CA on appeal from the Hon. Mr. Justice Rix. Before Henry LJ; Brooke LJ; Tuckey LJ. 28th March 2000.

LORD JUSTICE TUCKEY:

1. If a vessel is prevented by a port authority from discharging damaged cargo and ordered off berth until security is provided for the cost of storing that cargo in or removing it from the port, has the vessel been detained and who is responsible for providing the security? These questions arise under the terms of a time charter on an amended 1946 NYPE form between the Appellant owners and the Respondent charterers on appeal from Rix J, who allowed an appeal from arbitrators. Both parties say the questions are of importance because the NYPE form is used extensively.

2. **The Facts.**
By the charter which is dated 16 July 1993 owners time chartered the vessel the "Jalagouri" to carry a general cargo from Japan to India. A few days after sailing from her last loading port the vessel suffered engine damage and subsequently collided with a breakwater. Water entered No. 3 hold where a quantity of car components in cases was stowed. Following dry docking the vessel proceeded to Kandla where she started to discharge on 18 October 1993. Discharge of the sound cargo was completed in three days but it was then found that the cargo of car components had been damaged. The port authority would not allow discharge of this cargo and the vessel was ordered off berth on 21 October. She anchored in the inner anchorage. The reason for the port authority's action in suspending discharge was that it was not prepared to allow the damaged cargo to be landed unless it received a guarantee for the costs of storing or removing it from the port area. There followed exchanges between the parties about the guarantee. Eventually an acceptable guarantee was lodged and the vessel was then allowed to re-berth to complete the discharge of her cargo on 2 November 1993.

3. **The terms of the Charter.**
The relevant terms of the NYPE form as amended were as follows :

"Clause 2 That whilst on hire the charterers shall provide and pay for all fuel except as otherwise agreed. Port Charges, Comlpulsory Pilotage Canal Charges Agencies boatage on Charterers' business for clearance and cargo purposes only Commissions, Consular Charges (except those pertaining to the Crew and flag) and all other usual expenses except those before stated, but when a vessel puts into a port for causes for which the vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigation ordered because of illness of the crew to be for Owners' account. Fumigation ordered because of cargoes carried or ports visited while the vessel is employed under this Charter to be for charterers' account. ...

Clause 8 The Captain (although appointed by the owners) shall be under the orders and directions of the Charterers as regards employment and agency; and charterers are to load, stow and trim tally at both ends secure and discharge the cargo at their own expense under the supervision of the Captain who, if requested to do so by Charterers is to sign Bill of Lading. ... (amendments underlined.)

Clause 15 That in the event of loss of time from deficiency and/or default or men and/or strike or sabotage by officers/crew or deficiency of stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other causes preventing the full working of the vessel, the payment of hire shall cease for the time lost thereby. ...

Clause 18 Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel. ..."

There were 51 additional clauses including :

"Clause 53 Should vessel be seized or detained or arrested or delayed by any authority during the currency of this Charter Party, the Charterers' liability for seizure or detention or arrest or delay is ceased immediately from the time of her seizure or detention or arrest or delay and all time lost by this reason shall be treated as off-hire until the time of her release unless such seizure or detention or arrest or delay is occasioned by any act or omission or default of Charterers or their Agents. Any extra expenses incurred by and/or during above seizure or detention or arrest or delay to be for Owners' account, unless caused by Charterers as above.

Clause 72. Should the Vessel be detained or threatened to be detained at any port or place by reason of arrest or any other reason during the currency of the said Charter Party, the Owners shall provide security to release the Vessel or to prevent such detention under any circumstances, but if the Owners cannot take, in the absolute judgment of the charterers, the immediate steps for release of the Vessel, the Owners to agree that the Charterers shall at his [sic] discretion have right to arrange adequate security for the Owners in order to make the Vessel be released immediately from such detention, and the Owners further to undertake and agree to indemnify the Charterers against any and all costs, expenses and consequences relating to the said arrangements."

4. **The Arbitration**.
Charterers deducted US$67,872 .87 from the hire due to Owners on the ground that the vessel was off-hire under clause 53 between 21 October and 2 November 1993. Owners disputed this deduction and the matter was referred to arbitration by three experienced maritime arbitrators, Messrs. O'Donovan, Schofield and Kazantzis. In an interim award they found in favour of Owners. Their reasoning was as follows:

a) The vessel was not detained so clause 72 did not apply; but

b) the vessel was delayed so clause 53 did.

c) However, the delay was caused by Charterers' omission or default for not providing the security because this was an expense of discharge which they were required to meet by clause 8:

d) and so the vessel was not off-hire under clause 53 and Charterers deduction of hire was unjustified.

The arbitrators were not asked to decide the underlying question as to whether Owners were liable for the damage to the cargo.

5. **Rix J's Decision.**

In allowing the appeal Rix J's conclusions were as follows:

a) the vessel was detained so Owners were required to provide the security and the vessel was off-hire under clause 53

b) and in any event the vessel was off-hire under clause 53 because she was delayed and this was not caused by Charterers' omission or default because clause 8 did not require Charterers to provide the security as an expense of discharge, but

c) even if clause 8 did require Charterers to provide the security Owners could not bring themselves within the proviso to clause 53 if they were liable for the damage to the cargo.

6. **The Issues on this Appeal.**

Clause 72 - Detention.

It is convenient to deal with this issue first because if the Judge was right it is determinative of the appeal. At the end of his submissions Mr. Hill, Counsel for Owners, suggested that it was not, but that submission is not open to him in the light of his solicitors' affidavit asking for permission to appeal which said :

"It is not disputed that should the Court of Appeal uphold the finding of the Honourable Mr. Justice Rix on the meaning of "detention", this would be determinative of this appeal".

In any event clause 72 expressly deals with the provision of security. The suggestion that if it applies its requirements are in some way subordinate to other more general provisions in the charter is untenable.

7. The Judge took the meaning of the word "detained" from the OED and the decision of Kerr J. in ***The Mareva AS*** (1977) 1 Lloyds Reports 368. The OED defines detain as including " *To keep from proceeding; to keep waiting; to stop."* In ***The Mareva*** cargo damage made discharge more difficult. It was accepted that the vessel had been delayed, but Kerr J held that time had not been lost due to "*detention by average accident to cargo*" within clause 15 of the NYPE form. At page 382 he defined detention as some "*physical or geographical constraint upon the vessel's movements in relation to her service under the charter."* He supported this view by reference to ***Vogemann -v- Zanzibar Steamship Co., Ltd.*** (1901) 6 COM. CAS. 253, 7 COM. CAS. 254 (CA) another case under clause 15 where the vessel had sustained damage by "*average accident to the ship*". Commenting on this case Kerr J (at page 383) said:

"It was evidently common ground that she was detained on the way back to the port of repair in the sense in which I have sought to explain i.e. that there was a constraint upon her movements in the charterers' service, since she was going back on her tracks. But once she again set off on her voyage, albeit still delayed as a result of the accident, there was no longer any detention."

8. Applying these definitions of detention in this case the Judge said :

"The charterers here required the vessel to discharge, not to sail away to some other port. It is therefore irrelevant that the vessel might have sailed away, just as it did not prevent the vessel being detained in **Vogemanns** *that it did in fact sail for a port of repair. In both cases there was a* ***"physical or geographical constraint upon the vessel's movements in relation to her service under the charter"*** *or* ***"a constraint upon her movements in the charterers' service"****, to adopt and apply the words of Kerr J. It seems to me that an order by authorities, which can presumably be backed up by force or the imposition of sanctions, may be a physical constraint in itself. But in any event, a legal restraint is also clearly within the logic of the concept of detention. ..."*

The Judge then considered and rejected Mr. Hill's further submissions based upon the language of clause 72 saying :

"As for the clause's focus on arrest, the provision of security, and release, it seems to me that that can be over-emphasised. After all, the clause also refers to "any other reason" and as an alternative therefore to the provision of security it also says "or to prevent such detention under any circumstances". That is strong and broad language. In any event, this case is itself an example of a requirement of security in circumstances other than those of arrest or even threatened arrest. On the basis of the facts found in the award, it seems to me that a finding of detention is inevitable."

9. In his submissions to us, Mr. Hill stressed that the vessel had proceeded to berth and discharged for three days before it was ordered off berth. The vessel was free to leave for any other port. It could not be said that there was a physical or geographical constraint upon her movements or a constraint in relation to her service under the charter as the Judge held. The vessel had followed Charterers' instructions. It was for them to discharge the cargo. Accordingly, the service required of the vessel had been performed and Charterers cannot complain that the vessel did not continue to discharge if they did not provide the means to enable her to do so. Furthermore Mr. Hill submits that detention in clause 72 takes its meaning from the rest of the clause with its references to *"arrest"*, *"security*" and "*release"*. The vessel was not detained in this sense.

10. I cannot accept these submissions. I can see no reason why the word *"detained"* should be given a restricted meaning. Clause 72 covers detention or threatened detention for any reason and requires Owners to provide

security to prevent such detention under any circumstances. Applying the OED definition to the facts of this case: until security was provided the vessel was not permitted to stay at her berth; she was kept from proceeding with her discharge and sent out to the anchorage; she was kept waiting there outside the berth; she was stopped. This amounted to a physical and geographical constraint upon the vessel's movements in relation to her service under the charter. That service required the vessel to be at her discharging berth to enable Charterers to discharge the whole of her cargo. The port authorities' actions imposed constraints upon this happening which could only be alleviated by the provision of security. Until security was provided and the vessel was allowed to return to the discharging berth she was detained. Accordingly clause 72 required Owners to provide the security and the vessel was off-hire under clause 53 until this was done.

11. It follows that I agree with the Judge's conclusions on this issue. In giving permission to appeal Potter LJ said that what Kerr J said in ***The Mareva*** deserved reconsideration. Neither party to this appeal seriously suggested that Kerr J was wrong. His definition of detention is consistent with the OED definition and has been regarded as good law for many years. I agree with it and I see no reason to alter or elaborate the definition.

12. **Clause 8 - Expense of Discharge**.
Although the clause 8 obligations on Charterers have been extended to include discharge by amendment to the standard NYPE form, this is frequently done so the point under clause 8 is likely to be of some importance and is not governed by authority. The Judge said :

"*The issue therefore, is ... does the obligation to discharge render charterers in breach of clause 8 merely because the authorities make something which is not a matter of discharge into a condition precedent of permission to discharge?*

I do not think that clause 8 has the far reaching results for which owners contend. I agree ... that the storage costs and removal costs of goods, once those goods have been discharged, are not costs of discharge. They do not therefore fall to be charterers' responsibility under clause 8."

13. Owners submit that the Judge should have upheld their submission that as clause 8 imposed the responsibility for discharge upon Charterers it was for them initially to meet all the expenses necessary to effect discharge which in this case included the provision of the security. If Owners were liable for damaging the cargo then in due course the expenses incurred could be recovered as damages for breach of contract. Any other rule would leave it entirely uncertain who was to provide the security. In other words the rule which made commercial sense was "Pay now, claim later." Mr. Hill supported his arguments by pointing out that the charter imposed no obligation on Owners relating to the discharge of cargo. This was consistent with the position at common law where owners were required merely to get the goods out of the ship's hold and put them on deck or alongside.

14. The starting point for consideration of these submissions is the language of the clause. The words used are apt to describe the physical acts involved in loading and unloading the cargo. In other words the clause is concerned with the expenses involved in cargo handling. This is made clearer in the 1993 revision of the NYPE form which requires charterers to perform "all cargo handling including, but not limited to, loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging and tallying........" but is I think also the natural meaning of the words in the 1946 form. Nothing in the wording of the clause suggests that it imposes a wider responsibility for ensuring that a third party does not prevent cargo handling from being performed. The costs of storing or removing damaged cargo after it has been discharged are not costs of discharge and the clause is not wide enough to make them so simply because a third party has made security for their payment a condition precedent of discharge. As Mr. Edey, Counsel for Charterers pointed out, on the facts of this case the timing of the demand for security is critical. If it had not been made until discharge had been completed, Owners accept that it would not have been a cost of discharge which fell within clause 8. Furthermore, Owners' construction of clause 8 is inconsistent with clause 18 which defines the situations in which Charterers may have to provide security and clause 2 which lists what Charterers must pay for.

15. It follows that, like the Judge, I do not think that Charterers were in breach of clause 8 for failing to provide the security required by the port authority. Before the arbitrators and the Judge Owners contended that the vessel was not delayed within the meaning of clause 53. This contention was rejected and has not been pursued on this appeal. The vessel was therefore delayed even if she was not detained and as this was not caused by Charterers' act, omission or default the vessel was off-hire.

16. In dealing with clause 8 (although he said he did not have to decide the point) the Judge added :

"I suspect that it is also true however, that charterers are not responsible under clause 8 for extra costs which are costs of discharge but which are only caused by owners' breach........"

He gave as examples discharge made more difficult and expensive because of cargo damage and fumigation necessitated by insect infestation from a pre-charter cargo.

If all the Judge was saying is that ultimately charterers would not be liable for such costs because they could be recovered from owners as damages for breach of contract I would agree. But if he was saying that they should not initially have to be met by charterers as costs of discharge falling within clause 8, I do not agree. If the parties had to argue at the time of discharge whether or not the costs concerned were caused by owners' breach of contract this would give rise to unnecessary uncertainty. If the costs are costs of discharge and therefore fall within clause 8 "Pay now, claim later" makes good commercial sense.

17. So I think the obligations imposed on Charterers by clause 8 are clear which probably explains why there is no authority on the point which Owners have taken in this case. Of course where the charter is on the 1946 NYPE

form but does not contain an additional clause like clause 53, the only off-hire provision in the contract is clause 15. In this case I think Charterers could have relied on detention by average accident to goods but in many cases the situation will not be so clear cut and charterers may find that they have to put up money if the cargo receivers will not do so to ensure that discharge is completed to avoid their continuing liability to pay hire.

18. Finally, as I have said, the Judge concluded that even if clause 8 did require Charterers to provide the security in the first instance, it did not follow that any delay caused by the port authority's demand was "occasioned by any act, omission or default of charterers" within the meaning of the proviso to clause 53 if the underlying reason for the delay was owners' breach of contract which damaged the cargo. He supported this conclusion by an analysis of the structure of clause 53. I do not think it is necessary to consider whether that analysis is correct, given that clause 53 was an additional clause and both parties agreed that it was not very well drafted.

19. **Conclusion.**
The Judge was right for the reasons he gave that the vessel was detained within the meaning of clause 72 and/or delayed and so was off-hire for the disputed period under the terms of clause 53. Charterers were not in breach of clause 8. I would therefore dismiss this appeal.

LORD JUSTICE BROOKE:

20. I agree.

LORD JUSTICE HENRY:

21. I also agree.

Order: Appeal dismissed with Respondents costs. (Order does not form part of the approved judgment)

Mr. T. Hill (instructed by Messrs Sinclair Roche &Temperley for the Appellant)
Mr. P. Edey (instructed by Messrs Jackson Parton for the Respondent)