a small bulldozer and the vessel had then put to sea.

The copper concentrate in question was a very heavy substance: so heavy in fact that the depth of the 3,300 tons of it in the holds was but approximately five feet. Such a concentrate is finely divided ore consisting of valuable metal and rock and it has, as the evidence shows, the unexpected characteristic of becoming fluid when the voids between particles in the mass are completely filled by water and energy tending to com-

pact the mass is applied thereto. When this point is reached the internal frictions and cohesive forces and the sheering strength of the mass of concentrate drop very quickly and the mass becomes a somewhat viscous liquid.

The evidence indicates that something of this nature occurred to the cargo of the *Erwin Schroder*. At the level of 14% moisture by weight her cargo must have included some 460 long tons of water which constituted some 35.2% of the total volume of the cargo. On her third day out of Newcastle the vessel encountered a storm and from the buffeting she took, coupled with the vibrations from her engines, the cargo appears to have become compacted to the point where in holds 2 and 3 it became a liquid mass. With the rolling of the vessel and the forces imparted to her by the waves this mass moved and settled to port in each section of holds 2 and 3 causing the vessel to list. In the process some of the planks of the shifting boards in holds 2 and 3 were broken and it is not improbable that a considerable quantity of the ore moved from the starboard to the port side of the vessel in both of these holds. At that point the vessel deviated from her eastwardly course and made for Halifax with the wind and waves on her stern.

That the vessel was in grave danger of capsizing immediately before she changed her course is beyond doubt but it also appears from the evidence that she was in grave danger for some considerable period thereafter until she was out of the storm.

The learned trial judge found that the master was justified in not proceeding further on his voyage and in putting in to Halifax to save the ship. He then cited some of the evidence as to the nature of concentrates and after referring to the evidence of Dr. Milton, which he accepted, said:

> He left me without doubt that a ship which had a cargo of copper concentrate, with enough moisture in it, which the defendant vessel had, was in jeopardy of the cargo shifting to port or to starboard, with the effect that it would not shift back with each rolling of the ship, building up in the meantime, and the ultimate would be that it would roll over. The shifting boards, running fore and aft, in effect, if properly installed, only prevent the cargo from shifting from one side of the ship to the other—they do not prevent the cargo from jeopardizing the ship by movement in each side of the holds against the shifting boards and against the side of the ship and thereby massing against one side of the ship, to the extent that the ship will ultimately turn over. The centreline shifting boards, in reality, only split the cargo holds in half.
>
> There is no doubt in my mind that a cargo of this nature with these characteristics is a dangerous cargo for a vessel to have on board.
>
> I find that the cargo of the defendant vessel, loaded at Newcastle as aforesaid, was a dangerous cargo for the said vessel to load. The events that occurred aboard this vessel have, to my mind, proved that fact.

The learned judge went on to find that the cargo shifted to the port side, that nothing in the requirements of the Canadian Concentrates Code would have prevented such movement and that though the provisions of the Code were not followed to the letter the failure to follow them was not what caused the real danger aboard the defendant vessel.

He then referred to *Brass v. Maitland*[1] and found that there was so much uncertainty regarding concentrates and the question of shifting cargoes

[1] (1856) 6 E. & B. 471.

in 1962 that the question of how to deal with this cargo could not have been determined with certainty even by a team of experts and that commerce could not be carried on in such a situation.

Finally the learned judge expressed the view that the real point in the case was whether the carrier and/or master should have known about the dangers and what precautions should have been taken and that after hearing the expert witnesses it was clear to him that at least some of them did not understand ore concentrates and what could happen to a cargo of same and that the charterparty could not be read in such a way that marine commercial business could not be carried on.

While the learned judge did not expressly say so it appears to me to be implicit in this and in his conclusion that he was of the opinion that the carrier and/or master did not in fact know of the danger involved in carrying such a cargo or of what precautions were necessary and that in the circumstances prevailing with respect to common and even expert knowledge of the subject neither the carrier nor the master should be expected to have known of such dangers and what to do about them.

These findings are all, in my view, well supported by the evidence and in my opinion they should be affirmed. It becomes necessary therefore to consider what consequences flow from them.

The appellant, as I understand the argument, relies on clause 49 of the charterparty and on the provisions of sections 3 and 6 of the *Carriage of Goods by Sea Act,* 1936 of the United States as made applicable by clause 51 of the charterparty. The respondent, on the other hand relies on the provisions of sections 2 and 4 (6) of that Act.

Clauses 49 and 51 of the charterparty read as follows:

> 49. The Canadian Department of Transport Regulations require Charterers to present to the Port Warden at Newcastle a laboratory certificate showing the transportable moisture limit for normal stowage of the type concentrate to be shipped and a certificate of moisture content of the actual shipment to be loaded prior to loading. If the moisture in the shipment to be loaded exceeds the transportable moisture limit then, in accordance with the Department of Transport Regulations, shifting boards (centerline bulkheads) must be installed in accordance with the Port Warden's instructions.
>
> Charterers will endeavor to have the moisture content of the cargo below the transportable moisture limit and there is good possibility this will be accomplished but they cannot assure this. Therefore, if it is found that shifting boards are required, Charterers will provide labor and materials to the Master to accomplish the required installation. Such installation shall be made under the direction and control of the Master and Owners shall be responsible for the correct fitting, as well as the proper stowage and safe delivery of the cargo and safety of the vessel. Master shall arrange for crew to assist the Charterer's labor, if requested to do so. Installation time shall not count as loading time and Charterers hereby specify that it is their intent to provide the Master with labor and material to accomplish the installation as quickly as possible under the circumstances existing at the time.
>
> Centerline bulkheads and fittings, if installed, to be dismantled by Charterers or consignees' stevedores before and/or during discharging.
>
> Timber and fittings when dismantled to be disposed of by Charterers and/or consignees' stevedores if they desire. If Charterers and/or consignees' stevedores

prefer to leave all or any part of the timber and fittings aboard the vessel, this may be done subject to the Master's agreement. Dismantling time and time used in disposing of material (unless left on board by agreement with Master) to count as discharging time.

51. New Jason Clause, U.S.A. Clause Paramount, New Both-to-Blame Collision Clause, Chamber of Shipping War Risk Clauses 1 & 2 and P. & I. Bunker Clause as attached, are to be considered as fully incorporated herein.

The U.S.A. Clause Paramount so referred to as attached reads:

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

The provisions of the Act to which reference has been made read as follows:

2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(*a*) Make the ship seaworthy;

(*b*) Properly man, equip, and supply the ship;

(*c*) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * *

4. (6) Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibilty and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea: Provided, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

> Any agreement so entered into shall have full legal effect: Provided, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

In the view I take of the matter, assuming for the moment that the provisions of section 4(6) of the *Carriage of Goods by Sea Act* are applicable, the defendant's conduct in unloading the cargo at Halifax and refusing to carry it farther was justified by the express terms of the charterparty and was in fact not a breach of the contract.

To my mind all that is essential to the defendant's case under section 4(6) is that the cargo was in fact of a dangerous nature and that its shipment was not consented to by the carrier with knowledge of its nature and character. Had the dangerous nature or character of the cargo been discovered at any time after the vessel left Newcastle, that is to say, even before any movement of the cargo had occurred or before any list had developed or before any shifting boards had been bent or broken the master, in my opinion, would have been entitled to put into the nearest port and there discharge the cargo just as ultimately was done at Halifax. The fact that in the events which transpired the ship and cargo were actually endangered, while conceivably relevant to the quantum of damages recoverable, is, as I see it, not necessary to justify the discharge of the cargo and the refusal to carry it further in a case of the first kind described in section 4(6).

A submission was made that this cargo was not of a dangerous nature in the sense contemplated by the statute but to my mind this point is not maintainable. Granting that ore concentrate may not be dangerous *per se* in the degree that sensitive explosives are dangerous, as I see it, this cargo was of a highly dangerous nature in that it had the then unknown and unexpected capacity to liquify as a result of the compacting forces to which it was likely to be subjected in the course of an ordinary sea voyage.[2]

Moreover, as I see it, in the circumstance nothing turns on whether the vessel was seaworthy or not since the loss claimed arises from the plaintiff having shipped a cargo of a dangerous nature of which the carrier was not aware at the time of such shipment and from the exercise by the carrier, on discovering such dangerous nature, of the rights accorded to him by the contract in that exigency. Indeed in the view I take of the evidence, whatever unseaworthiness there was arose entirely from the unknown and dangerous nature of the cargo. Had the cargo not had the unexpected capacity to liquify there would, as I see it, have been no unseaworthiness, and no danger.

---

[2] Compare *Micada Compania Naviera S.A. v. Texim* [1968] 2 Ll. L.R. 57 and *The Atlantic Duchess* [1957] 2 Ll. L.R. 55 at 95 and 121.

In the course of argument reference was made to *Maxime Footwear Co. v. Canadian Government Merchant Marine Ltd*[3] where Lord Somervell of Harrow pointed out the overriding nature of the obligation of the carrier to exercise due diligence to make his ship seaworthy and it was submitted that it followed that the question of seaworthiness comes first and that the immunities of section 4 do not arise when a loss is found to be due to unseaworthiness which the exercise of due diligence could have avoided.

I doubt that the provision of section 4(6) is one of the immunity provisions referred to in that case. Rather it seems to me that section 4(6) is a specific provision with respect to the rights of a carrier to take remedial action whenever, in either of the two situations described, goods of a dangerous nature or character are being carried in his ship. This view moreover appears to have the support of the authors of the 17th edition of Scrutton on Charterparties who say at page 428:

> . . . The shipowner can presumably exercise his rights under this Rule even if in breach of his obligations as to seaworthiness.[4]

I do not think, however, that it is necessary to express any concluded opinion on the point because it seems to me that the obligation to exercise due diligence to make the ship seaworthy cannot be extended so far as to require the carrier to take measures to avoid a danger of which he did not know and could not reasonably be expected to know. It appears to me to follow that, on the assumption made earlier, the defendant is entitled to succeed.

There remains the question whether the terms of the charterparty exclude the applicability of the provisions of section 4(6) of the *Carriage of Goods by Sea Act*. The appellant's submission on this question, as I understand it, has two steps. It was first contended that the wording of clause 49 contemplates the carriage of a cargo of concentrates the moisture content of which might be above the transportable moisture limit for normal stowage as established by the Canadian Concentrates Code (from which it follows that even if the master of the defendant ship had been informed of the dangerous nature of the cargo he would not have been entitled to refuse to load it), that the clause further goes on to provide that the master and owners:

> "shall be responsible for the correct fitting, as well as the proper stowage and safe delivery of the cargo and safety of the vessel,"

and that by the use of this language the carrier confirmed its sole and absolute responsibility to stow the cargo properly and to deliver it safely at destination. The second step of the submission was that this wording has effect according to its tenor by virtue of section 6 of the *Carriage of Goods by Sea Act* and thus leaves no scope in which section 4(6) can operate in the circumstances of this case.

---

[3] [1959] A.C. 589.

[4] Compare the judgment of Kerr, J., in *Falconbridge Nickel Mines Ltd v. Chimo Shipping Ltd* on a similar point arising under section 4(5) of the *Water Carriage of Goods Act*, [1969] 2 Ex.C.R. 261 at pages 284-5.

I should add that it was not contended that the provisions of the *Carriage of Goods by Sea Act* as a whole were not applicable. On the contrary the position taken was that the incorporation of the provisions of the Act by the U.S.A. Clause Paramount had the effect of reducing the carrier's warranty of seaworthiness to an obligation to exercise due diligence to make the ship seaworthy and had, as well, the effect of introducing the requirement of section 3(2), the obligation of which was said to be "entirely consonant and in line with" the obligation undertaken by the carrier by clause 49 of the charterparty, but that what was thereby undertaken was an obligation to properly and carefully load, handle, stow, etc., a cargo of wet copper concentrate and that no excuse arising from the moisture of the cargo was open to the carrier in respect of failure to properly stow, carry and deliver it. The making of a contract to this effect was said to be within the permissible ambit contemplated by section 6 of the Act and thus to be legally binding even though the moisture of the cargo, in the event, rendered it dangerous.

This raises what appears to me to be the most difficult issue in the case but I do not think the contention can prevail.

As a matter of construction the purport of the wording relied on is, I think, affected by the context of clause 49 in which it is found, as well as by what is provided in the other special clauses and especially in clause 32 [*post*, p. 452] which provides for loading, trimming and discharging of the cargo by the plaintiff's stevedores free of risk and expense to the vessel. As I read it the first paragraph of clause 49 is a recital of a situation to be encountered which might or might not result in delay and expense in loading the cargo at Newcastle and it seems to me that the purpose of the second paragraph of the clause was to settle as between the parties to the charterparty how the situation was to be dealt with, who was to provide the materials and labor for the installation of shifting boards, if they should be required, who was to be responsible for the stowage of the cargo in the manner thus contemplated and for the ownership of the shifting boards themselves on completion of the voyage. If indeed the wording of this clause was intended to import an absolute contract for the proper stowage and safe delivery of a cargo of wet copper concentrate this strikes me as a strange context in which to provide for it, and I do not therefore regard the wording as having the meaning which counsel sought to attribute to it. Rather, as indicated, what I would interpret it to mean is that as between the parties the carrier should be responsible for the installation of the shifting boards and the stowage of the cargo in the manner contemplated, even though the labor for the trimming of the cargo and the labor and materials for the construction of shifting boards were to be supplied by the plaintiff and though the materials were to be his at the end of the voyage if he desired them, and that no responsibility for correct installation of the shifting boards nor for the proper stowage of the cargo or for its safe delivery or for the safety of the ship should devolve on the plaintiff. In short, as I read it, the wording relied on places responsibility as between the parties but is not a contract to produce a particular result.

A standard of responsibility with respect to the stowage and delivery of the cargo is, moreover, provided for by section 3(2) of the *Carriage of Goods by Sea Act* which prescribes that the carrier shall load, stow, carry, and discharge the cargo "properly and carefully"[5] and I would not interpret the wording of clause 49 as imposing responsibility for any higher standard than is required by that subsection.

Clause 49, moreover, in my opinion, shows that the installation of shifting boards and compliance with the standards described in the Canadian Concentrates Code was all that the parties contemplated would be required with respect to the proper stowage of the cargo. These standards were not in fact complied with perfectly but it has been found by the learned trial judge that strict compliance with them would not have obviated the danger. As I see it therefore nothing turns on such shortcomings as existed in the shifting boards or in the stowage. It had also been found that the dangerous capacity of the cargo to liquify was neither apparent nor known to the carrier at the material time and that in the state of common knowledge of the subject existing at the time the carrier could not reasonably be expected to have known of the dangerous nature of such a cargo. In these circumstances there is, as I see it, no reason why section 4(6) should not apply.

There is, however, a further reason why in my opinion the appellant's submission cannot succeed. While the submission was put forward only with respect to the particular wording of clause 49 of the charterparty it seems to me that if the contention that this charterparty fell within the ambit of section 6 were sound, and if it were carried to its logical conclusion, it could be applied as well to the whole charterparty, including clause 2 thereof and the absolute warranty of seaworthiness therein expressed and that it could thus render the incorporation, by clause 51 of the charterparty, of the U.S.A. Clause Paramount, nugatory and ineffective to reduce even that warranty to the obligation under section 3 to exercise due diligence to make the ship seaworthy or to confer on the carrier the rights and immunities defined in section 4. In my view it is unlikely that the parties could have intended such a result for to my mind the whole purpose of incorporating such a clause paramount in a charterparty is to ensure to the carrier that whatever may be the legal effect of the particular wording of the document his responsibilities will not be greater than those provided in section 3 of the Act and that he will be entitled to the rights and immunities provided in section 4. The clause paramount does not merely provide for the incorporation of the Act into the charterparty. If that were all that it said the present submission might indeed be stronger. But the clause goes on to say that nothing contained in the charterparty shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of its responsibilities under the Act. There are no rights or immunities conferred on the carrier by section 6 of the Act nor are his liabilities defined by that section. All that the section provides for is an expected situation in which the other provisions

[5] Vide *S.M. Renton & Co. v. Palmyra Trading Corp. of Panama* [1957] A.C. 149 per Lord Morton of Henryton at page 169 and Lord Somervell of Harrow at page 174.

of the Act need not apply and in which the parties are thus free to contract without statutory restriction. Therefore it seems to me that the rights immunities, responsibilities and liabilities to which the Clause Paramount refers can only be those defined in sections 3 and 4. On this basis I would conclude that section 6 of the Act does not fit this charterparty and should be disregarded in the interpretation of the charterparty just as the preamble of the Act and the provision of section 5 that the Act shall not apply to charterparties and other limitations of the applicability of the provisions of the Act must be disregarded.[6]

In reaching this conclusion I am not unaware that section 6 is so worded as to override the effect of preceding sections. Nor do I overlook the fact that section 2, which gives effect to the provisions of sections 3 and 4 when the statute applies of its own force, expressly does so "subject to the provisions of section 6" and thus can be interpreted as conferring no rights or immunities and defining no obligations except for situations to which section 6 will not be applicable. It seems clear, however, that the effect which the incorporation of a clause paramount in a charterparty may have depends to a very great extent on the particular charterparty and what intention is to be inferred in the particular case from the incorporation of such a clause.

Here there was to be but one voyage and but one item of cargo. The voyage was to be from a port in Canada to a port in Europe. The charterparty was made in New York where no statute applied to the making of a contract between the parties for the carriage of the cargo between such ports. There was thus no restriction on the freedom of the parties to contract. In particular there was no need of section 6 of the *Carriage of Goods by Sea Act* to permit them to contract on any terms acceptable to both of them and if they contracted for something within the ambit of section 6 their having done so would not be referable to any right thereby reserved but to their unrestricted right so to contract. In these circumstances the incorporation by them into their contract of a clause paramount which is meaningless if read subject to section 6, but which gives effect to the widely accepted standards of the Hague Rules if not so read, appears to me to indicate clearly that the latter is the correct construction to put upon the clause.

This conclusion is, I think, supported by the reasoning of Viscount Simonds in *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.*[7] when he said at page 154:

> I can entertain no doubt that the parties, when they agreed by clause 52 of the charter that the "paramount clause... as attached" should be incorporated

[6] See the comment of Lord Reid in *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.* [1959] A.C. 133 at 170:

"There are also sections of the Act which permit parties to agree to vary statutory rights and liabilities in certain cases, and permit the Government of the United States to modify the terms of the Act in certain circumstances. These, too, are meaningless if incorporated in this charterparty and I disregard them."

[7] [1959] A.C. 133.

> in their agreement, and proceeded physically to attach the clause which I have set out, had a common meaning and intention which compels me to regard the opening words "This bill of lading," as a conspicuous example of the maxim "falsa demonstratio non nocet cum de corpore constat." There can be no doubt what is the corpus. It is the charterparty to which the clause is attached. Nor, pursuing this main line of attack, can I be driven to a wholesale rejection of the clause because the Act, whose provisions are in turn deemed to be incorporated, itself enacts that its provisions shall not apply to charterparties. I cannot attribute to either party an intention to incorporate a provision which would nullify the total incorporation.
>
> My Lords, I should have come to this conclusion without the aid of any external circumstance. But I am confirmed in it by the notorious fact, to which both the learned judge and the editors of the 16th edition of Scrutton on Charterparties refer, that the parties to a charterparty often wish to incorporate the Hague Rules in their agreement: and by that I do not mean, nor do they mean, that they wish to incorporate the ipsissima verba of those rules. They wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the rules subsists between carrier and shipper: in other words, they agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them.

and at page 158:

> I think the parties intended, as I have already said, to introduce as a term governing their relationship as owners and charterers the limited measure of responsibility prescribed by the American Act. This seems to me so plain that I should properly be regarded as unduly astute if I turned my eye away from it. If this initial step is taken, it does not seem to me difficult to make commercial sense of the agreement, though I would not dissent from Parker L. J.'s description of it as a "jumble of provisions."

Apart therefore from the wording itself of section 6 of the Act I would reach the conclusion that it does not apply so as to permit the wording of clause 49 of the charterparty in the present case to abrogate the right of the carrier provided by section 4 (6) to discharge cargo, (which he had undertaken to stow, carry and deliver, etc., but which has turned out to be unexpectedly dangerous) in either of the events contemplated by that subsection. I may say, however, that even if I had reached the conclusion that section 6 of the Act should be read into the charterparty I would have had difficulty in concluding that its expression "particular goods"[8] could refer to the subject of a contract for the carriage of a quantity of unascertained copper and/or zinc concentrate or that the shipment as made was anything but an ordinary commercial shipment made in the ordinary course of trade. In view, however, of my conclusion on the applicability of section 6 it does not appear to me to be necessary to determine these questions.

Nor as I see it, is it necessary to consider what the position of the parties would be at common law if the provisions of section 4 (6) were not applicable as in my view its provisions do apply and govern their rights.

In my opinion the appeal therefore fails and should be dismissed.

---

[8] The French text of the draft convention of 1923 uses the expression "les marchandises déterminées". *Vide* Scrutton, page 502.

NOËL, J. (*after stating the facts*):—From the evidence adduced in this case, it appears to me that the captain of the vessel did the only sensible thing in returning as he did to port and in refusing to pursue the voyage, even after some of the surface water had been pumped off the vessel.

[*His Lordship reviewed the evidence, and proceeded:*]

This, in my view, indicates clearly that the liquefying of this cargo was clearly dangerous and could have led to the possible loss of this vessel had it pursued its voyage with this cargo aboard and there is no question in my mind that, as found by the trial judge, this cargo loaded as it was on this vessel, was navigationally dangerous. It was not, it is true, a physically dangerous cargo in the sense that explosives or chemicals emitting noxious gases might be for other cargo on board or for the life of the crew, but it definitely was established that it was dangerous for the life of the vessel. The difficulty here is that this cargo, although found dangerous because of its transformation into a viscous substance a few days after leaving port, was one which was subject to a number of government regulations which dealt with its loading precisely because of its moisture content and which, under the charterparty, was as far as "the correct fitting, as well as the proper stowage and safe delivery of the cargo and safety of the vessel" under the direction and control of the master presumably because of his navigational knowledge. This, of course, raises matters which, I believe, can be determined by an answer to the following question. What are the obligations in the circumstances above described of the owner of a vessel who undertakes to stow, transport and deliver safely a cargo which, because of its moisture content, was carried and stowed in holds divided by shifting boards erected according to the port warden's instructions, and to his satisfaction, substantially in accordance with a Code issued by the Canadian Department of Transport but which cargo, because of its peculiar characteristic unknown to the carrier of liquefying in a heavy sea, turned out to be dangerous to the life of the ship and its crew? Once the position of the carrier is clarified, the question then is how did he fulfill whatever obligations he had under the carriage contract.

A solution to these problems can be found only after proper consideration is given to the charterparty, the bill of lading, the relevant shipping Acts which may apply to this carriage of cargo and their application to the situation revealed at the trial.

The charterparty herein is between Richard Schroder, as owner of the appellant vessel, and Heath Steel Mines Limited, as charterer. It is dated November 9th, 1962, and is on the Mediterranean Iron Ore Form with attachments. It is signed for the charterer by A. J. Shields, traffic manager. The final clause on the printed form of the charterparty reads as follows:

> Clauses 28 through 51, as attached hereto, to be fully incorporated in this Charter Party.

Clause 51 provides as follows:

> 51. New Jason Clause, U.S.A. Clause Paramount, New Both-to-Blame Collision Clause, Chamber of Shipping War Risk Clauses 1 & 2 and P. & I. Bunker clause as attached, are to be considered as fully incorporated herein.

Counsel for the appellant, at the trial, agreed that the protective clauses were attached to the charterparty and formed part thereof when at p. 19 of the case he stated:

> M/1, the original charterparty has the protective clauses attached to it and I am instructed that no assertion or allegation will be made or relied upon by the plaintiff that the U.S.A. Clause Paramount or the other protective clauses do not have... form part of the charterparty. In other words, that we are quite content to admit that under the wording of clause 51 these provisions became part of the contract between the parties.

I will now only refer to those clauses which may be of some assistance in determining the rights of the parties herein namely clauses 32[9], 35[10] and 49[11], the U.S.A. clause paramount[12] and the New Jason Clause[13].

---

[9] Cargo to be loaded and trimmed and discharged by charterer's stevedores, free of risk and expense to the vessel. Stevedores shall work under the supervision of the Master. Master's supervision of the loading and/or discharging shall not extend to regulation of the speed of loading and/or discharging nor to periods when work can be done except as to ordering overtime work for Owner's account. Master to allow loading and/or discharging to be done during excepted periods and before time commences to count. Claims for stevedore damage are to be settled directly between Owners and stevedores.

[10] At loading port(s), Owners are to tender the vessel with holds properly swept, cleaned and dried, and in all respects ready to receive the cargo. Prior to tendering the vessel for loading, cargo battens are to be removed, bilge boards and limber boards are to be in place and made tight against cargo seepage, and rose boxes are to be suitably covered against cargo seepage. Should hand labor ultimately be required to discharge cargo from spaces so protected or from behind cargo battens if same are not removed, cost of same to be for Owner's account and such discharge to be done at Owner's risk and on Owner's time. Vessel must tender ready for loading with full ballast including filling of all vessel tanks.

[11] The Canadian Department of Transport Regulations require Charterers to present to the Port Warden at Newcastle a laboratory certificate showing the transportable moisture limit for normal stowage of the type concentrate to be shipped and a certificate of moisture content of the actual shipment to be loaded prior to loading. If the moisture in the shipment to be loaded exceeds the transportable moisture limit then, in accordance with the Department of Transport Regulations, shifting boards (centerline bulkheads) must be installed in accordance with the Port Warden's instructions.

Charterers will endeavor to have the moisture content of the cargo below the transportable moisture limit and there is good possibility this will be accomplished but they cannot assure this. Therefore, if it is found that shifting boards are required, Charterers will provide labor and materials to the Master to accomplish the required installation. Such installation shall be made under the direction and control of the Master and Owners shall be responsible for the correct fitting, as well as the proper stowage and safe delivery of the cargo and safety of the vessel. Master shall arrange for crew to assist the Charterer's labor, if requested to do so. Installation time shall not count as loading time and Charterers hereby specify that it is their intent to provide the Master with labor and material to accomplish the installation as quickly as possible under the circumstances existing at the time.

Centerline bulkhead and fittings, if installed, to be dismantled by Charterers or consignee's stevedores before and/or during discharging.

Timber and fittings when dismantled to be disposed of by Charterers and/or consignees' stevedores if they desire. If Charterers and/or consignees' stevedores prefer to leave all or

The U.S. *Carriage of Goods by Sea Act* (*Cogsa*) was entered in evidence by a New York attorney, Mr. McGowan, by the production of a copy.

A bill of lading was issued in this case but the parties seem to have accepted that it was only a receipt for the cargo and that the contract of carriage was to be found in the charterparty. The fact that the bill of lading was merely a receipt should, however, not prevent the American *Cogsa* rules applying to the present appeal under the authority of the reasoning of Lord Reid in *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.*[14] expressed at p. 168:

> If the paramount clause is to have any meaning or effect at all "This bill of lading" must be held to be a misnomer for "This charterparty." I find nothing to raise any doubt that this was the intention, and the fact that clause 52 directs that the paramount clause is to be "incorporated" in the charterparty appears to me to be a clear pointer that its initial words must be so read. So reading them, the paramount clause provides: "This charterparty shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this charterparty be repugnant to said Act to any extent such term shall be void to that extent, but no further". This is a plain and unequivocal direction to incorporate in the charterparty "the provisions" of the United States Act so that, if any other term of the charterparty is to any extent repugnant "to said Act", it shall be void to that extent but no further. I note that there must be repugnancy to the United States Act—not to some particular section of it.

Nor should the fact that the American Act states that it only applies to voyages to or from American ports and the voyage in the present case neither commenced nor ended or was to end in an American port prevent

---

any part of the timber and fittings aboard the vessel, this may be done subject to the Master's agreement. Dismantling time and time used in disposing of material (unless left on board by agreement with Master) to count as discharging time.

[12] U.S.A. CLAUSE PARAMOUNT

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

[13] NEW JASON CLAUSE

In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequences of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.

If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if such salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

[14] [1959] A.C. 133.

its application. The matter is also well dealt with in the above decision by Viscount Simonds at p. 155:

> ...Why should it apply to any other voyages than those to or from ports of the United States? I do not think that there is a clearer answer to this question than that given by the learned judge... No reason has been suggested, nor, as far as I am aware, could be suggested, why a similar restriction should be imported into the contract. On the contrary, to do so would from the commercial point of view make nonsense of it. I find it easy, therefore, as did the learned judge, to construe this contract as making the substituted standard of obligation coterminous with the enterprise.

I would also accept Lord Somervell's statement with regard to section 5 of the American Act which says that the Act will not apply to charterparties. He stated at p. 184 of the above case the following:

> I also agree with the learned judge on the second point based on the provision in section 5 of the Act that the Act shall not be applicable to charterparties. He said: "Since the clause paramount says that this charterparty shall be subject to the Act, it is insensible to incorporate into the clause paramount a condition which says that the Act shall not apply to charterparties." The provisions of the Act are, therefore, to be incorporated as terms of the contract *as far as applicable.* This is to apply the principle laid down in *Golodetz v. Kersten, Hunik & Co.* (24 Ll. L.R. 374).

I am also of the view that clause 51 of the rider to the charterparty, which merely considers as fully incorporated the U.S.A. clause paramount is sufficient, in my view, to bring into effect the relevant provisions of *Cogsa* insofar as they relate to the respective duties, obligations, immunities and exceptions of the parties herein.

Having thus determined that the relevant clauses of *Cogsa* apply to the present carriage mention should now be made of the provisions of section 4(6) of *Cosga* (which appears to be identical to Article IV, section 6 of the Schedule to the Canadian *Water Carriage of Goods Act,* R.S.C. 1952, c. 291 which deals with dangerous cargo. This section 4(6) reads [*ante.* p. 436]

It may be useful at this point to say that section 2(21) of the *Canada Shipping Act* describes "Dangerous goods" or "Goods of a dangerous nature" as meaning "goods that by reason of their nature, quantity or mode of stowage, are either singly or collectively liable to endanger lives of the passengers or imperil the ship and includes all substances determined by the Governor-in-Council, in Regulations made by him to be dangerous goods".

It thus appears that under a Canadian definition, goods which may imperil a ship may be considered as dangerous goods and such goods are not restricted to goods only which are inherently dangerous, such as explosives or chemicals, and the American law on this point appears to be no different. It may be of some interest to note at this stage that section 4 (6) of *Cogsa* deals in the first paragraph with dangerous goods unknown to the carrier, master or agent whereas the second paragraph deals with a case where the carrier, master or agent has knowledge of goods that become dangerous. It also appears that in the first case the shipper is held liable for all damages and expenses whereas in the second case, the carrier's recourse is limited "to general average if any".

*Cogsa* at section 3 (1) sets down that "the carrier shall be bound, before and at the beginning of the voyage to exercise due diligence" (a) to make the ship seaworthy, (b) properly man, equip and supply the ship, (c) make the holds . . . and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation".[15] Section 3 (2) requires the carrier to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried". Both of these requirements are similar to what is required under the Canadian *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, with the exception that the Canadian Act in Article III subsection (2) of the Schedule states that the obligation of the carrier to properly load, carry and discharge is made subject to the provisions of Article IV which makes due diligence an overriding obligation as stated in *Maxime Footwear Co. v. Canadian Gov't Merchant Marine Ltd*[16] whereas the American Act does not have these words. I do not believe that for the purpose of the present appeal, the lack of such words in the American Act would make any difference and we may assume that the carrier here, in order to disclaim liability, must establish, once it has been shown that the vessel was unseaworthy at the material time and that such unseaworthiness was the cause of the casualty or damage or loss or that the latter were the consequence or the result of such unseaworthiness, that it did show due diligence to make the ship seaworthy at the material time. Such, indeed, is the law as it applies to a case governed by the Canadian Act and from a reading of the American Act (which the parties appear to have accepted by merely depositing a printed copy of the Act in the present case[17]) or from the evidence adduced in this case, there appears to be no reason to hold that the American law is any different.

The appellant's position during the appeal is, in my view, twofold: (1) the respondent undertook to safely carry and deliver its cargo and failed to comply with its contractual obligations by not doing so and,

---

[15] Although there may be some question in my mind as to whether the overriding obligation of the carrier to show due diligence is a *sine qua non* condition to the exercise by the carrier of whatever rights he may have under section 4 (6) of *Cogsa,* or for that matter, under article IV(6) of the Canadian Act on the assumption that such rights are not immunities dependent upon the fulfilment of such obligation, I am prepared, however, to determine this appeal on the basis that the carrier herein had such an obligation as it seems to me that, if under the first paragraph of section 4 (6) of *Cogsa,* the carrier has a recourse against the shipper in damages for supplying dangerous cargo of which the carrier had no knowledge, then the latter must not, in my view, have caused such damage by neglectfully supplying an unseaworthy ship or by improperly stowing cargo in order to be able to take advantage of such a right. I should also add that I, however, have some doubts as to whether section 4 (6) of *Cogsa* applies to a situation such as the present one where a cargo is dangerous because it is improperly stowed or carried. It may well be indeed that the above section contemplates only cargo which is intrinsically dangerous. If such is the case, however, it seems to me that the carrier would still have a recourse under the common law if the shipper had tendered goods or cargo of a dangerous nature of which the carrier had no knowledge.

[16] [1959] A.C. 589 at 602; [1957] S.C.R. 801 per Cartwright J. at 809.

[17] Where there is no particular evidence as to the state of the American law on a particular question, I should think that the court is to assume that the foreign law is the same as the Canadian law.

therefore, breached the terms of the contract; (2) the execution of its contract was made impossible as a result of its vessel being unseaworthy and the respondent failed to establish that it had shown due diligence to make it a seaworthy ship.

I should say that having regard to the obligations under the charterparty, as well as under the *Water Carriage of Goods Act*, the two above contentions, if true, could render the respondent liable for the present casualty. According to the appellant, the respondent breached its contract of carriage and should be held liable to perform it, because the tendering of a cargo with a moisture content above the transportable moisture limit for normal stowage by the charterer was expressly provided for in the contract and was in accordance with the Department of Transport regulations for the transportation of such cargo. It was a proper cargo transportable with the installation of shifting boards (centreline bulkheads) and this was the case whether the moisture content of the cargo was 14 per cent or higher. The charterparty (at clause 49) also provided that the shifting boards were to be installed under the direction and control of the master "and owner shall be responsible for the correct fitting as well as the proper stowage and safe delivery of the cargo and safety of the vessel"[18]. The difficulties encountered by the carrier and the casualty which occurred were precisely of the type which the provisions of the charterparty were intended to prevent and the carrier cannot now, according to the appellant, having failed to comply with the express provisions of its contract, pretend that it was not fulfilled because the cargo was essentially different from what was represented at the time of shipment.

Appellant submits that the respondent breached its contract by (*a*) incorrectly fitting the shifting boards, (*b*) improperly stowing the cargo, and (*c*) in not safely delivering it. These provisions of the contract would apply not only at the time of loading, but also at Halifax when the charterer required the carrier to restow and proceed.

Appellant states that the shifting boards in the bulkheads were deficient in that they were not rigid enough to prevent the passage of cargo from one side of the ship to the other side while at sea and did not do so because they were significantly weaker than the minimum standard required by the

[18] I do not intend to deal at any length with respondent's proposition that clause 49 of the charterparty, which in addition to containing the above obligations of the carrier, deals also with the shifting boards and the Canadian Code requirements is void as repugnant to *Cogsa* in that it increases the liability of the carrier beyond what is contemplated in the Act, because I do feel that even if there had been no such clause in the charterparty the carrier would still, I believe, have had to comply with the instructions of the harbour master in order to establish that he had taken all reasonable means to properly stow this cargo. As far as the safe delivery of the cargo and the safety of the vessel are concerned, I should think that there is always an implied obligation on the part of the carrier to insure that his vessel is safe when he undertakes to carry and deliver cargo. In my view the above clause and particularly that part which renders the owner responsible for the "safe delivery of the cargo" and the "safety of the vessel" does not go beyond the obligations I have just described and cannot be extended to mean, as submitted by counsel for the appellant, that the carrier is prevented thereby from invoking any rights it may have against the shipper who has supplied a dangerous cargo unless, of course, the carrier knowingly accepted to stow and carry such a cargo, was negligent in so doing or even in simply accepting to carry it. As a matter of fact, these are the only matters to be resolved here.

Canadian Code. The breaking of a number of planks in holds No. 2 and No. 3 would, according to counsel for the appellant, indicate clearly that they were not solid enough to perform their function. These shifting boards were not those required by the Code (section 8 at p. 43 of the Code).

[*His Lordship here discussed the evidence on this subject and continued*:]

Under section 5.5 of the Code, a vessel's shifting boards must be rigged to the port warden's satisfaction and he gave a certificate that this had been done. This was also in accordance with all the charterparty, in clause 49, required the respondent to do in that: "shifting boards . . . be installed in accordance with the port warden's instructions". The charterer, on the other hand, under clause 49 of the charterparty, had to load and provide labour and materials to install the shifting boards and, therefore, also participated in this installation. It also had a man present during their installation, a Mr. Peters, who stated that he was present during the discussions which the master had with the port warden as to the erection of the shifting boards and the use of the vessel's own grain fittings rather than the boards specified in this Canadian Code. Peters, as the representative of the appellant, knew what sort of shifting boards were being used and made no objection to them. Under these circumstances, it is difficult to see how the shipper can now complain that the carrier did not comply strictly with the requirements of the Code. (In *Upper Egypt Exporters v. Santamana*[19] where a shipper complained of bad stowage when he knew it was being done, it was held that it was a good defence to show that the shipper was aware of the method of stowage and made no objection to it. Compare also *N. M. Patterson & Sons Ltd v. Mannix Ltd*[20]).

There is, however, a better answer to appellant's complaint of the adequacy of the shifting boards of the respondent in that the evidence is overwhelmingly to the effect that even if a solid air tight steel centre bulkhead had been installed on the vessel, and *a fortiori* one constructed strictly in accordance with the specifications of the Canadian Code, the casualty would still have occurred, because of the propensity of the concentrate when liquefied to build up, with increased pressure on the bulkhead under the rolling action of the sea, and to progressively cause a list to a point where it would become dangerous and for the ship to capsize. The experts produced by the respondent all said this, although it was denied by Captain Clowser, the Halifax port warden. The preponderance of the evidence is also to the effect that this substance with its increased pressure when liquefied, would also have gone through even a bulkhead installed in accordance with the Code. If such was the situation, and this seems to have been the case, respondent's non-compliance with some of the dimensional requirements of the Code had nothing to do with the casualty or the damage sustained. As a matter of fact, I should point out here that the shifting boards installed, although not complying in all respects with all the specifications set down in the Canadian Code were, however, substantially in accordance with this Code and cannot be described as being of a substandard type or of a mean quality. The present misadventure resulted

[19] (1923) 14 Ll. L.R. 159.
[20] (1966) 55 D.L.R. (2d) 119.

only from the transformation of the material and its increased effect on a bulkhead that was supposed to withstand forces 8 times smaller than those that the bulkhead was subjected to when the master decided to interrupt the voyage and seek refuge in Halifax.

I will now turn to the attack made by the appellant on the seaworthiness of the vessel. The respondent, it says, did not supply a seaworthy vessel because it was not tendered at Newcastle ready to receive the cargo pursuant to the requirements of the charterparty as (1) its bilges were clogged and they could not be pumped; (2) the material found in the bilges and on the tank top included material from previous cargo as well as concentrates from appellant's cargo and this seepage of material both from cargo and previous cargo (accumulated in tank top) into the bilges, was the cause of the inability of the vessel to pump her bilges during the voyage; (3) rose boxes were to be suitably covered against cargo seepage and the vessel was not fitted with such boxes. Some means should have been provided for bilge water to reach the suctions without clogging the suctions with cargo; (4) the master was not competent for this voyage as he had no knowledge with respect to the proper methods of stowage or carriage of this cargo; although told at Newcastle that during the voyage water could appear on top of cargo, he provided no method of permitting such water to run into bilges. Furthermore, as a result of the master's incompetence, shifting boards were not installed in accordance with the minimum requirements of the Code.

There is, in my view, no substance to appellant's contention that the vessel was not tendered ready to receive the cargo in accordance with the requirements of the charterparty. Mr. Peters, a representative of the appellant, stated that the vessel was in all respects suitable when he said at p. 100 of the transcript:

> Q. In other words then, insofar as you could, you satisfied yourself that the ship was delivered in accordance with the terms of the charterparty?
> A. As far as I could see, yes.
> Q. Was there any respect in which you felt that she didn't qualify?
> A. In my opinion, that was the ship was alright.

With regard to the bilges, the evidence discloses that very little more could be done than what the carrier actually did, which was to cover the boards with the burlap canvas and wooden strips. The sole object of making the bilges tight was to let water into the bilges and keep the grains of concentrate out. However, when the cargo liquefied, some of the fines found its way into the bilges and clogged them although there was also, but in minor quantities, remains of bauxite from a previous cargo, which found its way in the bilges probably from the tank tops or elsewhere. In my view, the essential cause of the clogging was due to the seepage of concentrate fines into the bilges caused by a liquefying of this cargo which, according to the evidence, splashed around in the holds for some time prior to the vessel's

arrival in Halifax. As long as the cargo remained solid, the burlap and canvas were adequate, but as soon as it liquefied, it could no longer prevent some seepage. The transformation of the cargo was, therefore, the sole cause of the inability of the vessel to pump the bilges during the voyage. There were, it is true, no rose boxes but they would have been covered any way by the canvas cover as they would have been located at the suction holes and here again there would have been no difficulty if the cargo had remained solid. In my view, the evidence discloses clearly that the bilges had been properly cleaned and sealed before the voyage and it cannot be seriously contended that the arrangements in this regard were deficient.

The master was not, it is true, familiar with the carriage of copper concentrates, but he had considerable experience as a master mariner and had transported and stowed bulk cargo before. He certainly had no prior experience with cargo of the nature of the concentrate (and according to the evidence there had been up to then very few carriages of this concentrate) nor did he know of the peculiar characteristics of this substance when subjected to kinetic energy or a rolling sea. As a matter of fact, very few people in the trade knew about this. He was told that water might appear on the surface of the cargo during the voyage and possibly should have provided some method of draining it. The evidence, however, discloses that a small quantity of water appeared on the surface after a bulldozer had trimmed the cargo in holds No. 2 and No. 3 prior to departure, and no water appeared during the trip. It was only after the vessel's arrival in Halifax when it had been wharfed that the material subsided and water appeared. During the voyage it did not appear, nor was it a problem. He did not install the shifting boards as required by the Code but, as we have seen, even if he had, the casualty would still have occurred as the sole cause of this misadventure was the sudden and unexpected transformation of the cargo.

It, I believe, follows that although respondent's vessel was unseaworthy at the time of its departure from Newcastle, such unseaworthiness was attributable solely to the peculiar nature of the cargo and was not due to any lack of diligence on the part of the carrier in any other respect.

The question now remaining is whether the master or the owner knew, or should have known, of the danger of carrying such a cargo. I should add that the question as to whether the shipper knew of the peculiar characteristics of this cargo and whether such peculiarities could be navigationally dangerous may also be pertinent, although there is authority to the effect that a shipper is generally held to warrant the safety of his goods even if he does not know of the danger involved in carrying them.

The peculiar characteristic of the cargo involved herein, according to the evidence, was in 1962 known only to a few scientists, and in some

respects to A. J. Shields, who negotiated the charterparty on behalf of the appellant. Three expert witnesses versed in shipping matters produced as witnesses by the appellant did not know and swore that no such physical change from solid to viscous was possible. The evidence clearly establishes that the master of the vessel and its owner did not suspect that the cargo they undertook to carry as a solid could turn fluid. Both of them made inquiries and were led to believe by representatives of the shipper that all they had to anticipate was possibly some water on the surface of the cargo and some shifting, and appropriate steps were taken to provide for these hazards. The master complied with the port warden's requirements in all respects. Had the master or owner made further inquiries, it would seem that they would not have obtained any further information on the nature of this substance. No one except highly trained scientists such as Dr. Milton and Dr. Purdy knew at the time of the possible transformation of this cargo and I do not believe that it is reasonable, in the circumstances of this case, to even suggest that they could have and should have consulted these gentlemen. I do not feel that the master or the owner had any reason to believe that the cargo, when tendered, even with the moisture content it had, was a dangerous cargo having regard to the fact that the Canadian Code provided for its transport by merely fitting bulkheads in the holds, under the guidance of what they had a right to consider was an official knowledgeable in such matters, the port warden. As a matter of fact, it cannot reasonably be contended under these circumstances that the master or the owner had knowingly gone into this contract of carriage, nor can it be said that as carriers of cargo they should have known when most of the experts in shipping matters did not know of the danger of carrying such a cargo. It indeed took a full trial and the evidence of highly trained scientists to discover that the arrangements provided for in the Code were inadequate for the carriage of concentrates with a moisture content beyond the transportable limit.

In reaching this conclusion, I have also carefully considered the fact that the carrier knew the shipment contained at least 14 per cent of moisture which represented some 440 tons of water, that the Canadian Code mentioned a "flow moisture point", that battens were placed over the interstices of the shifting boards, presumably to prevent liquid from migrating from one side of the vessel to the other and that the captain had been told that some water might appear on the surface. Yet, I cannot help but consider that notwithstanding the above information, the most important characteristic of this viscous substance of moving as a whole mass, was unknown to the carrier, nor could he, from the above, or from the information supplied by the shipper, have determined that such a transformation might occur and make this shipment dangerously liquid.

[*His Lordship here reviewed the evidence and continued*:]

It is not possible for me, under these circumstances, to reach any other conclusion than that the master of the vessel or its owner did not know and could not reasonably know of the danger involved in transporting this

cargo as such danger was not apparent or obvious nor were they told of such danger. They were not in any way neglectful nor did they lack in diligence in accepting and loading this cargo even if its moisture content was beyond the transportable limit and even if they were responsible for the proper stowage and safe delivery of the cargo. This obligation of the carrier, as a matter of fact, is not an absolute warranty but merely means that the carrier will not be negligent in the stowage of the cargo and the evidence here discloses no negligence of the carrier in any material respect nor is there any foundation to the appellant's contention that the carrier failed to comply with any of its contractual obligations under the charterparty. (Compare *Union Castle v. Borderdale Shipping*[21]).

The same cannot, however, be said of the appellant. In the first place, the appellant was, in my view, remiss in not trying in any way prior to the loading of this cargo, to dry it as it had undertaken to do in clause 49[22] of the charterparty. The evidence indeed discloses that it made no attempt whatsoever to fulfil this undertaking. The appellant then failed to inform the respondent of the danger involved in transporting this cargo on the high seas, as it, in my view, should have. Had this been done, greater precautions might have been taken to stow it (the evidence indeed disclosing that the only possible way this dry cargo vessel could safely carry this viscous substance was by honeycombing the holds) or the respondent would have declined to carry it, thus avoiding unnecessary damage and costs. By not informing the respondent of this danger, the appellant, through the omission of Mr. Shields, whom it held out as representing it, was guilty of a clear breach of duty[23] which, in my view involves appellant's primary as well as vicarious liability and is sufficient to bar and defeat appellant's action and sustain respondent's counterclaim. It appears to me that such would be the case even if the latter could not avail itself of section 4(6) of *Cogsa* which gives it the right to recover all damages and expenses directly or indirectly arising out of or resulting from a shipment of dangerous goods of which it had no knowledge and there is no question that that is the situation here. As a matter of fact, the obligations in respect of a dangerous cargo would, I believe, be the same whether at common law or under the specific rule of section IV(r) of *Cogsa* (compare *Atlantic Oil Carriers v. British Petroleum*[24]) and by landing this dangerous cargo as it did, the respondent was merely exercising either a contractual right given it under the charterparty or one exercisable under the law. It indeed, in my view, had fulfilled all the conditions required to do so. It therefore follows that this appeal is dismissed with costs.

[21] [1919] 1 K.B. 613.

[22] Charterers will endeavour to have the moisture content "of the cargo below the transportable moisture limit and there is a good possibility this will be accomplished but they cannot assure this".

[23] Since the decision of *Lennord's Carrying Co. v. Asiatic Petroleum*, [1915] A.C. 705 (H.L.), it now is clear that a corporation may have a primary or direct liability as well as a vicarious one.

[24] [1957] 2 Ll.L.R. 55 at 121.

CATTANACH J. (after stating the facts):—In his factum filed on behalf of the appellant, counsel for the appellant sets out the issues in the appeal as follows:

1. The trial judge erred in finding that the cargo was a dangerous cargo for the vessel to load and have on board.

2. The provisions of the Carriage of Goods By Sea Act (U.S.) do not justify abandonment of the voyage by the carrier.

3. The provision of the charterparty making the carrier responsible "for the correct fitting as well as the proper stowage and safe delivery of the cargo and safety of the vessel" is a valid and enforceable term of the contract of carriage.

4. The trial judge erred in finding that due diligence and the meaning of seaworthiness are not at issue in this action and in not finding that the vessel was unseaworthy due to lack of due diligence on the part of the carrier.

5. The trial judge erred in finding that failure of the shifting boards was not what caused the real danger aboard the defendant vessel.

6. In finding that uncertainty regarding concentrates and the question of shifting cargoes exonerates the carrier from liability on the theory of the requirements of commercial business or on the authority of the case of *Brass v. Maitland,* 119 E.R. 940.

As I understand the argument of counsel for the appellant, it was basically that (1) the carrier undertook to carry and deliver the cargo tendered by the charterer, which cargo, as tendered for carriage, was as described to the charterer by the shipper and that the charterer's action in discharging the cargo at Halifax and refusing to restow it and carry it to its ultimate destination, was in breach of the charterer's contract, as embodied in the charterparty, to do so; (2) that the cargo, as tendered for carriage, was not dangerous within the meaning of the *U.S. Carriage of Goods by Sea Act;* (3) that by reason of the carrier's failure to install centreline shifting boards in accordance with the minimum requirements of the Canadian Concentrates Code the vessel was unseaworthy; (4) that the carrier did not exercise due diligence to make the vessel seaworthy, and (5) that because of the foregoing and by reason of the express terms of the charterparty the carrier cannot rely on the *U.S. Carriage of Goods by Sea Act* as affecting its rights and immunities under that Act.

On the other hand, counsel for the respondent, again, as I understood his submission, contended that, unknown to the carrier, the cargo was dangerous, that the failure to install centre shifting boards of the minimum strength set out in the Canadian Concentrates Code was not the cause of the danger which the vessel encountered but rather the cause was that the cargo liquefied, that there was no lack of due diligence on the part of the carrier to render its ship seaworthy and that in accordance with the express terms of the charterparty the carrier was entitled to discharge the cargo short of its destination and accordingly was not in breach of its contract.

This is an appropriate point in the recital of facts to describe the cargo and its propensities as disclosed by the evidence adduced before the learned trial judge.

[*His Lordship reviewed the evidence and continued*:]

Code. The master of the *Erwin Schroder* had not seen it until he arrived at Halifax. Obviously the shipper had some knowledge of it because section 49 of the charterparty, drafted by the shipper, makes reference to its content. It has no statutory effect because it is not delegated legislation contemplated by a parent Act, the *Canadian Shipping Act.* I would therefore construe the Code as being departmental directions to port wardens.

Because the ultimate disposition of the matter, as I see it, must be determined by the interpretation of the charterparty, it follows that the pertinent provisions thereof should be set out in detail.

The charterparty is dated November 9, 1962. The final clause on the printed form reads as follows:

> Clauses 28 through 51, as attached hereto to be fully incorporated in this Charter Party.

In the reply to the defence it was pleaded by the plaintiff, the appellant herein, that such clauses were not attached and did not form part of the charterparty.

However, at trial, counsel for the appellant conceded that the protective clauses were attached to the charterparty and formed part thereof.

The U.S.A. clause paramount referred to in clause 51 of the charterparty reads as follows: [*ante,* p. 454]

There was a bill of lading issued, but the parties hereto accept the proposition that the bill of lading was merely a receipt for the cargo and that the contract between the parties is embodied in the charterparty.

While reference is made to "this bill of lading" in the U.S.A. clause paramount, Lord Reid in *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.*[25] said at page 90:

> If the paramount clause is to have any meaning or effect at all "This bill of lading" must be held to be a misnomer for "This charterparty".

The *Adamastos* case is authority for the proposition that the provisions of the *U.S. Carriage of Goods by Sea Act,* insofar as they relate to the respective duties, obligations and immunities of the appellant and respondent are as fully incorporated in the charterparty as if they were written out in full therein (see Viscount Simonds at page 79 and Lord Somervill at page 98).

The *U.S. Carriage of Goods by Sea Act* contains section 4 (6) reading as follows: [*ante,* p. 436]

Section 3 (1) constitutes an overriding obligation on the carrier to make the vessel seaworthy. Should it be found that the vessel was unseaworthy at the time of loading and that such unseaworthiness was the cause

[25] [1958] 1 Ll. L.R. 73.

of the casualty then the carrier, to avoid liability, must show that it exercised due diligence to make the vessel seaworthy at the material time. Section 3 (1) reads as follows: [*ante*, p. 436]

It was contemplated by the parties to the charterparty that the cargo to be tendered to the carrier by the shipper might exceed the transportable moisture limit and so require the installation of centreline shifting boards. That eventuality was provided for in paragraphs 49 [*ante*, p. 452] and 32 [*ante*, p. 452], of the charterparty.

The owner's obligation with respect to the condition of the vessel when tendered to receive the cargo is contained in paragraph 35 of the charterparty [*ante*, p. 452]

There is no doubt that the shipper by the express language of paragraph 49 of the charterparty was entitled to tender the cargo with its moisture content above the transportable moisture limit for transportation by the carrier, subject to the requirement that centreline shifting boards be installed in the vessel. Paragraph 49 provides that in such instance the shifting boards are to be installed "under the direction and control of the master and owners" who "shall be responsible for the correct fitting as well as the proper stowage and safe delivery of the cargo and safety of the vessel". This language is entirely consonant with the duty imposed on the carrier by section 3 (2) of the *U.S. Carriage of Goods by Sea Act.*

However the charterparty also provides that the centreline bulkhead is to be installed at the charterer's expense and with material supplied by the charterer. Further the charterer signified in paragraph 49 that it would endeavour to have the moisture content of the cargo below the transportable moisture limit and added that there was a good possibility that this would be accomplished, but no positive assurance was given. This, because of the time available, was no more than a pious hope and no efforts whatsoever were made by the charterer to reduce the moisture content.

It was submitted by counsel for the appellant that the charterparty herein constituted a special agreement for the carriage of a cargo of unusual character on special terms within the meaning of section 6 of the *U.S. Carriage of Goods by Sea Act,* [*ante*, p. 436]

While a bill of lading was issued in this case, it was apparently non-negotiable and was considered by the parties to have been merely a receipt for the cargo but that the charterparty governed the terms of carriage. I fail to follow how this particular transaction can be considered the subject matter of a special agreement so as to absolve the carrier from its responsibilities and liabilities with respect to the cargo, or to deprive the carrier of its rights and immunities with respect thereto as set forth in the preceding sections of the Act. It seems to me that this contract for carriage was entered into in the same manner as any ordinary commercial shipment is entered into in the ordinary course of trade. While the traffic manager of the appellant may have known of the peculiar propensities of ore concentrates, certainly the owner or the master did not, so that there could have been no consensus as to the nature of the cargo to justify a special agreement. Accordingly I

conclude that section 6 is not applicable and the contract of carriage falls to be determined by the terms of the charterparty in which the provisions of the *U.S. Carriage of Goods by Sea Act,* as applicable, form a part.

As I have intimated before, it is my view that the relevant sections of the *U.S. Carriage of Goods by Sea Act* as to dangerous goods are embodied in the charterparty.

The learned trial judge found that the cargo was dangerous. He said:

> I have no doubt and I find that, from the evidence that was presented before me, the Master of the *Erwin Schroder* was justified in not proceeding any further with the cargo that was aboard the defendant vessel.
>
> He was on a course across the North Atlantic, at a time when storms were of such nature that I have very, very serious doubts if he could have ever reached his destination and the fate of the defendant vessel would, in all probability, have been to end at the bottom of the North Atlantic, before reaching her destination.
>
> The Master of the said *Erwin Schroder* was justified, in my opinion, in returning to Halifax or any other port which might have been more to his advantage, to save the said ship.

Later he said:

> There is no doubt in my mind that a cargo of this nature with these characteristics is a dangerous cargo for a vessel to have on board.
>
> I find that the cargo of the defendant vessel, loaded at Newcastle as aforesaid, was a dangerous cargo for the said vessel to load. The events that occurred aboard this vessel have, to my mind, proved that fact.

Counsel for the appellant argued that this finding by the trial judge was erroneous. As I understood his submission, in this respect it was that the cargo tendered was a cargo of ore concentrate with a moisture content above the transportable moisture limit for normal stowage and liable to shift. The charterparty expressly provided for this contingency in paragraph 49 thereof. He argued that the finding of the learned trial judge that the cargo was dangerous is not made with reference to the *U.S. Carriage of Goods by Sea Act.* I fail to follow how it can be said that the learned trial judge did not consider the cargo to be dangerous within the meaning of that word in the context of the *U.S. Carriage of Goods by Sea Act.* He had said:

> . . . it appears to me that, briefly, one has to decide first, whether the cargo in question was of a dangerous nature or character, and then determine what are the responsibilities of the shippers, the carrier and the master, and where the burden of proof lies, under circumstances where the said cargo was of a dangerous nature or character.

This language makes it obvious that he had in mind section 4 (6) of the *U.S. Carriage of Goods by Sea Act* and more particularly so since it was upon these provisions that the respondent sought to rely in justification for its discharge of the cargo and abandonment of the voyage.

The initial words of section 4 (6) are "Goods of an inflammable, explosive or dangerous nature." There is ample authority to the effect that the

word "dangerous" should not be construed *ejusdem generis* with "inflammable, explosive". I would therefore read the words as "inflammable, explosive or dangerous in any other way".

The evidence adduced before the learned trial judge, in my opinion, conclusively established that ore concentrate, in addition to its likelihood to shift, also possessed the characteristic of turning to fluid under conditions of moisture content and subjection to compaction. This was a special characteristic not obvious to the carrier which created a danger outside the range of those which he should have foreseen and guarded against.

*Micada Compassia Naviera S. A. v. Texim*[26], a case involving the shipment of ore concentrate which was decided after the trial herein, is illustrative of the advance of knowledge with respect to concentrates from 1962, when the present case arose, and 1968. In that case the charterparty contained a "dangerous goods" clause. The master expressed doubts to the charterer about the moisture content of the ore, but was assured by the charterer that the moisture content was between 4% and 5%. The master sailed without shifting boards which he would have installed if the moisture content exceeded 7%. During the voyage the cargo liquefied and the master put into a port of refuge where shifting boards were installed. The owner claimed for damages occasioned thereby.

The case first went to arbitration where one of the arbitrators said:

> A prudent master would not knowingly stow a cargo of iron ore concentrates of a moisture content in excess of 7 per cent without shifting boards being fitted and would not knowingly in any circumstances load a cargo of iron ore concentrates with a moisture content in excess of 11 per cent.

On appeal before Mr. Justice Donaldson, he approved of the above finding and went on to say:

> The reason for this, as is known to all those who have practised in this court, is that iron ore concentrates are what is known as a thixotropic cargo. Such cargoes have this peculiar characteristic that although when loaded they appear to be reasonably dry, if they have a moisture content of above a critical amount they liquefy on vibration. Not only do they liquefy, but water tends to come to the surface which produces two difficulties, namely, the vessel is exposed to the free water effect and it is impossible to pump the water away through the bilges.

It was argued in the *Micada* case (*supra*) that the concentrate could not be considered dangerous because it did not appear in any list, regulation or code of dangerous goods. The arbitrator found:

> The Master was not aware, and could not reasonably be aware, of the dangerous nature of the cargo at the time of loading.

Donaldson, J. stated with respect to that finding:

> Whether that is right or not, it seems to me that these goods must be considered as being dangerous. The danger consisted of the fact that the cargo was *not what it seemed to be*. The master, on the findings of fact, had proffered to him what one

[26] [1968] 2 Ll. L.R. 57.

might describe as a non-shifting board cargo and it was offered, as it were, labelled as a non-shifting board cargo. In fact, we now know that it was, at least as to part, a shifting-board cargo and as to part it may not have been loadable at all. In a word, what he was being offered was a wet wolf in a dry sheep's clothing and there was nothing to put him on notice that the cargo was something radically and fundamentally different from that which it seemed to be. *In those circumstances it seems to me that the cargo was dangerous beyond all argument.*

There is no question in my mind that the evidence in the present case conclusively established that the cargo turned to liquid, that the master did not know, nor could he be expected to be aware, of that propensity and accordingly the learned trial judge was justified in finding that the cargo was dangerous and it is my opinion that he made that finding with the provisions of section 4 (6) of the *U.S. Carriage of Goods by Sea Act* in mind.

Counsel for the appellant next contended that the vessel was not tendered for reception of the cargo in a seaworthy condition in that the holds were not properly swept, cleaned and dried, that the bilges were not made impervious to cargo seepage and that adequate rose boxes were not provided. These allegations are not supported by the evidence.

The holds of the vessel were cleaned en route from the Caribbean to Newcastle.

Mr. Peters, the representative of the charterer, inspected the vessel on its arrival and was present at its loading. He stated categorically that the ship was in a fit state to receive the cargo.

With respect to the allegation that the bilges were not made immune to cargo seepage, it appears that the carrier could do no more than it actually did. The object was to let water into the bilges and keep the grains of concentrate out. So long as the cargo remained solid the fittings were adequate. Because the cargo turned liquid, a possibility of which the master was not aware, nor was he made aware of it by the shipper, grains of concentrate were carried through the burlap covering into the bilges with the result that the bilges became clogged thereby adding to the danger to the ship.

In my view the evidence established that the precautions taken were adequate to the extent of the knowledge of the master as to the cargo's propensities.

I do not consider that there is any substance to the allegations that the crew was inexperienced and unskilled. It is true that copper concentrate was an unfamiliar cargo to them, but that does not affect the quality of the seamanship of the master and crew. In response to a question from myself counsel for the appellant readily conceded that there was no complaint as to the seamanship when the danger to the ship was imminent and known to the crew on the high seas before the vessel's deviation to Halifax.

Neither do I consider that there is any substance to the suggestion made that access hatches should have been constructed to permit of access and

cleaning of the bilges. The evidence clearly establishes that the construction of the vessel, with bilges running along the sides of the vessel, rendered the construction of such access hatches useless except to the extent that a man could only clean the first bay and the remaining thirty or so bays could not be cleaned. Several witnesses agreed that access hatches would have been of no practical value.

Counsel for the appellant's principal attack on the seaworthiness of the vessel was concentrated upon the failure to install shifting boards of the minimum strength provided by the Canadian Concentrates Code. There is no doubt whatsoever that the shifting boards were, in some instances, of greater length than required by the Code. However, as I intimated before, I would construe the Code as being directions from the Department to the port warden. The shifting boards are to be constructed and fitted to the port warden's satisfaction. The ultimate decision was his. Paragraph 49 of the charterparty provides that where the moisture in the cargo exceeds the transportable moisture limit, shifting boards shall be installed in accordance with the port warden's instructions. This was done. I should think, that in the circumstances of this case, the master's responsibility would be to satisfy the port warden, which he did. I do not think the master was remiss in doing so and I further think that he exercised due diligence. I do not think that he abrogated his duties to the port warden, but rather that he acted upon the advice and directions of the port warden who, to the captain, was the most knowledgeable person on the scene.

In this case the carrier relies on the immunity in section 4 (6) of the *U.S. Carriage of Goods by Sea Act* that where goods of a dangerous nature are carried, to which he has not consented with knowledge of this nature and character (which fact was unequivocally established by the evidence), he may discharge them (as he did). However, section 3 (1) of the Act is an overriding obligation. If it is not fulfilled, and the non-fulfilment causes the damage, the immunities of section 4 (6) cannot be relied on. This can be answered by the carrier establishing that he was duly diligent to make the vessel seaworthy.

Counsel for the appellant submitted that the trial judge erred in finding that due diligence and the meaning of seaworthiness were not in issue.

Pottier, J. said "A great deal has been said about due diligence and the meaning of seaworthiness. I believe these are not the points at issue herein". Earlier he had said:

> . . . The cargo in question shifted to port side and nothing in the said Canadian Concentrates Code would prevent this movement. The said Code provisions were not followed to the letter, namely, hold #1 was not trimmed, the distance between the uprights secured to the hatch beams may have exceeded eight feet and the shifting boards were not exactly of the proper thickness in some respects. Some shifting boards were broken. These so-called failures, however, were not what caused the real danger aboard the said defendant vessel.

The trial judge was well aware of the questions of due diligence and seaworthiness and his first above quoted remark must be considered in the context of the whole of his reasons for judgment.

What I understand him to be saying is that even if the vessel was unseaworthy because of the installation of centreline shifting boards of lesser strength than prescribed by the Canadian Concentrates Code that factor was not the cause of the damage. He specifically found that even if the Code had been meticulously followed with respect to the dimensions of the shifting boards, that would not have prevented this particular cargo from moving and piling up as it did.

In short he found that the unseaworthiness was not the cause of the damage and accordingly stated that unseaworthiness and due diligence were not issues, and he must have said so for that reason and for the reason that the master did exercise due diligence to make the vessel seaworthy.

It was contended by counsel for the respondent that the appellant, through its traffic manager, Mr. Shields, knew that the cargo could turn fluid thereby endangering the vessel and the lives of its crew. Mr. Shields was the traffic manager of the appellant. It was he who negotiated the charterparty and signed it on behalf of the appellant. He was the member and co-author of a publication published in 1959 by the National Cargo Bureau at the request of the U.S. Coast Guard in which reference is made to the fact that, under certain circumstances, concentrates became dangerously fluid. He did not advise the respondent of this propensity of the cargo prior to loading but later sought to persuade the master to restow and continue the voyage from Halifax.

In my view it is conclusively established by the evidence that neither the master nor the owner knew that the ore concentrate could liquefy. All that they were told was that if the moisture content was above a certain percentage centreline shifting boards would be required to be installed and that there might be free water on the surface of the cargo.

Furthermore, it is also my view that the evidence established that the master did not have readily available to him the means of knowledge as to the nature of this cargo. In any event, it is clear that the carrier did not accept the cargo with knowledge of its nature and character within the meaning of those words in section 4 (6) of the *Carriage of Goods by Sea Act*.

I take it to be the law that means of knowledge is not tantamount to knowledge unless the nature of the cargo is universally known or the dangerous nature is obvious and apparent from an inspection of it.

Lord Campbell said in *Brass v. Maitland*[27] at page 946:

> A mere allegation of "means of knowledge" I think would not have been sufficient, as this might be satisfied by calling in skilful chemists and resorting to investigations inconsistent with the usual course of commercial business.

[27] 119 E.R. 940.

If the shipper knows of the dangerous nature of the cargo, it is clear on the authorities that he is bound to inform the carrier thereof.

I entertain reservations as to whether there was evidence adduced in direct form rather than by way of conjecture that Shields knew of the dangerous nature of the cargo and even if there was that evidence it is debatable that the knowledge of Shields can be attributed to the appellant.

Because of the view I take of the matter, it becomes unnecessary for me to resolve that point.

In *Brass v. Maitland* (*supra*) the court was unanimous in holding that the shipper was duty bound to advise the carrier of any danger inherent in the cargo. The majority held that the duty was absolute even though the shipper himself might not know of the danger. The majority decision was given by Lord Campbell with Wightman J. concurring. Crompton J. held that the duty was not absolute and that the shipper could not communicate what he did not know himself.

The leading texts take opposite views. Scrutton supports the view of the majority, whereas Carver supports the view of the minority.

In *Burley v. Stepney Borough Council*[28] the court referred to the conflicting decisions in *Brass v. Maitland* (*supra*) and reviewed the later cases which adopted one view or the other and concluded that there is an implied warranty that goods supplied for carriage are safe to be carried.

Hallett, J. said at page 293 and 294:

> . . . In the first place he contends that it is an implied term of the contract between the parties that the refuse to be removed thereunder—and I am reading from par. 3 of the statement of claim—should not contain matter which is dangerous, explosive or liable to spontaneous combustion; and that contention has made it necessary for me to look at a considerable number of cases, because, at least since the days of *Brass v. Maitland,* (1856) 6 E. & B. 470, there has been some doubt and some discussion as to what is the extent of liability of a person who delivers to be carried something which turns out to be dangerous. There was a majority view which was held by Lord Campbell, C.J., and Mr. Justice Wightman, in the case of *Brass v. Maitland,* and there was a minority view which was held by Mr. Justice Crompton.
>
> Then there have been several cases since then where the matter has been discussed, namely, *Acatos v. Burns,* 3 Ex.D. 282; *Bamfield v. Goole and Sheffield Transport Co.* [1910] 2 K.B. 94; *Mitchell, Cotts & Co. v. Steel Brothers & Co. Ltd.,* [1916] 2 K.B. 610; *Great Northern Railway Company v. L.E.P. Transport and Depository, Ltd.,* [1922] 2K.B. 742; and *Transoceanica Societa Italiana di Navigazione v. H. S. Shipton & Sons,* [1923] 1 K.B. 31.
>
> The difference of opinion as to the extent of the liability is also to be found among the text-book writers, because one view is expressed in *"Scrutton on Charterparties,"* Art. 31, and another view in *"Carver on Carriage of Goods by Sea,"* Sects. 278 and 279, and the differences have been placed on record in *"Salmond on Torts,"* 10th Ed., p. 566.
>
> Upon the whole it seems to me that the balance of authority is in favour of the view that there is an implied warranty that goods delivered for carriage are safe to be carried, and that is so irrespective of whether the person delivering the goods to be carried knows of the danger and irrespective of whether the person to

[28] (1947) 80 Ll. L.R. 289.

> whom they are delivered is under a common law duty or a statutory duty to carry them; but I think that that doctrine cannot be suitably extended to a case of this kind, having regard to the nature of the business arrangement between these parties and having regard to the terms of the written contract between them.

In *Atlantic Oil Carriers, Ltd v. British Petroleum Co. (The "Atlantic Duchess")*[29] it was found because of the wording of the charterparty that the clause paramount was not part thereof.

Mr. Justice Pearson said at page 121:

> I am inclined to think, therefore, that Art. IV, r. 6, did not become part of the contract of carriage between the plaintiffs and the defendants. This question became a minor issue because it appeared that the obligation in respect of dangerous cargo would be substantially the same whether it arose at common law by virtue of an implied term, or under the provisions of Art. IV, r. 6. On either basis my findings of fact negative any breach of the obligation.

In the present case I am of the opinion that section 4 (6) forms part of the charterparty, but even if it did not, then in either event the obligation of the shipper to the carrier is the same, that is, the shipper impliedly undertakes to ship no cargo of such a dangerous character that the shipowner could not, by reasonable care and diligence, be aware of, unless notice be given to the shipowner of the dangerous nature of the cargo, and he is, therefore, liable to any person who is injured by the shipment of such dangerous goods without notice.

Here the shipper gave no notice of the cargo's propensity to turn fluid. The carrier was only made aware of the propensity of the cargo to shift, which was guarded against, and which is a far different thing from turning to fluid.

I am in agreement with the findings of the trial judge that the cause of the vessel's danger was the dangerous nature of the cargo, of which the master was unaware, and that in accordance with its propensity the cargo had turned to fluid. In my opinion there was ample evidence to support those findings. I might add that upon the evidence I would also be prepared to conclude that the master had exercised due diligence to render the vessel seaworthy.

Therefore I agree with the trial judge that the master was justified in deviating to Halifax as a port of refuge, discharging the cargo there and refusing to restow the cargo and continue the voyage.

Several witnesses were of the opinion, which I adopt, that it would have been extremely dangerous to load a wet cargo (as this cargo was) in a dry cargo vessel (as this vessel was).

I would, therefore, dismiss the appeal with costs.

---

[29] [1957] 2 Ll. L.R. 55.