CA on appeal from Central London County Court, Mercantile Court (His Honour Judge Hallgarten QC) before Waller LJ; Rix LJ. Sir Martin Nourse. 25th January 2005.

Lord Justice Rix:

1. The issue in this appeal raises the question whether an injury to a ship's chief officer was the responsibility of its owners or its charterers. The injury occurred while the chief officer was engaged in the closing of the ship's hatch, but it was caused by the negligence of the charterers' stevedores in the overall course of loading and discharging operations. Afficianados of the shifting balance of responsibilities for such hatch and cargo operations will know that the incident was liable to lead to a dispute.

The parties and the vessel

2. The shipowners are C V Scheepvaartonderneming Flintermar, of Groningen in Holland. They are claimants in these proceedings and appellants in this appeal. I shall call them the "owners". They chartered their vessel *Flintermar* under a time charter on the Baltime 1939 form dated 13 January 1995 (the "charter") to Med Feeder Co Ltd of Malta. By an Addendum No 1 to the charter of the same date as the charter it was agreed that Sea Malta Company Limited would guarantee the obligations of Med Feeder Co Ltd. In any event, Sea Malta Company Limited are named as the charterers in box 4 of the charter. They are defendants in these proceedings and respondents to this appeal. I shall call them the "charterers".

3. The *Flintermar* was at the time of its charter a very modern vessel of 4200 dwt. It was built in 1994 and designed for flexible, multi-purpose operations. It had a single double-skinned hold capable of being sub-divided by removable bulkheads into two or three single-deck holds. It had the capacity of carrying 112 containers under deck and 133 containers on deck: the latter could be stacked up to three tiers in height in lines of five athwartship.

4. The hatch cover to the hold comprised eleven interlocking pontoons with a uniform length athwartship of 10.85 metres. Ten of the pontoons were 5.45 metres wide, while the central or "baby" pontoon was narrower, measuring 2.4 metres at its base and 2.2 metres at deck level. The purpose of the baby pontoon was to strengthen the vessel by remaining in place during loading and discharging operations, but in certain circumstances, which prevailed in the present case, it needed to be removed. The interlocking arrangements of the pontoons meant that they had to be opened in a fixed order. In particular, if the central section of the hold needed to be accessed, pontoons had to be removed as follows (numbering from forwards): 4, 7, 5, 6 and then the baby pontoon. The vessel was equipped with a hatch gantry crane which moved on rails which ran either side of the hold. The crane was ordinarily situated aft of the hold. Its sole purpose was the opening and closing of the hatch. When pontoons were removed in the course of opening the hatch, they were stowed on a level area of the deck forward of the hold. The gantry crane had no role in the movement of containers or other cargo, for it could only move fore and aft on its rails.

The trade and the accident

5. The vessel was delivered into the charter on 29 January 1995, initially for a period of six months, but the option to renew for a further six months was exercised. The incident in which the vessel's chief officer was injured occurred on 16 September 1995, at Gioia Tauro in Calabria, Italy. The chief officer concerned was Mr T'Lam. The vessel was then under the command of Master de Jong.

6. The trade limits indicated in box 17 of the charter were within the Mediterranean intention Italy-Malta. A pattern was established for a series of round voyages featuring in particular Malta and Salerno, but also other Italian ports. The vessel was used as a "feeder" service whereby containers were fed, in large part for clients operating substantial liner services, on initial or final legs of longer voyages. The nature of the service meant that at any port containers might be both discharged and loaded, and might be taken from or placed either under or on deck. Where the full sequence of operations was required, it took place as follows:
    1. Containers on deck would be discharged first.
    2. Pontoons would be opened to the extent that it was necessary to access containers below deck.
    3. The containers below deck would be discharged.
    4. Containers would be loaded into the hold.
    5. The pontoons would be closed.
    6. Any containers to be placed on deck would be loaded last.

7. Sometimes containers stowed on deck not due to be discharged at a particular port would have to be temporarily discharged to give access to the pontoons and the hold: they would then be reloaded as part of operation 6 above.

8. Limitations on the use of the gantry crane rendered alternative means of operation attractive. Thus the crane was only capable of passing over a single tier of containers three containers wide, ie with no container in either wing. If there was any other configuration of deck stowage due to survive discharging at a particular port, then the removal or replacing of pontoons forward of the "blockage" had to be achieved in one of two ways: either (1) by using a shore crane to remove the blockage and to reload it subsequently, in which case the gantry crane could reach the pontoons; or (2) by leaving the blockage in place and using a shore crane (instead of the gantry crane) to remove (and replace) the pontoons. When shore cranes were used, the pontoons were temporarily stowed ashore before being replaced.

9. In practice, the owners and charterers reached what was described by the trial judge, HHJ Hallgarten QC, as an "accord" to deal with such circumstances, namely the use of charterers' stevedores in the operation of a shore crane to deal both with the containers and the pontoons. I gratefully adopt his account of the facts to which I refer above and below. The practice seems to have already commenced under a previous master and, whether or not Captain de Jong knew of that, was continued by him during his command. He had discussed it with a representative of the charterers, probably Mr Machionetto who was in charge at Salerno where the bulk of the operations involving use of shore cranes to lift pontoons took place. Although the majority, even possibly the great majority, of operations did not, as it seems, necessitate the use of shore cranes to handle the pontoons, the accord was an established practice and occurred on some seven recorded occasions.

10. The judge did not deal expressly with the question of the payment of stevedores for this use of shore cranes to handle the pontoons, but it is common ground that on the evidence at trial no payment was demanded from or made by the owners. The stevedores were paid by shift and, provided the cargo operations were completed within the shift, the fact that pontoons were handled as well as containers led to no extra payment. Although the stevedores may in practice have been appointed and paid by the charterers' major clients, nevertheless as between owners and charterers they were the charterers' stevedores: as the charter stated in standard terms in its clause 4, the charterers were "to arrange and pay" for all cargo operations.

11. The judge had to consider nevertheless whether, for the purpose of the operations concerning the use of shore cranes to handle the pontoons, the stevedores became pro tanto the owners' contractors. He dealt with that question both generally and with respect to the incident of 16 September in the following passage at para 32 of his judgment:

"…as I see it, the upshot of that accord was that there was no question of stevedores' role changing – of stevedores being Charterers' contractors for some purposes and Owners' for others. I believe that, as between Owners and Charterers (Owners, of course not being privy to the actual arrangements made by Charterers with shipping lines or others), stevedores remained contractors of Charterers throughout. The consequence of this, as I see it, is that in respect of the removal and replacement of pontoons by the shore-crane, Owners were indeed providing customary assistance in cooperating with those actually conducting the operations. In the present case, that cooperation was given by the vessel adopting the slings method of attaching the baby pontoon to the spreader with the Chief Officer's involvement, including, of course, detachment of slings once the pontoon was at rest."

12. Quotation of that passage leads conveniently to the facts relating to the incident of 16 September in which the chief officer came to be injured. The vessel arrived at Gioia Tauro that day from Salerno. It had containers for discharge at Gioia Tauro stowed both on deck and within the centre of the hold. There were five other containers destined for later ports but stowed above those pontoons which needed to be accessed. There was also a "blockage" of a further sixteen containers, also destined for later ports, which prevented the gantry crane from reaching the pontoons in question. If those sixteen containers had been removed ashore and later reloaded, a two to three hour delay was liable to be incurred. So the accord was put into effect and the shore crane was used instead of the gantry crane to handle the pontoons. That made removal and reloading of the sixteen containers unnecessary.

13. Pontoons 4-7 and the baby pontoon were removed and placed on the quayside. Containers in the centre of the hold below pontoons 4-7, all of which were destined for Gioia Tauro, were discharged. There was no cargo for loading in its place. The five containers which had been temporarily discharged to gain access to the pontoons were to be reloaded in their original place, once the pontoons had been replaced in position. The incident occurred during the replacement of the baby pontoon which was the first to be repositioned. The pontoons of standard width were handled just like a container, for they had features which fitted the shore crane's container spreader. The narrower baby pontoon, however, necessitated a special procedure involving the positioning of slings which passed below the pontoon and were shackled to the spreader at two points. The chief officer was involved on the vessel's side and on the shore side there were at least the crane-driver assisted by a signalman on deck equipped with a walkie-talkie in contact with the crane-driver. The particular circumstances of the chief officer's fall off the baby pontoon on which he was standing and into the bottom of the hold were a matter of controversy at trial: but those details no longer concern this appeal and it is sufficient to record the judge's conclusions, which were as follows. The baby pontoon had been lowered into position and the chief officer was standing on it in order to release the two slings which had been passed around it. Unaccountably, the crane-driver lifted the spreader before the chief officer had managed fully to disconnect both slings. The baby pontoon tilted and the chief officer was thrown into the hold. Since there were no pontoons as yet in place on either side of the baby and there were no containers in the hold below, there was nothing to prevent the chief officer falling the full height of the hold, a distance of nearly 9 metres. The chief officer was very fortunate to avoid being more seriously injured than he was, or indeed being killed, especially as the baby pontoon fell into the hold after him. Commendably, the crane-driver managed at the last moment to steer the pontoon away from the chief officer.

14. The judge concluded that the overwhelming probability was that the accident arose through the negligence of the stevedores' signalman or crane-driver. Nevertheless, the charterers raised issues of causation and contributory negligence, founding themselves on a submission that the true, or at any rate a contributory, cause of the chief officer's injuries was the master's choice of an unsafe system of work or the chief officer's own negligence. The judge agreed that the system whereby the chief officer was working on the pontoon above an empty hold was unsafe. Nevertheless, he firmly rejected the charterers' submission that that was the effective or proximate cause of the accident, or that the chief officer had been in any way personally negligent. He said (at para 48):

"This was not a case of the Chief Officer missing his footing or of him being disturbed by some minor movement of the pontoon at a time when it had yet to be lodged firmly in place; what caused him to fall was the inexplicable heave of the crane upwards when, so far as one is aware his footing was secure, but which resulted in a fall being inevitable. In those circumstances, I am firmly of the view that the effective or proximate cause of the Chief Officer's injury was the negligent act of the stevedores. But for that inexplicable act the Chief Officer, who so far as I am aware was otherwise going about his task in a sensible fashion, would not have suffered any injury."

15. The judge went on, however, to consider the defence of contributory negligence. He concluded that such a defence did not operate in contract in the circumstances of this case, and there is no appeal from that ruling. In case he were wrong about that, however, he also made a finding of apportionment: that the injury was caused 80% by the stevedores' negligence and 20% by the adoption of an unsafe system of work (at para 51). He repeated his view that the chief officer had not been in any way personally negligent.

16. In essence therefore, the injury was caused by the negligence of the charterers' stevedores. The question is whether they were nevertheless performing owners' work at the relevant time in replacing the pontoons and whether for that reason the owners' claim in these proceedings to be indemnified against the costs of the reasonable settlement made with the chief officer must fail. The judge held that it did. The owners appeal with permission granted by the judge himself.

The terms of the charter

17. The charter contained the following terms relevant to the issue raised on this appeal. I have highlighted amendment of standard printed terms with the use of italics. The charter's typed rider to the standard Baltime terms commenced with clause 26:

"4. Charterers to Provide

Whilst on hire the Charterers to provide and pay for all coals, including galley coal, oil-fuel, water for boilers, port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug-assistance, consular charges (except pertaining to the Master, Officers and Crew), canal, dock and other dues and charges, including any foreign general municipality or state taxes, also all dock, harbour and tonnage dues at the port of delivery and re-delivery…(unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, also to arrange and pay for loading, trimming, stowing (including dunnage and shifting boards, excepting any already on board), unloading, weighing, tallying and delivery of cargoes, surveys on hatches, meals supplied to officials and men in their service and all other charges and expenses whatsoever including detention and expenses through quarantine (including cost of fumigation and disinfection).

All ropes, slings and special runners actually used for loading and discharging and any special gear, including special ropes, hawsers and chains required by the custom of the port for mooring to be for the Charterers's account. The vessel to be fitted with winches, derricks, wheels and ordinary runners capable of handling lifts up to 2 tons.

9. Master

The Master to prosecute all voyages with the utmost despatch and to render customary assistance with the Vessel's crew. The Master to be under the orders of the Charterers as regards employment, agency or other arrangements. The Charterers to indemnify the Owners against all consequences or liabilities arising from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders…

13. Responsibility and Exemption

The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants.

Clause 30 – ASSISTANCE BY CREW

Timecharter hire includes rendering customary assistance by the officers and crew same as when trading for own account inter alia:

1) opening and closing of hatches,
2) removing and/or replacing of beams,
3) shifting operations and docking,
4) bunkering,
5) supervision of loading and discharging,
6) to prepare vessel's holds prior to arrival in port or commencement of operations.

Above services to be rendered any time day or night, Saturdays, Sundays and Holidays included, provided port regulations and/or weather conditions permit, free of charge to Charterers.

Clause 31 – LASHING AND UNLASHING

Officers and crew to secure and/or unsecure, lash and/or unlash containers, place and remove stacking cones and bridge fittings during loading and/or discharging. Master to be responsible for and maintain tight and correct lashing of containers during navigation. Above services to be rendered any time of day or night, Saturdays, Sundays and Holidays included, provided port regulations and/or weather conditions permit, free of charge to Charterers.

Owners to supply all necessary fittings and full set of lashing/securing material to safely load and carry a full cargo of containers. Charterers to redeliver vessel with same, fair wear and tear excepted…

Clause 38 – STEVEDORES' DAMAGE

Should any damage be caused to vessel or her fittings by the stevedores, the Master shall endeavour to obtain repairs from the stevedores themselves and will report to Charterers and port agents within twentyfour hours from occurrence

(but in any case before vessel sails from port where damage incurred), Master to endeavour to obtain stevedores' written acknowledgment of damage caused and will arrange together with agents for a survey of damages, failing which Charterers shall not be liable for the repair costs.

Clause 48 – CHARTERERS' OBSERVER

Charterers have the right to place on board their own observer. Any advice, accommodation or assistance that the Charterers' observer may render with regard to the loading/ discharging operations of the vessel, is given to assist the Master. Neither the observer nor the Charterers are to be held responsible in any way whatsoever for the consequences of such advice, recommendations or assistance; it being clearly accepted and understood by the Charterers that the full and ultimate responsibility shall always remain with the Master of the vessel. Neither the observer nor the Charterers shall have any liability in respect of any claim or demands made by third parties in consequence of the above and the Owners shall the observer and/or the Charterers harmless for any such claim or demands. Loading, stowage, discharging to be made at Owners/Master's decision."

The parties' submissions

18. On behalf of the owners, Miss Poonam Melwani submits that, whatever may otherwise be the position in bulk trades, nevertheless in the trade with which this vessel was concerned where container cargo was generally carried both on and under deck and where loading and discharging of cargo preceded and followed hatch operations, such hatch operations should be regarded as part of loading and discharging for which charterers are responsible under clauses 4 and/or 13 of the charter. Alternatively, she submits that that conclusion is justified on the special facts of the accord found to have been reached between owners and charterers: in as much as the parties were agreed that hatch handling should be carried out by charterers' stevedores as part of cargo operations using a shore crane instead of the ship's crane and without cost to the owners. For the purposes of either submission she adopts the test propounded by Roskill J in *The Azuero* [1967] 1 Lloyd's Rep 464 at 470 as to whether a hatch operation is either part of discharging or so closely associated with the cargo operation that it can properly be treated as part of the discharge itself.

19. On behalf of the charterers, Mr John Kimbell submits first, that opening and closing of hatches is part of the owners' exclusive responsibility, both at common law and as emphasised in clause 30(1). Secondly, he says that the parties' special accord did not affect the fact that when dealing with the hatch pontoons the stevedores were performing owners' business for which the owners remained responsible under the charter. Therefore the facts that charterers may have been responsible for cargo operations under clauses 4 and/or 13 and that for these purposes the stevedores must be regarded as their contractors or agents were irrelevant. Thirdly, he submits that, under clause 48, a special clause which must take precedence over standard clauses such as clauses 4 or 13, the owners' ultimate responsibility even in matters of loading and discharging was reaffirmed: for these purposes he relies in particular on the words in clause 48 that *"the full and ultimate responsibility shall always remain with the Master of the vessel"*. Fourthly, he submits that owners' claim is in any event destroyed by the finding that the master's unsafe system of work was a material factor in the causation of loss, as measured by the judge's 20% apportionment for the purposes of contributory negligence.

20. I will refer to the judge's reasoning below. As will there appear, although he found critically in favour of the charterers on the basis that the hatch operations could not be said to be part of loading and discharging, nevertheless in other respects his views went against their submissions. In these respects, covered by Mr Kimbell's first, third and fourth submissions, the charterers have a cross-appeal.

21. It is convenient at this point to note two arguments which Miss Melwani did not invoke on behalf of the owners. She did not rely on the employment and indemnity clause (clause 9), and she did not submit that the stevedores were the charterers' "*servants*" for the purposes of the last sentence of clause 13. In the latter respect, she did not seek to challenge Donaldson J's cautious dictum in ***The White Rose*** [1969] 2 Lloyd's Rep 52 at 60, where he said –

"In the circumstances it is unnecessary to decide whether Mr Goff is right in his submission that the term "servants" extends no further than that class of person for whom the time charterers are vicariously responsible, although I incline to think that it is so limited."

22. What, however, Miss Melwani said she was relying on for owners' claim was damages for breach of the charterers' obligations in respect of cargo operations, founded on clause 4 and reflected in the last paragraph of clause 13. Thus she emphasised that the claim was not under an indemnity clause, but for damages for breach of contract. It was so pleaded. Although the implied term was not spelled out in the amended particulars of claim, it was not in dispute that, subject to clause 48, the effect of clause 4 is to impose on charterers a contractual obligation to perform their operations of loading and discharging with due care, that is to say without negligence. This is reflected in the last sentence of clause 13: see ***The TFL Prosperity*** [1984] 1 Lloyd's Rep 123 at 128 where Lord Roskill said:

"Having regard to the obligations imposed on the charterers by, in particular, cl. 4, to which I need not refer in detail but which requires the charterers to provide and pay for many things including bunkers and loading and discharging, I doubt whether the fourth sentence of cl. 13 imposes greater liabilities than would in any event fall upon the charterers either under the charter or at common law."

23. See also ***The Eurus*** [1996] 2 Lloyd's Rep 408 at 418/419; [1998] 1 Lloyd's Rep 351 at 358/9; and, dealing with the equivalent clause in the NYPE form, ***Court Line Ltd v. Canadian Transport Company Ltd*** [1940] AC 934 at 951/952, where Lord Porter said – "*In my opinion, by their contract the charterers have undertaken to load, stow, and trim the cargo, and that expression necessarily means that they will stow with due care.*"

24. In the circumstances, provided the closing of the hatch was to be treated as part of loading and discharging, and subject to clause 48, it was not submitted on behalf of the owners, and in my judgment rightly so, that it would matter whether or not the stevedores were to be regarded as "servants" of the charterers in the sense tentatively favoured by Donaldson J. As it is, it may be that "servants" in this context is not to be construed strictly but rather as a synonym for agents generally, for the older cases dealing with the appointment of stevedores usually referred to stevedores as "servants": see ***Harris v. Best*** (1893) 68 LT 76 at 77.

The judge's reasoning

25. The judge dealt with the charterers' reliance on clauses 30 and 48 in advance of the owners' argument founded on clauses 4 and 13 and ***The Azuero***. This was logical since, if the owners had an exclusive and insulated responsibility for hatch operations and/or an overall responsibility for loading and discharging in any event, their claim would have to fail.

26. As for clause 30, the judge was not persuaded that it assisted the charterers. The essence of his reasoning was that the operations listed in the clause were not necessarily the exclusive province of the owners. Thus bunkering (clause 30(4)) was a matter of shared responsibility. In such circumstances the accord reached between the owners and charterers regarding the use of a shore crane to handle the pontoons was consistent with the owners rendering customary assistance, as indeed the chief officer had done in the handling of the slings on the baby pontoon. Since the use of the shore crane had not been a merely unilateral decision by the owners, and since for these purposes the stevedores remained the charterers' contractors (see para 11 above), it could not be said that the operation remained in the exclusive province of the owners.

27. As for clause 48, the judge identified the critical words being those already emphasised above, falling in the second half of the clause's third sentence: "*it being clearly accepted and understood by the Charterers that the full and ultimate responsibility shall always remain with the Master of the vessel*". If those words were given the meaning advanced by Mr Kimbell, they would override not only clauses 4 and 13, but also render clause 38, with its implication that charterers have a residual liability for stevedore damage, redundant. In the circumstances the clause was better construed as emphasising the Master's responsibility for his *decisions* as to how cargo operations should be conducted (see the last sentence of the clause) but leaving on one side the charterers' responsibility for the c*onduct* of those operations by their stevedores.

28. The judge was then in a position to consider the owners' reliance on clauses 4 and 13 and ***The Azuero,*** free of any overriding effect emerging out of clauses 30 or 48. However, he found ***The Azuero*** of limited assistance because it was not concerned with first or last hatch openings and closings but with intermediate operations during the course of discharge. In the present case, however, there was only a single opening and closing of the pontoons and the fact that cargo operations occurred and continued on deck before and after such opening and closing of the hatch was merely fortuitous. In any event handling of cargo was one thing and handling of the hatch another. Clauses 4 and 13 were only concerned with the former. Thus clause 4 only mentioned hatches in the context of "*surveys on hatches*" and "[*e]ven more to the point"* clause 13 spoke of loading, stowing or discharging "*of goods*". The owners' claim therefore failed.

29. The judge cited the passage from ***The Azuero*** (at 470) which contains Roskill J's test "*so closely associated with the operation of discharging the cargo that it can properly…be treated for all practical purposes as part of that discharge*", but did not expressly put the facts of the case to that test. Oddly, but perhaps reflecting the way in which the argument was put before him, he did not bring into his consideration of clauses 4 and 13 the particular facts of the accord, even though he had considered them crucial to his treatment of clause 30 and had already decided that the stevedores were acting throughout as charterers' stevedores.

Discussion (1): the effect of the charter terms

30. Before considering how the particular facts of this case bear on its solution, it is first necessary to establish what the charter says about the parties' respective responsibilities for hatch and cargo operations.

31. The common law, developed in the context of voyage charters and bills of lading, adopted a geographical test for distinguishing the respective responsibilities of the parties to a contract for the carriage of goods. Prima facie, and subject to contrary agreement, what occurred on board ship was the owner's responsibility: as long, however, as cargo was still ashore, it was charterer's or cargo owner's responsibility. Thus the ship's rail was the geographical dividing line between one area of responsibility and the other.

32. However, since cargo might well be handled on both sides of that line by the same stevedores, agreements were made as to the parties' responsibilities for those stevedores. Sometimes the agreement was that the charterer should simply arrange for a stevedore (ie select a competent stevedore), sometimes it was that he was to arrange and pay for a stevedore, but otherwise leaving responsibilities where they lay, sometimes it was that the charterer (through his stevedore) should take on full responsibility for the handling of cargo. Such agreements became particularly important in the context of time charters, which (within broad limits) allow the charterer free range to employ the vessel as he wants. Even where the charterer shouldered that full responsibility for handling cargo, a further difficulty remained, since particularly in the area of stowage the master of the ship retains an important role and ultimate responsibility for the safety and seaworthiness of his vessel. Clauses therefore speak of the charterer's cargo handling operations remaining "*under the supervision*" of the master. In ***Court Line Ltd v. Canadian Transport Company Ltd*** [1940] AC 161 the House of Lords held that those words did not affect the charterer's primary liability for cargo handling under clause 8 of the NYPE time-charter form in the absence of any interference by the master or any negligence by him in matters which affected the safety of the vessel and

were unknown to the stevedores. However, the addition of the words "*and responsibility",* so that the phrase becomes "*under the supervision and responsibility*" of the master, has been held to reverse the position again, so that primary liability for cargo handling under clause 8 of the NYPE form reverts to the owner: ***The Shinjitsu Maru No 5*** [1985] 1 Lloyd's Rep 568.

33. Moreover, the charterer has also become keen to have his own representative or observer on board to assist and keep an eye on cargo operations: and clauses have been developed, of which the present clause 48 is an example, which seek to express the relationship between such a representative of the charterer on the one hand and the master of the vessel on the other and also to regulate the way in which each may affect the respective obligations of the parties.

34. There is, however, comparatively little discussion in the authorities of the parties' respective responsibilities for hatch handling. ***The Azuero*** appears to be the leading and perhaps the only example. Whether or not it is of much assistance on the facts of this case, it does appear to demonstrate that hatch handling is not in all circumstances the exclusive province of the owner.

35. In these circumstances at this point three essential questions arise for discussion as a matter of the construction of the charter: (i) Who under the charter has primary responsibility for hatch handling operations? (ii) Who under the charter, absent clause 48, has primary responsibility for cargo operations? (iii) Does the reference in clause 48 to the master's "full and absolute responsibility" override the answer under (ii)?

36. ***(i) Hatch handling***. In my judgment the answer to the first question is that the owners bear primary responsibility for hatch handling. It seems to me that this follows from the fact that the hatch is part of the vessel's equipment so that prima facie one would expect that the owners would be responsible for its operations and handling. Moreover, the vessel contained its own gantry crane for handling the hatch pontoons. All of this was paid for by the charterers' hire. It is in this context that I find that the reference to hatches in clause 4 only in the context of "*surveys on hatches*" is relevant: that limited reference in the sphere of charterers' responsibilities is consistent with hatch operations falling within the sphere of owners' responsibilities. Moreover, in ***The Azuero*** Roskill J agreed with the concession by the shipowners in that case that the cost of first opening and of last closing must fall on them (at 468).

37. In this context the charterers do not need clause 30, but I would accept that if anything it supports the conclusion to which I have already come. I would do so unequivocally if all the operations listed in it were likewise a matter of owners' primary responsibility. But I agree with the judge that bunkering does not fall within that category of operations: on the contrary clause 4 expressly refers to fuels as something which the charterers are to provide and pay for. Thus if unfit bunkers are supplied, the charterers will be responsible. On the other hand the bunkers must also be received by the vessel. Shifting operations and docking may also involve an element of charterers' responsibility depending on the facts, and the final paragraph of clause 4 emphasises that *"special gear…required by the custom of the port for mooring to be for the Charterers' account"*. Therefore clause 30 is not an allocation of responsibility clause but must fit in to the charter as a whole. The fact that clause 30 speaks of customary assistance suggests that in certain circumstances the primary responsibility for the listed operations could fall elsewhere than on owners.

38. In any event I do not think I fully understand the use which Mr Kimbell seeks to make of clause 30 as a matter of construction. He submits that hatch operations are within the owners' *exclusive* sphere of responsibility. The examples of bunkering and mooring show that that cannot be derived from clause 30 itself. I am not sure in any event that I know precisely what he means by "exclusive". If he means what I think of as primary responsibility, then I understand him. But even if hatch operations are the primary responsibility of the owners, as I would in any event hold, that would not answer the question whether on special facts a particular hatch operation was to be treated instead as part of loading and discharging, as occurred in ***The Azuero.*** If, therefore, by *"exclusive*" Mr Kimbell intends to suggest that it is impossible for hatch handling to fall within the charterers' sphere of responsibility, I would not agree. I bear in mind, nevertheless, that, since hatch operations are primarily a matter for the owners, responsibility should not easily be found to have shifted to charterers. This is what I think the judge had in mind when he said that if it had merely been the fact that owners, without agreement with charterers, had chosen to use the charterers' stevedores to handle the pontoons, this would not have shifted responsibility away from them and onto the charterers. In saying so, however, and in developing the facts relating to the parties' accord, he allowed for the possibility that that accord was capable of materially changing the position.

39. In sum, I agree with Mr Kimbell that hatch operations are the primary responsibility of the owners, and I am prepared to assume that they are even prima facie exclusively so, but I do not accept that clause 30 takes the matter any further, nor do I agree that it is therefore impossible for responsibility to fall upon the charterers whatever the circumstances may be.

40. ***(ii) Cargo operations****, apart from clause 48*. I can take this briefly, for it is common ground that, subject to clause 48, clauses 4 and 13 place primary responsibility for cargo operations on the charterers: see paras 22/24 above. Mr Kimbell also accepts that clause 38 reflects that conclusion in as much as it is premised on charterers' underlying responsibility for stevedores' damage. Mr Kimbell was at first inclined to say that clause 38 itself imposed such liability on charterers: but I think he came to recognise that it is truer to say that clause 38 reflects an underlying situation (to be derived from clauses 4 and 13) in which such liability is taken as a given. As it stands, clause 38 is a concession in charterers' favour, for it requires the owners to look directly to the stevedores

in the first instance for repairs, and also excuses charterers if the owners fail to take certain steps to secure the ground for holding stevedores responsible ("failing which Charterers shall not be liable for the repair costs").

41. ***(iii) Clause 48.*** Mr Kimbell submits that the effect of the language of "*full and ultimate responsibility*" is to transfer liability back via the master on to the owners, just as in the case of clause 8 of the NYPE form when it contains the additional words "*and responsibility*". If the question is asked: responsibility *for what*?; the answer is: for *"loading/discharging operations"* (see the first sentence of the clause). Mr Kimbell did not rely on the fourth sentence of the clause. But the clause emphasised that whereas it might be for charterers' observer to *advise*, it was for the master and thus the owners to *decide*, and with the power to decide came responsibility.

42. Whereas that distinction may in general be true of clause 48 itself, nevertheless on the construction of the charter as a whole the judge was right, in my judgment, to make a different distinction, between decision and conduct, or, it might be said between negligence in method and negligence in execution. It is for the master to decide how to load and discharge, but for the charterers and their stevedores to execute the cargo operations without negligence. Otherwise the whole balance of the charter is turned on its head. I note the following factors. First, the background of the charter is one in which the charterers have responsibility for loading and discharging operations (clauses 4 and 13). If that responsibility were in truth to be transferred to the owners, then one would expect clauses 4 and 13 to have been amended appropriately. As it was, both clauses were amended, but in other respects not relevant to the issue before the court. Although clauses 4 and 13 were standard printed clauses and thus clause 48, as a special, typed clause, if inconsistent, has to take precedence, both at common law and under clause 61, nevertheless the question remains whether the clauses are inconsistent, and if so to what extent. The failure to amend clauses 4 and 13 suggest that one should not look for any unnecessary inconsistency. Secondly, clause 38, itself a special, typed clause, itself reflects the underlying situation where charterers are liable for negligence of their stevedores which causes damage to the vessel.

43. Thirdly, clause 48 does not bear the form of a clause which is intended fundamentally to reverse responsibility under the charter for cargo operations. Its focus of concern is the role of charterers' observer. That is its title and the subject-matter of each of its first four sentences. The emphasis of the clause is, as Mr Kimbell himself points out, to distinguish the power of the charterers' observer to advise, recommend or assist, and the duty or responsibility of the master and owners to decide. Even if the charterers' observer does play his role, he and the charterers are to have no responsibility "*for the consequences of such advice, recommendations or assistance*" (the first part of the clause's third sentence). It is directly in this context that the second half of that sentence goes on to say that ultimate responsibility remains with the master. As the judge asked: responsibility for what? Mr Kimbell goes back to the first sentence of the clause and answers: for "*loading/discharging operations*". The judge, however, suggested "*for the consequences of such advice*" etc, which seems to me to be preferable, for it is the immediate context. The reason is: because it is for the master to decide (the fifth sentence). Moreover, if clause 48 were intended to override clauses 4 and 13 completely, then one might expect it to emphasise its general application by opening with language reminiscent of clause 50 in ***The Filikos*** [1967] 1 Lloyd's Rep 464 (a case on the Baltime form) which began - *"Notwithstanding anything to the contrary contained herein and particularly provisions of Clauses Nos. 9 and 13…the Owners to be responsible…*"

44. Fourthly, Mr Kimbell's construction would possibly render clause 31, another special, typed clause concerned with lashing and unlashing of cargo, entirely redundant. The only way its redundancy could be avoided is if clause 48 were strictly limited to loading and discharging simpliciter and did not include lashing and unlashing. However, the fifth sentence of clause 48 refers to "*Loading, stowage, discharging*", which suggests that stowage is intended to be included in the first sentence's "*loading/discharging operations";* and ***Attorney-General v. Leopold Walford (London) Ltd*** (1924) 18 Ll L Rep 314 and other cases mentioned below show that loading and discharge should be given a broad construction including stowage.

45. These considerations which arise on the specific terms of this charter render the reliance placed on the *"and responsibility"* amended form of clause 8 of the NYPE form somewhat sidelined, and indeed Mr Kimbell did not take time during his oral submissions to refer us to ***The Shinjitsu Maru No 5*** [1985] 1 Lloyd's Rep even though he had included it in his authorities bundle. It therefore probably suffices to point out that the amended clause 8 of the NYPE form deals in a single sentence with the question of responsibility for cargo operations, thus – *"and Charterers are to load stow trim and discharge the cargo at their expense under the supervision and responsibility of the Captain…*"

46. In the circumstances I do not think that authorities on the amended clause 8 should guide the decision on the charter in this case. It will suffice to observe that in ***The Shinjitsu Maru No 5*** itself it was in any event the master and not the stevedores who had been negligent; and although in two subsequent cases the fault was that of the stevedores themselves, who simply managed to drop things, the decision in ***The Shinjitsu Maru No 5*** was influential: see ***The Argonaut*** [1985] 2 Lloyd's Rep 216 and ***The Alexandros P*** [1986] 1 Lloyd's Rep 421.

47. In sum, if the correct characterisation of the facts of the discharge at Gioia Tauro is that the replacement of the pontoon, even if treated as part of the cargo operations themselves, is nevertheless properly to be considered as the consequence of the master's decision as to the method of operation, then the owners will fail. If, however, it falls to be considered as part of the cargo operations and the accident was due to the stevedores' negligent execution rather than the master's decision, then, subject to Mr Kimbell's fourth submission on causation, clause 48 will not avail the charterers.

Discussion (2): the application of the charter terms to the facts

48. The facts relating to the parties' accord and the cargo operations at Gioia Tauro have been fully set out above. With respect to the judge's approach to his decision under clauses 4 and 13, I do not think it is possible to leave the accord out of account at this final stage of the analysis.

49. It is now necessary to say something further about ***The Azuero.*** That case was not concerned with liability for negligence but with responsibility for the cost of an operation. The charter concerned was a Centrocon voyage charter for the carriage of a cargo of grain to Venice. Clause 48 provided that "Charterers' stevedores to be employed by vessel at discharge port/s and discharge to be free of expense to the vessel". During the discharge the hatches were closed and re-opened on occasions (it is not clear whether this was on a daily basis or whenever the weather required it) and these intermediate closing and openings were performed by the shore stevedores and charged for by the port authority on a rate per ton of cargo discharged irrespective of the number of handling operations: and all of this occurred by reason of the custom of the port. The question was whether this charge should fall on owner or charterer. It was common ground and the judge agreed that first opening and last closing of the hatches was for the owner's account. If the intermediate hatch operations should be treated on the same basis, then the cost would also have fallen to the owner. However, the owner submitted that the cost of the intermediate operations were all part of the discharge and therefore should fall on the charterer under clause 48: for discharge was to be free of expense to the vessel. Roskill J agreed with the owner even though the charterer submitted that the true analysis was that the intermediate operations were carried out pursuant to the owner's obligation to take care of the cargo.

50. Roskill J began by considering four cases which had been brought to his attention on the width of the meaning of "loading" and "discharging". These demonstrated in his judgment that one should not give too rigid a dictionary meaning to those words. In one case, the repairing of torn bags was considered part of the cost of discharge: ***Leach & Co (Limited) v. Royal Mail Steam Packet Company*** (1910) 16 Com Cas 143. In another, it was held that loading included the cost of stowage and that in general loading and discharging should be regarded as covering the whole of cargo operations other than its carriage at sea: ***Attorney-General v. Leopold Walford (London) Ltd*** (1924) 18 Ll L Rep 314 at 316. In a third, it was similarly held that loading included everything that was required to put the cargo in a condition in which it could be carried: ***C Wilh Svenssons Travaruaktiebolag v. Cliffe Steamship Company Limited*** [1932] 1 KB 490 at 495/6. In the fourth, it was again held that stowage (and bagging) is part of loading: ***Argonaut Navigation Company Ltd v. Ministry of Food*** [1949] 1 KB 14, 572.

51. Roskill J then proceeded by stressing the realities of the situation and the need for a practical test. He said (at 470): *"What is the reality of the position in the present case? The reality, as I see it, is this: the charterers were responsible for getting that cargo out of the ship and for paying for the necessary labour to get that cargo out of the ship. It is true that, under this form of charter, so long as the ship had that cargo on board, the ship was under a duty to take all proper care of the cargo (subject to all relevant exceptions in the charter-party), a duty which would no doubt include an obligation to protect the cargo against, for example, damage by rain. But that is not conclusive. The point is this: Is the operation, the cost of which the charterers seek to debit against the owners, either part of discharging the cargo, or so closely associated with the operation of discharging the cargo that it can properly, bearing in mind the way in which words such as* ***"loading"*** *and* ***"discharging"*** *have been construed by the Courts over the years, be treated for all practical purposes as part of that discharge so that the cost falls upon the charterers? In my judgement the owners' contentions here are correct. When one looks at the whole of the circumstances and the facts found in the special case and those in the supplemental document, R.1, I think that the work was done and charged for as part of the operation of discharge."*

52. Miss Melwani submits that, irrespective of the accord and other facts of the case, it was sufficient for owners to succeed that cargo operations would commence before the opening of the hatch and would continue beyond the replacement of the hatch pontoons. I disagree: one can posit the standard situation where the hatch operation was handled entirely by the owners using the vessel's gantry crane. In such circumstances I do not think there is a cogent case that the hatch handling becomes part of the cargo operation conducted by the charterers. It remains entirely within the owners' sphere.

53. Once Miss Melwani moves, however, to her alternative submission based on the special facts of this case, it seems to me that she is on much firmer ground. Not only did the hatch handling occur within the time and space of the overall cargo operation, but it was conducted by the charterers' stevedores as an integral part of that cargo operation, without extra payment or any payment charged to the owners, and all pursuant to an accord or agreement between the parties. In such circumstances it seems to me that if one poses Roskill J's realistic and practical test, whether the hatch closing was to be treated as part of the overall cargo operation, it seems to me that the answer is a relatively plain, Yes. I think that the judge would have come to the same answer if he had asked himself that question and taken the facts of the accord into account at this stage of his judgment.

54. Moreover, it seems to me that the charterers themselves recognised the force of this conclusion. The fall of the baby pontoon damaged both the bottom of the hold and the pontoon itself. When the owners claimed for the cost of repairing this damage, the charterers paid. It was only the owners' claim for the cost of compensating the injured chief officer for which the charterers continued to deny liability. Mr Kimbell submitted that the relatively smaller cost of the physical damage was swallowed without proper advice. That does not appear to be the case and in any event cannot be known: but the practical answer emerged in evidence at trial when Mr Mizzi, the charterers' manager at Malta, admitted, as he had previously stated in correspondence, that the opening and

closing of hatches was an integral part of the discharge at Gioia Tauro. He agreed, saying: "*Well, in practice, yes, but in legal terms I don't know.*" Roskill J would have been impressed by that "*in practice*", and so am I. Even the rejection of liability for the injury to the chief officer was put forward (in a letter from the charterers dated 27 May 1996) on the mistaken ground that whereas clause 13 rendered the charterers liable for the physical damage to the vessel, it did not cover the financial loss involved in the need to compensate the chief officer.

55. The judge said that he had put out of his mind the fact that the charterers had accepted liability for the damage to the vessel. I agree that it is irrelevant as a matter of construction of the charter. But I do not agree that it is irrelevant to the question of characterisation of the facts for the purposes of Roskill J's practical test.

56. Mr Kimbell nevertheless submitted that the stevedores must still be regarded as the owners' agents to the extent that they were dealing with the hatch pontoons. The judge did not think that the stevedores' agency changed according to the precise work they were doing at any time, and I agree.

57. Subject, therefore, to Mr Kimbell's fourth submission on the question of causation, I would be prepared to find in favour of the owners' appeal.

Causation

58. Mr Kimbell accepts that the claim under clauses 4 and 13 is in damages for breach of contract and not merely under an indemnity clause. He therefore did not press his submission that a 20% responsibility for the accident on the part of the owners automatically put an indemnity claim out of court: c*f* ***E E Caledonia Ltd v. Orbit Valve Co Europe*** [1993] 2 Lloyd's Rep 418 at 427. Nevertheless he submitted that the judge's finding for the purpose of contributory negligence, had it applied, remained relevant for the purposes of the question of causation in contract. I do not agree. The judge found that the effective cause of the chief officer's accident was the charterers' stevedores' negligence. He found that the use by the master of an unsafe system of work was not causally relevant, since but for the stevedores' negligence the chief officer "*would not have suffered any injury*". If it had been otherwise and if the proper characterisation of the facts had led to a conclusion that the real cause of the chief officer's injury was the master's decision to carry out the operation in the way that he did, then clause 48 would have come to the charterers' rescue even on the basis that the whole operation did lie within their sphere of operation under clauses 4 and 13. As it is, I see no reason to differ from the judge's findings as to causation, with which I in any event agree.

Conclusion

59. For all these reasons I would allow the appeal and find in favour of the owners' claim. The judge quantified it at E220,924.46 in respect of the liability to the chief officer, which was prima facie to be presumed under Dutch law and properly settled by the owners, plus a further E26,384.58 in respect of the costs of defending and settling that claim. I would therefore award those sums to the owners as damages for breach of contract by the charterers. Although differing from the judge in the ultimate result, the basis of my doing so itself depends on his findings of fact and on a narrow disagreement about the relevance of ***The Azuero.*** The judge had to deal with a myriad of other points, both factual and legal, none of which has been successfully challenged on this appeal.

Sir Martin Nourse:

60. I agree.

Lord Justice Waller:

61. I also agree.

ORDER

1. The appeal from paragraph 1 of the order of His Honour Judge Hallgarten QC dated 30th March 2004 be allowed and the cross appeal in respect thereof be dismissed.
2. Judgment be entered in favour of the appellants in the principal sum of 220,924.46 euros and 26,284.58 euros, together with interest on those sums up to the date of judgment at 31,808.13 euros.
3. Paragraph 2 and 3 of the order of His Honour Judge Hallgarten QC be set aside and the following orders as to costs to apply instead; (a) the respondents shall bear and pay their own and the appellants' costs of the action, including of this appeal, such costs to be subject to detailed assessment if not agreed; (b) the respondents to make a payment on account of the appellants' costs of this action in an amount of £50,000 within 14 days hereof; (c) the respondents shall repay to the appellants within 14 days hereof the sum of £30,000 paid by the appellants on 13th April 2004 in respect of the respondents' costs of the action, together with interest theron at the rate of 5.75 per cent from the date of payment, being £1,361.10 until the date of repayment.
4. The respondents shall within seven day hereof return to the appellants the original letter of undertaking.
5. Permission to appeal to the House of Lords be refused.

(Order does not form part of approved Judgment)

Ms Poonam Melwani (instructed by Messrs Rayfield Mills) for the Appellant
Mr John Kimbell (instructed by Messrs Clyde & Co) for the Respondant