IN THE SUPREME COURT OF NEW ZEALAND SC 39/2009

BETWEEN	**TASMAN ORIENT LINE CV** Appellant
AND	**NEW ZEALAND CHINA CLAYS LIMITED** First Respondent
AND	**IMERYS MINERALS JAPAN KK** Second Respondent
AND	**NEW ZEALAND DAIRY BOARD** Third Respondent and Cross Appellant
AND	**NESTLE KOREA LIMITED** Fourth Respondent
AND	**CHONG KUN PHARMACEUTICALS** Fifth Respondent
AND	**NIPPON NZMP LIMITED** Sixth Respondent
AND	**MAEIL NEW ZEALAND CHEESE COMPANY LIMITED** Seventh Respondent
AND	**DONG SUH FOODS CORP** Eighth Respondent
AND	**CHOHEUNG CHEMICAL IND CO LIMITED** Ninth Respondent
AND	**ALLIANCE GROUP LIMITED** Tenth Respondent
AND	**ZHEJIANG FUBANG GROUP CO LIMITED** Eleventh Respondent
AND	**SHIN YANG LEATHER CO LIMITED** Twelfth Respondent
AND	**SHIN OH CO LIMITED** Thirteenth Respondent
AND	**DSI COMPANY LIMITED** Fourteenth Respondent
AND	**KWANG SUNG HIGH-TECH CO LIMITED** Fifteenth Respondent
AND	**ONG SEO TRADING CO LIMITED** Sixteenth Respondent
AND	**NEW ASIA TRADING CO LIMITED** Seventeenth Respondent

AND **PPCS LIMITED**
Eighteenth Respondent

AND **SUNGRIM ENTERPRISE CO**
Nineteenth Respondent

AND **SHINY LEATHER CO LIMITED**
Twentieth Respondent

AND **SUN JIN NEO TECHNO LIMITED**
Twenty First Respondent

Hearing:	28 October 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	B D Gray QC with N A Beadle for the Appellant P R Rzepecky with M A Flynn for the Respondents

---

CIVIL APPEAL

MR GRAY QC:

May it please Your Honours, I appear for the appellant, and with me, Mr Beadle.

ELIAS CJ:

Thank you Mr Gray, Mr Beadle.

MR RZEPECKY:

May it please Your Honours, I appear for the respondents, and with me is Mr Flynn.

ELIAS CJ:

Thank you, Mr Rzepecky, Mr Flynn. I apologise for our late start. I'm afraid I was tied up in another matter.

MR GRAY QC:

Not at all, Your Honour. As if often the case, litigation which is complex and involves a number of issues now comes to this Court. With leave having been granted to the parties to argue several points, but several points on both sides of the same issue. And the issue for the Court is whether conduct by the master of a vessel, after it struck the ground in the Sea of Japan, disentitles the carrier to the protection afforded by a provision in the Hague-Visby Rules, which are incorporated into New Zealand legislation. And it's a question of considering precisely what is the relevant conduct and how it might be that that conduct might operate to disentitle the carrier to the protection that it claims. And it has to be acknowledged that for the judges both in the High Court and the Court of Appeal, the conduct was troubling. And while they, at different times, accepted that the conduct fell within the management and the navigation of a vessel, and that the words in the rule applied, and would have enabled the carrier to avoid liability in this case, nevertheless the conduct was thought to be sufficiently troubling that they found different techniques or described different techniques for finding that the conduct was not in the navigation or in the management of the vessel. As is often the case with appeals, it comes to this Court with something of a history. The cargo interests have pleaded and raised arguments on a number of grounds in an attempt to avoid the rule applying. First, they pleaded deviation. They said that what the master did meant that it was no longer the contracted voyage, but that pleading was withdrawn. Then they pleaded unseaworthiness at the commencement of the voyage by reason of failure to employ a competent master and crew, and that, too, was withdrawn. Next, they pleaded unseaworthiness of the vessel by reason of her condition, and that was resolved against cargo interests at trial. Among all of those claims, never pleaded and never argued was barratry. Among the many defences, cargo have never said the master intended to harm the ship and the cargo, and that amounts to barratry, and for that reason, Article IV Rule 2(a) of the Hague Rules does not apply in this case. And it's perhaps going to be relevant, at some point, to have a look at the pleadings, which set out precisely what it is that cargo said the master did, and what was the response. The pleadings can be found in volume 1 in the case, and there are a number

of statements of claim, because there are a number of cargo interests, but they are the same, and can conveniently be found under tab 6. And they found, in a reply, because, of course, in the way the pleadings in these cases go, cargo start by saying it's contract of bailment, we gave you our goods, you failed to give them back, please give us money. And the ship says no, the reason we couldn't give you your cargo is that there was an error in the navigation or in the management of the vessel. And so in a reply, cargo has said, well, the provision in the Hague Rules allocating liability as between the parties in Article IV Rule 2(a) doesn't apply, because the conduct was not truly in the navigation or in the management of the vessel. And so at paragraph 3 of the reply at page 51 of the case, cargo set out what it said the master did. And in particular, they say following the grounding, I'm sorry, it's page 42 of the case, it proceeded to take the Tasman Pioneer round the eastern side of Biro Shima island, failed to anchor immediately, continued to steam, failed to make proper effective and timely assessment of damage –

TIPPING J:

On my volume, it's on 51. I'm looking at 51, and I'm entirely with you.

MR GRAY QC:

That's my fault, Your Honour. 51 is actually the carrier's reply, the statement of defence. The reply itself is on 42, and it will be necessary to look at both.

BLANCHARD J:

Which are we looking at, at the moment?

MR GRAY QC:

42, Your Honour. Paragraph 3 of the reply by cargo. And there are 14 particulars of conduct which cargo rely on. I was at five, failing to monitor rising seawater. Failing to apply pumps. Failing to alert the Coast Guard. Failing to seek assistance from other vessels, to report the location of the grounding to the Coast Guard. To provide accurate information as to circumstances of the grounding in a timely manner. Failing to have extra pumps placed on board until later in the day, and then a consequential

allegation causing delay in the appointment of a salvage company. Steaming for too long, and putting the hull under excessive pressure. And then the relevant intention is alleged at 3.2. It was intended to allow the master to misrepresent and lie about the true circumstances of the casualty, so as to absolve himself from blame, and to hide what was alleged to be a reckless decision to transit the inside channel of Biro Shima island. And then there are some particulars in 3.2. Captain Hernandez lied to the Coast Guard. That, of course, is a particular that supports the allegation of intent. It's not a particular which, itself, caused loss. The loss has already been suffered by the time this particular becomes relevant. He erased the course plot from the chart, and re-plotted the course. Informed the vessel's representatives that he'd collided with a semi-submerged object, probably a container, instead of being honest with the carrier and the owners. Lied about the circumstances to the Coast Guard. Counselled deck officers and crew to lie. Downplayed the extent of the damage. All of that is conduct that explains what it was that Captain Hernandez was trying to achieve. And then in 3.3, none of these acts of omissions were bona fide for the navigational management of the vessel. And things were made worse.

TIPPING J:

The insertion of bona fide there is an add-on to the actual terms of the rule, isn't it?

MR GRAY QC:

Yes, it is. There is no provision in the Rules requiring decisions to be bona fide. In the High Court, Justice Williams said that it was appropriate to imply a requirement, that steps in bona fide. In the Court of Appeal, Justice Baragwanath, in the principal judgment, said that he'd reached a similar conclusion by a different route, but I'll come on to make submissions that, essentially, His Honour did the same thing.

WILSON J:

Mr Gray, if the allegations in part 3 of the pleading, if proved, amounted to barratry, is it of any moment that the term barratry was not included in the pleading?

MR GRAY QC:

Yes, we say it is. We say this is not a pleading of barratry. That it might be conduct which amounts of barratry, although we say it isn't. But if it were, then we say that the carrier has lost the opportunity to call the master and to deal with the particular intention that is required in order to demonstrate barratry.

ELIAS CJ:

But what would have to be pleaded in order to raise barratry, because I think what's being put to you is that it's not necessary to plead law, and if what is alleged amounts to barratry, surely that is sufficient.

MR GRAY QC:

Yes.

ELIAS CJ:

What would be necessary, in your submission?

MR GRAY QC:

It would need to, the pleading would need to be that the master intended to damage the ship or the cargo, or was reckless with knowledge that the loss which actually occurred probably would occur.

TIPPING J:

So you must plead intention to harm, or reckless –

MR GRAY QC:

Recklessness, a particular kind of recklessness.

TIPPING J:

Yes, subjective recklessness.

MR GRAY QC:

Recklessness with knowledge, not that damage might occur, that the particular loss which occurred probably would occur. And that's not a formulation that I've made up to give to Your Honours. We'll come to see conventions where that formulation –

ELIAS CJ:

You're going to give us authority for that?

MR GRAY QC:

Yes, I am.

ELIAS CJ:

Yes, thank you.

MR GRAY QC:

Within the Hague Rules themselves.

ELIAS CJ:

Yes.

MR GRAY QC:

And in the limitation convention, and in other conventions dealing with international carriage of goods.

TIPPING J:

So you must plead either intention to damage, or recklessness in the sense you're going to elaborate on?

MR GRAY QC:

Yes. Lack of bona fides, we say, is not the same thing. And lack of bona fides is not, we say, an appropriate pleading where the defence of barratry is raised to reliance on Article IV Rule 2(a) of the Hague-Visby Rules.

TIPPING J:

Well, that's, in part, why I raised with you whether that was going to signal something equivalent to barratry, but you say not?

MR GRAY QC:

We say not, Your Honour. Now, I had erroneous –

ELIAS CJ:

But you will come on to give us chapter and verse on that?

MR GRAY QC:

Oh yes.

ELIAS CJ:

Yes, thank you.

MR GRAY QC:

The next document in the case is the statement of defence by the carrier to that reply, and it's at that point that I need to take Your Honours to page 51 and following. There is the response to paragraph 3 of the reply. A denial of 3.1 but an admission of certain of the particulars, particularly a failure to anchor immediately, a failure to alert the Japanese Coast Guard, or seek assistance from other vessels, and an admission of a failure accurately to report the location of the grounding. And similarly, at 3.2, an admission of failure by misrepresentation to the Coast Guard and the owners and managers about the time of the casualty. An admission that the master erased the plot from the relevant chart and re-plotted a course around the western side of the island. An admission that he informed the owners and

managers of a collision with an unidentified object, and that he counselled the crew.

BLANCHARD J:

Is it accepted that he was being dishonest in his own interests?

MR GRAY QC:

Yes. But the relevant intention, the carrier says, is the one pleaded by cargo in the reply, and it's an intention to absolve himself from blame.

BLANCHARD J:

And save his job?

MR GRAY QC:

Yes.

TIPPING J:

Could you just pause, please. This is quite intricate, and I – yes, thank you.

MR GRAY QC:

There was expert testimony by Captain Goodrick, a witness called by cargo, who accepted that each part of the steps described in the pleadings was a step in the navigation and the management of a vessel. That all of those things, steering, employing pumps, calling the Coast Guard, taking soundings, were steps in the navigation or in the management of the vessel, and as might be expected in the light of that evidence, Justice Williams in the High Court, and Your Honours don't need to go to it, but it's at paragraph 215, found that all of those steps were in the navigation or in the management of the vessel.

WILSON J:

Was there any conflicting expert evidence to that evidence?

MR GRAY QC:

No, Your Honour.

TIPPING J:

That depends, though, on whether the expert had a correct appreciation in law, doesn't it, of what navigation and management amount to?

MR GRAY QC:

Well, yes, I mean, he didn't give –

TIPPING J:

I mean, he was obviously steering the ship, in one sense. But what I'm slightly resistant to is that that sort of precludes any examination of that subject, which, I suppose, is what you're suggesting, is it?

MR GRAY QC:

I'm happy to be there, but I'll try and make a more nuanced argument as well. All I'm saying is that as a matter of expert testimony from a master mariner –

TIPPING J:

To the extent that it's a matter of evidence –

MR GRAY QC:

Yes, and within his field of expertise.

TIPPING J:

That's the only evidence. Right. So to the extent that it's a matter of law, this evidence is of no help.

MR GRAY QC:

To Justice Williams in the High Court, and Justices Baragwanath and Chambers in the Court of Appeal said, for the purposes of Article IV Rule 2(a), the conduct was not in the management or in the navigation of the vessel, because of a relevant intention of the master. And it is true that in re-examination by my learned friend, Captain Goodrick went on to say, well, because he did these things for a bad reason, then I say they're not

navigation or management of the visit, and he conceded that he was making a moral judgement about the conduct of the master, and basing the revision of his evidence on a moral judgement about whether the master was intentioned in the right way. But all I was wanting to say was –

ELIAS CJ:

Sorry, what did you say? It sounds contrary to the proposition you just put to us.

MR GRAY QC:

No, no, well, forgive me if it did. The expert testimony was that all of the steps that are particularised in the pleading are steps in the navigation or in the management of the vessel.

ELIAS CJ:

Yes, yes. They're not extraneous to management and navigation, no.

MR GRAY QC:

And then I put to Captain Goodrick, when, in your evidence in chief, you've said these were not steps in the management or the navigation of the vessel, you did that because of a moral judgement that you'd made about the intention of the master.

ELIAS CJ:

Oh, I see.

MR GRAY QC:

And he said yes, that is why I gave the evidence in chief that I did. But to understand the reasoning process of Justice Williams in the High Court, it was, first, these are steps in the management and navigation of the vessel.

ELIAS CJ:

Do you want to give us a reference to that evidence? I have not read that evidence.

MR GRAY QC:

Oh, forgive me, Your Honour. It's in Volume 2 of the case. It's under tab 26.

ELIAS CJ:

That's fine.

TIPPING J:

Is the essence of it that but for this moral judgement, these acts are all prima facie, if you like, in the management and navigation of the ship? But if you make a moral judgement about them, they cease to be?

MR GRAY QC:

Yes, I think that's one way of expressing it, Your Honour.

ELIAS CJ:

Well, isn't it that it's partly a question of fact, because if they had been acts extraneous to the management or navigation of the ship, that would have been determinative. The question that remains is whether acts taken for the management or navigation of the ship, if taken with a different motive than good management or navigation of the ship, are not?

MR GRAY QC:

That is the question Your Honours are dealing with today.

ELIAS CJ:

Yes, yes.

McGRATH J:

All this is summed up by the majority when they use the word "outrageous"?

MR GRAY QC:

In my submission, that kind of pejorative language is unhelpful. Your Honour is right, in my submission, when saying when the majority made its decision,

or Justice Baragwanath, with whom Justice Chambers agreed, he adopted a similar reasoning process to Justice Williams, which is to say that the steps are steps which are taken in the management and navigation of the vessel. The words of Article IV Rule 2(a) can apply to them. But I find that they don't, because of the motivation of the master, and then he used the word "outrageous", and selfish, cynical, interests of the master to describe the way in which he characterised the master's motives. And our proposition is that motive is irrelevant. Steps are either in the management and navigation of the vessel or they're not. Short of barratry, intentional harm to the vessel, we say motivation is wholly irrelevant and forms no part of the inquiry that needs to be undertaken in considering whether Article IV Rule 2(a) applies.

TIPPING J:

If motive is irrelevant, then you've got a difficult problem, I would think, of mixed motives, you know, whether it's dominant motive, or, I would have thought that could be a recipe for a certain amount of real difficulty.

MR GRAY QC:

Your Honour, I have a submission to make just along those lines. That if we're looking for a control in relation to when Article IV Rule 2(a) might apply and might not, the motive of the master is a very poor instrument of control. It's hard to assess.

ELIAS CJ:

What about mixed motives?

MR GRAY QC:

Well, they, too, in my submission, are hard to assess and hard to evaluate, and are we looking for dominant or driving, or a substantial, or a significant, or approximate. There's a whole field of inquiry that would be brought to bear in claims of this type which are not found in any of the prior litigation, and which we say would be inappropriate to seek to bring to this particular field of law, because it's unnecessary. And, essentially, it's because the rules are really a deal that was reached, a bargain that was made between cargo and ship

owning interests in an international convention, then adopted into domestic legislation in a number of countries in the world. And the bargain really had some bright lines. We'll give up on this if, on the other hand, we can keep our protection in relation to that. And we'll go to the travaux of the conference and see how that bargain was reached.

BLANCHARD J:

On that question, do you accept, is it the case, that barratry is the exception to the exception?

MR GRAY QC:

Yes. It can be seen from the travaux that, essentially, ship owners conceded on limitation of liability packaging unit and tonnage limitations, in return for which they said, but we insist on our errors in navigation and management exception. To which cargo said, well, we're just not having a bar of barratry. We're not prepared to accept that you might not be liable if there is barratry. And that was accepted by ships.

BLANCHARD J:

Yes. On the portion of the travaux that I've seen so far, that was unclear to me, so it's helpful to have that clarification. But at some point, it would be also helpful if counsel gave us particular references.

MR GRAY QC:

Yes, and I can also show you, Your Honour, parts in the Hague-Visby Rules where that is reflected.

TIPPING J:

Does that proposition amount to this, that provided it's within the management or navigation, all conduct of the master and crew will give rise to exemption, save barratrous conduct?

MR GRAY QC:

Yes.

TIPPING J:

So the line is drawn between conduct that is barratrous and conduct that is not barratrous?

MR GRAY QC:

Yes.

TIPPING J:

Subject always to navigation and management.

MR GRAY QC:

Yes, and save it being to conduct in relation to the ship and the cargo collectively, and not just the cargo.

TIPPING J:

Yes, yes.

MR GRAY QC:

And subject to it being in the course of the voyage, and not something that's pre-voyage or at the end of the voyage.

TIPPING J:

Subject to those subtleties, that's the essential line?

MR GRAY QC:

Yes, it is.

ELIAS CJ:

Sorry, you say the recklessness dimension, and you may well be coming on to this, in which case, defer it, the recklessness dimension must relate to loss of the ship, rather than the cargo. Were you making a distinction there?

MR GRAY QC:

Yes I will come on to make a point Your Honour but there are an important pair of cases called the *The Glenochil* and *Gosse Millerd* in which ships came and said well I'm not liable for this particular loss because it's part of the navigation or the management of the vessel and cargo said no, no, no, that exception applies where the whole of the venture, the ship and the cargo and the crew and everyone involved in the marine adventure is at risk. Where the management only relates to care of the cargo, as opposed to the cargo and the ship, then Article IV Rule 2(a) doesn't apply.

ELIAS CJ:

Yes, yes.

TIPPING J:

The emphasis is on navigation and ship?

MR GRAY QC:

Navigation and management.

TIPPING J:

Of ship.

MR GRAY QC:

Of the ship, yes.

TIPPING J:

Not cargo?

MR GRAY QC:

Correct.

McGRATH J:

Mr Gray, the context of this case involves, if you like, two causes in the sense that one cause no one's focusing on because it seems, I understand it, to be

accepted it comes within the exclusion clause, everything up to the grounding, thereafter the focus of the pleadings, questions of motivation, those sort of issues. Is it relevant in this case, on your argument, that, if you like, the master is confronted by a particular dilemma of what to do after grounding and then took the course which has been criticised. Is that a fact that this is a cause on top of an earlier cause, if you like. Is that relevant to the issues in the case?

MR GRAY QC:

Can I start by saying cargo says it is. Cargo says the decision to proceed to, on the inside passage through the island, was not a sound one and what the master wished to do after the grounding was to conceal that he'd made an unsound decision. So although cargo accepts that there accepted an exception that applies, Article IV Rule 2(a) means that the carrier is not liable as a result of the grounding itself. They say a beginning to understanding what the master did subsequently is found in that decision. Then they say yes, what followed is a separate series of events and needs to be considered separately. And they say the master was not making bona fide decisions in the navigation and the management of the vessel because of concern for his own position. We've admitted that the master was concerned for his own position and that was a motivation for him but we say it doesn't matter. We say that motivation short of barratry is irrelevant for the purposes of Article IV Rule 2(a). Provided the steps are in the navigation or in the management of the vessel, then the allocation of risk embodied in the Hague-Visby Rules provides that carrier is excused from liability and cargo will need to make their own arrangements for insurance.

McGRATH J:

The question I'm asking is really directed to motivation on which your position is absolute, doesn't apply?

MR GRAY QC:

Correct.

McGRATH J:

Thank you.

MR GRAY QC:

Correct. I'm sorry if my answer was a bit too long.

McGRATH J:

No that's very helpful.

MR GRAY QC:

But the reasoning process in the High Court was these are steps which can be in the navigation or in the management of the vessel. Prima facie therefore Article IV Rule 2(a) applies. However, there is an applied requirement that steps be bona fide in the navigation or in the management of the vessel and that implied requirement was not able to be met in this case and therefore by reason of the conduct not being bona fide Article IV Rule 2(a) does not apply and the allocation of risk for which the ship asserts is not available.

ELIAS CJ:

Some of the conduct must have been bona fide? I mean trying to reach safe conditions and pumping and all of that.

MR GRAY QC:

Yes, the master did pump, did sail to anchor and we say that a proper understanding of what the master thought he was doing and intended has to recognise that his goal was to relocate the vessel to a point at which he could misrepresent the course he had taken. Necessarily part of that is he thought he could get there. If he knew, if he intended to damage the vessel by sailing it when he knew the vessel would sink and it would not be able to get to the point at which he could misrepresent his voyage, there'd be no point. There'd be nothing to be served by doing it. So implicit in an understanding of what the master did is that he thought he could get to a place where he could present as truth that he'd proceeded round the western side of the island.

Explain the nature of the collision differently and seek to preserve his career. Implicit in that is that he must have thought that he could succeed and on the way he was doing the things that you would expect a master to do to enable him to succeed, he was pumping and steaming. On the way it became apparent to him that he would have to anchor because of the amount of water coming into the vessel, the list, and the way in which the vessel was behaving, and he anchored.

TIPPING J:

Is it very important then to carefully keep separate in one's mind questions of motive as against questions of intention?

MR GRAY QC:

Yes we say that is a material distinction. His intention was to absolve himself. His motive was to get to a point where –

TIPPING J:

No, I would have thought his motive was concealment but his intention was to get to some place of safety.

MR GRAY QC:

Yes.

ELIAS CJ:

A sort of criminal importation. It may not be particularly helpful but what – your position, as I understand it, is that motive is irrelevant, you just look at the acts?

MR GRAY QC:

Yes.

ELIAS CJ:

Save for barratry.

MR GRAY QC:

Barratry.

BLANCHARD J:

Are you saying he was oblivious to the possibility that in moving the ship as he did he might cause it to suffer further damage and might cause the cargo to suffer damage or further damage?

MR GRAY QC:

I can't go that far Your Honour, I don't know. it didn't become necessary to know.

TIPPING J:

This is where this question of recklessness I think is going to be so very important.

BLANCHARD J:

Yes, it's relevant to recklessness.

MR GRAY QC:

In the High Court Justice Williams found that he must have known that it had been a reasonable sort of collision because he noted that the vessel had slowed down considerably, almost stopped in the water, but the engine revolutions had reduced dramatically before picking up again and that the vessel had begun to list almost immediately. So Justice Williams was, inferred that it must have been apparent to the master quite soon after the grounding, after the collision with the rock, that the vessel was damaged quite badly. But we say it's not possible to know how the – how serious the master appreciated it was or what would be the likely consequences of steaming in the way that he did. We do say he must have thought that he could steam to a place where he could misrepresent successfully the course the vessel had taken.

TIPPING J:

Well I signal that although this terminology is open, I think the question of whether he was recklessly indifferent to the safety of the ship or whether it's been established or can reasonably be inferred could be quite important because recklessness can sometimes be equated in the law with intention.

MR GRAY QC:

Yes. Your Honour at the stage we've reached in thinking a way into the problem, that's an entirely understandable position. It's perhaps helpful to go to the Hague Rules and to see how they deal with this type of recklessness where they do –

WILSON J:

Before you do so Mr Gray, the master wasn't a witness was he?

MR GRAY QC:

No he was not.

WILSON J:

And this is one of the reasons why you say, I understand your submission, that the pleadings are important?

MR GRAY QC:

Yes.

BLANCHARD J:

Did he, was he criminally convicted as a result of this incident?

MR GRAY QC:

Yes but not for a charge which carried relevant intention. But the Japanese authorities did convict him.

ELIAS CJ:

Of what, do you know?

TIPPING J:

Something about the coast guard, wasn't it?

ELIAS CJ:

Oh yes, yes.

TIPPING J:

It was to do with –

MR GRAY QC:

I'll clarify –

TIPPING J:

It was to do with the coast guard wasn't it?

MR GRAY QC:

Yes it is. It's negligently navigating the vessel.

ELIAS CJ:

Just thinking of the pleadings, one of the loose threads I had was that in the Court of Appeal the majority principal judgment places a lot of emphasis on the swell and the fetch and the, and something else that was going on, but those things don't appear in the pleadings. The sea conditions or at least not the ones you took us too. Are they, were they –

MR GRAY QC:

In the statement of claim, it's certainly accepted that at the time the weather wasn't good.

ELIAS CJ:

No.

MR GRAY QC:

And the fact that the weather wasn't good was a factor which cargo interest says made it reckless to take the particular route which was taken.

ELIAS CJ:

I see, yes that's fine.

MR GRAY QC:

The Japanese pilot says that the route is available but it is quite narrow. The master had sailed a vessel through it before but not a vessel as large as this one. But cargo say it's because there was about 35 knots of wind and –

ELIAS CJ:

No I'm talking about the position after the grounding.

MR GRAY QC:

The sea conditions prevailed and Justice Baragwanath did think that because of those sea conditions, finding the earliest possible safe place to anchor would have made sense to the master and it may well be that that was part of the thinking that led to him characterising the master's conduct as outrageous.

ELIAS CJ:

It's just that it doesn't come through the pleadings quite as strongly but that's, it was part of the evidence you accept?

MR GRAY QC:

Yes.

ELIAS CJ:

Thank you.

MR GRAY QC:

Now in the appellant's authorities under tab 1 is the Marine Transport Act and the Hague-Visby Rules are the fifth schedule to the Act and are implied into

every contract of carriage for goods from New Zealand, which this was. It can be seen from page 1083 that Article I has some definitions. "Carrier" means the owner or the charterer and "ship" means a vessel. Article II provides that subject to Article VI every contract of carriage of goods by sea will be subject to the responsibilities, liabilities, rights and immunities set out. Article III 1 contains what is the probably most important obligation by the carrier and that is before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy, to properly man and equip it. The relevant factors are two. One is it's at the beginning of the voyage. The other is that it is to exercise due diligence to provide a seaworthy ship. It's not an absolute obligation to provide a seaworthy ship or a competent crew. And already it can be seen that these Rules embody a bargain with benefits and burdens going both sides.

Then at Article III 2 subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods. So subject to Article IV they've got to look after the cargo while they are baileys of it.

McGRATH J:

When you talk about this being a bargain between the shop owners and cargo owners, how should we relate that to the fact that this is an international treaty entered into by nations?

MR GRAY QC:

It's a bargain between nations whose individual national interests tend to be rather more on the ship owning side or the cargo owning side. So that the representatives of the nations at the convention tended either to speak for ship owners or cargo owners because they thought that's where their national interests lay.

McGRATH J:

You're making them sound like counsel for a party but you'll have to identify for us who each nation represented.

MR GRAY QC:

Yes but in the materials Your Honour will find –

McGRATH J:

Will find that?

MR GRAY QC:

– helpful articles which explain the background. Essentially the way they've gone is that through the 17th and through the 18th and 19th centuries in the United Kingdom, freedom of contract was a guiding principle. Whereas obligation of bailment had been absolute, carriers had come to require terms in contracts of carriage which excluded them liability for breach of duties of bailment so that they were liable almost for nothing. In the United States of America, which was principally a cargo owning country, Courts had said those sorts of provisions are unenforceable in the public interest. In the United States of America, however, legislation had been enacted which said, well, it doesn't really help us when we've got carriage of cargo from England coming across with the ship being liable virtually for nothing and carriage of cargo from the United States going the other way where the ship's liable virtually for everything.

Senator Harter introduced legislation which initially in its first draft gave effect to the judgments of US Courts. That draft was scrapped almost entirely, was replaced by another draft which was amended clause by clause and reflected a balance and very much really the beginning of the balance that is found in the Hague Rules. It's a little technical error in Justice Baragwanath's decision that he characterises the Harter Act as being legislation which removed contractual exclusions which ship owners relied. Probably His Honour derived that from a text called Wilson but it's not quite right and my learned friend's have included in their bundle other materials which explain the background to the Harter Act more accurately. But the Harter Act did permit ships to exclude liability for errors in the navigation or in the management of the vessel.

There then were different regimes in different countries. New Zealand enacted legislation not unlike the Harter Act as did Australia and Canada. After the First World War there was a convention. Parties came together to say let's get one uniform set of rules which means that international carriage is on a reasonably uniform basis whatever the port of embarkation or whatever the port of discharge and there was a meeting over several days where cargo said, we don't like the limitations of liability, they're too tough. Ship owning countries' representatives said, well, we'll increase those limitations but in return for that you need to understand that we wish to rely upon the Article IV Rule 2(a) exclusions, errors in navigation and management of the vessel. And overall the regime is one in which the carrier is liable where the carrier itself has done something wrong. So you will find there are fault and privity provisions on the way through.

Now understanding that we then come to Article IV and Article IV Rule 2(a) can be found at page 1085 and it can be seen, there are a large number of other circumstances in which the allocation of risk between the carrier and the cargo is made and the decision we say of Justice Fogarty is helpful in the Court of Appeal because it construes Article IV Rule 2(a) within the context of all of the rules. And it seeks to discern the meaning of Article IV Rule 2(a) by looking at this list of exclusions but it can be seen for example in Article IV Rule 2(1) that there is an exclusion, for any other clause arising without the actual fault and privity of the carrier and without the actual fault or neglect of the agents or servants of the carrier but the burden of proof is on the person claiming it. But again in many ways that encapsulates the bargain that has been reached. The carrier is liable where the carrier has been at fault but the burden lies on the carrier to demonstrate that it hasn't.

TIPPING J:

I think that the (b) immediately following (a) referring to fire with the exception unless causes, is significantly illustrative of the underlying premise, because (a), of course, is directed to people other than the carrier as such.

MR GRAY QC:

Yes. Precisely, Your Honour.

ELIAS CJ:

Isn't Article IV 1 relating, or am I right that Article IV 1 relates simply to the obligations in Article III on the carrier and in respect of those obligations the proof of exercise of due diligence is on the carrier –

MR GRAY QC:

Yes.

ELIAS CJ:

– but the bargain is that outside those obligations proof is on the party alleging that the carrier's responsible in respect of the other cause under (q).

MR GRAY QC:

Yes. The bargain in Article III 1 and IV 1 is if cargo wants to show that the ship was unseaworthy at the commencement of the voyage, it bears the burden of showing that.

ELIAS CJ:

Yes, yes.

MR GRAY QC:

If the ship or the carrier wished to avoid liability by demonstrating that they exercised due diligence to make the ship seaworthy, then they bear the burden of showing that.

ELIAS CJ:

Yes, yes.

MR GRAY QC:

We accept that under Article IV Rule 2(a) we bear the burden of showing that the loss arose by reason of act, neglect or default in the navigation or in the

management of the vessel. So the boat, the burden doesn't lie on cargo to disprove that –

ELIAS CJ:

I see.

MR GRAY QC:

– as a condition of recovery. Now the parts relevant to intent that I wanted to take Your Honours to I found first on page 1087 in Article IV Rule 5(e) and this relates to calculation of limitation and it provides that neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it's proved the damage resulted from an act or omission of the carrier, and that's the carrier personally not someone else, with intent to cause damage or recklessly and with knowledge that damage would probably result. And we say that is the intention regime embodied in the Rules.

And it can be found again over the page at 1088 in Article IV bis which again relates to limitation. Nevertheless a servant or agent of the carrier shall not be liable to avail himself of the provision of this article if it's proved the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result. We say that if the Court –

ELIAS CJ:

Is this only though in respect of an action brought against a servant or agent?

MR GRAY QC:

Yes, that one is.

ELIAS CJ:

I see, yes.

MR GRAY QC:

So we say if the question is, is there a degree of knowledge or intent which might preclude the carrier successfully relying on Article IV Rule 2(a), and can we look to the Rules to find out what kind of knowledge or intent might do that, then those provisions guide us, and I'll come on to make submissions to show that those provisions are matched in other provisions dealing with international carriage of goods and are applied by the Courts, including in New Zealand.

ELIAS CJ:

So these are the only provisions relating to intent?

MR GRAY QC:

Yes.

ELIAS CJ:

Yes, I see.

BLANCHARD J:

What is the background to the insertion of Article IV bis? What mischief in the original Rules were they aiming to remedy?

MR GRAY QC:

It's – IV bis Your Honour is really to permit the bringing of proceedings against servants where proceedings are not available against the carrier by reason of the Rules. So it can be seen in IV bis 1 that the defences available to the carrier are preserved and then at IV bis 2, but if an action is brought against a servant or agent, the servant or agent also can have advantage.

BLANCHARD J:

Well did the servant or agent have a defence under the Rules as they originally stood?

MR GRAY QC:

That was the unclarity that was resolved by this.

BLANCHARD J:

So they were putting that in and then making an exception for conduct that would be barratry, is that what you're saying?

MR GRAY QC:

No Your Honour. My understanding is that what IV bis was designed to do was to clarify the position of servants who were sued. It was to make clear that first the IV bis provisions didn't affect the carrier's position and related only to the position of servants or agents. Second, that if they were sued they had the same benefits and entitlements that were available to the carrier and in four, like the carrier –

TIPPING J:

What was implicit for the carrier?

MR GRAY QC:

If they wanted to take advantage of the Rules, they couldn't do so if they had intentionally damaged the goods or been reckless knowing that damage would probably result.

BLANCHARD J:

So they put it in for the agent or servant but it's not in expressly for the carrier?

MR GRAY QC:

No it's not. That comes back to the question you asked earlier Your Honour, was barratry excluded and where in the travaux can you find it and is that the bargain that was reached.

BLANCHARD J:

Which is something we'll deal with later.

TIPPING J:

But it would be very odd if you gave a barratry exception from the protection for a servant and didn't give it to the master or to the –

ELIAS CJ:

There's a claim against them.

MR GRAY QC:

Precisely. Equally it would be very odd if you allowed the master to exclude liability for barratry.

ELIAS CJ:

Is the structure though that barratry is, has to be, for the exclusion to operate in relation to the carrier, it must be the carrier who has committed the barratry because they're separately treated, the –

MR GRAY QC:

That is part of the structure Your Honour.

ELIAS CJ:

But is paragraph (e) which you took us too, which does have the barratry exception, but that only relates to paragraph 5, does it?

MR GRAY QC:

Yes it does. That only relates to the limitation.

ELIAS CJ:

The limitation, I see.

MR GRAY QC:

But Your Honour is correct –

ELIAS CJ:

But it must be that, that is a good indication that the barratry exception in these sort of terms must be implicit in relation to the other exemptions.

MR GRAY QC:

That's our submission Your Honour and no other. And when the High Court and the majority of the Court of Appeal found that Article IV Rule 2(a) might not be available because of a level of intent on the part of the master, they didn't come to ask the next question, well what level of intent. And we say that help can be found within the Rules themselves by reference to the level of intent that's required before limitation is not available and before defences are not available to servants and agents.

TIPPING J:

The act neglect or default provision and the barratry provision were conventionally separate in bills of lading were they not?

MR GRAY QC:

Yes.

TIPPING J:

Ergo, no one would have thought that 2(a) was apt to exempt from barratry because you needed separate and they clearly weren't introducing it but when they brought it in for servants, they thought it necessary to make it express?

MR GRAY QC:

Yes. The reason we're making submissions on this point is that there hasn't been litigation between carriers and cargo about the extent to which master's intention might affect the availability of the Article IV Rule 2(a) bargain as to where risk lay. Some of the texts say Article IV Rule 2(a) is drafted so widely that it must cover intention as well as negligent conduct. Those passages in the text are pretty succinct. It's possible to look at them and say, gosh that could be taken so far as to mean that even barratry is excluded and I'm wanting to make clear that we don't go that far. We don't need to.

ELIAS CJ:

So you accept that there's an exception to the exception in IV 2(a) for barratry, but you say the barratry must be the barratry of the carrier, and that it's in like of like scope to paragraph 5(e) and IV bis?

MR GRAY QC:

Not the middle, Your Honour. The allocation of risk in Article IV Rule 2(a) is that where there's act, neglect or default by the master.

ELIAS CJ:

Yes.

MR GRAY QC:

So it's barratry by the master.

ELIAS CJ:

Yes, all right.

TIPPING J:

And you say this wasn't barratry?

MR GRAY QC:

Correct, Your Honour. Somewhat amusingly, it's been put once this way, Your Honour. Navigation is horizontal. Barratry is vertical. And it's not part of the contract of carriage that the ship will be moved –

TIPPING J:

Vertically, yes. But if Rule 2(a) included barratry, there would be virtually nothing left in III 2. Or am I confusing myself? In other words, the duty subject to Article IV properly and carefully to handle the cargo would be rendered almost non-existent if barratry were included in Rule 2(a) of Article IV.

MR GRAY QC:

Yes.

TIPPING J:

And that is an unlikely proposition.

MR GRAY QC:

Yes. And, indeed, Justice Baragwanath found, and Justice Chambers agreed with him, that even the master's intent in this case rendered Article III 2 empty of meaning, and we say that His Honour misunderstood the scheme of the Rules when he found that, that the Rules are enforceable, do confer benefits on cargo, even with the interpretation of Article IV Rule 2(a) that we advocate.

ELIAS CJ:

I had understood you to be agreeing with the proposition that was put to you by Justice Tipping.

MR GRAY QC:

The proposition, Your Honour, was that if barratry was included.

ELIAS CJ:

Ah.

MR GRAY QC:

But we don't seek to include barratry.

ELIAS CJ:

Yes, yes.

TIPPING J:

I'm simply at the abstract, I'm not worried about the facts of this case at the moment. I'm just looking at this as an abstract.

MR GRAY QC:

How does the scheme work.

TIPPING J:

Yes, exactly.

MR GRAY QC:

How do we understand the scheme of the Rules, and what does it tell us about the way they might apply in this case. And if you can exclude liability for even intentional harm, then what is the extent of your obligation. And that's a very powerful proposition.

TIPPING J:

One of the advantages of this argument, if it's sound, is that it creates a clear and principled line between what is and what isn't within Article IV 2(a).

MR GRAY QC:

Yes.

TIPPING J:

In other words, you're protected for everything that's in the management and navigation, except barratry.

MR GRAY QC:

Yes. And we say that that is the correct interpretation of Article IV Rule 2(a), the correct application to the facts in this case. And we've made submissions about the Australian High Court decision in *Bunga Seroja*, which is a Perils of the Sea decision (Tulane Maritime Law Journal Spring 1999). But in his judgment in this case, Justice Callinan came to say, well, in some ways the outcome of the application of the Rules can be counter-intuitive, but we have to accept that this is a bargain that's struck, that allocates risk between parties. And our role is to apply the bargain. And the principled interpretation that Your Honour Justice Tipping just articulated is the one that we have

advocated on the process of this case through the Courts. That everything, apart from barratry, is excluded.

TIPPING J:

Provided it's within management and navigation of the ship.

MR GRAY QC:

Yes, yes.

WILSON J:

Can I just go back to an earlier stage of your argument, to check my understanding. Is it your argument that even if all the particulars pleaded by the cargo interests were established, that would not, in law, amount to barratry?

MR GRAY QC:

Yes. Because the relevant intent was never pleaded. Now, in the High Court, Justice Williams found that it was appropriate to imply a requirement that steps in the management or navigation of the vessel be bona fide before the allocation of risk in Article IV Rule 2(a) was available by reference to a number of cases. The first of those was an American case called *Star of Hope* 76 US 203 (1869), and I'm going to make submissions that all of those cases are off-point and unhelpful, and do not help us to understand why masters' intention should be relevant for the purposes of Article IV Rule 2(a). The first is *Star of Hope*, which is an average case.

McGRATH J:

At what point are we at in Justice Williams' judgment? Just give me a paragraph reference to that.

MR GRAY QC:

233, Your Honour.

McGRATH J:

Thank you.

MR GRAY QC:

His Honour said, "In addition, authorities have addressed the question of fides on occasions. *Star of Hope* is an average case. The question in that case is whether the sacrifice made had genuinely been made for the purpose of preserving the vessel and the balance of the cargo". And the case does not involve a thorough evaluation of evidence about the master's state of mind. And the phrase "bona fide", where it appears, is really shorthand for "genuinely". When, in fact, a sacrifice is made to protect the whole, then average is available. And that's the context is which bona fide is used in that case, and it can well be understood that in an average case, before allowing recovery by the carrier from cargo of a contribution to the cost of a sacrifice, the sacrifice, the sacrifice must genuinely have been made for the benefit of the entire venture.

TIPPING J:

So that does directly involve a question of purpose?

MR GRAY QC:

Yes.

TIPPING J:

But that's a wholly different issue?

MR GRAY QC:

Wholly different context. The next case relied on by His Honour at paragraph 233 of his judgment is *Boudoin and L v Ray McDermott & Company Inc 281 F.2d 81*. And that's a negligence case. In that case, a barge was not tied up well. The sea surge lifted the barge, damaged the dock. And the question was whether there had been carelessness. And again, it's a different question, and it's a question which makes reasonableness of conduct a relevant issue. The next case *Phelps, James & Co v Hill [1891] 1 QB 605* is a

deviation case. And the issue in that case is whether the deviation was reasonable. So because there's an inquiry about reasonableness, of course the mental state of the master becomes relevant. The next one, is a case in which while in port, stevedores stole a storm valve plate, for the purpose of selling it for scrap. It was decided on the basis that felonious acts of the stevedores were not done in the navigation of the vessel, and of course they couldn't have been done in the navigation of the vessel if the vessel wasn't navigating because it was in port.

TIPPING J:

Was it a question of management rather than navigation?

MR GRAY QC:

Well, it might have been if it was in the course of the voyage, or if it was something done in preparation for the voyage. But again, it's a different question that the one we're dealing with in this case. If the master had removed the storm valve plate during the voyage so that water could enter and damage cargo, then there might have been a relevant question, what kind of intention by the master was material to understanding whether the Article IV Rule 2(a) allocation of risk applied or not. But it's a different kind of question. The next case is *The Bulknes [1979] 2 Lloyd's Rep 39*, and that is more difficult for me to deal with. It's actually difficult to understand, because the judgment is so brief. It's in my learned friend's bundle under tab 22. It's a very brief judgment of Justice Sheen. The vessel was underway. There were two openings on the deck. One was an access hatch, and the other a sheltered companionway protected by a watertight door. The hatch had a combing. It was heavy weather, and the lid of the hatch was opened. Water came in, and damaged the cargo. It is true in this case that His Honour, at the conclusion on page 41 on the right-hand side, relied on evidence by the Chief Officer, that he couldn't think why anyone entered the hatch, and if someone did, it was not in the normal running of the ship. And His Honour went on to say, well, "it's a misuse of language to say that the surreptitious opening of the hatch by a member of the crew is an act or default in the management of the ship". And His Honour therefore declined to apply Article IV Rule 2(a) to

prevent the carrier from being liable. Perhaps in understanding of the case is found in the left-hand column on page 41 in the second paragraph. About five lines down, Captain Lardin was asked for his views about this. He said it was unlikely that anyone would have opened the hatch, but that it was possible that one or members of the crew had hidden something, possibly drugs, in the forecastle, and had opened the access hatch secretly. The hatch cannot be seen from the bridge. The next paragraph down, "Captain Lardin struck me as being an efficient officer, and I have no reason to doubt that he gave his evidence honestly". It's a modest first instance decision, not carefully reasoned as to why the mental state of the master or crew should be relevant to Article IV Rule 2(a), and can, perhaps, be understood in the context of its facts. And then His Honour referred finally to the Hill Harmony case. My understanding is that it remains the case that commentators and practitioners in this field, in markets like London, are about evenly divided about this case, and it can be seen that the result bounced around on its way through the Courts. The case involved a ship and a voyage between the west coast of North America and Japan. The time charterer required the vessel to proceed with utmost dispatch, and the shortest and quickest route is what's called the Great Circle Route, which travels north past Alaska, and in a circle to Japan. The plumb line route straight across the Pacific is longer. The master elected a route straight across the Pacific. The arbitrators who heard the case understood him to say that he'd had bad weather when he'd last taken the Great Circle Route, and it was to avoid the bad weather that he took the longer route. But they noted that 360 preceding voyages by various ships between the two ports had taken the Great Circle Route, and they could think of no obvious navigational reason for taking the Great Circle Route, which, of course, was longer, earned more revenue for the ship owner, and cost the time charterer more, because the charter period was longer. And so what was involved was a conflict between the obligation to proceed with utmost dispatch in prosecuting the voyage, and reliance by the owner on the error of navigation or in the management of the vessel provision in the Hague Rules saying, well, the decision about routing is entirely one for the master. The High Court overturned the arbitrators' decision, and said, well, if the master said he'd encountered bad weather, matters of navigation are entirely for him,

and we're not going to second-guess them. The Court of Appeal said likewise. The House of Lords overturned it. In judgments by Lord Hobhouse and Lord Bingham, the House of Lords said, This is not about navigation or management of a vessel. This is about economic employment of a vessel. And it is not an answer to a breach of the duty to prosecute a voyage with utmost dispatch to say, 'I took a longer route because I thought I'd encounter bad weather'. It's not genuinely a decision in the management or navigation of the vessel to say 'I took a longer route because there might be bad weather' when to do so is a breach of an obligation to undertake the journey as quickly as possible. As it happens on the facts, the master's decision was probably made in port before the voyage commenced, although nothing much turned on that. And it's one of those very nicely balanced cases about which commentators and expert practitioners still differ, and continue to differ. We say that it has to be considered in the context of this case, because it is a case which considers the motivation of the master when considering whether Article IV Rule 2(a) will excuse a breach of contract. But we say, in the end, it's unhelpful, because it deals with an entirely different economic interest than the one we have in this case.

ELIAS CJ:

But it's about scope. And scope is the scope of the Article, of the exception. And that's acknowledged here.

MR GRAY QC:

Yes. That's our answer, Your Honour. Just a different context. So we say that the bases upon which Justice Williams in the High Court found that it was appropriate to consider motivation of the master and to consider whether conduct is bona fide in the management and navigation of the vessel before the allocation of risk in Article IV Rule 2(a) applies can be shown to not be helpful. What is illuminating is that His Honour had to go to those diverse, different circumstances in order to find support for reliance on good faith when construing Article IV Rule 2(a). And that's because there aren't authorities which do it directly. And they don't do it directly, we say, because it's not relevant. In the Court of Appeal, Justice Barawagnath proceeded differently.

He said that there were four reasons why prior common law should be disregarded, and why Article IV Rule 2(a) protection should not be available. And they are, Your Honour, at paragraphs 43 to 47 of His Honour's judgment, together with the *Suisse Atlantique Societe d'Armement Maritime S.A v N.V Rotterdamsche Kolen Centrale [1967] 1 AC 361 (HL)* point which is at paragraph 55. The first point made by Justice Barawagnath at paragraph 42 is that the raison d'être of the Hague Rules was to depart from prior common law. So we should ignore prior common law, because the Hague Rules were intended to depart from them, and I will come later to show Your Honours briefly where prior common law had applied the predecessor to this provision, in a way which enable the carrier in this case to take advantage of it.

McGRATH J:

Sorry, Mr Gray, it will help me to get there more quickly if you gave me a casebook reference.

MR GRAY QC:

To His Honour's judgment, yes, it's in Volume 1, under tab 23.

McGRATH J:

Thank you, that's all I need.

TIPPING J:

It's got American maritime …..

MR GRAY QC:

I actually think since preparation of the case, the Court of Appeal decision is reported in the New Zealand law reports. But this was the first official, or quasi-official report. The travaux, we say, make clear the nature of the bargain. The travaux are found in the appellant's bundle of authorities, Volume 1 under tab 6. And the passage that I would like to take Your Honours to begins at page 142. By this time, there'd been debate about obligations to make the ship seaworthy in Article III, and debate had moved to Article IV.

McGRATH J:

What page number?

MR GRAY QC:

142, Your Honour. Or 248. There are page numbers at the top and bottom, unhelpfully. I'll use the bottom ones. 248. At the bottom of the left-hand of page 248, Sir Norman Hill, representing the United Kingdom, says this clause, Article IV, is the ship owner's clause. Now, Sir, I would venture to remind the committee that we've dealt with the cargo interest clause in Article III and we've agreed and accepted the actual words that the cargo interest have put forward, imposing the obligations on the ship with regard to seaworthiness. And what is more important, we've adopted Article III Rule 2, which is the carrier shall be bound to provide for the proper and careful loading, handling, stowage, carriage custody care, and unloading the good carried. We've not sought to weaken or qualify those words in any way. When we come to Article IV 2, our big point is the navigation point, and what we've asked is that we should have the words which, from time immemorial, have certainly appeared in all British bills of ladings, faults or errors have not appeared. They've been added. Our old words were act, neglect or default of the master, mariner, pilot, or servants of the carrier in the management and navigation of the ship. And we would ask, Sir, in our clause, to have our old words leave out "faults and errors", and put in our old words instead. And then Monsieur Doar makes an interesting point that English people like very short sentences, and European people like more nuanced, long ones, and he'd be happier with some long ones. And he made that point in quite a long speech.

ELIAS CJ:

I think he's saying the opposite, isn't he? We try to make things as short as we can, and you try to make things as long as you can. A Gallic salute.

MR GRAY QC:

Sir Norman Hill responded to that on 251, at the bottom. "I would not venture to argue the point with you. But the ground on which I would appeal to the Association is this. As I've told you, in Article III, we've conceded all that cargo owners want. If this is to go through –

ELIAS CJ:

Sorry, where are you?

MR GRAY QC:

251.

ELIAS CJ:

But before then, Mr Doar – it's always a mistake to take judges to these things. We fall over them. But he actually refers to barratry.

TIPPING J:

Yes, I've got that, too.

MR GRAY QC:

What is the page Your Honour is looking at?

ELIAS CJ:

At page 250, there is one point which I want to single out, and that is barratry.

TIPPING J:

Presumably that means that at the draft that they had before them at that stage, barratry of master was going to be within the exclusion.

MR GRAY QC:

Yes.

TIPPING J:

This is a part of the travaux which suggests that there was a deliberate decision to remove it.

MR GRAY QC:

What I need to find is the matching –

TIPPING J:

And therefore the line was drawn between non-barratrous conduct and barratrous conduct.

MR GRAY QC:

Indeed.

TIPPING J:

Because I thought the passage that the Chief Justice has just referred to was quite a good example of that thought.

MR GRAY QC:

And then the part I was drawing to Your Honours' attentions was at 251, at the bottom. "I would not venture to argue the point with you, but the ground on which I would appeal to the Association is this. As I've told you in Article III, we've conceded all that cargo carriers want. If this is to go through, we have to get it accepted by ship owners, and I would despair of ever getting accepted by ship owners, unless I could point to their old, familiar exceptions. It may be that they're very conservative, it may be that they're very pig-headed. But we have, as ship owners, have had a rather bitter experience of the treatment we've received, not only from our own Courts but from others".

ELIAS CJ:

I must say that some of these comments in here make me feel a bit more cheerful about knowing so little about this subject. It looks as if some of the people who are engaged in its drafting didn't know very much about the subject, either.

MR GRAY QC:

Because they were national representatives.

ELIAS CJ:

Yes, probably.

MR GRAY QC:

I don't know if New Zealand was represented. We certainly did go along to conventions of this type, unexpectedly to the British at that time, anyway, being represented separately at Versailles, and the like. But what we say the travaux shows is that where in paragraph 43, Justice Baragwanath says that the raison d'être of the Hague Rules was to depart from the prior common law, in relation to Article IV Rule 2(a) that is not correct. That in fact –

McGRATH J:

Did Justice Barawagnath rely on the travaux for that, or the source he gave for that decision?

MR GRAY QC:

The source for that, I'm not sure there is one, Your Honour.

TIPPING J:

I think it was just a feeling that His Honour had that this was a new departure, so to speak, across the board.

BLANCHARD j:

The vibe?

TIPPING J:

Yes. One of those.

MR GRAY QC:

Well, he had, at paragraph 34, discussed the Harter Act in New Zealand, Australia and Canada. And referred to texts tracing the legislative history. And it may be that His Honour thought he was synthesising. That's my submission, if that's what His Honour thought, it isn't accurate.

ELIAS CJ:
Thank you. We'll take the adjournment now.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.47 AM

ELIAS CJ:
Yes, Mr Gray.

MR GRAY QC:
As Your Honour pleases. We were looking at the decision of Justice Baragwanath in the Court of Appeal and the four reasons that he had articulated as –

BLANCHARD J:
Just before we move away from the travaux, unless you're planning to go back to them?

MR GRAY QC:
I know I owe Your Honour a response on where was barratry excluded.

BLANCHARD J:
Well, yes, it's just that I've only dipped into these, but about page 25 – yes, page 258, they're dealing with barratry, which evidently was in the list in Article IV 2 –

MR GRAY QC:

Yes.

BLANCHARD J:

– as paragraph (b), and they appear on that page to agree to it, yet it disappears.

MR GRAY QC:

It may be that we can get no further than that, but to say that there was an express provision protecting a carrier from the consequences of barratry, which was removed.

BLANCHARD J:

Yes, but when did it get removed?

MR GRAY QC:

In the short time –

BLANCHARD J:

Unless I'm misreading page 258.

MR GRAY QC:

No, we think Your Honour's right, that in an early draft there was a proposal that barratry be excluded, and that exclusion was itself removed.

ELIAS CJ:

The barratry be excluded?

MR GRAY QC:

Yes, in other words –

TIPPING J:

You're not protected against barratry.

MR GRAY QC:

Yes.

ELIAS CJ:

Yes, yes.

TIPPING J:

And that's where Lord Phillimore says it's always been included in bills of lading, of course as a separate –

MR GRAY QC:

Yes.

McGRATH J:

What you're really saying is the travaux don't tell the full story, there'll be –

MR GRAY QC:

I fear, Your Honour –

McGRATH J:

– agreements reached outside of the formal proceedings.

MR GRAY QC:

I think I'm still likely to have an hour and a quarter at lunchtime to see if I can find something further, but so far we can't find anything more than it having been debated but not finding a place in the final.

TIPPING J:

Well, one thing is quite clear from this, that it's not implicitly included in (a).

MR GRAY QC:

Correct. If it is to be included it's included separately –

TIPPING J:

Yes.

MR GRAY QC:

– as it was under the –

TIPPING J:

And that, I think, is a significant point, and may be as far as one needs or can go.

MR GRAY QC:

I agree with both, Your Honour. As far as you can but as far as you need to. It's enough that it was separate, included in a draft, but excluded.

BLANCHARD J:

Thank you, Mr Gray.

MR GRAY QC:

As Your Honour pleases. Justice Baragwanath's second point was at paragraph 44 of his judgment, and that was that the narrow focus on text without regard to context, which could be seen in the judgment of Lord Justice Scrutton in the Court of Appeal in *Gosse Millerd*, has been firmly rejected in favour of the dissenting judgment of Lord Justice Greer in that case. The case is in the bundle of authorities that we've given Your Honours. In the Court of Appeal, Lord Justice Scrutton gave a judgment which said this is an error that falls within Article IV Rule 2(a), Lord Justice Greer said, no, it didn't, because it's a default in the management of the cargo, not in the management of the ship, and Article IV Rule 2(a) applies only to, "act, neglect or default in the management of the ship" and the House of Lords agreed with him.

BLANCHARD J:

Was this the case where they had the hatch open so they could do some painting while they were in port and rain got in and damaged some iron –

MR GRAY QC:

Yes.

BLANCHARD J:

– or steel?

MR GRAY QC:

I'm pretty sure that's the facts, Your Honour. Yes. "Hatches were left open, tin plates –

TIPPING J:

Tin.

MR GRAY QC:

– were exposed to rain". And essentially what Lord Justice Greer said – and his judgment's not terribly long, it's, if Your Honours wish to go to it it's in the Volume 1 of the Appellant's bundle under tab 14.

TIPPING J:

The passage cited by Justice Baragwanath at paragraph 36 of his judgment, the passage in *Gosse Millerd* –

MR GRAY QC:

Yes.

TIPPING J:

– actually seems to suggest, with respect, the opposite of what His Honour is propounding, namely that these words had a long judicial history –

MR GRAY QC:

Yes.

TIPPING J:

– and there's no reason to suppose that when they were enacted by the English Parliament they were to be taken as having any different meaning.

MR GRAY QC:

Indeed.

TIPPING J:

So…

MR GRAY QC:

That goes to his first point rather than his second.

TIPPING J:

Yes.

MR GRAY QC:

But serves to emphasise the submission that we've made, that in fact it's perfectly clear that the intention of the Hague Rules was to achieve a bargain which was the preservation of some parts of each of the competing regimes, rather than a departure from all of them. Lord Justice Greer gave his judgment at page 739 and following, at the bottom paragraph on 739, "The first question may broadly be stated thus, is the failure to utilise the hatch covers or tarpaulins of the ship with care for protection of the cargo an act, neglect or default in the management of the ship, within the meaning of the Rule, when it cannot be said or at least has not been proved to be an act, neglect or default with regard to the safety or with regard to the condition or purposes of the ship itself". And then His Honour reasons that, "It is not conduct which falls within Article IV Rule 2(a) –

McGRATH J:

Sorry, you're at page now?

MR GRAY QC:

That was 239 – 739.

McGRATH J:

Thank you.

ELIAS CJ:

Sorry, what tab are we at? I've missed that.

MR GRAY QC:

Fourteen, Your Honour.

ELIAS CJ:

Thank you.

MR GRAY QC:

And Volume 1. It will perhaps detain us too long to go through this judgment in detail. The relevant passages in His Honour's judgment, in my submission, are at 741, between lines 3 and 6, "The negligence was not in relation to the condition of the ship," and then about two-thirds of the way down 741, "If the tinplates were damaged through the negligent admission of rainwater into the hold at Liverpool, i.e. in port, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship. For instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea connections so as to prejudice the ship's safety while also damaging the cargo". Then over at 742 in the second paragraph, the first sentence, "In interpreting these Rules it's not immaterial to consider the circumstances which gave rise to the enactment of the Statute, which gives force of law to these Rules," and that's the Harter Act. And then over the page, at 743, the bottom half, "Further, I think it is incumbent on the Court not to attribute to Article IV Rule 2(a) a meaning that will largely nullify the effect of Article III Rule 2, unless they are compelled to do so by clear words, the words 'act, neglect or default' in the management or in the navigation of the ship, but if they are to be interpreted in their widest sense would cover any acts done on board the ship which relates to the care

of the cargo and in practice such an interpretation, if it did not completely nullify the provisions of Article III Rule 2, would certainly take the heart out of those provisions and in practice reduce to very small dimensions the obligation to carefully handle, carry, keep and care for the cargo, which is imposed. In my judgment, a reasonable construction requires that a narrower interpretation should be put on the accepting provisions in Article IV Rule 2(a), 'If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo' is within the protection of Article IV Rule 2(a), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from".

ELIAS CJ:

So your submission is that the weight placed on Greer LJ's dissenting opinion is misconceived, because he is clearly saying – not dealing with the question where the navigation of the ship is an issue?

MR GRAY QC:

Correct, Your Honour, that is my submission, that –

ELIAS CJ:

He is simply saying that anything that is to do solely with impact on the cargo is not within the exception.

MR GRAY QC:

Yes. Lord Justice Greer is drawing a bright line.

ELIAS CJ:

Yes.

MR GRAY QC:

Where the conduct at issue is in the navigation or in the management of the ship, then there is protection for the carrier. Where it's not, because it's care for cargo only, then there is no protection. But it's a different kind of approach

than the one that Justice Baragwanath ultimately came to, which is to say, well, yes, it's in the navigation or in the management of the vessel, but because it's not bone fide therefore the words don't cover it. And we say that while Lord Justice Greer did say the things that Justice Baragwanath relies on, the consequences he derives from that are not available. The third factor His Honour articulated was that modern construction is purposive. Unhappily, in our submission, His Honour then didn't go on to identify the purpose that he was seeking to achieve by the construction of the Rules that he found, and I will later take Your Honours to a case called *The Jordan II*, in which Lord Steyn says, "Modern construction is purposive and for that reason I choose not to interfere with the established understanding of the Rules". In my submission, it may well be accurate to say that modern construction is purposive, but His Honour, Justice Baragwanath has not spelt out what that means for the interpretation of Article IV Rule 2(a) in this case.

TIPPING J:

Well, unless you identify the purpose, it's somewhat meaningless.

MR GRAY QC:

That's my submission, Your Honour, what purpose? And we say that the purpose of the Rules as a whole shows that there is a construct, where there is an allocation of risk to cargo in some circumstances. And fourth, at paragraph 47, His Honour Justice Baragwanath relied on a passage from the judgment of Justice Kirby in *Bunga Seroja*. With great respect to His Honour, we interpret the passage as weighing in favour of the construction of the Rules that we advocate. Justice Kirby, in paragraph 137 of his judgment, which is set out by Justice Baragwanath in paragraph 47 of his, goes on to refer to the consequences for insurance, for certainty of outcome, for avoidance of unnecessary and unproductive litigation, of creating uncertainty in the law by the way in which these Rules are interpreted. It's a passage which argues in favour of comity, of uniformity of interpretation, and of adherence to settled understandings of the law, because to do otherwise promotes litigation which doesn't add anything to community wealth. It consumes litigation services without benefitting, and we say that those are

arguments that weigh in favour of the settled law that existed both before and after the enactment of the Hague Rules being applied in this case. So we say that those four reasons that Justice Barawagnath identified as being appropriate for departing from the prior common law don't exist. His Honour then went on to say, well, a construction of Article IV Rule 2(a) which had the effect that the carrier advocates in this case would strip Article III Rule 2 of meaning, and he relied on *Suisse Atlantique*. And we say that His Honour has misunderstood the construct of the rules, and the balance of benefit and burden that apply, and His Honour, in expressing that view, is ignoring the obligations that lie on the carrier under Article III 1 and Article III 2, and is failing to understand that even with protection being available to the carrier under Article IV Rule 2(a) in this case, nevertheless there remain obligations of the carrier which have to be fulfilled, one of which the carrier had to demonstrate in this case by proving to the satisfaction of Justice Williams that the vessel had been seaworthy at the commencement of the voyage. Justice Chambers largely simply agreed with Justice Barawagnath that he said in paragraph 69 of his judgment that he thought the "travaux were irrelevant, and that modern conditions were different from those pertaining at the time the Hague-Visby Rules were negotiated". Again, because His Honour was largely agreeing, he didn't spell out what conditions are different and why the difference in conditions might weigh in favour of a different interpretation of the Hague Rules. So it's difficult to respond.

McGRATH J:

Is he really saying that the Hague travaux are not a legitimate guide to interpretation?

ELIAS CJ:

It's too old?

MR GRAY QC:

Because they're too old. It's only one paragraph.

ELIAS CJ:

He did say that.

MR GRAY QC:

It's paragraph 69.

TIPPING J:

The last sentence has a certain validity, but again, it's in the abstract. It doesn't take one very far. One would have to reason through what has changed in such a way as to make – but leave that aside, I also find difficult, I must signal, the idea that because people have joined who are not represented, you should sort of ignore the background, if you like, in a contract, which is assigned. The assignee on a construction point can't be heard to say, well, I wasn't there at the beginning.

MR GRAY QC:

Can't be in a better position.

TIPPING J:

No. I mean, the analogy is pretty loose, but –

McGRATH J:

Well, here, we have a formal record of travaux, which, of course, you don't have in the contractual context.

MR GRAY QC:

No. And not all conventions are the same. This one was deliberately a convention to gather competing positions, and to achieve a balance between them, which was acceptable to all, and probably unacceptable to many, as well. In my submission, the correct reading of paragraph 69 of Justice Chambers' judgment is that he's agreeing with Justice Barawagnath, mainly for the reasons that Justice Barawagnath has expressed. And it's difficult to take his reasoning much further than that. But it is interesting that both of them justify their interpretation by saying it's no longer appropriate to look at prior common law, and it's no longer appropriate to look at the travaux.

That there are modern conditions which govern interpretation, but they do not spell out what those modern conditions are, and why those modern conditions lead to a different interpretation from the prior common law.

BLANCHARD J:

Do any of the leading textbooks take this attitude?

MR GRAY QC:

Not this attitude, Sir. We gather the relevant passages from leading texts in our submissions at paragraph 53 and, following Scrutton, says, "Where an exception of negligence of the ship owner's servants is clearly expressed, full effect will be given to it, so that even the most culpable recklessness on their part will not render him liable". Carver, "It seems that the exception extends even to a wilful or reckless act of a person within the list, that is, master, mariner, pilot or servants of the carrier as opposed to the carrier himself, for the words of Article IV Rule 2(a) do not, in fact, refer to negligence, but to act, neglect or default". Halsbury, "If the words occurring in the Hague-Visby Rules had meaning assigned to them by judicial construction when used in contracts of the carriage of goods by sea. Before those Rules had the force of law, the proper approach to the construction of those words in the Rules is that there's no reason to suppose the words should bear a different meaning in the Rules". So the leading texts are all in favour of –

BLANCHARD J:

Well, what the Court of Appeal majority is saying is directly opposed to what Halsbury says.

MR GRAY QC:

Yes. And, of course, this is one of those fields in the law when the texts are important, because they synthesise a number of quite small decisions.

McGRATH J:

But is there a Privy Council case on this, and I think it might have been in the respondents' submissions I saw it.

MR GRAY QC:

The one that I'm going to take Your Honour to in a moment is something or other meets –

BLANCHARD J:

I think it's actually the House of Lords.

MR GRAY QC:

The *Marriott v Yeoward Brothers [1909] 2 KB 987* is the House of Lords case.

BLANCHARD J:

I wasn't thinking of that. Don't worry.

MR GRAY QC:

We say there are seven things which are at the point of departure for this case. The first is that the plain meaning of the words in the Rule would cover the master's conduct, and that the contract between the carrier and the cargo allocates risk of loss from the type of conduct at issue to cargo. Second, that prior common law used the same words and construed them in a way which would protect the carrier in this case, and the traditional authority for that is *Marriott v Yeoward Brothers [1909] 2 KB 987,* a decision of the King's Bench, which is under tab 13 of Volume 1 of our bundle. Third, the prior common law was construed in a manner which provided cover, and also the case called *The Glenochil [1896] P 10*, which is at tab 10 in our authorities. *The Glenochil* is the predecessor to *Gosse Millerd*, which we looked at a moment or two ago, and distinguished between conduct which affected cargo only and conduct which affected the ship. Fourth, we say the travaux show that Article IV Rule 2(a) were intended to continue the prior common law position. Fifth, we say that subsequent cases also showed that Courts continued to apply prior common law, and refer to a case called *Bulgaris v Bunge & Co (1933) 38 Comm Cas 103*, which is under tab 17 of Volume 1 of our bundle. And also a

case called *Kalamazoo Paper Company & Ors v Canadian Pacific Railway Company & Ors [1950] SCR 356* which is under tab 20. If we went through every case, Your Honours, we'd be here all week. We don't wish to do that. These are short cases, which simply apply points. Sixth, the leading texts that we've just reviewed state the law in the opinion of the learned authors in a manner consistent with the submissions that we're making. And seventh, uniformity of construction between nations and certainty are a value in this field, and we've already looked at the decision of Justice Kirby in *Bungus Seroja*, which articulates the principles that will be familiar to Your Honours.

TIPPING J:

Are there any other jurisdictions which can helpfully be looked at to suggest the uniformity that you're suggesting?

MR GRAY QC:

In the bundle, there's a decision relied on by my learned friends from France, there's a decision from the Court of Appeal in Germany in our bundle, and late last week, my learned friend served an authority from Holland.

TIPPING J:

The France one was the *Lucile Bloomfield & Ronda Cour d'Appel de Rouen DMF 1970 667* case, was it?

MR GRAY QC:

Yes. We distinguish the *Rouen* case on two grounds. One, we say the voyage had concluded, because the vessel was tied up. And we say that the conduct, not only of the master but also of the owner, because it shows that the owner was involved in the decision making in that case. So we say that the French case can be understood in a way that is consistent with the submissions that we're making.

McGRATH J:

Does the French case reason on the basis of travaux, or address them?

MR GRAY QC:

No, Your Honour. It distinguishes between nautical fault and commercial fault, and it says the decision at issue in this case is not a nautical decision, but a commercial decision. It was about whether to seek help from salvers. And it was to avoid having to pay salvage that a decision was made not to seek help. We say, Your Honours, that it has to be recognised that the construction that the High Court and the Court of Appeal have placed on Article IV Rule 2(a) is a departure from prior law. It is a reform of the law. And from time to time, it also has to be accepted that cargo owners chafe under Article IV Rule 2(a). Cargo owners argue that it is inappropriate for there to be an allegation of risk between cargo and carrier such as that which is achieved by Article IV Rule 2(a). They pointed to revised Rules, the Hamburg Rules, which have not come into force. And new rules, the Rotterdam Rules, which were agreed in September this year, have been signed by ten countries. Not yet enough to become operative, and not yet adopted by any country into domestic legislation. And the chafing has been consistent. The *Riverstone Meat Company v Lancaster Shipping Company [1961] 1 Lloyd's Rep 57* is under tab 2 in our bundle. It's a decision of the Privy Council given in – sorry, the House of Lords. In this case, it's a case involving entry of water, and the issue was unseaworthiness. But the five Lords who sat each gave separate judgments, and in my submission, each of them adopted an approach to an interpretation of the Rules which was to look at the travaux, to look at the record, and to value consistency of interpretation. Viscount Simmons dealt with the exception in Article IV on page 67. Towards the bottom of the left-hand column, he sets out Article IV 1, and the bottom of the paragraph articulates the unseaworthiness context. And over the top of the page, the burden of proof context. About a quarter of the way down says "to ascertain the meaning of the Rules, it's necessary to pay particular regard to the history, origin and context". The Courts below hadn't. He said that he'd have to deal with it at some length. The Hague Rules were a result of a conference or conferences. The aim was broadly to standardise, within certain limits, the right of every holder of a bill of lading against the ship owner, prescribing an irreducible minimum for the responsibilities and liabilities to be undertaken. To guide them, the framers had other precedents,

including the Harter Act, Commonwealth legislation. They had decisions of the English Courts. And in all cases, the relevant words were found. He noted that Lord Hailsham in *Gosse Millerd*, in the passage that I think His Honour Justice Tipping referred to in the judgment of Justice Barawagnath earlier, said that there's no reason to depart from prior meanings of the same words found in the Hague Rules. And so His Honour essentially held that the words exercise due diligence to make the ship seaworthy in the Hague Rules were adopted from the Harter Act, similar statutes. They should be given the meaning given to them previously. The other Law Lords reached similar conclusions. Lord Merriman, at page 78 at the top of the right-hand column, Lord Radcliffe, on 82 at the right-hand column, second paragraph down, said, well, if you had to choose between two alternative meanings without any background in the way of previous authority, it would be difficult to know which way to turn. Natural and ordinary meanings of words don't help. But over the page at 83 on the left-hand column in the middle paragraph, he said, but fortunately, there is a settled meaning. And the appropriate thing to do is to use, we have to begin with the common learning that the words in question were adopted by international convention. Lord Keith began his judgment at page 86. It's only a brief judgment. But again, in his first introductory paragraphs, he relied heavily on the diplomatic, legislative and prior common law history of the Rules. Lord Hodson, his judgment at 88, the right-hand column, he, again, refers to the history of obligation, and he traces through prior common law dating from before the conventions in Brussels on pages 89. And at page 90 in the left-hand column in the middle of the page, he says "the stream of judicial dicta and of direct authority flows in one direction, and weighs in favour of a construction". We say the case is helpful in showing that with the construction of these Rules, not only is it not desirable to depart from prior common law and the travaux of the conference. But, in fact, the reverse is true, and that it's helpful and desirable to refer to them.

McGRATH J:

Mr Gray, just going back to Justice Tipping's question. A while ago, you acknowledged authorities in France, and you dealt with that one, then Germany and Holland. I can remember these were referred to, particularly

the Holland decision, and the respondents' submissions. Do you accept that that's against you?

MR GRAY QC:

No, I don't.

McGRATH J:

You don't. I mean, just to be clear on the point, you do not accept that outside of the common law countries, there's any different trend?

MR GRAY QC:

No, I don't. I will spend a little while on *Quo Vadis*, which I say is wholly consistent with the submissions that I've been making, and, in fact, will be helpful in seeing that there is consistency in approach to relevant intention when considering the limited circumstances, i.e. barratry or akin to barratry, in which the kind of risk allocation provisions like Article IV Rule 2(a) concerns are dealt with.

ELIAS CJ:

Mr Gray, where are you proposing to take us now? I'm just –

MR GRAY QC:

I'm not doing too badly now, Your Honour. I'm talking now about the circumstances and the way in which the Court might decide whether to depart from an established understanding. I'm then going to make submissions that those circumstances aren't available in this case.

ELIAS CJ:

Yes.

MR GRAY QC:

Remind Your Honours that I've briefly said earlier that the master's intention is a poor control mechanism for determining when Article IV Rule 2(a) might apply, deal with *Quo Vadis*, the Dutch case, which we saw for the first time

last week, and then turn briefly for what I understand is almost a cross-appeal, which is the argument raised by cargo that the ship didn't discharge the burden on it of showing that cargo was damaged by the collision, and may not already have been damaged, and essentially only be saying we agree with Justice Chambers for the reasons that he gives.

BLANCHARD J:

Are you going to deal with barratry?

MR GRAY QC:

I say barratry is not pleaded. It doesn't arise. There is no evidence of relevant intention.

TIPPING J:

I would like to hear from you on this reckless element of barratry, because you forecast that you were going to come back to that.

MR GRAY QC:

Yes, I will do that in the context of *Quo Vadis*.

TIPPING J:

Because for me, I think it's close to the heart of the case.

ELIAS CJ:

Yes. I'm wondering, really, whether you need to develop at any length the reasons why you say that one shouldn't tailor a new rule, that that really might be left to reply if it's necessary.

MR GRAY QC:

Happy to do that, Your Honour. The authority I was going to take Your Honours to was *The Jordan II* which is under tab 33 in our bundle. It's a judgment of Lord Staine.

BLANCHARD J:

Well, are you going to take us to that?

MR GRAY QC:

I'd like to just briefly, Your Honour. Again, this is an Article III Rule 2 case, the stowage of cargo. You can see that Lords Bingham and Birkenhead agree with Lord Staine, and Lord Staine gives the major judgment. He sets out the central issue in paragraph 3 in the middle of page 60. The central issue is whether Article III Rule 2 defines the irreducible scope of contract, or merely stipulates the manner of performance of functions, which the carrier has undertaken in the contract of service. In cases where the parties to a contract of carriage agree that loading, stowage and discharge are to be formed by shippers, charterers and consignees, the specific question of whether the carrier is, nevertheless, liable to cargo owners, whether latter or stevedores perform their functions improperly or carelessly. In other words, the question is whether such an agreement which transfers responsibility for the operation from shipowners to shippers, charterers or consignees is invalidated by Article III Rule 8. Paragraph 4, longstanding precedent is the effect that such a reallocation of risk by agreement is permissible, and that in the postulated circumstances the carrier is not liable. His Honour then, His Lordship sets out the way in which the Hague Rules came to be part of the contract, and what the claims are. And paragraph 11 deals with the existing rule.

TIPPING J:

And this was a case where the House of Lords was being asked to reverse the existing rule?

MR GRAY QC:

Yes, to depart from it. His Lordship articulates the existing rule at paragraph 11. He goes on at the bottom of paragraph 11 on page 62 to say, "It's true that in the language of precedent, it was an obiter statement, but it was a carefully considered one". And then at 12, His Lordship introduces Renton, which is the accepted authority for the proposition. At paragraph 16, he relies on Lord Mansfield for the value of certainty, particularly in an international

trade context. At paragraph 18, he affirms that interpreting Article III Rule 2, the starting point is the language of the text, but doesn't necessary accept the reasoning of Lord Justice Devlin, Mr Justice Devlin, at that stage. At paragraph 19, he analysed the way in which Justice Devlin had interpreted the Rules. He noted the Rules were designed to achieve a part harmonisation of diverse Rules. He goes on to say in interpreting Article III Rule 2, its purpose and context are important. It's obvious that the obligation to make the ship seaworthy is fundamental, which the owners can't transfer. There's an inescapable personal obligation, and a reference to *Riverstone Meat Company v Lancaster Shipping Company,* which we've just looked at. He goes on to say those who are not attracted to literal interpretations of an international convention reliant principally on linguistic matters may find it entirely possible to conclude that the context and purpose of Article III Rule 2 would not be undermined by permitting owners to transfer responsibility for storage, but noted that Justice Devlin had thought it was difficult to believe the Rules were intended to impose a universal rigidity about what were, essentially, practical secondary functions. He went on to note at the bottom of paragraph 19 that Justice Devlin's interpretation had been purposive, permitting transferred, it was a principled and reasonable approach, not based on technical rules of English law, but founded on a perspective relevant to the interest of maritime nations generally. His Lordship then sought assistance from the travaux, from texts and from foreign jurisdictions, and then asks, at paragraph 27, is a departure justified. He sets out the basis on which the House of Lords is prepared to depart from its own prior decisions, and that is where experience is showing the decision is not meeting the needs of the community.

TIPPING J:

That's a complication that doesn't apply here, isn't it?

MR GRAY QC:

Yes, it is. We don't have a practice note to that effect, and we're not overruling something decided in this country. But I say that the approach is nevertheless helpful, and should guide the Court in considering this case.

Paragraph 29 noted that even if persuaded that the interpretation was wrong, the case against departing from the prior established position was overwhelming. And at 31, noted that was referring the Rules, and for that reason, it was singularly inappropriate to re-examine the prior decision, which had produced a settled position. Now, I said to Your Honours last week we got a copy of *Quo Vadis* from my learned friends. It's probably most helpful if we deal with it now, so my learned friends know what it is we have to say about it, and we have prepared a small supplementary submission which collects our submissions.

Essentially Your Honours, we say that a proper understanding of this case shows that, to the Courts in Holland, the motive of the master was irrelevant in determining whether the conduct is an act, neglect or default in the navigation or management of the ship. That there is an exception if the master intended the harm, or was reckless with knowledge the particular damage to particular cargo would probably result, that is an intention akin to barratry.

WILSON J:

Why do you say "akin to"?

MR GRAY QC:

It's Nelsonian blindness Your Honour. It's failure to form the subjective intention because of a subjective unwillingness to do so.

WILSON J:

Isn't that barratry on your formulation?

MR GRAY QC:

Yes it is, Your Honour.

ELIAS CJ:

So, it's not akin to barratry, it's barratry, take out "akin to"?

MR GRAY QC:

Yes, we say it is.

WILSON J:

Yes.

MR GRAY QC:

Your Honours I think, were sent a copy of the decision?

ELIAS CJ:

Yes.

BLANCHARD J:

You shouldn't assume that we've read it.

ELIAS CJ:

No, I haven't read it.

MR GRAY QC:

Well, I wonder if I can ask you to look over at paragraph 2.1?

TIPPING J:

Of the decision?

MR GRAY QC:

Of the decision. High Court asks some experts to answer some questions. One is whether the vessel was seaworthy and they expressed the view the vessel was seaworthy at the beginning of the voyage from a construction, technical point of view. The experts were further of the view that with a probability bordering on certainty, it can be stated that if the air inlet of the main engine on deck had been closed in timely manner and one –

BLANCHARD J:

I'm sorry, whereabouts are you reading from?

MR GRAY QC:

2.2 Your Honour, it's on the second page of the decision at the bottom.

BLANCHARD J:

There's two 2.2s.

MR GRAY QC:

Oh, I'm sorry.

TIPPING J:

This habit is a bit disconcerting.

MR GRAY QC:

I think that's the only place that – no, it doesn't.

BLANCHARD J:

What had happened in this case?

MR GRAY QC:

A valve had been left open, permitting seawater to enter and damage cargo.

TIPPING J:

In port, or at sea, or?

MR GRAY QC:

At sea. It was an engine valve. What the experts said was the vessel was seaworthy, it was negligent to leave the valve open and the master could have been expected to have done better.

TIPPING J:

Did the master know that the valve had been left open?

MR GRAY QC:

The experts' report –

ELIAS CJ:

It was a case of gross negligence, wasn't it?

MR GRAY QC:

It was alleged to be gross negligence.

ELIAS CJ:

Yes.

MR GRAY QC:

We say, on the facts it was decided it was not gross negligence. Simply forgot or knowingly, is the formulation of the experts Your Honour.

TIPPING J:

Simply forgot?

MR GRAY QC:

Or knowingly left open.

TIPPING J:

Well that's pretty unhelpful.

MR GRAY QC:

Mhm.

BLANCHARD J:

It wasn't just a valve, it was an air inlet on deck.

MR GRAY QC:

To allow air into the engine room.

BLANCHARD J:

Yes.

TIPPING J:

Simply forgot, or knowingly?

MR GRAY QC:

Yes.

TIPPING J:

Well, the whole difference might depend on whether or not which of those two it was?

MR GRAY QC:

Your Honour, if you look at the top right-hand corner, there's a fax page number and on page 6 the decision of the Court of Appeal starts and it says it proceeds on the facts –

BLANCHARD J:

I'm sorry –

McGRATH J:

I don't have a fax number at all –

BLANCHARD J:

The problem is, we've been sent two copies of this.

ELIAS CJ:

Have we?

TIPPING J:

Mhm.

BLANCHARD J:

We may be working from a different copy.

MR GRAY QC:

The copy that I have Your Honour begins, "Ship and damage 2002" and it's got 327 in the top left-hand corner?

BLANCHARD J:

Yes.

MR GRAY QC:

On the second page of that, at the bottom, is the passages from the experts' reports that I was just making submissions about. Two pages further over, in the middle of the page or just below, it says "Court of Appeal". It says, "The Court of Appeal proceeds on the facts summarised most recently in paragraphs 3.1, 1 to 4."

TIPPING J:

Is the Supreme Court the lower Court?

MR GRAY QC:

Yes.

TIPPING J:

Yes.

MR GRAY QC:

And then the Court of Appeal says, "The appeal concerns..." and I can't find a 3.1, 1 to 4 which is why I took Your Honours to the experts' report. At 2.2, the Court of Appeal says, "In this proceeding, Gerling claims as the insurer, who has subrogated rights in the cargo, against Kroezen as the ship owner/owner, payment on account of Gerling's contribution as cargo insurer towards the salvage fee declared in general average in respect of tow assistance rendered following engine damage." It argues, "a) the fault is so

serious that it concerns gross negligence bordering on intent, so that this reliance as the ship owner on grounds for exclusion of liability of fault in the management of the ship fails." Second, "That the ship was unseaworthy because there was an incompetent master." 3.2 is the understanding of the facts Your Honour, "Kroezen failed to have someone close the open direct air inlet of the ship's main engine which this should have been done in the prevailing weather conditions." 3.3, "The Court of Appeal agrees with the experts' conclusion which is not disputed by the parties either. Taking the conclusion as the starting point, the High Court rightly considers this was not a case of gross negligence bordering on intent as the master. Particularly, if one assumes that Kroezen knowingly did not close the air inlet, he would have made a serious error as the master but it is not likely, in the opinion of the Court of Appeal, that he made this error willingly and knowingly in the sense that he acknowledged that his act or omission was wrong, thereby consciously accepting the risk that the ship, cargo and crew would be put in danger, even the risk of sinking the ship. Accordingly, a fortiori, it is out of the question that in this case the concept of gross negligence bordering on intent which was recently further defined by the Supreme Court in two judgments has been met, namely that behaviour which can be characterised as reckless and with knowledge that damage will probably result."

TIPPING J:

That's the equivalent of a conscious appreciation of the risk that damage would result and going ahead and running that risk notwithstanding?

MR GRAY QC:

Yes, yes and I'll – we come on in our written short argument that I've just handed up to say, that phrase is not drawn by Dutch Courts from nowhere –

TIPPING J:

No, no, it comes from Article.

MR GRAY QC:

– it's the same phrase that we've seen in the Hague Rules. We'll shortly see the same phrase in the Warsaw Convention.

TIPPING J:

But I was focusing on their earlier formulation, consciously accepting the risk which isn't necessarily, in linguistic terms, identical with the Article V(e), was it, formulation as reckless and with knowledge? It comes very close I think, to the same outcome.

MR GRAY QC:

My submission would be that in substance it is the same. It's either subjectively intending something to happen –

TIPPING J:

Or appreciating the risk and deliberately running it?

MR GRAY QC:

Which is the same thing.

BLANCHARD J:

I think the reason you couldn't find paragraphs 3.1 et cetera, is that they're in a judgment by the Supreme Court which is actually the top Court, contrary to what was being said earlier. There's a reference to other Supreme Court judgments further on and the fact that the Court of Appeal applied them.

TIPPING J:

There's a reference to the High Court.

MR GRAY QC:

Yes. Can I just finish dealing with the case? Over at 3.4 Gerling has argued for three reasons, which the Court of Appeal will discuss below, that this is a case of gross negligence bordering on intent such that he cannot avail himself of the aforementioned ground for exclusion of liability, fault in the

management of the ship. So the issue is on the table. Is this gross negligence bordering on intent so the neglect will default in the management of the vessel. Exclusion is not available. Gerling argues that because the incident which led to the damage occurring it's not correct to use the concept of gross negligence as it's been developed in more recent Supreme Court. It argues the issue must be understood in the light of the law as it stood earlier when the proceeding was brought and in which the case for gross negligence is objective knowledge of imminent danger. And subject of knowledge of danger such as was mentioned in the 2001 cases is not required. Court of Appeal says this argument is rejected. Notwithstanding that it goes without saying that in 1987 in Dutch Transport the trend had set in respect of the concept of gross negligence towards probability awareness. One needs to apply the current understanding as to the standard for judging. The question whether there was gross negligence bordering on intent in respect of the incident which occurred in the past and breaks open the exclusion of liability for nautical fault. Second, Gerling argued that for breaking through a complete exemption of liability less serious gross negligence was required than breaking through a limitation of liability and the Supreme Court had developed a concept of gross negligence specifically for cases of limitation of liability. The Court of Appeal says that may be the case but there's no reason not to apply the concept developed in the aforementioned judgment in the Supreme Court such as the present one.

Then finally Gerling says that in the circumstances Kroezen is guilty of knowledgeable recklessness. The Court of Appeal says the above considerations lead to the conclusion that grounds 1 and 2 fail. Kroezen's defence that a distinction must be made between Kroezen and his ship owner and Kroezen and his master and that he can, in the first capacity, rely on a complete exclusion of liability, even if in his second capacity gross negligence can be imputed to him does not accordingly need further consideration. I take it from that that the master was in fact the owner. And ground 4 fails as well.

So what cargo had said in this case is where there is gross negligence bordering on intent the Supreme Court has said that the act, neglect or error I

the management or navigation of the ship exclusion doesn't apply and you should actually apply a lower threshold to a decision about whether act, neglect or default applies because that is an exclusion of liability and not merely a limitation of liability. Both arguments are rejected and they're rejected because the Supreme Court has decided that before those exclusions are not available, there must be intent or gross wilfulness – I'm sorry, intent or wilfulness with knowledge that loss will result.

McGRATH J:

Subject if not object.

MR GRAY QC:

Subject.

ELIAS CJ:

Of loss?

MR GRAY QC:

Yes. There is in fact a gloss that it is in some circumstances such loss, in other words, the particular loss that did occur, not some loss.

TIPPING J:

I would have thought as a matter of policy if you could foresee – or if you were subjectively reckless as to loss, generically you shouldn't be able to escape on the basis that you were not subjectively reckless as to a particular type of loss.

MR GRAY QC:

It's always something different.

TIPPING J:

It seems rather hair-splitting.

ELIAS CJ:

Depending on the nature of the loss and its connection with the negligence –

TIPPING J:

Well if it was wholly different in kind perhaps.

ELIAS CJ:

Yes.

TIPPING J:

But there couldn't be anything like that here.

MR GRAY QC:

A helpful way of considering the context slightly differently is in a case which is tab 15 in my learned friend's bundle.

BLANCHARD J:

Have we finished with Q*uo Vadis*?

MR GRAY QC:

Yes thank you.

TIPPING J:

This is tab 15 in the respondents' –

MR GRAY QC:

Tab 15, yes. A case called *Monarch Airlines Ltd v London Luton Airport Ltd*. It's a case in which an aircraft while taxiing down a runway became damaged by some loose concrete material on the runway and there was within the standard terms and conditions on which Luton Airport permitted aircraft to land and take off, the exclusion which is paragraph 10 in the left-hand column on page 403 in the head note and it can be seen that it is neither the airport nor the company nor its servant or agent shall be liable for loss or damage to the aircraft occurring while the aircraft is in the course of taking off, arising or

resulting directly or indirectly from any act, omission, neglect or default by the company, its servants or agents, unless done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Then summarised in the right-hand column at paragraph 2, the words act, omission, neglect or default were clearly intended to include negligent acts. The whole purpose of the clause was to exclude the consequences of all deliberate and negligent acts unless they were done with the intention or recklessness described in the clause. The words of the clause were wide enough in their ordinary meaning to cover negligence on the part of servants.

And paragraph 4, the effect of article 17 to 24 of the Warsaw Convention was broadly that subject to certain limits the carrier was liable for loss of life, personal injury and damage to baggage or cargo unless the carrier proved he and his servants had taken necessary measures to avoid the damage and it was impossible for him or them to take them.

At page 408 - also in the head note at paragraph 5, I'm sorry Your Honours, on 403, under article 25 a carrier was liable if it was proved there was actual knowledge that damage would probably result from the act or omission of a carrier. The test was subjective –

TIPPING J:

Damage, that suggests a generic approach?

MR GRAY QC:

Yes we'll come on to see that point but yes it does, yes.

TIPPING J:

Oh I see, so my instinctive reaction is confirmed by this authority is it?

MR GRAY QC:

Confirmed by that passage, we'll see elsewhere the words "such damage" as to be found in this particular provision. And is also to be found in other provisions which –

BLANCHARD J:

It would have to be damage of the general kind if you – that you were advertent of.

TIPPING J:

If it's within the range of advertence as my brother puts it, surely it doesn't matter what its precise kind is.

MR GRAY QC:

I suspect that's a matter of fact and degree, isn't it?

TIPPING J:

Well it's like the ordinary tort cases.

ELIAS CJ:

Type of damage.

TIPPING J:

Yes, *Hughes v Lord Advocate [1963] UKHL 8* and all those cases.

BLANCHARD J:]

Which is the passage you're wanting to take us to?

MR GRAY QC:

It begins on page 408, Your Honour, on the right-hand column, and it's highlighted with marks on the right-hand side. There's only to be liability of any of those cases if there's an intention to cause damage or if there's relevant recklessness. Counsel submits that the cause doesn't expressly refer to negligence but in my judgment it would make a nonsense of the

clause if the airport company was not liable for what might be called ordinary negligence but only liable for other neglect. And then 409 again in the right-hand column marked on the side, it seems to me the words act, omission, neglect or default were clearly intended to include negligent acts and the whole purpose of the clause was to exclude the consequences of all deliberate and negligent acts unless they were done with the intention or recklessness described in the clause.

TIPPING J:

But we haven't yet come to a point that apparently bears on this question of the nature of the damage.

MR GRAY QC:

No we haven't come to that point Your Honour.

TIPPING J:

We're coming to it are we? It's taking a long time to come.

MR GRAY QC:

Over at 410, again in the right-hand column, should the proviso be construed using the same test of construction as article 5 of the Warsaw Convention. Again article 25 has set out the words such as not in that one. Over at 411 I the left-hand column confirmation of the test under article 25 is subjective and at the bottom of the left-hand column, acknowledgement of consistency with provisions in the Hague-Visby Rules and Article IV of the convention on the limitation of liability for marine claims 1976. Now that convention on limitation of marine claims has been at issue in respect of this casualty. Justice Williams has given an earlier judgment in this proceeding – oh not in this proceeding, in proceedings between these parties in respect of this casualty and we've also given Your Honour a copy of His Honour's judgment and that applies the limitation rules that have just been referred to.

ELIAS CJ:

Where is that, was that handed up?

MR GRAY QC:

Yes it was Your Honour.

McGRATH J:

Mr Gray, just before you go to that. I've just been looking at paragraph 13 of your supplementary submissions and is the import of paragraph 13.2 a submission that there is another exception for barratry.

MR GRAY QC:

I'm sorry Your Honour?

McGRATH J:

Paragraph 13.2 of the supplementary submission?

BLANCHARD J:

I think Mr Gray confirmed that earlier.

MR GRAY QC:

Yes. There is no exception for barratry.

McGRATH J:

Yes, I was just checking that.

MR GRAY QC:

In the judgment I've just handed up at page 657 –

ELIAS CJ:

I'm sorry, I'm totally confused. I had thought that you had said at the outset that you accepted that barratry was an exception to the exception.

McGRATH J:

That's why I asked the question.

BLANCHARD J:

Well I think that's what he's saying –

MR GRAY QC:

With respect Your Honour I've close off the double negative and I accept there is no exception for barratry. I'm not saying there's no exception to the exception.

TIPPING J:

If you're barratrous –

ELIAS CJ:

If you're barratrous you don't get the protection but – so this point is simply that it's not specifically included as an exception to the exception?

MR GRAY QC:

Correct.

ELIAS CJ:

Yes. But you say it is?

TIPPING J:

For reasons that were traversed earlier you say it's an implicit, at least an implicit exception to the exception?

MR GRAY QC:

Yes I do, yes.

ELIAS CJ:

Yes.

MR GRAY QC:

I have then –

TIPPING J:

And barratry you accept is intentionally harm or subjectively recklessly causing harm?

MR GRAY QC:

Yes.

TIPPING J:

Putting it in very short order?

MR GRAY QC:

Yes.

ELIAS CJ:

But hang on. Looking at this footnote and quoting Scrutton barratry appears to be an exception that is null and void. You're not putting that proposition to us?

MR GRAY QC:

I had intended it to mean the same thing Your Honour, that there is no exception for barratry under the Hague Rules.

BLANCHARD J:

But presumably that Carriage of Goods by Sea Act 1971, which is an English Act, has something in it that makes barratry a null and void exception? I don't know that this is taking us very far.

MR GRAY QC:

Forgive me if I've been unclear. If the facts, if in this case barratry had been pleaded and proven –

ELIAS CJ:

Yes.

MR GRAY QC:

– I would not argue that Article IV Rule 2(a) –

ELIAS CJ:

Applies.

MR GRAY QC:

– would apply to enable the carrier to avoid liability.

ELIAS CJ:

Yes, thank you.

MR GRAY QC:

I'm sorry if my double negatives –

McGRATH J:

That's your position notwithstanding the submission in 13.2 of the supplementary submission?

ELIAS CJ:

And the footnote?

McGRATH J:

And the footnote.

MR GRAY QC:

The words do and you will find some texts are couched in terms which can be interpreted as going so far as to say even barratry would be excluded but it is not my argument that barratry is excluded because I say that the travaux in the way that we have looked at them this morning shows that there had been an express exclusion for barratry in a draft that was not carried through into the final and the only way to construe that is to accept that Article IV Rule 2(a) was not intended to apply to barratry.

Finally to deal with Justice Tipping's point about the type of damage –

BLANCHARD J:

Well weren't you taking us to Justice Williams?

MR GRAY QC:

Yes I was, the same point Your Honour, where at Justice Williams' judgment in *Tasman Orient Line* at 657.

TIPPING J:

This is the earlier judgment?

MR GRAY QC:

Yes it is. This is the limitation one. Paragraph 23 His Honour sets out the power of New Zealand Courts to make limitation decrees. Your Honour will note that subsection (1) sets out the class of people who can seek limitation and subsection (2) limits the circumstances in when limitation is available. No person shall be entitled to limitation of liability in respect of claims for loss or injury or damage resulting from that person's personal act or omission where the act or omission was committed or omitted with intent to cause such loss or injury or damage, or recklessly and with knowledge that such loss or injury or damage would probably result. And that's the word "such" that I've been telling Your Honour I would take you to in due course. Whether in the end the presence of the word "such" takes as much further than our earlier discussion, well I don't really submit that it does. It must be a matter of fact and degree and –

ELIAS CJ:

Well it's like damage. "Such" can mean "like."

MR GRAY QC:

Yes.

TIPPING J:

It doesn't – it can't be intended to mean the actual damage in suit, I wouldn't have thought.

MR GRAY QC:

Yes, if there are 50 containers on board and containers 1 to 10 are damaged but 13 to 24 are not, and the master gets up and says, well I actually thought containers number 17 and 18 would be damaged but it never occurred to me that 8 would be, I'm not sure a Court would be terribly sympathetic.

TIPPING J:

Well this may be a bridge too far. This issue doesn't bite in the present case, does it?

MR GRAY QC:

The reason I'm taking you to this is to say we have seen from the *Quo Vadis* case that the Dutch Supreme Court has established the basis upon which it will decide that an act, neglect or default in navigation or management of the vessel provision is not applicable and that is where there is intent or recklessness with that that damage would occur. There's a similar provision in the Warsaw Convention. There is the same provision in New Zealand legislation dealing with limitation. There is a consistent approach across conventions and domestic legislation dealing with carriage of goods that protections are lost only where the loss arises from conduct which is intentional or reckless with knowledge that loss will probably result.

TIPPING J:

This is section 85 of the Maritime Transport Act?

MR GRAY QC:

Yes.

TIPPING J:

Right.

MR GRAY QC:

And the purpose for taking Your Honours to these cases and provisions is to say there is a consistent approach within the general regime dealing with carriage of goods both by sea and air, particularly by sea. And there is no basis for grafting into Article IV Rule 2(a) a different approach to intention. The general regime already has one. No further approach is necessary and it would be inappropriate.

ELIAS CJ:

Mr Gray it's 1 o'clock. How much longer do you expect to be?

MR GRAY QC:

Half an hour Your Honour.

ELIAS CJ:

Yes thank you, we'll take the luncheon adjournment now.

COURT ADJOURNS: 1 PM

COURT RESUMES: 2.14 PM

MR GRAY QC:

Your Honours please, two points. First, barratry. My learned friends in their submissions have made reference to a provision in the Marine Insurance Act which defines barratry for the purposes of that Act. It's a definition that refers to wilful commission of a wrongful act to the prejudice of the owner. We say that's a definition which is peculiar to a contract of marine insurance and that the marine insurance context needs to be borne in mind when considering the definition. We ask the –

ELIAS CJ:

Do you have the definition?

MR GRAY QC:

It's in my learned friends' synopsis.

ELIAS CJ:

Oh, it's in the synopsis, right, thank you.

MR GRAY QC:

At paragraph 4.2.

ELIAS CJ:

Thank you.

MR GRAY QC:

Remember that the insurance context is a relationship of utmost good faith between the insured and the insurer, and that of course barratry will be wholly inconsistent with that. And remember too that the risks at issue between an insured and an insurer are different from risks that we find in this case. So we say that the passages in paragraph 7 to 11 in our submissions and the definitions we refer to are preferable and more helpful. To recap, we say that barratry is intentional infliction of harm. It's deliberately sinking the ship, it's setting fire to the cargo. We say that barratry was never at issue in this proceeding. Your Honours will recall we reviewed the pleadings. The pleadings were that there was a reckless decision to transit the inside passage and there followed a succession of steps and omissions, said to be intended to enable the master to avoid responsibility for his reckless decision and not to be bone fide in the management or in the navigation of the vessel.

BLANCHARD J:

That definition, I think, was the one that Justice Hamilton was referring to in *Mentz Decker & Co v Maritime Insurance [1909]1 KB 132* and that was an insurance case. But I think Justice Porter in *Compania Naviera Bachi v Henry Hosegood* picked up Justice Hamilton's statement and seems to have endorsed it in a context which was not insurance.

MR GRAY QC:

That's the one at tab 18 of my learned friends' –

BLANCHARD J:

I don't know, I've got them. Did you say tab 18? No, no, it's not, it's a lot earlier than that.

TIPPING J:

I don't think those two cases are referred to in the case books, the ones that my brother has mentioned.

ELIAS CJ:

Well, I'm wholly unfamiliar with them, so perhaps you'd better get the reference to them, if you want comment on them.

BLANCHARD J:

Well, *Mentz Decker & Co v Maritime Insurance* seems to be reported in a volume of maritime law cases. Oh, no, it's 1910 1 KB 132 and the other one, *Compania Naviera Bachi* is 1938 Volume II All England 189. They're both pretty distinguished Judges.

MR GRAY QC:

If it pleases Your Honour, I'm not familiar with the authorities. I'll have a look at them overnight, if I may, and reply…

ELIAS CJ:

So will the rest of us. Three eight nine, is it?

BLANCHARD J:

Sorry, which one?

ELIAS CJ:

The last one, sorry, the *Compania Bachi.*

BLANCHARD J:

One eight nine.

ELIAS CJ:

One eight nine, thank you.

MR GRAY QC:

Essentially, what we say on barratry is we almost wonder why we're talking about it because we never under this to be a barratry case. We say it's not disclosed on the pleadings, we understand our learned friends may say, "Well, we have alleged that decisions were not taken bone fide in the navigation or in the management of the vessel and that's enough and as a legal consequence that flows." But we say it isn't enough, and we say it isn't enough because we say in order for there to be barratry there has to be a positive allegation of intent or recklessness with knowledge that damage would probably result to the deck cargo. All of the plaintiff's cargo was stored on deck. And we say that requires an allegation of a positive state of mind by the master, and that the very best that can be said on the pleadings is that there was an allegation that his conduct was for an ancillary purpose, and an allegation of an ancillary purpose which was to avoid responsibility for his conduct, and we say that the presence of an ancillary purpose is not the same thing as the presence of a positive intention to harm cargo or recklessness with knowledge that damage would probably result. And we say an allegation of absence of good faith is an absence of an intention but not an allegation of the presence of a different one. It's one thing to say, "You didn't believe A," that's a different thing from saying, "You did believe B." And we say that notions of foreseeability don't help us. What is required in this case is beyond foreseeability, way beyond. It's deliberate intention to harm or Nelsonian blindness, that amounts to the same thing. Nelsonian blindness –

ELIAS CJ:

You mean, deliberately running a known risk of harm?

MR GRAY QC:

Yes, knowing that damage would probably result. Not that there might be harm, that something might flow, but that probably it would, a degree of certainty, and you might be asked to draw inferences. Now, while we say that facts can be inferred from evidence, pleadings can't, allegations can't. The topic of the positive intention of the master was simply not the subject of allegation or of evidence at the trial. Williams J inferred that the master must have known quite soon that the collision had been a serious one, and he did that from evidence before him, and that may have gone to the allegations which had been made. But that's different from asking Your Honours now to interpret the pleadings as raising for determination whether the master deliberately intended to harm the vessel, or was Nelsonialy blind about what he was doing, and for the reasons I expressed earlier we would say in any event such an inference can't be drawn on the facts because he must have intended to succeed in his plan to relocate the vessel, that he must therefore have –

BLANCHARD J:

Well, there was nothing to suggest that he was deliberately harming the ship or the cargo, that he wanted that sort of consequence.

MR GRAY QC:

We say, nothing at all, Sir.

BLANCHARD J:

Of course, you don't have to intend to harm, do you?

MR GRAY QC:

We say, for barratry you do, that is what barratry is.

TIPPING J:

And the only dissent from that is the type of recklessness to which you are referring, which is a little short of actual intention but is equated traditionally in the law, with intent.

MR GRAY QC:

It's my submission, Your Honour, it's the kind of indifference which is the same as intention, nothing less. And that's why we say this really just is not a barratry case and never has been.

TIPPING J:

Well, it's a bit like reckless murder, which is treated in moral terms as exactly the same as meaning to cause death.

MR GRAY QC:

Yes, reckless use of a motor vehicle, which sits at the far end of the spectrum. So, barratry hasn't featured, in pleadings, in evidence or in argument. It might now be possible to say, well, if there might not be a word in the pleading that has the heading "barratry", but we've alleged all the components of it, we say, "No, there hasn't been," just hasn't been on the table. And, indeed, we're only getting to that because in fact the mixed motives of the master don't go far enough to avoid the operation of Article IV Rule 2(a). The only reason barratry arises at all is that if the facts alleged and included in the judgments about what the master did and what the master was trying to achieve don't take this case outside Article IV Rule 2(a) then, as Justice Tipping said, the real heart of it is, do we get to barratry? And the answer is, well, analytically you can, if the facts go so far, but they don't, and in recognition of them not having done so it hasn't been an issue in this case so far.

Finally, the last ground of topic in respect of which leave was granted to make argument was whether the carrier had discharged the burden of showing that cargo had been damaged as a result of the collision and had excluded the possibility of damage having been caused earlier in the voyage by reason of power supply to refrigerated containers having been interrupted. It was a topic which took the carrier somewhat by surprise at trial, it not having

appreciated that the topic was raised on the pleadings. Argument was made by cargo that there had been a failure to disclose in discovery relevant documents, including what are known as the Partlow charts, which measure the temperature within containers, and the Court was asked to draw an inference against the carrier on grounds of the unavailability of those charts. In the Court of Appeal it was argued that because of the unavailability of the charts – and again there was a request that an inference be drawn against the carrier – the carrier had failed to disclose that to discharge the burden of showing that the goods were in good condition at the time of the collision and the damage to the cargo was caused by the consequences of the collision. As it happened, the surveyor representing cargo had provided a report which showed that the Partlow charts had been shown to the surveyor following the collision. So they had been seen. Justice Chambers was the Judge who spent time addressing the issue. Between paragraphs 77 and 93 of his judgment he reviews the evidence, accepts that there had been a collision, that the only available witnesses who had been on board had given evidence about power supply being interrupted after the collision, and in those circumstances was prepared to hold that the carrier had discharged the burden of showing that any loss was caused by the collision and its consequences. I am content, for present purposes, to simply submit that Justice Chambers was right, for the reasons that he expresses, and I don't wish to say anything more about that topic for present purposes.

TIPPING J:

What did the trial Judge find on this point, the same?

MR GRAY QC:

The same conclusion, yes.

TIPPING J:

And we've got concurrent findings of fact.

MR GRAY QC:

Yes.

TIPPING J:

In effect.

MR GRAY QC:

Yes. Those are my submissions, Your Honour.

ELIAS CJ:

Thank you, Mr Gray. Yes, Mr Rzepecky.

MR RZEPECKY:

I might just take a moment. In anticipation of today's hearing, I've tried to produce the nub of our case to one page which with Your Honour's leave I'd like to –

ELIAS J:

Always welcome, one page.

MR RZEPECKY:

I might add, that it's just an attempt to reach the nub quickly, by no means – we rely entirely on our full written submissions that we've already provided. Just by way of introduction, we say that Article IV Rule 2(a) is a negligence exemption, it doesn't go any further than that. It doesn't cover wilful misconduct, it doesn't cover barratry and when you read through the travaux preparatoires you can see that all the discussion is about negligence. And my learned friend has referred to the problems from – on different sides of the Atlantic where English ship owners are – had blanket exclusion clauses but the Courts in America wouldn't enforce them because they were contrary to public policy. And we say that in this case Captain Hernandez sailed over the line of conduct which is exempt under the rule and he sailed into conduct which is, which is effectively misconduct and not covered by the exemption and this case is a good example of how the rules allocate responsibility and how relatively easy it is for the parties to determine what their relative risks are. The parties agreed in this trial, prior to trial, that the decision of Master

Hernandez to take the shortcut inside the channel into Biro Shima was covered by the rule. There was no problem with that so we didn't have to deal with it apart from setting out the background facts. That is because his purpose in taking that shortcut was to try and keep up with the schedule that Tasman had set him. He was trying to make the gap at Kanmon where he had to pick up a pilot and despite the adverse weather conditions and against the fears expressed by the first officer on the bridge as to the inappropriateness of transiting that channel, he nevertheless took the risk and or course the transit lost his confidence, ordered his crew to turn to port and because he'd lost his reference on the radar and he couldn't see out of the window because of the poor visibility, he didn't realise he'd actually entered the channel at that stage and was abreast of Biro Shima Island and he piled into that island at 15 knots. His ship weighing, displacing 22,000 tonnes, it went from 15 knots to almost stopped in the water and caused catastrophic, Titanic-like rents through the hull. And he knew immediately that he was facing a very serious maritime accident and that his ship was seriously damaged. Now that, that conduct, up to that point, there's just no, there wasn't a lot of dispute about it, there was some dispute about what the master may have known or what his response should be and that was covered by evidence. But the parties more or less agreed over the subsequent elements of the misconduct and much of it was admitted by, by Tasman Orient at the time and my learned friend took you to the pleadings. They didn't call any evidence of the crew to dispute the interpretation that the respondents put on it through their witness, Captain Goodrick, and he was very firm in his view about the default of this master and his response to the serious maritime event. So both parties in fact were able to rely without having the master, or any member of the crew, on the comprehensive investigation of the Japanese Coastguard and that's a feature of most major maritime casualties. So I think my learned friend has said in his submissions that this is going to create more litigation or it's – is going to be difficulty with investigating what happened, well that's certainly not the case here. And from our collective research from all the parties, this is probably the only case of its type, where there's been such extreme misconduct in the course of navigation and

management of a ship at sea, that's come to Court, where there's been an issue under Article IV Rule 2(a). Now I –

ELIAS J:

Well it may not have been but it's the only one we know about –

MR RZEPECKY:

It's the only one we know about.

ELIAS J:

And we know about it because you tried to cover it up.

MR RZEPECKY:

Yes Ma'am and the –

ELIAS J:

Clumsily.

MR RZEPECKY:

And the good efforts of the Japanese Coastguard and one of the crew who stated that because he was a devout Catholic, he couldn't continue to lie anymore and dobbed the master in. So lucky for us. But the – in terms of the facts, this is about the most serious misconduct you could ever expect and I am sure my learned friend is not surprised that I'm saying that.

TIPPING J:

Are you referring to the conduct after the –

MR RZEPECKY:

After Sir, yes. Once he'd, once this vessel had gone past the rocks, the evidence from Captain Goodrick, and accepted I would say by any other of the expert witnesses, although he was the maritime witness, was that he should have immediately put out a mayday call, a pan call, mayday being, "I'm in distress, need urgent help", pan call meaning I'm in – I need assistance but I can talk to you, or contacted the Japanese Coastguard who were very close

in the area, they had a base not far away. Now here he was, he just piled into these rocks, his vessel was immediately listing, he got – the evidence showed that he got the crew to take soundings, he found out that he was leaking into two cargo holds, the ship had a double bottom so although he'd had a Titanic-like damage, the evidence ultimately was that the holes into the holds themselves were relatively small so that the rate of flooding might have been quite slow. He didn't know that, he just knew that there was flooding in his holds. Conventional wisdom according to Captain Goodrick is that if you have two holds, two spaces in a ship like that flooding, then there's a serious risk of instability and ultimately capsize. So for any master mariner with 35 years' experience like this one, he knew that he needed assistance fast and he knew that he was in trouble. Now his options at that point were to either steam, and I'll just use layman's terms, off to the right into Sukhano-wan, if my memory serves me correctly, a sheltered piece of water with shelving, shallow beaches where the vessel could have been beached adjacent to a Japanese Coastguard facility and where the vessel could have anchored in a sheltered place and there could have been immediate assistance rendered including extra pumps. His other option which wasn't really an option at all was to flee. He went to the left which was into the inland sea, he went as far as he could, in fact his intentions as inferred by the Court, was to join up with the course that he ought to have taken, had he taken the conventional route around Biro Shima. So he wanted to connect to that course and he literally got as far as he could it seems until he could go no further because the bow of the ship was so far down, dropped his anchor and stopped and that's a reasonable inference based on the facts – we only have his statements to the Japanese Coastguard. Now I listened carefully to the exchange earlier on the facts and that's why I don't mean to labour the point, but these are very serious facts in maritime terms, twenty eight men were on that vessel and all the plaintiff's, all the respondents' cargoes. Now the Judge found that had he not taken that step, those cargoes would not have been damaged, they would have been saved. So not only do we have the misconduct following the grounding, but we also have cargo that would have been perfectly all right, destroyed and we had a ship that's literally sailed down to its deck in the water. Now, I heard earlier an exchange where the Court asked my learned friend about what

some of the tasks onboard may well have been bona fide, they may well have been, well of course, he had to use his pumps and try and keep the vessel afloat but he mismanaged that and pumped literally the sea out because he pumped from the wrong compartment, so he didn't really put enough attention on that. By driving the ship forward into the seas, the respondents' naval architect said that he effectively increased the flow of seawater into the ship.

I also heard in the exchange earlier, that he may well have been trying to get to a safe place. Now, the safe place to the right was available within the hour. He steamed for at least two and a half hours, although there is some equivocal evidence about that, where he was sighted. The major point is that he didn't ask for help, so he wasn't going to safety, he wasn't going to meet a tugboat. Maybe his conduct might have been explained, he simply kept quiet and off he went, pumped, forcing more water into the ship, causing it to go down to the deck and ultimately it settled even further until the water got almost back to the bridge and all of the cargo, apart from the Dairy Board cargo which was heat damaged, was flooded and destroyed. Through a Herculean effort, Nippon Salvage managed to tow the vessel stern first into a bay, beach it, unload it and I understand it was subsequently scrapped because it was so badly damaged.

Where he anchored, in the Sukhano-wan, was deep and it wasn't sheltered, so he was subject to weather. The salvers had much difficulty in their work, because they were exposed to weather in the inland sea, and quite often, they had to stop work. Sometimes they had to abandon the ship altogether, because it was dangerous for them. There's an incredible difference in that decision to go to the right within an hour towards help and a shelving sheltered beach, and out into the sea, into the teeth of a gale and seas. They're not like ocean swells, but it's certainly got a reasonable fetch, so they're, I think, 35 or 40-knot winds. And we did actually plead those as part of the background in our pleading. So when, with respect, the majority says this was outrageous misconduct, it was. Similarly, obviously Justice Williams was not impressed with the conduct at all.

TIPPING J:

Are you saying, I've just glanced at paragraph 1 of your single page, that the answer to this case, the conduct, however you describe it, was not in the navigation or management of the ship.

MR RZEPECKY:

Yes, Sir.

TIPPING J:

Is that your essential response?

MR RZEPECKY:

Yes, Sir.

TIPPING J:

So you don't actually get to these words at default, neglect, et cetera?

MR RZEPECKY:

No, Sir. It was always, we argued that in the High Court and the Court of Appeal. In fact, the argument is recorded in the Honourable Justice Fogarty's dissent, but it's dealt with by Justice Baragwanath. And, in fact, it's the decision that he made, was that his conduct was not capable of being in the navigation or management of the ship. And it all relates to purpose, what was the master's purpose. And that's how the cases have allocated risk, the cases on this clause. They're all negligence cases, of course, so there's no question about the, well, not all of them, but –

TIPPING J:

Do you have a second point, if this point fails, that all that the Article protects against is what sometimes is called mere negligence?

MR RZEPECKY:

Yes, Sir. And the problem for us in making that submission are those words, act, neglect, or default, and I'll come on to that in my submissions.

TIPPING J:

You've given us a splendid warm-up on the facts, Mr Rzepecky. But I just wanted to start understanding where this is all heading.

MR RZEPECKY:

So far, the facts have been our friend in this case.

TIPPING J:

I'm not surprised. So all the Article protects against is mere negligence, for want of a better terminology?

MR RZEPECKY:

Yes, Sir. And in my written submissions, I do refer to the travaux preparatoires. I mean, the approach of the Courts, and I've referred in the submissions to *Effort Shipping Co Ltd v Linden Management SA & Ors [1998]*, and that this approach was adopted by Justice Williams. I think in *Effort Shipping*, the Court said, "Unless there's a bullseye, the travaux preparatoires isn't actually that helpful".

TIPPING J:

And is this concept of Justice Williams the bona fide concept linked in some way with the concept of purpose?

MR RZEPECKY:

It must be, Sir, with respect, in my submission.

TIPPING J:

Because it's not sort of self-evident from the judgment, I don't think.

MR RZEPECKY:

No, Sir. That notion is a notion that, and my learned friend took you to some of the cases we've cited, which we've described in our submissions as tangentially relevant. They're tangentially relevant because they describe

what the duty is of the master. They're obviously not Hague Rule cases. But we say that the duty on the master is to act bona fide in the navigation and management, so that the decisions that the master makes are for the safety of the ships, its crew and its cargo. And this concept of bona fide obviously causes the Court some trouble, because of the counter-argument that there may be a degree of uncertainty. But the principle behind that is it provided that a master acts bona fide in the situation set out in the *Star of Hope*, which is a US Supreme Court decision from the 19th Century, on where the master sacrificed cargo. So they're assessing what was the reason, why did he do it. And the Court says, well, if he is acting in good faith, if he was being honest, if he was bona fide, then we're not going to look very hard at the reasons, because a person in that situation, we're not going to double-guess them. We're not going to look at them, and run a fine rule with the benefit of hindsight. And so that's a threshold, and it's been picked up in other cases, but in particular, in the *Hill Harmony*, which I'll come on to in my submissions, where there was a submission in the Court of Appeal by counsel that the primary threshold test for the application of the Rules was, was the master acting bona fide. And I heard earlier an exchange, the Court asking my learned friend whether it may well be a helpful case, because of the term and scope. And in my submission, although my learned friend has said it can be distinguished because it's of a different economic interest, and that, no doubt, relates to the contractual relationship. It certainly is an analysis, and we say a very important analysis of the Rule. And it does aim at purpose. So just getting back to my overview, we say that this case can be resolved by looking at what these words mean in the context and purpose of the Hague Rules, and in the travaux preparatoires there is a lot of questioning, particularly of management. There was a huge amount of uncertainty and dissatisfaction with that word, and you'll see Mr Doar says, well, how do we translate management into French? It's almost impossible. And others say, well, that could be anything, if you put management in there. But the British ship owners said, well, it's not enough to put navigation. We need to put management in order to make the clause wide enough. And yet others said, well –

ELIAS CJ:

Well, isn't that because the management of the ship must be the handling of the ship, and you need navigation as well, because that's the course you set, or something like that. It does seem to me, and you'll probably come on to this, that you are going to have to, it's quite a gloss you're asking us to put on 2(a), because you're really asking us to interpret it as saying that the exception applies to any Act, and to navigation or management of the ship that's not in good faith.

MR RZEPECKY:

Yes, Your Honour. Well, we say in our submissions that we don't need to go that far. We support the Court of Appeal decision, which didn't need to go that far.

ELIAS CJ:

Yes.

MR RZEPECKY:

We do have a section in the submissions about bona fide.

ELIAS CJ:

Yes.

MR RZEPECKY:

Which is a review of that concept and the High Court. But we don't need to establish bona fide. But what we do want to establish is what the words "in the navigation and management of the ship" mean.

ELIAS CJ:

But you say they're about purpose.

MR RZEPECKY:

Yes, yes, Your Honour.

ELIAS CJ:

That it all relates to purpose.

MR RZEPECKY:

Yes, Your Honour.

ELIAS CJ:

But 2(a) can be, make perfect sense without any reference to purpose.

MR RZEPECKY:

Well in that case Ma'am with respect it wouldn't make perfect sense because it would strip the heart out of the rules which is the decision of Justice Greer in the *Gosse Millerd* because this – and this was the problem for the convention when they were negotiating because the word management is so wide, Justice Greer said in his judgment, this could be anything that affects the cargo. There are so many management issues on board a ship, anything to do with the cargo on a ship could be management so I'm going to make this distinction based on some of the earlier authorities that if it's a task simply for the cargo, then this clause is not going to cover it, even though on a strict interpretation of the words it may well. So what he was saying was that –

ELIAS CJ:

But I agree with that. That seems to me to be quite right because you have to construe 2(a) in the context of Article III.

MR RZEPECKY:

Of Article III Ma'am, yes.

ELIAS CJ:

Yes but this is different because an act in the navigation or the management of a ship need not have anything to do with the purpose with which it's being undertaken. It may simply be how the – or acts of navigation and management handling of the ship.

MR RZEPECKY:

Precisely Ma'am and it's the last part that makes the distinction here. These are not acts, with respect, of navigation and management. There was a deliberate –

ELIAS CJ:

Well they are, it's the course that you said, you said he went left instead of going right.

MR RZEPECKY:

But the issue is are they in the management and navigation of the vessel for the purposes of Article IV Rule 2(a) and for the rules and there was an amendment to try and narrow the application of the clause in the travaux preparatoires where they add in the management in navigation and the word "in" is quite important because that takes it into the rules. So we say, and it's here in my overview, he must be performing the contract of carriage. That must be the purpose.

TIPPING J:

Are you saying that it would have been different if it had seen while navigating or managing the ship?

MR RZEPECKY:

Yes Sir.

TIPPING J:

You're putting a lot of weight on the word "in".

MR RZEPECKY:

Well –

TIPPING J:

I would have thought it – but if you say there's something in the travaux that supports that well I'll willingly be led to it but it just seems a fairly refined sort of proposition.

MR RZEPECKY:

As usual Sir the travaux itself can be vague, there's just one line where they make that change. What we say though, and it's in 2 of my overview, the primary enquiry is into the master's purpose and to fall within the exemption a purpose must be to perform the contract of carriage as evidenced by the applicable bill of lading and subject to the Hague Rules. Because what we have here is a maritime venture and if the master steps out of the maritime adventure, which is governed by the rules and the bill of lading, and starts going off on a frolic of his own, he's no longer in the navigation and management of the vessel for the purpose of conducting the adventure under the auspices of the Hague Rules. He's now outside of that altogether.

BLANCHARD J:

That might be a little difficult to argue in circumstances where he was actually trying to get back on the course he should have been on.

MR RZEPECKY:

But he was doing that, with respect Sir, not for any recognisable reason in terms of navigation and management. Captain Goodrick said this is not the response of a master to a significant maritime disaster. That would have been the correct response.

ELIAS CJ:

No one is trying to exonerate him from blame in what he did. That's not the issue.

TIPPING J:

But you seem to be saying that in the navigation or in the management means that if the navigation or the management is irresponsible, it's not in the navigation or in the management.

MR RZEPECKY:

Well it would be more, rather than irresponsible it would be whether it's to further the interests of the cargo owners, the ship owner and charterers or whether it's to further the master's own interests. Because if he's furthering his own interests then everything he's doing is the total antithesis of what he should be doing, it's totally counter-intuitive which is what Captain Goodrick –

TIPPING J:

But it's just bad navigation, bad management but it's still, he's still managing the ship however badly, isn't it?

MR RZEPECKY:

Well not if he's fleeing the sea and he's not calling for help and he's doing something – he's not, it's not as if he just sat there and did nothing. He's doing something which actually causes damage to the ship and the cargo. He's forcing water into it and causing it to sink.

TIPPING J:

But what's your best case for the construction of in the navigation, the linkage with purpose?

MR RZEPECKY:

Well there has to be, the purpose has, it has to be a purpose under the rules.

TIPPING J:

Yes but is there any authority supporting this reading in of purpose of being a control mechanism for navigation and management?

MR RZEPECKY:

Well all of the cases look at purpose to some extent and again –

TIPPING J:

Well what's your best one?

MR RZEPECKY:

Well the *Gosse Millerd* is an example because there the Court looks at whether the purpose is for the cargo or for the ship as –

TIPPING J:

But that's a wholly different issue. I can't see, with respect, that as helping support this proposition.

MR RZEPECKY:

It's still a purpose related analysis.

TIPPING J:

Well it may be.

ELIAS CJ:

I wonder really whether it is purpose related or whether it's a more factual enquiry.

TIPPING J:

Well it's whether it's management of ship.

ELIAS CJ:

Yes.

TIPPING J:

If it's solely directed to the management of the cargo then it's not management of the ship. This point doesn't seem to me to have any mystique at all. It's a common sense interpretation point.

MR RZEPECKY:

The *Gosse Millerd* point Sir?

TIPPING J:

Yes.

MR RZEPECKY:

Well except that the basis of the common sense interpretation point is to look at what is required under the rules which is the Article III obligations on the carrier and Justice Greer decided that they would be stripped out if there was –

ELIAS CJ:

We agree with that.

MR RZEPECKY:

Similarly the obligation would be stripped out and that was essentially Justice Baragwanath's finding, if the master is able to go off on a frolic of his own and destroy the cargo and the ship. His purpose isn't to promote the contract of carriage or to do his best for the maritime adventure. His purpose is to go off on a frolic of his own, flee the scene and in doing that destroys the cargo which he must have known was happening. I mean the ship was sinking under him as he fled the scene and continued to sink under him before – he never ever called for help. He was reported to the authorities and they came and found him.

TIPPING J:

Well you're trying to get two controls, one through in the navigation or management and the other in through the mere negligence concept.

MR RZEPECKY:

Yes.

TIPPING J:

Is there any authority that directly says that in the navigation or in the management you're not in that if your purpose is something quite inimical to the general purpose of the venture?

MR RZEPECKY:

Yes sir, there are Sir. Perhaps a good example is the case that my learned friend referred to you under *Bulknes* with the door that was – although the Court doesn't talk, there's no analysis in terms of purpose, the outcome is that because the purpose was not related to the management of the vessel, it was for – it was so that the crewmen could access something illegal and otherwise there'd be no reason to open the door. There's no purpose so it wasn't recognisable as being for the management, in the management. Now it's the same here. Nothing he did was recognisable. Failing to call for help. Continuing to steam into the storm and pump – and force water into the vessel, none of those acts were recognisable as being in the management or navigation of the vessel because they were literally destroying it and the cargo.

McGRATH J:

But wasn't his purpose actually in the end to head to the port, the ultimate destination port?

MR RZEPECKY:

He was never going to get there Sir.

McGRATH J:

Well that's – you're the one that's talking about purpose. Was it not his purpose, ultimately, to get there?

MR RZEPECKY:

His purpose was to join up with his course so that he could ultimately lie about what had happened. Because if he blew the whistle when he was at Biro Shima then his – everyone would know he'd taken the shortcut. He had to actually go –

McGRATH J:

I understand that but in the end his purpose wasn't to let the boat sink once he got back on his original course, his purpose surely was to get to his destination as a subsidiary purpose if you like**,** subsidiary to getting first to where he thought he should be.

MR RZEPECKY:

With respect Sir it was the master's destination, not the best destination for the ship and cargo.

ELIAS CJ:

But best destination is to introduce another concept altogether.

MR RZEPECKY:

With, respect, Ma'am, it's – what he was actually doing was destroying the ship and cargo, so it was –

ELIAS CJ:

Well, I can –

MR RZEPECKY:

– no destination for the ship and cargo.

ELIAS CJ:

I can understand that the line you are drawing, which I think it might be fruitful for you to expand upon, is that this was a frolic of his own.

MR RZEPECKY:

Yes.

ELIAS CJ:

I don't see that that, and I think the case that Justice Blanchard referred to was along those lines, but I don't see that that turns on nicer concepts of purpose or intent, it would have to be something totally outside the scope of what he was engaged to do, I would have thought, not just misjudgement or even judgment that served his own purposes, it would have to be something that was a frolic of his own.

MR RZEPECKY:

Well, with respect, Ma'am, this is a frolic of his own.

ELIAS CJ:

Well, I know, you're saying that, and I think you should concentrate on that and perhaps direct us to any authorities which support that point of distinction.

MR RZEPECKY:

Well, the distinction is really between what would normally be expected to be within the, in the management or navigation of the vessel, and acts that are just so far outside of that that they're not for those purposes.

TIPPING J:

Aren't we getting ourselves into a sort of dual room for argument if we get – I would have thought navigation and management are factual inquiries, not purpose of inquiries, and the control in all this is the act, neglect or default. I think you're endeavouring, skilfully, to bring in, if you like, a second level of control, which has to be there because, I mean, if factually you're navigating or managing the ship –

MR RZEPECKY:

Yes.

TIPPING J:

– you're outside the exemption. But here factually he was navigating and managing the ship, very, very badly, no doubt.

MR RZEPECKY:

But because, if he'd taken the right-hand course and gone to shelter, he would have been navigating –

TIPPING J:

Sensibly.

MR RZEPECKY:

But this is not just a misjudgement or – what we have here is an act intentionally done. It's not misguidedly done, he's not trying to do something but just got it wrong, misjudged the situation, perhaps like the master in the *Quo Vadis,* who didn't close the air intake.

TIPPING J:

But if we concentrate on purpose, how dominant does the purpose have to be, how substantial? What about mixed purposes, mixed motives? I just can't imagine that those who drafted this had in mind a purposive control, as opposed to a factual control, from these words.

MR RZEPECKY:

I can see entirely what Your Honour is saying, but I wouldn't have thought that the people that drafted this would have thought that cargo would be responsible for what is effectively an act well outside of what –

TIPPING J:

But you see, you're still afloat on act, neglect or default. It's just, what I'm being a bit resistant to is this sort of double-headed, almost discretionary sort of – well, not discretionary, but, questions of degree. I think we should avoid questions of degree in here as much as we can. Here, you may be able to

say that this man's purpose was the dominant purpose, but there'll be other cases where purpose will not be nearly so straightforward. If purpose is the ultimate control, I would think, with respect, we may be doing this Rule a disservice.

MR RZEPECKY:

Well, it is a – there are authorities where the purp – mainly in the United States, where the Court will look at the primary purpose of what was done, and I've dealt with that in paragraph 4.9 of my submissions –

TIPPING J:

Well, I think it would be helpful, as the Chief Justice said a few minutes ago, if you took us to what you see as the leading cases on this purposive gloss.

MR RZEPECKY:

If I could take Your Honour to my bundle, volume 2, respondent's volume 2, this is a charter party case, the *Compania Sud American Vapores* –

ELIAS CJ:

What tab?

MR RZEPECKY:

It's tab 18, volume 2. And this is really what I was saying earlier about how the Court in the *Gosse Millerd*, how Justice Greer looked at it. If I could take Your Honours to page 82 paragraph 60, which is in column 2.

TIPPING J:

Sorry, I haven't quite got there yet. Page 86, did you say?

MR RZEPECKY:

Eighty-two, Your Honour.

TIPPING J:

Eighty-two, thank you.

MR RZEPECKY:

If we could go – the Court reviews the owners arguments, where they say, in column 1, "The Court must ask itself what was the primary purpose of heating the bunkers, which is identified as the act relied upon," and they then cite the *Gosse Millerd* –

BLANCHARD J:

Sorry, can you tell us what the fact of the case are, so we –

ELIAS CJ:

Well, this is another distinction between whether it's to do with cargo or ship.

MR RZEPECKY:

Yes.

ELIAS CJ:

But there's no issue here. He was navigating the ship, he was managing the ship. He was, you say, navigating and managing it to its ruin and the ruin of its cargo.

MR RZEPECKY:

Yes.

ELIAS CJ:

But we're not in this area of distinction between cargo and ship handling.

MR RZEPECKY:

Well, we are to the extent that his purpose in carrying out the acts that he carried out were not for conducting the contract of carriage.

ELIAS CJ:

But that's maybe a different argument.

TIPPING J:

You're taking purpose from the *Gosse Millerd* context into a wholly different context, and I don't think *Gosse Millerd* cases are going to help much. Now, there may be plenty of cases that will help you, but not *Gosse Millerd* issues.

MR RZEPECKY:

The problem is that most of the cases are negligent cases, so there's no question of whether what happened was appropriate or not. It's just a question of whether it was purely for cargo or for –

TIPPING J:

Yes.

MR RZEPECKY:

– cargo and the ship, so that the cargo was incidentally damaged, and this case is no different, *Compania Sud*, because the case before Your Honours is the most extreme case I've been able to find, apart from theft cases, where there's been misconduct by a master. So –

TIPPING J:

Surely the concept of purpose is inherent in the question or ship or cargo, but it's not inherent in navigation or management.

MR RZEPECKY:

With respect, it is to this extent, if the act is simply not recognisable as an act that is capable of being for navigational management, within the context of the Rules. So if the act of navigation is deliberate and wilful for the benefit of the master and which actually destroys the cargo rather than delivers it to its destination, then it's not going to be exempt.

ELIAS CJ:

It is his navigation and his management that you claim caused the loss to the cargo.

MR RZEPECKY:

Yes.

ELIAS CJ:

As a matter of fact, I just don't see how you get around that.

MR RZEPECKY:

His acts –

ELIAS CJ:

You can't say, well, because his purpose was to get out of trouble, you ignore, that it has no application.

MR RZEPECKY:

It's really a question of whether the clause applies to wilful and deliberate acts –

ELIAS CJ:

Yes, but isn't that –

MR RZEPECKY:

– rather than just negligence.

ELIAS CJ:

Isn't that in the area of barratry or some concept similar to that, rather than in the interpretation or in application of the words "navigating and managing the ship"?

MR RZEPECKY:

Well, if he's navigating for a barratrous reason, for example, if he is on his contracted course but he deliberately runs onto a sandbar so that pirates can come in and take the cargo off and the master will be paid a share…

TIPPING J:

Well, then you don't need the second limb, you're clearly liable because you don't have the protection of the act, neglect or default, if it's barratrous act, neglect or default.

MR RZEPECKY:

The problem has been, and why barratry has come into this at the stage that it has, the position of the appellant, of Tasman has been that act, neglect or default is wide enough to cover all conduct including barratry and that was, as I understand it, Tasman's position in the Court of Appeal. This was just the widest exclusion possible and it would cover all conduct.

TIPPING J:

It's not so here.

MR RZEPECKY:

It's not so here and that's their position today that the point in raising barratry, why the respondent's raised barratry in the Court of Appeal was to – because there was clearly no exclusion because of the *Leesh River* case, *The Chyebassa*, which said there's no exclusion for barratry and because of the travaux preparatoires which said, which ruled out such an exclusion and it's the – we argued in the Court of Appeal that that was, by analogy it must include all wilful misconduct including this wilful misconduct.

TIPPING J:

But if barratry within acts, neglects or defaults then I can see some point in trying to sneak out of the navigation issue but as it's no longer in there, by just a grave concession, then I don't see why we need to struggle –

MR RZEPECKY:

No –

TIPPING J:

– to have the control through navigation.

MR RZEPECKY:

It, there are some other aspects that I would like to explore though –

TIPPING J:

Of course.

MR RZEPECKY:

– in terms of the definition of those words.

TIPPING J:

What navigation or management?

MR RZEPECKY:

Yes.

TIPPING J:

But your essential proposition doesn't depend on the definition, does it? It depends on a supervening purpose or a conjoined purpose. The act is tied with a malign purpose. It's not in the navigation or management. That's the proposition I'm having difficulty with.

MR RZEPECKY:

Yes. Well if we look at definitions of those words, they are all connotations of acts with a safety for promoting the safety of the ship. It's passage through the water as a cargo carrying ship, as part of a cargo carrying venture and I can take Your Honour to the cases on that. It's difficult to see how you could say that Master Hernandez's purpose had the element of seamanship or tension in terms of conducting the ship as a cargo ship which would justify an argument that he was actually navigating at the time. Because his conduct was so poor those words just don't cover his actions and there is a –

ELIAS CJ:

Well that –

MR RZEPECKY:

– analysis in *The Hill Harmony* where they talk about navigation and define it as being an act of seamanship. There has to be a good maritime reason for the act, for the act of navigation. That's what navigation is and I think Lord Justice Hobhouse says just because the ship's going – everything that causes a ship to move through the water is not necessarily navigation. That's unhelpful within the context of the rules and he talks of, and it's at 4.14 of my submissions, at page 159 of the judgment, "'Navigation" embraces matters of seamanship. Mr Donald Davies in the article I have referred to suggests that the words 'strategy' and 'tactics' give a useful indication. What is clear is that to use the word 'navigation' in its context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. Lord Sumner pointed out, when navigation is in question, choices as to the speed or steering of the vessel are matters of navigation –

BLANCHARD J:

But that's in a totally different context.

MR RZEPECKY:

– as will be the exercise of laying off a course – "

ELIAS CJ:

And indeed that's exactly what you're complaining of here. That he steered the vehicle to the left, rather than to the right, and –

MR RZEPECKY:

But that he took those steps for his own benefit at the cost of the cargo in the ship.

ELIAS CJ:

Well let me just flag that I do not see that you can maintain the submission that he was not navigating and managing the ship. You may say he wasn't navigating and managing it bona fide in the interests of the ship owner but

then you have to demonstrate why that means that the ship owner doesn't have the benefit of IV 2(a). That the ship owner is only protected if the master is acting bona fide in the navigation and management that he is undertaking. And if barratry exists, surely that is the exception that the law has carved out and if you don't come within that, is there anything short of it that provides an exception to the exception?

MR RZEPECKY:

It was very much, and just looking at Justice Baragwanath's decision at paragraph 59, where he is applying there what I submit is a purposive approach to the rules where he says, the subsequent conduct is another matter. It can only be described as outrageous –

ELIAS CJ:

Sorry, paragraph?

MR RZEPECKY:

59 Your Honour. I can give you the casebook reference if that would help?

ELIAS CJ:

No that's fine.

McGRATH J:

I'll just ask you as you go to this. This argument is to purpose of interpretation of navigational management of the ship. You're really adopting what Justice Baragwanath said?

MR RZEPECKY:

Yes.

McGRATH J:

So this is your best case in a sense, isn't it, because no other case is cited by Baragwanath J on the point as I see it, but if there is you may want to come to it, so this is really the reasoning on which you're pinning this argument on?

MR RZEPECKY:

Yes Sir.

McGRATH J:

Right.

MR RZEPECKY:

The subsequent – sorry, it's paragraph 50. The subsequent conduct is another matter and can only be described as outrageous. It was fundamentally at odds with the purpose of both the conduct of carriage and the legislative regime designed to achieve a sensible compromise between competing interests. The Judge's conclusion was clear. None of those actions can have been motivated by Captain Hernandez's paramount duty to the safety of the ship, crew and cargo. None could have been motivated by his obligations as a master, particularly the obligation to report and take whatever steps were recommended to minimise the danger to life, to navigation and avoid the risk of pollution. All those actions can only have been motivated by Captain Hernandez implementing a plan designed to absolve himself from responsibility or blame for the grounding and lend a veneer of plausibility to his falsehood. I am satisfied that such behaviour, carried out for the selfish purposes of the master, and wholly at odds with the carriers' obligations under article 3.2 is not conduct in the navigation or in the management of the ship within the meaning of Article IV Rule 2(a) . While the conduct is less extreme than thefts by stevedores, and he refers there to *Brown & Co Ltd v T & J Harrison*, which Justice MacKinnon held not to be in the navigation or management of the ship, the point is similar. The decision was upheld on appeal and followed by Justice McNair in *Leesh River* which is *The Chyebassa*. So that's the reasoning is because the conduct is so fundamentally at odds with what the normal purpose of the master would be, or what the expected purpose of all the participants to this contract, that it cant possibly be in the navigation and management under the rules because he's destroying the cargo, he's not carrying it to its safe destination.

TIPPING J:

But thefts by stevedores has got nothing to do with managing or navigating the ship. It's not surprising it was found not be in the –

MR RZEPECKY:

Well –

TIPPING J:

I mean I don't think this has got anything to do with the point. That sort of reference. I mean –

ELIAS CJ:

What's this French case?

MR RZEPECKY:

The *Lucile* –

ELIAS CJ:

Yes, is that one that we have?

MR RZEPECKY:

Yes Ma'am, it's in the materials and I've dealt with it in my submissions as part of the application of the approach of the Courts. In that case there was a collision and the master of the *Lucile* went into port, tied up alongside and then haggled over the salvage but took no note of the fact that his vessel was taking on water and in fact played his hand too hard and the ship capsized against the wharf and destroyed the cargo.

McGRATH J:

Is this the case which Mr Gray described as commercial or nautical, is that right?

MR RZEPECKY:

Yes, because the French have this problem with trying to interpret or to translate management, they've developed these terms, faute nautique or faute commerciale and faute nautique is anything to do with the vessel, commerciale is dealing with management of the cargo and everything else and isn't covered by the exemption and the Court said that –

McGRATH J:

But that was in port because it couldn't be navigation, presumably, because the vessel was in port.

MR RZEPECKY:

With respect, there can be navigation when the ship's tied up alongside, and it can be management. It's certainly management alongside, and, in fact, the House of Lord in the *Hill Harmony* dispelled any doubt about whether actions could be while the vessel wasn't actually at sea. But in that case, the master wasn't doing, was found to not be doing his best for the cargo. He was simply, by an ulterior motive, not taking enough steps. You could contrast that with the other decision that my learned friend referred to, the *Kalamazoo Paper Company & Ors v Canadian Pacific Railway Company & Ors [1950] SCR 356* decision, where the ship had struck an object, sprung some rivets and was leaking, and the master managed to get it into a sort of shallow berth. And he estimated what the rate of flooding was, and decided that he didn't need pumps. So he took no steps, just like the master in the *Lucile*. And the Court held that that was an act in management of the vessel, not purely for cargo. So he was within the exemption. And that he was just negligent, that there wasn't any sort of ulterior motive, or intention to harm the cargo.

McGRATH J:

Was the *Rouen* French case concerned with the dichotomy between ship and cargo?

MR RZEPECKY:

No, with respect, Sir, because the steps that the master would have had to take to save the ship would have also been to save the cargo, so in the *Kalamazoo* case, which is similar –

McGRATH J:

Just before you move off the French case, could you just explain to me, because I haven't grasped it yet. In what way do you say that case assists your client's argument?

MR RZEPECKY:

Because the lack of action by the master. He's now managing the vessel alongside, which is taking on water. And he decides not to get any assistance, or any pumps. So he's exercising that management over his ship, and possibly, depending on the expert evidence, questions of navigation. So he's allowing water to enter his ship. He's not taking any steps to get assistance from salvers because he's negotiating with them and trying to get the price down. He misjudges it, and the ship rolls over because it takes on too much water.

BLANCHARD J:

What's the difference between that case and *Kalamazoo*?

MR RZEPECKY:

The difference in the *Kalamazoo* case is that the master in the *Kalamazoo* case thought he was okay. He didn't think he had to get extra pumps. The master in the *Lucile* knew that he had to get extra pumps, but was trying to haggle. The master in the *Kalamazoo* thought he didn't, but he was negligent in making that assessment. As I see it, that's the essential difference.

BLANCHARD J:

Well, the master in the *Lucile* simply got his timing wrong. He thought he didn't need the new pumps yet, and could haggle. I don't think there's much difference between the two cases, quite frankly.

ELIAS CJ:

Well, except in result.

MR RZEPECKY:

Result, yes.

TIPPING J:

Well, the difference is so subtle, the difference, if there is any, is so subtle as to suggest that the result should not differ.

ELIAS CJ:

Yes, I think that's probably right.

TIPPING J:

Which is the right result is another matter.

MR RZEPECKY:

Well, if you looked at the *Hill Harmony*, then Lord Hobhouse may well say there was no good maritime reason for delaying putting pumps on board a sinking ship, and therefore it wasn't an issue of management or seamanship. Because it's not recognisable as being an act of management when it's simply, the purpose of it isn't to save the ship. It's to save money on haggling on the –

ELIAS CJ:

Well, that's why I think that the idea, that purpose enters it, just can't be valid.

TIPPING J:

The fact that you are mismanaging the ship can't take you outside the exemption.

MR RZEPECKY:

No. Unless it wasn't your intention to manage the ship in the first place. So acts that have the appearance of management, but literally aren't for the management of the ship.

TIPPING J:

No, but omission to do something that a sensible person would do is mismanagement.

MR RZEPECKY:

Yes, Sir.

TIPPING J:

Well, these people were obviously omitting, in both cases, to do something that a sensible person would do, and it seems to me that the preferable view may be that they were both mismanaging the ship. But they were in the management of the ship.

MR RZEPECKY:

The French Court in *Lucile* appears to have looked at the ulterior motive of the master, and decided that he wasn't in the management –

TIPPING J:

Well, he was trying to get the job done on the cheap.

ELIAS CJ:

Where's the report of that?

MR RZEPECKY:

It's in our casebook, Volume 2, at tab 23. There should be an English translation behind the pink paper there.

ELIAS CJ:

Monsieur Doar, this is the very point he makes, isn't it.

TIPPING J:

Is it little iii towards the top of page 6 of the translation that the point starts?

MR RZEPECKY:

I'm sorry, Your Honours, I can't quite find it. I'll be with you in a moment. It's on page 11. I'm sorry for the delay. It's the second full paragraph. "From his perspective, the chief official of the maritime authority, head of navigational security, approaches Captain Hansen in his report, and commanding the *Ronda* of having underestimated the seriousness of the situation, of having refused help which was offered to him, of having acted as if he had only one thing in mind, which was to reduce the cost of salvage".

ELIAS CJ:

Where's the decision on this point? It seems to be a preliminary decision.

MR RZEPECKY:

It seems to be at page 12. I'm sorry. The second full paragraph towards the bottom of that paragraph, "Whereas the ship owners' representatives were present, or at least, the ship's agent, even admitting that the grounding of the ship was impossible, as the appellants admit, at least without great risk, and that the stopping up of the breach would have been particularly difficult to carry out at sea, the fact that this salvage operation was not tried or prepared, the fact the captain had no interest in the cargo, he took no valid decision, whereas he should have in his role as commercial agent and representative of the carrier, brought to bear all the skill with respect of the goods, constituted faults that affect just as much the ship as the cargo. These faults are, therefore, commercial and the ship owner must answer for them".

TIPPING J:

Well, that's very difficult.

ELIAS CJ:

So we've got that, and we've got Lord Hobhouse.

TIPPING J:

But that is a description of faute commerciale, as they would call it.

MR RZEPECKY:

They would, yes, Sir.

TIPPING J:

To, as being the operative cause, but they're saying it's constituted faults that affect just as much the ship as the cargo, meaning that, I would have thought that was faute nautique, but obviously not. It has to affect only the cargo, I would have thought, before it becomes commerciale.

MR RZEPECKY:

In terms of the *Gosse Millerd*, there's a reasonable summary of the beginning of the report, which looks like a head note. There's a commercial fault, not a nautical fault, of the captain of the ship which capsized and sunk some hours after the collision, where the captain relied only on the pumping capacity onboard, took no proper steps to avoid or delay the capsizing of the ship, neither attempted nor took any preparatory steps to do anything, took no interest in the cargo, his only worry having been to avoid the cost of salvage. The ship owner must, as a result, answer for these non-nautical faults of the captain, and make good the damage caused to those interested in the cargo and their insurers. That's a summary of what we've just been looking at.

TIPPING J:

Well, I don't find this terribly persuasive, in the light of the *Gosse* dichotomy. Just because he'd had a commercial element, it's got nothing to do with the severance, it's got nothing to do with the traditional severance between ship and cargo.

MR RZEPECKY:

I beg your pardon, Sir?

TIPPING J:

Just because it's got a commercial overtone that he was trying to save money, it's got nothing, I would have thought, to do with the traditional distinction between ship and cargo.

MR RZEPECKY:

Not the, the traditional distinction in terms of the English cases.

TIPPING J:

Yes.

MR RZEPECKY:

But in terms of this case, he wasn't, the act of trying to negotiate or trying to save on salvage wasn't recognisable as an act of the management of the vessel, and as a result, he failed to do anything. So if his fault was ignoring the ship and negotiating, then he can't be within the exemption, because his very purpose to save, not to save the ship, to save on cost, not the ship.

BLANCHARD J:

I must say I agree that it seems to me a very strange distinction.

ELIAS CJ:

And it seems to be contrary to the English authority. Where do you want to take us in terms of the first point, which is that it wasn't in navigation or management?

MR RZEPECKY:

I think it'll be worth just looking at, well, I've dealt with the *Hill Harmony.*

McGRATH J:

Is *Bulgaris & ors v Bunge & Co Ltd (1933) 45 Li L Rep 74,* is that against you on this point?

MR RZEPECKY:

Yes, and to some extent, it's even against my learned friend.

McGRATH J:

Well, do you want to deal with that, perhaps?

MR RZEPECKY:

I can deal with that, yes. *Bulgaris v Bunge*, when my learned friend talks about settled law and the prior common law cases, I understood from his submissions that he's talking about the only other case where there was an allegation of conducts which might border on what has happened in this case, and that's *Bulgaris v Bunge*. In that case, there was a charter party, and the charter party had exactly the same clause as Article IV Rule 2(a). Now, the vessel was abandoned in the Bay of Biscay in a storm, and not long after it had been abandoned and the crew taken off by another ship, a German ship came along and salvaged it, with great effort and at great risk to the sailors. It was then taken into a port. As a result, the cargo owners had to pay a share of the salvage under the General Average Rules. And they then sued the ship owner on the grounds that the ship owners' crew had wrongfully abandoned the vessel. And the ship owner relied on, well, first of all, argued that it was perfectly acceptable under the circumstances for the ship to be abandoned, and the Judge agreed with that, so it never got to the next step, which was a question of whether the conduct fell within the equivalent of Article IV Rule 2(a). But the Court was prepared to make some obiter statements about the scope of the Rule.

ELIAS CJ:

Can I just ask you, I take it that Counsel don't expect to finish today, and so that we'll then take the adjournment in the usual manner at four o'clock? Yes, that's fine.

TIPPING J:

Are you referring us now to the judgment in the *Bulgaris*?

MR RZEPECKY:

Yes, Sir.

TIPPING J:

Would you mind just reminding me what tab it is?

MR RZEPECKY:

It's tab 14 of Volume 1 of the appellant's materials.

ELIAS CJ:

It's 18 in mine.

MR RZEPECKY:

Sorry, there are two versions. 17 is the one that we want, 17, please. If I could refer Your Honours to page 81, the first column. He reviews the clause there, and says, "Now, supposing it was a breach of duty by the captain and crew of the *Theodoris Bulgaris* to desert as they did. The question is whether the ship owner would be nonetheless relieved from liability for damages for the consequence of that desertion of the ship by reason of the terms of this clause. First of all, even if it had been the grossest and deliberate and wilful desertion of the ship in calm weather, I think there would still be an act of neglect or default of the master for which, under these words, the owners would be relieved. With regard to that, I must bear in mind that it is being held that even culpable recklessness on the part of the captain or crew is vis-a-vis the owner an act of neglect or default for which under such a clause he is relieved of responsibility, and the strongest case is *Marriott v Yeoward Brothers [1909] 2 KB 987"*. And then he goes on to say further down, "The other point is whether, if this desertion of the ship was an improper desertion of the ship without adequate reason, having regard to the state of the weather or the disaster to her, whether that will be an act, neglect or default of the navigation or management of the ship. I do not want to add, and I am glad to think this will not add, one, to the many cases in which that deplorable and obscure phrase has been discussed. But I think it would be an act, neglect or default on the navigation or management of the ship. However, as I have said, it is not necessary to debate this question of law at any great length,

because I think the defendants in this case have failed to establish the first proposition on which they seek to recover damages, namely, as they pleaded that the *Theodorus Bulgaris* was improperly and unnecessarily abandoned by her master and crew".

TIPPING J:

Mr Justice McKinnon, as he was then, I take it, there was a recognised expert in this field. He seemed to think it would have been in the management.

MR RZEPECKY:

Yes.

McGRATH J:

So how does this case help you?

ELIAS CJ:

No, it doesn't.

MR RZEPECKY:

It doesn't.

McGRATH J:

I thought you said it doesn't help Mr Gray.

ELIAS CJ:

It's obiter. Is that what you say?

MR RZEPECKY:

It's obiter. So to say that there's a general rule –

ELIAS CJ:

I see.

MR RZEPECKY:

That act, neglect or default is wide enough to include wilful misconduct –

ELIAS CJ:

Yes, that's a fair point. Because if an acknowledged expert says, well, it's a point that's obscure and difficult, but this is what I think I would decide.

McGRATH J:

It's not a strong authority.

MR RZEPECKY:

It's not a strong authority, and, what's more, it's based on *Marriott v Yeoward Brothers*, which is a 1909 case with a clause prior to the Hague Rules, where the approach of the English Courts was to allow blanket exclusion clauses. And in that case, the owner of luggage had her luggage stolen, and the Judge, for the purposes of the hearing, assumed that it had been stolen by the ship owners' employees, and allowed the ship owner to rely on a clause which had act, neglect or default, not in the management or navigation, but any act, neglect or default whatsoever. And the Judge in that case took the view that the intention of the clause was to provide a very wide, it was Justice Pickford, and he says, "It is clear to me that the intention of the condition was to exempt the defendants from liability from any possible cause". That's in paragraph 7.5 of our submissions. That's totally different from the exemption in Article IV Rule 2(a), because we know that the policy behind the Hague Rules was to reach a compromise between cargo and carrier interests, and to avoid these blanket exclusion clauses that British ship owners were relying upon, which were being enforced on one side of the Atlantic in the UK, but not in the United States. So we say that *Marriott v Yeoward* is an authority that's not reliable, and if *Bulgaris v Bunge* is based on that authority, then *Bulgaris v Bunge* is not reliable either. And it would seem that, well, previously my learned friend has argued that the *Bulgaris v Bunge* decision justifies even an exemption for barratry, because it's simply so wide. And that seems to be what the Judge is saying there. It's the widest possible. And that is the textbooks that my learned friend has referred Your Honours to,

actually rely on the *Bulgaris v Bunge* case. There's no other authority that they refer to in making those statements of principle.

McGRATH J:

And the reason they do that is the close similarity of the language between the –

MR RZEPECKY:

Yes.

McGRATH J:

What the old bill of lading provision and the Hague Rules Article IV. Not precisely the same.

MR RZEPECKY:

No. It's radically different in this case. It's an extensive clause that's clearly intended to rule out any liability at all on the ship owner, and it just says act, neglect or default, any act, neglect or default whatsoever. It doesn't refer to navigation or management.

McGRATH J:

So the whatsoever, I understand, is a word of emphasis, but what's the other difference?

MR RZEPECKY:

The words act, neglect or default are the same. It's just that when you read the entire clause itself –

TIPPING J:

It's not qualified by in the navigation or in the management of the ship.

MR RZEPECKY:

It's not qualified by –

TIPPING J:

That's the essential bit.

MR RZEPECKY:

Yes, and it's clearly intended, when you read the wording, to be a clause of blanket exclusion. It's in the appellant's Volume 1 tab 13. In column one at page 994, Justice Pickford says, first of all, that a man cannot, by stipulation, excuse himself for the wrongful act of his servants unless he does so in plain and unambiguous language. And then he refers to the condition in question, which begins with these words. "The steamer, her owners, and/or charterers are not responsible for any loss, damage, injury, delay, detention or maintenance or expense during same, of or to passengers or their baggage or effects, or for the non-continuance or non-completion of the voyage by whatsoever cause or whatsoever manner". And then he goes on, he says, "If it stopped there, I would not think there could be much doubt that it was meant to protect, and did protect, the defendants from everything. I think that is quite clearly shown by the case", and he refers to Ashington in London, Brighton South Coast. And then he goes on, on page 996 where he says, at the top of the page it goes on, "And whether arising from the Act of God, King's Enemies, Restraint of Princes, Rulers or People, disturbances, Perils of the Seas, rivers or navigation, collision, fire, thieves, accidents to or by machinery, boilers or steam, unseaworthiness of the steamer, even existing at the time of sailing or from any act, neglect or default whatsoever of the pilot, master, mariners or other servants of the steamer, their owners and/or charters, or from restriction or quarantine or from sanitary regulation, it just goes on and on and on –

TIPPING J:

This was drafted in St Mary's Acts obviously.

MR RZEPECKY:

I think it's one of the clauses that Mr Doar was so annoyed about when he was negotiating with the English contingent, the UK contingent at the

convention. And then he – it includes these words, "Act, neglect or default whatsoever", and he says they're not any act unless felonious, but any act. And there is a discussion there about whether they included, whether they were supposed to be acts in the navigation and he then goes onto say, "Prima facie, I should say that any act means any act especially when it follows the very comprehensive clause that the defendants will not be responsible for loss occasioned by whatever cause or in whatever manner." Now to me, with respect, it is our submission that that is a totally clause in a totally different context to Article 2 Rule 4(a) and if Justice McKinnon has relied on that case to base his analysis of Article IV Rule 2(a), then with the greatest of respect, it's just chalk and cheese and I –

TIPPING J:

Wasn't this case much more simply answered by thieves, whether on board or not?

MR RZEPECKY:

– you don't even get to act –

TIPPING J:

– no.

MR RZEPECKY:

– neglect or default, but it just would be a question of whether they were the owners – because they were the own, the ship owners own –

TIPPING J:

– they were on board, they were likely to be crew.

MR RZEPECKY:

The Court might want to make a distinction or employees.

TIPPING J:

Well never mind that.

BLANCHARD J:

Have Justice McKinnon's remarks in *Bulgaris* been proved in any subsequent case?

ELIAS J:

He says that.

MR RZEPECKY:

No Your Honour, that – I can't find the case where they've been cited but they have been approved by English textbook writers in particular in *Scrutton* which of course he was an editor of. Now without meaning to be disrespectful, I've also referred in our submissions to a rather interesting article by Lord Roscall which is referred to in *Effort Shipping* where he talks about Justice McKinnon and to some extent Lord Justice Scrutton's attitude towards these rules and maybe informs us of why he made the disparaging remarks about the clause, but certainly shows that he was a strong advocate for complete freedom of British ship owners to contract and that he didn't like the idea of any restrictions at all, so with the greatest of respect we say, that if what my learned friend has stated to be the common law position on act, neglect or default in terms of Article IV rule 2(a), then *Bulgaris* and *Marriott* are not reliable authorities for any analysis, rather you've got to look at the rules and the purpose of the rules as did Justice Baragwanath to see whether the conduct should be exempt or not. And in fact I recall an earlier exchange where the Court sought any confirmation from an authority about the perils of relying on pre-Hague cases and many of the cases within the context of what they're dealing with, be it deviation or Perils of the Sea or seaworthiness, if it's convenient for them to use the old words, then they will. There's one case I think that my learned friend might have to referred to, *Stag Line* where there is a warning against relying too heavily on previous cases and in paragraph 7(10) of our submissions, I've referred the Court to *Voyage Charters* where the learned author says, "Although in general cases on management, remain generally applicable, cases on the meaning of navigation particularly those pre–dating the Hague Rules, need to be approached with some discernment because those cases arise in a different

context and should not be necessarily treated as material to the effect of the present exemption."

TIPPING J:

Are the vast majority, as you've said, of these navigation management cases, *Gosse Millerd* type cases as opposed to what you might call, "straight navigation" or –

MR RZEPECKY:

Almost without exception they are, they are cases where –

ELIAS J:

– the difference between Article III and Article IV?

MR RZEPECKY:

Yes, they're not *Bulgaris* or like or this case.

TIPPING J:

No.

MR RZEPECKY:

They are cases where there's been – they're all negligence cases.

TIPPING J:

Well that's not the key distinction. The key distinction in my mind is that they are all seeking to try and determine whether it's – the focus is the ship or the cargo –

MR RZEPECKY:

Yes.

TIPPING J:

– which is not an issue here.

MR RZEPECKY:

But they have done that through looking at the purpose.

TIPPING J:

Yes I understand that, but it's a rather different exercise upon which you are engaged. We've been down this road –

MR RZEPECKY:

– yes of course. Except though that in the cases, the general run of the mill cases, masters are doing the best they can, they're just negligent.

ELIAS J:

So are you – your submission to us is that the authorities are not very firm, they're quite slight and that the better course is to look at it in terms of the purpose of the rule?

MR RZEPECKY:

Yes, yes Your Honour. And that's actually what Justice Baragwanath has said. He said that there were no, no authorities on this point and that he would look at, take the purposive approach, there was nothing directly on point and he really looked at the conduct and decided whether or not the conduct, whether the intention of the rules was for that conduct to be exempt.

ELIAS J:

But how on earth could you discern that? I mean from the structure of the rules, there's a clear division between the obligations the ship owner takes on under Article III and the exemptions he gains under Article IV and Article IV can't undermine the other. But that really is the cargo navigation management of the ship divide and what is there in the rule itself that suggests that management and navigation is not just a factual determination?

MR RZEPECKY:

It's, well it – perhaps going back to traveaux preparatoires, there was an attempt to have a definition of those words, so there was no definition so you would say it's been left to the party's contracts of carriage and if they can't agree the Courts, to determine at any given case whether the action is in the navigational management of the ship, within the purpose of the rules and what we're saying in this case is to, and I know we've dealt with this, but to

deliberately destroy the cargo through wilful misconduct, to embark on a course of conduct which is a complete antithesis of performing the contract to carriage within the Hague Rules, is simply not in the navigational management. It may be navigational management, but for the master's own purpose.

McGRATH J:

In the end is it true that Justice Baragwanath in paragraph 60, gives as his reasons for saying it's not conduct in the navigational management first, but it was done for the selfish purposes of the master –

MR RZEPECKY:

Yes.

McGRATH J:

– and secondly because it's wholly at odds with Article III (2) obligations?

MR RZEPECKY:

Yes.

McGRATH J:

That's – I just have some difficulty in seeing how that really relates to purpose, I don't know if you can help with that, but that's what – if you are relying on that case, that certainly seems – the Court of Appeal decision seems to me to be your best case.

MR RZEPECKY:

Yes.

McGRATH J:

Is there anything further you can say to elucidate why those two points are at the heart of purpose in interpreting the purpose of the words, "In the navigation or management of the ship"?

MR RZEPECKY:

Well the purpose of the rules is to allocate risk. But the primary duties on the carrier who's entrusted with the cargo and his goods, to exercise – yes to

under Article III (2) to keep, properly keep, carry and care for those goods. And the exemptions under Article IV, which are just bill of lading clauses that seem to have been negotiated almost clause by clause, we can see that from the barratry clause coming out, do impinge on that obligation, but what the Courts have said is, you can't allow the exclusion under Article IV rule 2(a) to strip out any meaningful role by the carrier and that's why there's been this distinction made between cargo, navigation and management. And what Justice Baragwanath is doing limiting it further to where there's wilful misconduct which is clearly totally contrary to the performance of the obligations under Article III. It's not as if they are trying to perform them, but do so negligently, there's – you cannot recognise when you look at the conduct – there is no conduct that Captain Hernandez carried out which could be recognised as for the performance of Article III. And that is why Justice Baragwanath has said, well it's so fundamental. He says at paragraph 59, "It was fundamentally at odds with the purposes of both the contract of carriage and the legislative regime. This is deliberate and wilful acts for the master's own purposes, not for conducting the contract of carriage – and so within the rules it's not within, it's in the navigation.

ELIAS J:

Well if the rules really are about allocating risk as between cargo and carrier or whatever, are – how is, how are the ends of that distribution, which seem on the face of the rules to be in terms of handling of cargo and handling of the ship, how are they furthered by this exception in cases where the master acts equally contrary to the interests of the ship owner and the cargo handler?

MR RZEPECKY:

In that case the ship owner, the master is acting, is because the master is the agent of the ship owner, that the ship owner should bear the responsibility for his deliberate misconduct, not cargo. But you've got – let's assume you've got two innocent parties, but it's the agents of one, the agent of one of the parties that's caused the loss through misconduct.

ELIAS J:

But that's the same, that's the same if he's grossly negligent.

MR RZEPECKY:

Except that that is part of the bargain, we say cargo's accepted and cargo's insurers have accepted that the master won't, the owner won't be liable for the negligence of the master but no more than that.

ELIAS J:

Well that's your second point which you're going to get on to, yes.

MR RZEPECKY:

That's it's a negligence provision.

ELIAS J:

Is it convenient then to –

MR RZEPECKY:

Yes.

ELIAS J:

– have you finished that point now or is there anything you want to say to...

MR RZEPECKY:

The point I think I had embarked on was an analysis of *Marriott v Yeoward* and my submission on that is that those cases are not reliable and that Justice Baragwanath is correct to say there are no applicable authorities so I've got to look at the rules and apply for places of interpretation of them, those are my – that's my submission on that point.

ELIAS J:

Yes, and so tomorrow we'll look at why you say Rule IV 2(b) is confined only to an exemption for negligence.

MR RZEPECKY:

Yes. I've got to deal with that Ma'am, the bona fides point, the barratry point and the cross claim.

ELIAS J:

Thank you, we'll take the adjournment now.

COURT ADJOURNS: 3.58 PM

COURT RESUMES ON THURSDAY 29 OCTOBER AT 10.02 AM

ELIAS CJ:

Yes, Mr Rzepecky?

MR RZEPECKY:

As Your Honours please. Moving on now to part of my submissions which deals with barratry issues. It's become more of an issue since it was introduced in the Court of Appeal as an argument that we introduced to try and confine the application of Article IV Rule 2(a) on the basis that Article IV Rule 2(a) didn't cover all conduct which was the argument of Tasman Orient at the time –

ELIAS CJ:

So you introduced it did you?

MR RZEPECKY:

In the Court of Appeal. Not in the High Court.

ELIAS CJ:

No but how do you say the pleadings support the argument?

MR RZEPECKY:

I'm going to come to that in my submission.

ELIAS CJ:

All right.

MR RZEPECKY:

There's two points to the barratry point. The first one is by analogy. Wilful misconduct is simply not covered by Article IV Rule 2(a), because essentially that's what barratry is. And the second point is that if the facts as found by the High Court amount to barratry and there is no issue with the pleadings, and I'll

come onto that point shortly, then just because we haven't used the word barratry doesn't mean that this Court can't rely on that concept to agree with the – reach the same outcome as the Court of Appeal did. And Justice Baragwanath does mention barratry in his judgment, it's just that he said he didn't have to go that far.

It seems that this issue may well turn on what barratry really means, what the definition is, and looking at the cases and authorities it appears that most of the definitions are inclusive. But the, one of the most important sources of definition must be the Marine Insurance Act 1908 and that's in the materials of, our materials at tab 25 if I could take Your Honours there. Now what is here at tab 25, apart from the front page, on the second page in, is the second schedule to the Act. The significance of this schedule is that it's rule of construction for marine insurance policies and of course cargo owners and ship owners both insure themselves against the consequences and losses of barratry. So this sets out the scope of the risk that they run and it defines the term barratry as including every wrongful act wilfully committed by the master or crew the prejudice of the owner or as the case may be the charterer. And that would appear to be a reasonably broad definition by comparison to the definition that I think my learned friend might have given you in his submissions. But it's supported further by authority and I'd like to turn now to Halsbury's which is in tab 8 of our first volume. It's the second page in, at paragraph 1494, barratry of master and crew. The exception of loss or damage by barratry includes every wrongful act wilfully committed by the master or crew to the prejudice of the ship owner. There is no barratry if the act is committed –

ELIAS CJ:

Sorry it's tab what?

MR RZEPECKY:

I'm sorry Your Honour, it's tab 8.

ELIAS CJ:

My fault, 8, thank you.

MR RZEPECKY:

It's the second page in on page 8. So the exception, it just repeats really what's in the Marine Insurance Act. There's no barratry where the act is committed with the sanction or privity of a ship owner. To be guilty of barratry the master must have deliberately violated his duty to his employer and acted against his better judgement. An act of mere negligence or mistake does not amount to barratry. A master's motive is, however, immaterial and it may equally be barratry whether he intends to benefit himself and deceive a ship owner or whether he seeks to advance a ship owner's interest. And then there's some examples of where there – barratry where there's deviation for smuggling but –

ELIAS CJ:

Do we have these cases that are –

MR RZEPECKY:

Referred to by –

ELIAS CJ:

Yes, in 7 and 8? They seem to be contrary to the contention that you are advancing? Footnote 7 and 8.

MR RZEPECKY:

Well it says here the master's motive is immaterial and it may equally be barratry whether he intends to benefit himself or deceive a ship owner, whether he seeks to advance a ship owner's interest. I don't take that to be against my contention if it's simply a question of a wilful act committed to the prejudice of the owner.

WILSON J:

Is it your submission that what we have here is a fraudulent deviation?

MR RZEPECKY:

No Your Honour. Nothing to do with deviation. That is just an example of what it – in Halsbury's that's an example of what might amount to deviation.

McGRATH J:

Did the opening words, the exception of loss or damage by barratry, what's the context we're dealing with here? What's the rule to which it's an exception?

MR RZEPECKY:

I don't think it's –

ELIAS CJ:

The bill of lading?

MR RZEPECKY:

It's a bill of lading issue and it might be, I might be able to further clarify by coming onto the judgment, the authority that His Honour Justice Blanchard mentioned yesterday which is the *Compania Naviera Bachi v Henry Hosegood & Co Ltd* and I have some copies of that judgment, we managed to obtain a copy overnight. I wonder if I might hand that up? As I recall it, we may have discussed this in the Court of Appeal as well. Now this case occurred during a Spanish civil war and a ship was requisitioned, or seized, there was a notice of seizure by the Republican government while the ship was in England and the crew balked at that because they hadn't been paid so they took action to frustrate the working of the ship so that the receivers of the cargo couldn't get their cargo and the receivers ultimately took proceedings against the – I think the owners might have sued the receivers, the receivers sued the owners for the lost costs and the owners counter-claimed for unpaid freight. But the issue really related to an exception in the charter party and if I could turn to page 193, at about paragraph G, where the Judge reviews clause 29, the steamer shall not be liable for loss or damage occasioned by barratry of the master or crew. So that's the exemption or

exception that the Court went on to apply and then further on page 194 about halfway down, taking those exceptions in order, the first exception which is claimed is that the ship owners are protected because the extra cost of discharging was due to the barratry of the crew, and that was of course the crew not complying with their, the lawful orders. It is plain that barratry can be committed by the crew, indeed there have been cases where four or even one of the crew who has obtained authority, has been found to have committed barratry and where it has been found that the owners are entitled to recovery as for barratry, it is true that in this particular case barratry is used in charter party and not in an insurance policy, but the meaning is the same in both. The matter is discussed somewhat fully in Chalmers Honorary Insurance and a digest of cases is given at page 161. And then –

TIPPING J:

It doesn't necessarily follow that barratry, well the meaning might be same in charter parties and insurance policies, is exactly the same for the purposes of the Hague Rules.

MR RZEPECKY:

There's no indication that it would be otherwise though.

TIPPING J:

Well I think there are indications in the Hague Rules as to what barratry amounts to and I would suggest for your assistance please, that Article IV bis which talks about servants, and article V is it, V (e) –

MR RZEPECKY:

Yes.

TIPPING J:

– makes it clear that barratry, for the purpose of the Hague Rules, is either intention or the sort of recklessness with knowledge that damage would probably result.

MR RZEPECKY:

Those rules of course are amendments brought in in 1966, a long time after the Hague Rules were originally drafted.

TIPPING J:

Yes. But that doesn't seem to, that doesn't, to my mind, matter.

MR RZEPECKY:

But the, they're also definitions of recklessness, specific to those particular exempt – limitation clauses, but barratry itself has a much wider scope than that, than those clauses.

TIPPING J:

But it would be very odd if the definition of what is effectively barratry, vis a vis servants or agents of the carrier, were different, vis-a-vis, the carrier itself.

MR RZEPECKY:

The distinction is this. Those clauses relate to acts by the named parties, either the servants or the carrier itself against the interests of the cargo owners directly. So it's a limitation on the, on how that limitation might apply if there's a deliberate act against the interests of the cargo owners, but barratry has a much wider meaning and as set out in the Marine Insurance Act, it's to the prejudice of the owner or as the case may be the charterer.

TIPPING J:

But isn't the master a servant or agent of the carrier?

MR RZEPECKY:

Yes sir.

TIPPING J:

Well isn't therefore in Article IV bis, a fairly good indication as to what is outside the scope of 4.2(a) and with the consequence that if it's not there it's in 4.2(a)?

MR RZEPECKY:

With respect, no sir, because those they're specific limitation provisions that are quite separate to Article IV Rule 2(a) and if barratry is an exception and I think the *Leesh River* case was related to the original Hague Rules not the amended, where barratry was, where the Court held that barratry wasn't an exception, it wasn't necessarily defined in that way.

TIPPING J:

But if barratry is an exception to the exception as I think –

MR RZEPECKY:

Yes sir.

TIPPING J:

– as I think we're all proceeding on that premise, what I'm putting to you is, do we not find a very cogent definition of what amounts to barratry in Article IV bis 4?

MR RZEPECKY:

It's capable of amounting to barratry but it's not the only definition of barratry and barratry seems to have a wider scope and that is wilful, wilful acts which are contrary to the interests of the ship owner as set out in the Marine Insurance Act, otherwise –

TIPPING J:

So you're saying that, you're saying that this is not an exclusive definition of barratry?

MR RZEPECKY:

No sir, in fact it doesn't use the word barratry either.

BLANCHARD J:

But as Justice Tipping says, it would be very unusual if you had something which was a definition of barratry in effect in some of the rules but then you took the – then you implied an exception for barratry into another rule and gave it a wider meaning.

MR RZEPECKY:

What I –

BLANCHARD J:

– in other words, isn't it quite likely that what the international community has done is to negotiate their own version of barratry in the amendments to the rules?

MR RZEPECKY:

They have – it's more reckless or wilful conduct in relation to cargo, into the actual cargo itself.

TIPPING J:

This is a definition of wilfulness?

MR RZEPECKY:

Yes.

TIPPING J:

Wilful is an inherently slippery word.

MR RZEPECKY:

Yes Sir.

TIPPING J:

And as my brother says, for better or for worse Article IV bis 4 is for the purposes of the rules, effectively what is regarded more generally as wilfulness.

MR RZEPECKY:

Yes sir, that's an entirely, but it doesn't rule out a wider definition of barratry in Article IV Rule 2(a) which would make Article IV Rule 2(a) apply to negligence only and not wilful misconduct – because it's a negligence exclusion.

BLANCHARD J:

In fact you were interrupted before you got on to the content of the bottom half of page 194 in *Compania Naveria Bachi* and what is being said by

Mr Justice Porter there is quite close to what's now in the rule. I'm referring to the piece below the quotation from Mr Justice Hamilton.

MR RZEPECKY:

Yes Sir.

BLANCHARD J:

He tightens it, Mr Justice Porter seems to tighten it up a bit. "It must be a wilful act, deliberately done and to the prejudice of the owners."

MR RZEPECKY:

Yes Sir.

BLANCHARD J:

And then he says skipping some words, in the next sentence, "If in fact there is an intention to do an act which will cause injury." Now that's quite close to within intent to cause damage or recklessly with, and with knowledge that damage would probably result.

MR RZEPECKY:

The intention is around the act, not necessarily the damage, so there can be an intention to carry out the act separate to and the damage is consequential –

McGRATH J:

Knowing there's a risk and taking it nevertheless.

MR RZEPECKY:

– yes and taking, running, deliberately running the risk, it's also consistent with somebody – that a person that intends the natural consequences of their actions. Yes it is closer to the IV bis but not exactly the same as.

BLANCHARD J:

Depends on how you interpret what the Judge was saying.

TIPPING J:

If we're working on what is the position for the purposes of the Hague, well I would have – needed some persuasion that we shouldn't go with what is in the Hague Rules vis-a-vis, what appears to be this subject. Why do we need to go outside the rules themselves when it's fairly clear from the dual references in the two places as to what those drafting this intended to be barratry or the way they wished barratry to be expressed.

MR RZEPECKY:

It could also be characterised as reckless with deliberate conduct in relation to the cargo, but not barratry generally because it's not acts in – as defined in the Marine Insurance Act to the prejudice of the ship owner, but I can see that where cargo is damaged there would be some prejudice to the ship owner as well but there is that distinction.

McGRATH J:

Your point as I understand it that you've developed into this dialogue with the bench, is that the words of Justice Porter, "Intention to do an act which will cause injury" can be equated to the words of Article IV bis, "Recklessly and with knowledge that damage would probably result", that's – so you do –

MR RZEPECKY:

Yes.

McGRATH J:

– your argument does relate it back to the Hague Rules doesn't it, if I understand it?

MR RZEPECKY:

Yes it's, it's a –

TIPPING J:

Oh well you and I aren't in any state of difference then Mr Rzepecky?

MR RZEPECKY:

I can see how the two are similar.

ELIAS J:

But you – then you are not contending for a wider definition?

MR RZEPECKY:

Another way of looking at it is if the drafters of the rules had decided that there should be a narrower definition, they could have added it to Article IV Rule 2(a) rather than left the common law rule in place which is that barratry is not an exception to – that barratry is not accepted under the rules. If barratry under the rules isn't an exception, then why do they even need to put those clauses in IV bis. You might say well –

ELIAS CJ:

Everyone accepts that it is an exception to the exception. You're pushing against an open door here.

MR RZEPECKY:

So then why narrow what has previously been the exception. If they'd wanted to narrow it to the same as IV bis they would have done that but –

ELIAS CJ:

Well then you are saying it's a wider definition than in IV bis.

MR RZEPECKY:

Yes I am, yes, sorry Your Honour. So if they'd wanted to narrow it in the same way then they would have done that specifically. Instead they've just left the common law in place.

ELIAS CJ:

I also wonder whether you don't need to look at the further statement made by Porter J which emphasises that if there was barratry, was there loss by barratry, because again there maybe mixed causes here. It's quite clear if an intention to wreck the ship is an issue but if there are mixed motives, as we discussed yesterday, about the way he preserves the ship, which is really

what seems to me to be an issue here, then can you say that the loss was by the barratry alone.

MR RZEPECKY:

In this case, in our case, the case that we're arguing today, that would be, based on the findings of a High Court, that would be –

ELIAS CJ:

You just say it's a question of fact?

MR RZEPECKY:

It's a question of causation and that the conclusion in the High Court was that those acts by Captain Hernandez caused the damage to the deck cargo. That it wouldn't have been damaged –

ELIAS CJ:

Yes but not all of those acts were acts of barratry. They were not acts that were seeking deliberately to wreck the ship or to cause damage.

MR RZEPECKY:

Or as my learned friend said, the Nelsonian blindness which is I'll do this and the ship's in peril but I'll do it anyway. And those, the failure to call for help and continuing to steam at full speed into a storm and anchoring in open water, those were the issues, those were the acts complained of that were wilful acts for his own purposes. There's no mixed causation issue there and those are the acts which caused the loss because they caused the ship to effectively be sailing under the waves.

ELIAS CJ:

Well why did –

TIPPING J:

You can still argue that this conduct was reckless and –

MR RZEPECKY:

Yes Sir.

TIPPING J:

The problem there is the pleadings and the absence of findings of fact.

MR RZEPECKY:

Yes Sir. It's just a question of whether, well as I said there's two limbs. One is the scope of conduct that is exempt under the clause and the other is whether this is in fact barratry. We're not saying that we need to establish barratry in order to succeed on the arguments that were successful in the Court of Appeal but looking the pleadings, perhaps if I could take Your Honours to volume 1 and there are several versions of the pleadings which are very similar on each point. If I could take Your Honours to tab 5, page 8, it's 43 of the case. At paragraph 3.2 Captain Hernandez conduct following the grounding referred to in paragraph 3.1 was intended to allow him to misrepresent and lie about the true circumstances of the casualty so as to absolve himself from blame and in particular hide his reckless decision to transit the inside channel of Biro Shima in order to take a shortcut route as referred to in paragraph 2.0. So although that's a pleading of intention it's certainly also conduct that's contrary to the interests of a ship owner –

TIPPING J:

But it's not a pleading of the right sort of intention?

MR RZEPECKY:

Well we go on to say that at paragraph 3.4, it is misconduct referred to in 3.1 and 3.2 as a result that the condition of the ship and the amount of flooding into the hulls was significantly worse and –

TIPPING J:

But you can't expand the allegation.

WILSON J:

Do you accept that in terms of the intention of the master following the grounding, you are bound by your pleading at 3.2?

MR RZEPECKY:

Yes Sir. That was – yes Sir.

TIPPING J:

There's no other statement of relevant intention in the pleading?

MR RZEPECKY:

No Sir.

TIPPING J:

Right. Well can you please elaborate then how that is a pleading of a relevant intention for barratry?

MR RZEPECKY:

Because when you take the pleading as a whole he's embarked on conduct that's going to – contrary to his duty and contrary to the interests of the ship owner, for his own purposes, which is –

BLANCHARD J:

Did you anywhere plead that he knew that his action was going to cause damage or that he was reckless about that?

MR RZEPECKY:

No we just referred to misconduct throughout the pleading. It's – where we do, we just, where we refer to his, the closest we could say is that his decisions weren't bona fide, as again intentions, but no we haven't pleaded a recklessness pleading, this was not a recklessness pleading.

McGRATH J:

You're not pleading a state of mind as to recklessness, I think that's the point?

MR RZEPECKY:

No but there was, it's clear though that a master mariner in his position would know when he embarked on his course of conduct –

BLANCHARD J:

Well that may be so but it's a question of what you pleaded.

MR RZEPECKY:

Yes Sir. We haven't pleaded.

TIPPING J:

Well, this could have major ramifications to the tactics at trials. I mean you can't ask us, I don't think, unless you can persuade us differently, to make in effect findings of fact in this Court for the very first time which aren't even pleaded.

MR RZEPECKY:

No Sir and I'm not proposing to do that.

TIPPING J:

Well how can you possibly rely on an allegation that this was barratry?

MR RZEPECKY:

To the extent that if barratry isn't within Article IV Rule 2(a) and the definition, the wider definition includes wilful misconduct, then that's a strong indication that the clause itself only relates to negligence and whether this was barratry or wilful misconduct or recklessness, it certainly, the conduct wasn't negligence. It was worse than that.

ELIAS CJ:

But that's as to, that's as to the consequences but as to appreciation of the risk there's no allegation.

MR RZEPECKY:

Only in the evidence. There's evidence from Captain Goodrick that this master would have known that embarking on this course of conduct he was destroying the vessel.

ELIAS CJ:

Yes but it's not in the pleadings.

MR RZEPECKY:

No it's not in the pleadings.

ELIAS CJ:

If it's not in the pleadings then your opponent doesn't know that he must call the master or deal with the allegation distinctly in some other way?

MR RZEPECKY:

Yes Your Honour and, you know, he was already facing an allegation that the master's conduct wasn't bona fide and decided not to call the master or any member of the crew in relation –

WILSON J:

Well in 3.2, as I read it Mr Rzepecky, is quite clearly an allegation of intention to obtain personal benefit.

MR RZEPECKY:

Yes Sir.

WILSON J:

And surely the ship's interests were entitled to make their decision as to how to conduct their self at trial on the basis that that was the alleged intention post –

MR RZEPECKY:

Yes Sir.

ELIAS CJ:

And Halsbury's says that's irrelevant.

MR RZEPECKY:

As does the *Hosegood* decision.

ELIAS CJ:

Yes.

BLANCHARD J:

Your best case is probably *Mentz, Decker* but it would seem this morning when Mr Justice Porter comes to refer to that he then seems to qualify what is said in *Mentz, Decker*.

ELIAS J:

And it was in the very different context.

MR RZEPECKY:

It's still, though, with respect, in Justice Porter's exposition there of what barratry – it's still – it's the intention to cause the act which he's talking about, it's not necessarily the appreciation of the injury.

TIPPING J:

Well that's the respect in which Mr Justice Porter may have elaborated on what Mr Justice Hamilton said in *Mentz, Decker*.

BLANCHARD J:

When you read *Mentz, Decker* the facts are very interesting, it is quite clear that on the occasion on which this ship got into its final trouble, he was doing exactly something which on a previous occasion had caused trouble, which he'd managed to get out of and I, I just wonder whether Mr Justice Hamilton in expressing it the way he did, was perhaps influenced by those facts, though

he brings them out in the facts without bringing them out in the statement of law, but Mr Justice Porter then tightens it up.

TIPPING J:

And Mr Justice Hamilton's judgment was ex tempore.

BLANCHARD J:

They were both ex tempore.

TIPPING J:

The second one was after an interval of several days, wasn't it?

BLANCHARD J:

Well you may be right.

ELIAS J:

Right, that's a nice technique

MR RZEPECKY:

Yes I've, I wasn't able to obtain *Mentz, Decker*, but we did get a copy of a briefer version of it but not the version that has the, unfortunately the barratry, so unfortunately I haven't been able to read that to the extent I'd like to.

BLANCHARD J:

Is the version reported in the Kings Bench Reports, a briefer version?

MR RZEPECKY:

Yes, yes Your Honour. It's only two pages and it's about deviation by the look of it. The only other place where there's clearly, where there's evidence of appreciation by the master that he be causing significant damage to the cargo and the ship in what he was doing, was in Captain Goodrick's evidence. I was proposing to take the Court to that but there isn't – I can't say that there's a consistent pleading point, although the facts in the pleading and the evidence of Captain Goodrick add up to wilful misconduct to the advantage of the master and against the interests of the owner and at that level, which would appear to be supported by the definition in the Marine Insurance Act, there's a wilful act. And the findings in the High Court and the consistent findings in the

Court of Appeal are consistent with recklessness – this is – I don't think the appellant or any Court looking at this case has viewed the master's conduct as mere negligence, it's more serious than that and that's the way the case has been run from the very outset. But it's been run on the basis that his decision to do what he did wasn't bona fide and therefore not in the navigational management of the vessel.

TIPPING J:

Let us assume that you, that this either isn't barratry or you can't argue it's barratry, can you argue that it's nevertheless outside the exemption?

MR RZEPECKY:

Yes Sir.

TIPPING J:

Yes well I would have thought –

ELIAS J:

Well that's your bona fide argument is it?

MR RZEPECKY:

There's the point I raise yesterday which because of the quality of these acts, they couldn't possibly be in the navigational management of the ship, within the rules –

TIPPING J:

Yes there's that one.

MCGRATH J:

It's Justice Baragwanath's point?

MR RZEPECKY:

Yes, so that's, that's been our main argument and –

MCGRATH J:

Yes. Did you run – you ran that argument directly in the Court of Appeal?

MR RZEPECKY:

Yes and we argued that in the, in the – we argued that this wasn't capable of being in the navigational management in the High Court as well –

TIPPING J:

The bona fide point was associated with that argument –

MR RZEPECKY:

Yes.

TIPPING J:

– wasn't it?

MR RZEPECKY:

That's right.

TIPPING J:

Now let's assume that argument too goes against you. Let's assume.

MR RZEPECKY:

I haven't had an opportunity to discuss the bona fide point with you –

ELIAS J:

No he's coming on to that.

MR RZEPECKY:

– I was going to come on to that, yes, but if that comes against me then I would be left with arguing that this is a negligence provision and that it doesn't go any further than that. I think what my learned friend is saying is that it's negligence, super negligence –

TIPPING J:

Up to barratry, but not including barratry?

MR RZEPECKY:

– yes, it's negligence plus.

TIPPING J:

Yes.

MR RZEPECKY:

Or super sized negligence.

TIPPING J:

Well it's any act or conduct short of barratry?

MR RZEPECKY:

Yes.

TIPPING J:

That's what he says. Now that seems to me with respect, to be, at least on its face, a clear principled line –

MCGRATH J:

Yes.

TIPPING J:

– on which to interpret –

MR RZEPECKY:

Well –

TIPPING J:

– on which to interpret IV 2(a). Now that's where I want your help, at some stage.

MR RZEPECKY:

I could do that now. I would have – in my submission, it's – as far a line is concerned, it's, it's – it would be a more appropriate line or more discernable line to identify what conduct was negligent and any conduct beyond negligence –

ELIAS J:

But that's your additional point that you're going to come on to?

MR RZEPECKY:

But in dealing with the line, the line is negligence and that is a discernable line.

TIPPING J:

But the line is mere negligence?

MR RZEPECKY:

Yes, there's no need to go any further than that.

TIPPING J:

So gross negligence is outside the clause?

MR RZEPECKY:

Well no, but I don't see that there's a, there's not a huge distinction between negligence and gross negligence –

TIPPING J:

Oooh, oooh.

MR RZEPECKY:

– it's the impact more than anything, but you're not on to recklessness.

TIPPING J:

Well there's objective recklessness and there's subjective recklessness. You see this is where the line –

ELIAS J:

We don't want to go there.

TIPPING J:

– is apt to be so slippery unless you draw it at barratry. I don't think, with great respect, you can say that there's no, that mere negligence and gross negligence aren't, aren't – well they're both negligence but they are demonstrably different qualities of negligence.

MR RZEPECKY:

Well the, when the clause was discussed in the travaux, there was discussions about negligence, negligence navigation and that's at pages 148 and 149, but it's not clear from that whether that's – was the only, but it's certainly they appear to be discussing negligence. Justice Baragwanath in his decision at paragraph 50 –

ELIAS J:

Are you now coming onto – as I understand it, you've probably finished what you're saying about barratry?

MR RZEPECKY:

Yes.

ELIAS J:

And you're coming on to –

MR RZEPECKY:

Negligence.

ELIAS J:

– your fall back positions of negligence and you want to –

MR RZEPECKY:

Bona fides.

ELIAS J:

– say something more about bona fides?

MR RZEPECKY:

Yes. In terms of negligence, Justice Baragwanath considered at paragraph 50, I can take Your Honours there, that it was capable, the words, "Act, neglect or default" were capable of a narrow interpretation or a wide interpretation. He says at paragraph 50, "What is the true construction of that subclause? It can be read broadly as in *Marriot v Yeoward* or narrowly so that 'Act... or default' are read ejusdem generis with 'neglect' and are not extended

to reckless, let alone wilful, misconduct; and it can be read purposefully in the light of other provisions of the Rules" and then he goes onto talk about deviation. So really it's negligent acts that we're talking about.

ELIAS J:

But neglect isn't the same thing as negligence is it?

MR RZEPECKY:

I didn't hear that sorry Ma'am?

ELIAS J:

Is neglect the same thing as negligence?

MR RZEPECKY:

Neglect and default are negligent, one is an act the other's omission. Neglecting to do something is admitting to do it.

ELIAS J:

But you're saying that it has the meaning that it's only concerned with negligence?

MR RZEPECKY:

Yes. Well that's a possible interpretation. It could be wider, it could be narrower, that's what the Judge is saying at paragraph 50, that he could take a wide or a narrow interpretation of it and as it's an exclusion clause and the approach of the Courts has been to give it as limited interpretation as possible, then it should be a wider – it should be a narrower interpretation so that it does only relate to negligence. Certainly the cases all deal with negligence so they all talk about negligent conduct and some of the textbook writers also talk about negligence or gross negligence but they don't go any further than that. I've referred to *Davies & Dickey,* although –

ELIAS J:

Can't you neglect to do something recklessly, just as you can act either negligently or recklessly?

MR RZEPECKY:

Yes Ma'am.

ELIAS CJ:

So, I mean, isn't that the natural of this, that it isn't talking about degrees of culpability, it's just talking about the fact of an act or a failure to act, and is quite neutral on the intention accompanying the act.

MR RZEPECKY:

Well, neglect and default has been defined in cases as being synonymous with negligence. So in my submission, that means negligence. To add "act", why would you have neglect or default? You may as well just put "act", any acts.

BLANCHARD J:

But gross negligence is, as somebody said, is just negligence, and there's always been some doubt in English law about whether it is, in fact, a category of its own. We also have to remember that we're dealing here with an international instrument, and we have no knowledge of what kinds of divisions other countries might or might not make in relation to negligence. I think probably we could accept that other countries all recognise the concept of negligence, but do they recognise any concept of breaking it down into divisions?

MR RZEPECKY:

That's not, I haven't looked at that, Sir. The *Quo Vadis* is an example of how the Dutch Courts have approached the application of the clause, and similarly, the *Lucile* case is an example of how the French have made a distinction.

BLANCHARD J:

But that was a completely different kind of distinction.

MR RZEPECKY:

That's based on it being not, yes, Sir.

TIPPING J:

Justice Baragwanath's thesis, as I understood it, was that there was here a class, that's being generous if you like.

MR RZEPECKY:

Yes, Sir.

TIPPING J:

And that all members of the class had connotations of negligence. But I have difficulty discerning that class. Acts, omission or default, I mean, where do you read the overriding control of negligence from?

ELIAS CJ:

That's what I was trying to say. But I couldn't see that.

MR RZEPECKY:

As I say, most of the cases speak of negligence when they talk about this clause. Even the judgments in the *Bunga Seroja* in the brief review that they do.

TIPPING J:

Well, they would. Because most cases will be cases of negligence without any varnish.

MR RZEPECKY:

That is the difficulty that Justice Baragwanath identified, that this was an issue where there was no precedent. So he was looking at general principles. He goes on at paragraph 55 to say that the clause shouldn't be read so widely as to render meaningless the obligation of the carrier under Article III.2, and decided that this conduct was beyond the pale, so it was render that meaningless. Whereas negligent conduct, obviously, because of all the other decisions, doesn't go that far. And that is a clue as to why he imposed a narrow interpretation on it. But I'm not submitting that the words are narrow.

But I am saying that we support Justice Baragwanath's view that they can be narrow or wide.

TIPPING J:

Well, I think they should be read down so as to exclude barratry. But the question is, should they be read down any further? That's really the essence, isn't it?

MR RZEPECKY:

Well, we say, because it's an exclusion clause, they should be read down to exclude this type of conduct the Court has been dealing with, the Court of Appeal dealt with the outrageous conduct of the master. They should be read down to not exempt the carrier from that conduct, and place the liability and responsibility for that on the innocent cargo owner.

ELIAS CJ:

I thought you were arguing that they should be read down as confined to negligence.

MR RZEPECKY:

Yes, yes, Ma'am. If the master was doing his best under difficult circumstances, then the Court wouldn't look at the reasonableness of what he was doing, or whether he'd been negligent, because it would be exempt. And that seems to be a part of the rationale for the Rule. And that, I've referred in my submissions to the statement by the International P & I clubs. There's a brief copy of that.

ELIAS CJ:

What if you have a master who's drunk?

MR RZEPECKY:

I'm sure that never happens, Ma'am.

ELIAS CJ:

But where does that fit within your analysis. You said, “doing the best he can under difficult circumstances”.

TIPPING J:

That’s self-imposed.

MR RZEPECKY:

I think that’s the answer.

ELIAS CJ:

Is that within the exception?

MR RZEPECKY:

No, because he wouldn't be, he would have put himself in such a state that he couldn't competently manage the ship or navigate it.

ELIAS CJ:

Really?

MR RZEPECKY:

It wouldn't be negligence. It would be deliberate misconduct by the master.

ELIAS CJ:

So you’d exclude from the exception all deliberate misconduct?

MR RZEPECKY:

Yes, Ma’am. In fact, he’d be committing a crime. I mean –

ELIAS CJ:

It’s not barratry though, is it?

MR RZEPECKY:

Well, I think it possibly would be, to be drunk in charge of a cargo ship. Well, maybe not, because you're not, I don't see where the advantage is to the person that's drunk, but it's certainly against, it's contrary to their duty and it's contrary to the interests of the ship owners. So you're almost there. It's pretty extreme. It's very serious misconduct, obviously.

TIPPING J:

So would your line require, would your line mean that gross negligence was covered by the exception?

MR RZEPECKY:

Yes. But nothing more than that.

BLANCHARD J:

We're getting into very difficult territory here, because you can take all sorts of examples. You can take a master who is suffering from some psychological abnormality, or is going insane, or who is perhaps realising it, perhaps not realising it, temporarily incommoded by some illness which is affecting his judgement. We'd have to start drawing lines there. What was and what was not misconduct.

MR RZEPECKY:

That may well be negligence. If he didn't –

BLANCHARD J:

Well, he might not have appreciated it, of course.

MR RZEPECKY:

He might not even be negligent. But if somebody was going mad and committed barratrous acts, that wouldn't mean that it wasn't barratry.

BLANCHARD J:

Well, that's if it's barratry. If this is barratry, we're not having to worry about it. What we are worrying about is something that you would have us fit or slide in between negligence and barratry.

MR RZEPECKY:

Well, in *Davies and Dickey*, which is in tab 6 of our first volume, and I accept that it's a very general statement, but it says that "if the goods are damaged or lost as a result of negligence in the navigation or management of a ship, the carrier avoids liability, however gross the negligence on its employee's part. To succeed in attracting the protection of Article IV Rule 2(a), the carrier does not have to prove negligence by express evidence of every element of the event in question. It is sufficient that the Court be judicially satisfied of the negligence by inference from other evidence". And then he goes on to say, "It must be in the navigation and management", and then he goes on to say at the second paragraph, "most of the litigation has been concerned with the meaning of the phrase 'in the navigation or management of the ship'", and that there are many tests. But certainly, Professor Davies is talking there about negligence or gross negligence. He's not saying even wilful misconduct would be, he doesn't talk about barratry, either, I accept. But –

McGRATH J:

Your argument on negligence faces problems, I suggest, with Mr Gray's structural argument in connection with the Rules, that the Rules are intended to lay down obligations on ship owners within the sphere of their control.

MR RZEPECKY:

Yes.

McGRATH J:

Rather than some of the subtleties of just how bad the master's conduct might be. What do you say to that?

MR RZEPECKY:

Well, it's a little inconsistent in one way, because management of the cargo, of course, is not, is at sea, is not within the sphere of the carrier's direct control, and yet the carrier remains liable for that if the acts are specifically for the cargo. But when the Rule was drafted, that wasn't, the natural effect of the Rule was that any management of the ship that affected the cargo was going to be exempt, and Justice Greer in his decision, identified that as a real problem with the Rule, because there was no discernable line. And so he started to interpret Article IV Rule 2(a) in a restricted way. So there is that issue, where the owner still remains liable for actions which are outside his direct control.

McGRATH J:

So you're really saying that the structure that Mr Gray has put to us isn't really there when it's been broken down by Lord Justice Greer and others?

MR RZEPECKY:

No, and by other judges, for example, Justice Chen, who's a very experienced maritime Judge, although there's not a lot of discussion as to why he clearly said, well, this is not navigation or management if you're doing it for this purpose.

McGRATH J:

So you're back to those cases, yes.

MR RZEPECKY:

And as Professor Davies says, the main issue is whether it's navigation or management, and there are a lot of cases on that point, trying to identify that. But as far as control by the ship owner is concerned, I think that was only one part of it. Another part was not second-guessing the master, if he's done his best under the circumstances. But if he hasn't done his best, then yes, there is liability, and we say that should be shared at home with the ship owner, not the cargo owner. The cargo owner has agreed to accept negligent misconduct, but not wilful and deliberate conduct that leads to the destruction

of the cargo owner's property. I don't think I can take that, unless I can be of further assistance on that point. I had some more submissions on the bona fides issue. I don't think it really developed that, particularly. But it is in my submissions in some detail. It was, as Your Honours have heard, the basis of Justice Williams' decision, but not relied upon by Justice Baragwanath. If Your Honours accept that Justice Baragwanath's decision was correct, then there's no need for us to really rely on bona fides at all. But as you would have seen from the pleading, it was the basis of our case at the outset.

ELIAS CJ:

I'm not terribly clear on how this argument is distinct from the argument that what was done was not in the management and navigation of the ship.

BLANCHARD J:

Aren't they just variations on the same theme?

MR RZEPECKY:

Yes, they are. And it's a question of acts that aren't done bona fide for the management and navigation of the vessel, for example, if an act which is capable of having the appearance of navigation is committed which isn't done for the safety of the ship, but is done for the opposite, then that is not navigation within the Rules.

TIPPING J:

This is just a more sophisticated way of dressing up the purpose argument, isn't it?

MR RZEPECKY:

Yes, Sir. But it is supported by authority, by the *Hill Harmony,* we say. In particular, the Court of Appeal decision by Lord Justice Potter. And there was a direct submission on point. It's at tab 28 of Tasman's, the appellant's. At page 217, where Lord Justice Potter is reviewing the owner's arguments, he says, "Fourth, he submits that there should be no difference in principle between the second example and what happened in this case, namely, the

decision by the master to adopt a particular course in the interests of what he judged to be safe navigation, not on the grounds of any forecast received as to future weather conditions, but on the basis of his own previous experience of heavy weather along the more northerly route. He points out there is no precedent for holding the bona fide judgement of a master as to the proper course for a vessel. To follow in the interests of safety, it must be demonstrated to have been reached on reasonable grounds before it can qualify as a decision in relation to navigation, and submits that given the responsibility of the master in matters of navigation, and the scope of difference as to judgements of that kind, the test should be, indeed, one of bona fides, rather than reasonableness in the absence of special provision in the charter party". Now, they're trying to apply, of course, Article IV Rule 2(a) and the clause in the charter party relating to employment of the vessel. And at page 218 column 2, the Judge talks about, at the top, starting with "In my opinion", he talks there about the structure of the charter party, and then halfway down, "However, neither obligation displaced the right and responsibility of the master in matters of navigation, and in particular, decide upon the course or courses to be followed when prosecuting the voyage as properly defined, having regard to weather conditions and other hazards of navigation. In that respect, he had a duty to reach a bona fide decision based upon his own judgement and experience. As to the question of the reasonableness of that decision, if the master was negligent or unreasonable in his judgement, then the liability of the owners for such negligence depended upon the scope of any relevant exemption clause in that respect, and in particular, in this case, Article IV Rule 2(a)". So we say that to be considered for Article IV Rule 2(a), the decision in the navigation or management has to be bona fide. So in this situation, where the master did what was totally counter-intuitive to an experienced seaman, didn't call for help, steered into the open water, and cause the ship to literally sink under him, those weren't bona fide decisions made for the navigation and management of the vessel. They were just the opposite. And, therefore, they're not capable of being navigation or management within terms of the Rule.

TIPPING J:

Was the concept of bona fides carried into the decisions of the House of Lords?

MR RZEPECKY:

Well, the House of Lords decided the case on a different point, and overturned the Court of Appeal's decision because the House of Lords decided that it wasn't actually an issue of navigation, it was one of the master's contractual obligation to pursue the voyage with utmost good faith. But in reviewing –

TIPPING J:

With utmost dispatch.

MR RZEPECKY:

I beg your pardon, Sir, I meant utmost dispatch. But in reviewing the Court of Appeal's decision, the House of Lords mentions the bona fides issue, and would have had an opportunity to say, that doesn't sound right. And that's the highest point I can put on it. At page 155 column 2, where Lord Hobhouse, in his speech, says, "In the Court of Appeal, the leading judgment agreed to by other members of the Court was given by Lord Justice Potter. He held that the ocean route to be followed by the vessel was a matter of navigation for the master, and not a matter of employment upon which the Charterers could give the master orders. Provided that the master acting bona fide, it did not matter whether he acted reasonably, because the owners were protected by exception in Article IV Rule 2(a)". So that's what I said earlier, if the act is bona fide, the clause applies, so there's no issue about negligence, because the owner is not going to be responsible.

TIPPING J:

Is your proposition that this is not bona fide because it was for an improper purpose?

MR RZEPECKY:

Yes, Sir.

TIPPING J:

So where, really, the wheel has turned full circle?

MR RZEPECKY:

Yes, Sir. It wasn't bona fide, because he was, as both the High Court and the Court of Appeal considered, acting in his own selfish interests. But it's not as if he was acting in a benign way. He was taking a deliberate course of conduct which destroyed the cargo and, to a large extent, put the crew in danger.

TIPPING J:

If we hold, if we hold that purpose is not relevant to navigation or management, then this separate argument can't run, can it?

MR RZEPECKY:

It would be difficult to run, yes, Sir. What I would say, though, is that it's part, it's got to be looked at as part of the, because there is no definition in the Rules of navigation or management and the Court is left to apply those concepts in each case to the facts, then although the Honourable Justice Williams implied, attempted to imply it into the Rules, which we support as well, but it's really part of the definition based on the *Hill Harmony,* and although my learned friends are, I think, has made the point it's a different economic issue, I'm not quite sure how that distinguishes the case, because the Court is attempting to find out what the scope of the conduct was, and apply the clause.

TIPPING J:

In all the many navigation and management cases, is the concept of bona fides employed?

MR RZEPECKY:

No, Sir, because it's not at issue. There's no, I haven't been able to find a case where there's an issue. The decisions have been made, oh, except for,

of course, by implication *Leesh River, The Chyebassa*, with the stolen plate. If the plate had been taken off by a crewman so he could inspect into the pipe and hadn't been replaced and the cargo had suffered wet damage, then that would have been subject to Article IV Rule 2(a). But because the plate was stolen by a stevedore, removed for that purpose, the Judge decided that it couldn't possibly be in the management of the ship because the plate was taken off for an ulterior motive. It wasn't in the course of the voyage and Justice, I think it's Justice Hobhouse would say, there was no good maritime reason for removing the plate. There was no good maritime reason –

ELIAS CJ:

Well there was no maritime reason.

MR RZEPECKY:

No, no maritime –

ELIAS CJ:

The good is what really adds the complications.

MR RZEPECKY:

I think it's the *Suzuki* case where they talk about the *Suzuki* case in the House of Lords. If you look at, if you break Captain Hernandez's conduct down and you say, well, what was the reason for not calling for help? What was the good maritime reason or what was the maritime reason for not calling for help? There isn't one. So how could not calling for help be management of the ship? An act in the management of the ship. How could steaming to a gale with the bottom ripped out of the ship, there's no maritime reason for doing that so how could that be navigation? All of the cases, what is a constant theme in the cases is that navigational reasons are made for the safety of the ship. They're made with safety in mind for the crew, the ship and the cargo. He didn't make any decisions for the safety of that ship. The ones that we've complained about anyway. In fact they were totally contrary. He was the biggest threat to that ship following the grounding. His conduct and to the cargo and that's really where we started this case in the High Court. I

accept entirely we didn't start it as a barratry case. We started it as a case where the conduct wasn't bona fide, wasn't for the safety, there was no maritime reason for carrying it out and that is the complete nub of Captain Goodrick's evidence and much of the cross-examination and evidence in the case for the experts is around some of those issues.

ELIAS CJ:

In a number of cases where there are these demarcation issues as to whether an act is in the course of handling the ship may be usefully looked at by posing the question whether it was for maritime reason but I'm not sure that you can extrapolate from that to say that if there is no good maritime reason you are not navigating or managing – or, what's the word, the handling of the ship issue, you're not doing that. I'm not sure that they are equivalent and you seem to be making them comparable?

MR RZEPECKY:

Well the House of Lords emphasised that these are matters of seamanship for the safe conduct of the vessel and that there has to be –

ELIAS CJ:

But there was a useful way to look at the issue that they had to look at there. The removal of the –

MR RZEPECKY:

With respect Ma'am, it's just as useful in this context because again the House of Lords says just because the ship is moving through the water doesn't mean that it's in navigational management. We're looking at those words in a context of the Hague Rules which allocates risk. We're not looking at them generally. It's not navigation or of navigation. It's backed into the rules and into the scheme of it.

ELIAS CJ:

I understand that.

MR RZEPECKY:

And the rule's left it to the parties and the Court to decide in any given situation what is navigational management within the concept of the rules. And this was so far outside navigation and management –

ELIAS CJ:

Well it's so far outside good navigation, I can totally accept that, and good management of a ship, but it's really whether he – and it's the debate we had yesterday, it's the same thing.

MR RZEPECKY:

Yes it's way beyond negligence we would say and I think, both the High – there are concurrent findings by the High Court and Court of Appeal as to the significant default of this master –

ELIAS CJ:

Yes, yes, I accept that.

MR RZEPECKY:

– and how bad his conduct really was. And it's well worth looking at Captain Goodrick's evidence to get a feeling for the risk. Because there are concurrent findings I haven't included a lot of the other information in the case but there is screeds of it.

ELIAS CJ:

It's not in dispute.

MR RZEPECKY:

As to how poor it was. So unless I can be of further assistance on that point I have one more point which is the cross-claim. It would be difficult for us to challenge the findings of Justice Chambers and what with the greatest of respect is a very good analysis of scant evidence. It's a constant problem for cargo and for trying to recover after cargo accidents – after accidents where cargo has been damaged of course, cargo waves goodbye to their goods on

the wharf and doesn't know, has no knowledge after that of what happens to them until they turn up at the other end, or don't as the case may be, and it's often very difficult so there's always protracted discovery and interrogatories and issues like that to try and get to the bottom of it and some of that's based on the pleadings. But here, of course, the ship owning interests Tasman did have that information so the fact that there's any scarcity of information really has to go against them. But both Justice Williams and Justice Chambers have struggled with the lack of clear evidence and both have decided that it's not particularly clear, Justice Williams saying he couldn't really say and Justice Chambers saying that, well I think it was more likely to have happened on board the ship but it doesn't really matter whether it happened on or off, before or after the grounding, there are – Tasman doesn't have any defences. Of course if we don't succeed on the Article IV Rule 2(a) argument then the possibility that the cargo was damaged following the grounding it becomes a live issue for us and so I just want to make a brief submission on that.

Firstly my learned friend in fact it's recorded in Justice Chambers' decision that they were taken by surprise by the allegation of heat damage but in the case at tab 7 page 068, there's the statement of claim and in that statement of claim they've always been on notice of heat damage. It's one of the particulars and then there's a schedule at the back of the statement of claim, that's the Dairy Board statement of claim. So there was always a prospect of that. We've referred in our submissions to *The Oak Hill* and *The Isla Fernandia* and both those cases stand for the proposition that even after a grounding or other maritime accident the carrier still has an obligation to keeping careful the cargo. In this case it appears that the, if the cargo was damaged on board there's a failure to have provided power to the reefer containers which caused the cargo to be heat damaged –

TIPPING J:

Forgive me for not having a firmer grip of this issue as I should have, but is the question whether the damage was caused by something other than the grounding or prior to the grounding and its consequences?

MR RZEPECKY:

Yes the, what happened was the, between –

TIPPING J:

I don't need any more detail. Are you saying they hadn't excluded –

MR RZEPECKY:

No.

TIPPING J:

– the possibility –

MR RZEPECKY:

Yes.

TIPPING J:

– or whatever, that it had happened for some reason before the grounding?

MR RZEPECKY:

Yes Sir.

TIPPING J:

Right, Justice Chambers held for that it had been excluded on the balance of probabilities?

MR RZEPECKY:

He appears to say that although he then goes on to say it doesn't matter which one because they don't have defences for either. Justice Williams said, I just don't know, and therefore it goes against cargo whereas we say the onus was on Tasman because there was a prima facie claim against them because the pleading was you accepted our cargo in good order condition and gave it back to us damaged so we don't know what happened in between. Tasman has the onus, like a bailee, of establishing a defence. And so there was a series of emails from the master to Tasman during the voyage

from New Zealand to Yokohama where his deck generator was failing and he said I'm worried about the cargo and Tasman didn't rule out the possibility in the trial that that's where the damage had occurred. Justice Chambers has reviewed the evidence and based on submissions from both parties it looks like he agrees that it probably happened on board the vessel, rather than on the trip.

BLANCHARD J:

Sorry, what does that mean?

ELIAS CJ:

After the grounding.

MR RZEPECKY:

Sorry, after the grounding on board the vessel. I beg your pardon. After the grounding on board the vessel. So the vessel is being salvaged. The containers are sitting there, and at some stage, the power has been cut off. There's a possibility that there simply wasn't enough diesel on board to supply electricity or generate a capacity, or that the cables had to be pulled up because there was water around them. And it's on that basis that Justice Chambers has said, well, it's probably down to the master. We just say that the findings are equivocal, even in a Court of Appeal, and that Tasman hasn't discharged the onus, and it had an obligation to look after the cargo following the grounding. It was still contractually bound to do that.

TIPPING J:

So if it failed to look after the cargo properly before the grounding –

MR RZEPECKY:

It's liable.

TIPPING J:

It's liable, and wouldn't have the benefit of Article IV Rule 2(a).

MR RZEPECKY:

No, Sir.

TIPPING J:

Because it's a cargo-focussed problem.

MR RZEPECKY:

Yes, yes, Sir. It's a cargo-focussed problem. That's the *Gosse Millerd*. And, in fact, following the grounding, it's the same issue. The containers are sitting there out of the water. Tasman has to supply electricity to them to keep them going.

TIPPING J:

I think your best point is the before the grounding one. Frankly, it starts to get very messy if it's after the grounding and some collateral cause as well.

MR RZEPECKY:

Well, before the grounding, my difficulty is it appears Justice Chambers is preferring after the grounding. If it's after the grounding, and we say we don't know which, and that's why Tasman's failed to prove, because they've got the onus of proof.

TIPPING J:

But hasn't Justice Chambers effectively held that it was after the grounding –

MR RZEPECKY:

Yes.

TIPPING J:

And it was more than just a cargo-focussed issue, therefore, they can rely on the Article.

MR RZEPECKY:

Well, he said the cables might have been in the water, but there's just no evidence to suggest what alternatives were tried, what steps were taken.

TIPPING J:

So is your case, really, that they didn't prove enough –

MR RZEPECKY:

Yes, Sir.

TIPPING J:

To get themselves out of their prima facie liability?

MR RZEPECKY:

Yes, Sir.

BLANCHARD J:

And I think you're also saying there are not concurrent findings of fact, because Justice Williams didn't make one.

MR RZEPECKY:

He didn't make any, but then held against us, because he said we had the onus, and we say that's wrong, with respect to him. But then Justice Chambers managed to cobble together enough information to decide that it's more likely, it probably happened, I think he uses the word "probably", probably happened after the grounding, and there are a number of possibilities, including not delivering electricity and having cables in the water. But he's not sure about that either, and he sort of just throws up his hands and says –

TIPPING J:

Is he, in effect, saying probably following the grounding, and as a result of the grounding.

MR RZEPECKY:

No. Well, to the extent that if the cables were in the water, the inference is that he is saying that. But to the extent that there wasn't electricity delivered, and there are many ways of doing that, and that wasn't clarified at the trial, although the one person, the only person who was present at the time, Captain Landelius, did give evidence. I don't think he gave detailed evidence on those points.

TIPPING J:

Thank you. I understand it better now, what the compass of the problem is.

MR RZEPECKY:

Yes, Sir. Essentially, we say that they had an obligation to maintain that cargo after the grounding. Just because the vessel had grounded, didn't mean they threw up their hands and gave up.

BLANCHARD J:

Are you giving us references to the relevant evidence, if we're going to have to review it?

MR RZEPECKY:

I don't think I have in my submissions, but it's set out in Justice Chambers' –

TIPPING J:

You're asking us to come to a different factual conclusion, and I'm not saying that's not open to you, from that reached by Justice Chambers? It's a pure question of fact?

MR RZEPECKY:

Yes, Sir. The evidence, though, if you could just bear with me for one moment, there are a series of emails. It's all in Volume 2, documents 45 to 52 are the series of emails. There's a report in Volume 3, the Clancy Vanguard report, although that wasn't put to the High Court, and has double hearsay in many cases.

TIPPING J:

It seems a wee bit of a problem.

BLANCHARD J:

It isn't evidence, if it wasn't put to the High Court.

MR RZEPECKY:

Well, it seems to come in at the Court of Appeal. And there's also the salvage diaries of, and my learned friend may disagree with me on that, but I don't recall it ever being discussed or put to any witness. Documents 32 and 33 are the salver's information, and then documents 34 to 38 are survey reports for the Board. I'm sorry there aren't specific references. But it's more a case of, even on Justice Chambers' assessment, whether there's sufficient evidence to find that Tasman did all it could following the grounding to maintain electricity to those containers.

BLANCHARD J:

Well, if you're wanting us to disturb Justice Chambers' factual finding, I think you've got to point us to the evidence that we should use for that purpose.

MR RZEPECKY:

It's more internal to his decision where he says it's not particularly clear, but –

BLANCHARD J:

Where does he say that?

MR RZEPECKY:

Of course, we hope that we won't have to rely on these submissions.

TIPPING J:

Well, you are now.

BLANCHARD J:

Possibly for that reason, I haven't studied the cross-appeal with the attention I should have given it, and that's why I'm seeking some assistance.

MR RZEPECKY:

Yes, Sir, and I apologise that I haven't provided the actual reference.

ELIAS CJ:

Do you identify the evidence in your submissions?

MR RZEPECKY:

I don't, no, I'm sorry, Ma'am.

ELIAS CJ:

It's not terribly satisfactory doing it in this way. It may be that it would be better for a joint memorandum. Take us, by all means, to the judgment and what you say about the judgment. But in terms of identifying the relevant evidence if you're asking us to come to a different conclusion, we would appreciate having a written memorandum of the evidence we should be looking at.

MR RZEPECKY:

Yes, Ma'am.

BLANCHARD J:

Which should be a joint memorandum, so that Mr Gray can identify anything that he thinks we should look at, as well.

MR RZEPECKY:

Yes. I apologise for not providing it today. I can undertake to get the ball rolling on that.

BLANCHARD J:

Well, it's a question of when the ball stops rolling. We really want something within a week.

MR RZEPECKY:

Yes, Sir. He says at paragraph 94, "If my analysis above is correct, then the principal reason why the reefers went off power after the grounding is that seawater reached depth level, rendering the generator unsafe to use. If that is right, then TOL's problem is (inaudible 11.18.20) finding that seawater reached depth level, only because of Captain Hernandez's post-grounding misconduct". And so we succeeded on the cross-appeal. He says here at paragraph 97, "Like the Judge, I've found the evidence difficult to analyse, but in the end, have concluded that the loss of power to the reefers was probably the consequence of seawater at depth level, which, in turn, points to the cause being Captain Hernandez's outrageous conduct". At 98, "As it turns out, therefore, it does not actually matter, on my view of the case, whether heat damage occurred prior to the grounding or after it. If it occurred prior, the Article IV Rule 2(a) defence is plainly not available. If it occurred after, I have found that the heat damage was probably caused by Captain Hernandez's outrageous conduct. Either way, TOL does not have a defence to its failure to properly look after these particular goods". So that's the number of his reasoning. And all we would say is that it still didn't rule out the possibility that they could have done more, and there isn't much evidence anyway of that. But I'm happy to talk to my friend after today, and if we can collaborate on a memorandum, then filing it within a week. Unless I can be of further assistance, those are my submissions.

ELIAS CJ:

Yes, thank you. I just had one thought. This decision of the Court of Appeal has now been reported in this American series for some months. Has there been any commentary on it? We haven't been referred to – I meant to ask you about it.

MR RZEPECKY:

The case has been reported in the American maritime cases and the Lloyd's Law Reports, so it's got some interest. There's been some industry comment, but not at a very high level.

ELIAS CJ:

So there's nothing published?

MR RZEPECKY:

The only published article is in the reputable Lloyd's Maritime Law Quarterly. It's an article by Associate Professor –

TIPPING J:

Paul Myburgh.

MR RZEPECKY:

Paul Myburgh. I'm sorry. And we did actually produce that in opposition to the leave application, and it is in our materials, and referred to in my memorandum in our submissions, where I deal with Justice Fogarty's minority decision. But in his article, Professor Myburgh supports the majority and the approach, and is critical of Justice Fogarty's narrow approach, literal approach.

ELIAS CJ:

So there's nothing else?

MR RZEPECKY:

There's nothing else. But the Court of Appeal decision has got some reporting credibility, anyway, amongst maritime law.

TIPPING J:

Well, they got that far, at least.

BLANCHARD J:

We have occasionally overturned judgments that have reporting credibility.

ELIAS CJ:

Thank you. We'll take the morning adjournment now.

COURT ADJOURNS: 11.22 AM

COURT RESUMES: 11.40 AM

MR GRAY QC:

As Your Honours please, the first small point, as the respondents disclosed in their submissions opposing leave being granted for an appeal to this Court, Associate Professor Myburgh has provided advice to the respondents in this case. Can I ask Your Honours please to look at the definition of barratry in the Marine Insurance Act, probably conveniently found in the respondent's bundle at volume 2 under tab 25. The submission made by my learned friend is that this definition of barratry means that relevant intention applies to the act but not necessarily the damage and his submission is that the definition is of wilful conduct which causes effectively consequential damage. My submission is that's not an accurate reading of this definition.

ELIAS J:

Sorry which, where are we?

MR GRAY QC:

It's under tab 25 Your Honour, it's number 11.

ELIAS J:

Eleven, sorry, yes 11 thank you.

MR GRAY QC:

The definition is the term barratry includes every wrongful act, so we get the act first, wilfully committed by the master or crew to the prejudice of the

owner. And the wilful part comes after the act and applies to the prejudice. And we say consistently with the definition of barratry in the cases that we've given you, the thing that distinguishes barratry is not that the act is wilful but that the damage is wilful.

ELIAS J:

Or that the prejudice is wilful?

MR GRAY QC:

Yes. And that it's a misreading of the definition in the Marine Insurance Act to argue otherwise.

TIPPING J:

And wilful in this context means either intentional or with subjective recklessness?

MR GRAY QC:

Yes. Now we did caution in our submissions against just applying marine insurance cases without thinking of context. Often the issue in marine insurance cases is which of the insured perils might apply to enable the ensured to recover. And there are separate insured perils for negligence and for wilful conduct and the latter can come to be called a barratry insured peril. And in those circumstances when the decision is just how will the insured will recover, which peril is this, mere negligence within the negligent extension or is it wilful misconduct and is there a wilful misconduct extension called barratry, can provide a different context for some marine insurance cases and it's interesting to look at *Halsbury* at the shipping and sea, shipping and navigation sections and the marine insurance sections, both of which deal with barratry but in very slightly different ways and by referring to slightly different cases. So that's my first point, if it pleases Your Honours.

My second point is my learned friend said in relation to Nelsonian blindness, that the relevant test or the relevant way to consider the master's conduct in this case, is I'll do this and the ship is in peril and I will do it anyway. The law

relating to Nelsonian blindness has, so far as we understand it in the marine context, been most recently dealt with by the House of Lords in a case called *Manifest Shipping Company Limited v Uni–Polaris 2001 All ER743* –

TIPPING J:

Which volume of the All Englands – 2001(1) is it?

MR GRAY QC:

One Your Honour.

TIPPING J:

2001(1) is it?

MR GRAY QC:

Yes. Lord Scott deals with this issue and essentially what he says is it's not Nelsonian blindness to say I won't ask because I don't know what the answer will be, it's Nelsonian blindness to say, I won't ask because I do know what the answer will be and I don't wish to confront that answer. And Your Honours will recall that I made submissions that that mere foreseeability is not the kind of intention that we're dealing with when we're dealing with the recklessness part of the relevant intention in the Hague Court, Hague Rules. That it's reckless knowing that damage probably will result – I won't ask because I fear the answer that I know there will be when I do.

Next, my learned friend submitted that Article IV Rule 2(a) is only a negligence provision and Your Honours will recall that I've referred to established authorities that say that the phrase, "Act, neglect or default" provides much wider coverage than that and includes intentional harm and the analysis in the cases that gets to that point, focuses on the presence of the word, "Act", in addition to the words, "Neglect or default". And often what the judgments say is that while it may be possible to read neglect or default in a way which reads it down to negligence, the presence of the word, "Act" expands it to something which is wider.

BLANCHARD J:

Can you remind us of which cases say that without going to them?

MR GRAY QC:

I wonder if you'll let me come back to that at the conclusion Your Honour, but yes I will. Justice McGrath then asked my learned friend what was his response to the structural argument we had made, that the scheme of the act, a scheme of the rules is to make the carrier liable for things which are within its own control but to enable it to avoid bearing the risk of loss from causes which are beyond its control, and my learned friend's answer was to say, that well the care of cargo provision in clause 3.2, Article III(2) is inconsistent with the scheme advocated by the appellant because care of cargo is beyond the ability of the carrier to control once the vessel has disembarked and is at sea. Our response to that is to say, Article III(1) is an obligation to exercise due diligence to make the ship seaworthy at the commencement of the voyage –

McGRATH J:

– and it's absolute just to –

MR GRAY QC:

– as within the control. Article III(2) begins with the words, "Subject to Article IV", so that the care of cargo provision is in fact subject to the risk allocation in Article IV and therefore we say is consistent with the submissions that we have made. Next my learned friend took Your Honours to the judgments of the Court of Appeal and House of Lords in the *Hill Harmony* and his submission was that the House of Lords decided the case on a different basis from the Court of Appeal, recognised what Lord Justice Potter's reasoning had been, but then decided in the case, in a manner which did not impact on the decisions that he had made. We say with respect, that that's not an accurate reading of Lord Hobhouse's judgment in the House of Lords. The case can be found at tabs 27 in the High Court, 28 in the Court of Appeal, and 29 in the House of Lords. My learned friends took you in the House of Lords to page 155.

TIPPING J:

Which volume are we –

MR GRAY QC:

Volume 2 Your Honour, I'm sorry, of the appellant's bundle, under tab 29.

TIPPING J:

Tab 39 – 29 sorry.

MR GRAY QC:

My learned friend took Your Honours to the decision of Lord Hobhouse at page 155 on the right hand side, bottom half of the page, where Lord Hobhouse had recited what Lord Justice Potter had held and he said at the bottom of that column, "The judgment of two such experienced Judges are entitled to great respect but so is the decision of the commercial shipping arbitrators, to whom the parties agreed the resolution of their case should be entrusted." Over the page at 156, Lord Hobhouse in the first paragraph talks about the criticism of the decision of the Court of Appeal by a very experienced commentator, in the second paragraph says, "The question raised by the dispute is not new, reflects the conflict of interest between owners and charterers under a time charter, and deals with the interest in time". He then deals at the right hand side of page 156 with scheduling of a vessel and the fact that the parties had agreed about the way in which scheduling would take place, His Lordship continues that in the left hand side of 157 and in the right hand side of 157 makes a number of points relevant to the duty to proceed with utmost dispatch. At the bottom paragraph in 157, "But even if the Courts below should have got involved which they have not, in a discussion of what was the usual route across the Pacific from Vancouver to the East Coast of Japan, the arbitrator's reasons were clear, the northerly route was the shortest route, there was no evidence that any other route was a usual route, there was evidence that the northerly route was the usual route to follow, as it had been by 360 vessels over a three month period, it was also incorrect to treat the case as if it left open the possibility that there'd been a

rational justification for refusing to proceed by the northerly route. The arbitrators found that the Master did not have any rational justification for what he did, My Lords it follows from what I have already said, that on the findings of the arbitrators, the charterers were by ordering the vessel to proceed by the shortest and most direct route, requiring nothing more than was in any event the contractual obligation of the owners, therefore the question whether the order was an order as regards the employment of the vessel is academic. But it was in truth such an order. The choice of ocean route was in the absence of some overriding factor, a matter of the employment of the vessel, her scheduling, her trading so as to exploit her earning capacity. The Courts by contrast accepted the owner's argument that it was necessarily a matter of the navigation of the vessel". His Honour then deals with authorities that discussed those propositions and from 159 on the right hand column at the bottom in the paragraphs marked by the editors of the Lloyds reports, "The meaning of any language is affected by its context. This is true of the words employment in a time charter and of the acceptance for negligence in the navigation of a ship in a charter party or contract of carriage. They reflect different aspects of the operation of the vessel. Employment embraces the economic aspect, the exploitation of the earning potential of the vessel, navigation embraces matters of seamanship. Mr Donald Davies in the article I've referred to, suggests that the words strategy and tactics, give a useful indication. What is clear is that to use the word navigation in this context, as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Sumner pointed out, where seamanship is in question, choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason, as did Mr Justice Clarke from the fact that the Master must choose how much of a safety margin he should leave between his course and a hazard, or how and to what speed to proceed up a hazardous channel to the conclusion that all questions of what route to follow are questions of navigation. The Master remains responsible for the safety of the vessel, her crew and cargo. If an order's given, compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the Master is entitled to refuse to obey it. Indeed as the Safe Port cases show, in

extreme situations the Master is under an obligation not to obey the order. The charter's submissions in the present case and the arbitrator's reasons and decisions did not controvert this." But His Honour then goes to explain why it was a breach of contract to take the longer and more expensive route. Now, in my submission Lord Hobhouse did deal with the bona fide question. What he says is, matters which are genuinely matters of navigation remain for the Master and we don't question them, we don't ask whether he's done them bona fide or not. We don't ask what his intention is, they remain for him, but the issue in this case is not one of those. The issue is about compliance with the obligation to employ the vessel in a manner which takes the most direct route, limits the time and expense to the charterers of the route being undertaken. It's a different economic interest, as I submitted.

TIPPING J:

As Lord Hobhouse's employment embraces the economic aspect, similar to the French view of faute commerciale.

MR GRAY QC:

That was the way I read it Your Honour, it's possible to wonder whether Lord Hobhouse is influenced by continental notions and looking for a decision in the case and a reasoning process which brings consistency to this field of the law.

ELIAS CJ:

Well it wouldn't just be a continental notion, it must be a – it must be a division, because there are things as he indicates, that the owner is entitled to insist on.

MR GRAY QC:

Yes it's not just continental, I don't go so far as to say Lord Hobhouse has said, "Gosh this is the way the French would do it, therefore I shall".

ELIAS CJ:

No.

MR GRAY QC:

But it is consistent with it.

ELIAS CJ:

Yes. Because it's a necessary distinction to be drawn.

MR GRAY QC:

Yes it is. Justice Blanchard the parts of our submissions which summarise construction of acts of neglect or default, are paragraphs 53 to 57 and they are references to texts and cases which are footnoted in the texts.

BLANCHARD J:

Thank you.

MR GRAY QC:

And finally the cross-claim Your Honours. We don't entirely agree with our learned friend's reading of Justice Williams' decision. Justice Williams' decision can be found in the case in volume one under tab 19.

McGRATH J:

Sorry, that was tab?

MR GRAY QC:

Nineteen Your Honour. And the discussion of this part of the claim begins on page 329 of the case at paragraph 296. Now what had happened was that the carrier had not appreciated that a claim of this type was made. It hadn't been included in early statements of claim, there'd been amended statements of claim which had made quite minor changes, which the plaintiffs understood, gave them an opportunity to put the carrier to prove that the loss had been caused by the collision to the rock and the consequences of dealing with that, but that hadn't been understood. There are documents called partlow charts which are little graphs that record the temperature inside containers for the duration of the voyage. Your Honours will have probably seen them before.

Those partlow charts had not been provided on discovery, partly because at the time, discovery was provided the early statements of claim, having put the condition of the cargo up to the point of the collision with the rock at issue, and so that they weren't relevant. And then later, it was not possible to find them. It was accepted by cargo that it had not specifically asked for them, but at trial, it did ask the Judge to infer that because they hadn't been provided, they contained no evidence that could assist the carrier, and therefore may have disclosed that the cargo had suffered heat damage before the collision. That was resisted. Subsequently, before the Court of Appeal, it was noted that surveyors appointed by cargo had, in fact, seen the partlow charts immediately after the cargo had been unloaded, and had an opportunity to inspect it and report on them. And no report of heat damage was made for the period before the collision. Justice Williams did see a witness, Captain Landelius, who had been on board the vessel in the course of her salvage. He didn't have a very clear recollection of cables providing power to individual containers on the deck, but he did say that he recalled there being some issue with water across the deck, which made it unsafe for there to be electrical cables. And there's always an issue, when a vessel is dead in the water, about how you can generate electricity, and what that electricity is used for. Not all the ship's generators are available, because some below-deck compartments in the vessel are filled with water, and new generators are brought onto the vessel to generate power for salvage purposes. So Justice Williams made his decision, which is only pages 329 and 330. He deals initially with the request that an adverse inference be drawn, and he declines to draw it. At paragraph 301 at the top of page 30, he cites that Mr Rzepecky pointed to the telexes that he's referred Your Honours to today. Mr Rzepecky said that there are these telexes, which suggest that there may have been difficulty with the ability of the vessel to generate power, and if it had difficulties with power, it may not have supplied power to the containers. Then he records at 302 Mr Rzepecky's arguments that there was no evidence submitted to support the defence that damage to the reefer containers was inevitable following the grounding. Now, that's a reference to a different defence. One of the defences at trial was that from the moment of the grounding, all loss to cargo was inevitable, and that the post-grounding

conduct by the master was irrelevant, because nothing the master could have done could have saved the cargo. And His Honour had decided that issue against the carrier on the facts. He heard extensive evidence about how water might come into the vessel, and what was inevitable. And that's what His Honour Justice Williams is referring to in 302. His Honour said that showed Tasman had failed in its ongoing obligation to keep the Dairy Board's product properly refrigerated, sorry, Mr Rzepecky argued that Tasman Orient had the onus of establishing that inevitability of damage was a consequence of the grounding, and not of some separate fault. No evidence had been adduced. 303, His Honour said that I had submitted that the charts had never been requested. The loss was caused by the salver's removal of the genset. There was no evidence of the failure of the genset during the voyage or after the grounding. He pointed to evidence from Captain Landelius, salvage and saving as much cargo as possible involved prioritisation of resources and the loss or damage arising from the failure to maintain electricity supplied to the reefers was closely connected with the casualty, and arose in the context of preserving the ship and her cargo. I haven't had many opportunities to make jury speeches in the course of this hearing, but it is possible to point to just how difficult a salvage operation is, and how hard it is to manage the provision of electricity and the supply of electricity to parts of the vessel that need it. And then His Honour's decision. "It's possible that the Dairy Board's produce in the on-dock reefers was damaged before Tasman Pioneer reached Yokohama. But that is speculative. As Captain Karoke's witness statement demonstrates" – and that's evidence in a document admitted by consent – "the times at which the gensets may have been connected or disconnected to reefers, particularly those containing Dairy Board produce, is unclear, as is whether the disconnections were at the salver's instigation, or the direction of the Swedish Club representative. In the absence of the partlow charts for the reefers containing the damaged Dairy Board produce, it would be unsafe to conclude that Tasman Orient failed in its continuing obligation to care for the reefers after the grounding by disconnecting the electricity supply. The position is so uncertain that no such conclusion can safely be reached". Now, we say that what His Honour is saying there, look, this vessel struck a rock. Ultimately, it had to be salvaged. It was grounded. All of the cargo was

affected. And that provides an explanation for the supply of electricity to refrigerated containers being cut off. It's not that cargo bears the onus of demonstrating that damage was caused by another purpose, but with the ship having shown an effective cause, an evidential burden passes to raise for serious consideration something else. And all His Honour is saying is, it's only able to be speculated upon whether there might have been some prior damage. There's no evidence as a basis for it. There's no evidence available which permits a different conclusion. And so we submit His Honour's not saying there's a reverse onus, or that there's a legal onus in the wrong place. But he's saying, there is evidence of something which would cause electricity supply to be removed, and there's nothing to suggest that I should go behind it. The position is not entirely clear.

TIPPING J:

So you're saying that the ship has produced a prima facie cause, which has not been displaced in favour of cargo?

MR GRAY QC:

Yes.

TIPPING J:

And that's that the proper reading of this, perhaps slightly awkwardly-worded passage?

MR GRAY QC:

Yes. I'd have drafted it differently myself. And hindsight is wonderful. But yes, that is my submission, Your Honour, and my submission is that the analysis of Justice Chambers in the Court of Appeal, which my learned friend took you through, is the same. And that's why I made my submission to Justice Blanchard that there were concurrent findings in the High Court and the Court of Appeal. And unless Your Honours have any questions, those are my submissions in reply.

TIPPING J:

Yes, I have a question. The parts of the Hague Rules which we've been looking at from the point of view of barratry, they came in at a later stage?

MR GRAY QC:

Yes, they did.

TIPPING J:

Is there anything preceding their coming in, which might elucidate their purpose or their terms? In other words, are they travaux apropos of those amending?

MR GRAY QC:

Not in the Hague Rules themselves. From the 1920s in the United Kingdom, limitation legislation adopted that kind of formulation. So if support is able to be derived from liability regimes within the field but in different conventions and legislation, then the answer is yes, but otherwise, no.

BLANCHARD J:

And where do we find that material?

MR GRAY QC:

We haven't given you, Your Honour, the predecessor to the 1976 Rules. We have given you the 1976 Rules and their adoption into legislation in New Zealand, and they are in that *Tasman Pioneer* decision of Justice Williams that we handed up yesterday.

TIPPING J:

So the provenance, if you like, of the '60s Hague amendments or additions is English limitation law?

MR GRAY QC:

Yes.

TIPPING J:

And, of course, 5(e) is in the limitation context.

MR GRAY QC:

Yes, it is.

TIPPING J:

So they, presumably, have borrowed that same formulation for the other context of IV bis?

MR GRAY QC:

Yes. And it's possible to submit that consistency across different parts of the overall regime dealing with carriage of goods by sea is desirable and appropriate.

TIPPING J:

Yes, thank you very much.

MR GRAY QC:

Those are my submission, Your Honours.

ELIAS CJ:

Mr Rzepecky, do you want to respond on the last point?

MR RZEPECKY:

The last point being the analysis of Justice Williams' decision?

BLANCHARD J:

No. The provenance of the changes that were made to the Hague Rules.

MR RZEPECKY:

Oh, yes, well, I am grateful for the opportunity. It is in the tonnage limitations, and it's a good point that it is a limitation provision, because, of course, Article IV Rule 2(a) is an exemption. So there's quite a different approach in common law between exemptions and limitations. And so it's logical that they

would consistently apply the same recklessness exception to a limitation that's been used previously, and ignore, and leave the Article IV Rule 2(a) to the common law, and the fact that barratry, we say it's a negligence provision and that wilful misconduct isn't included, without having to actually amend it. They were looking specifically at limitation. The reason why the compromise within IV bis and the limitation provision is that it's a super limitation provision, which reflected more modern types of shipping, like containers, that I think previously to that I think it was about 100 pounds per package. But this brings in another regime, which applies to packages and divides the packages within containers, and also weight. And it's a much better limitation economically. And so the trade-off was that it would be unbreakable, and by putting in that very strict provision, it's called the unbreakable limitation, because it's very hard, of course, for cargo owners to ever prove the facts required to establish the exception. So it's quite a different approach than Article IV Rule 2(a). Other than that, I can't assist any further.

ELIAS CJ:

On reflection, we want to consider the submissions we've received, and it may not be necessary to have the joint memorandum on the evidence. So we will put out a memorandum if we require that.

MR RZEPECKY:

As Your Honour pleases.

ELIAS CJ:

It will hold matters up, but we think it would do no harm to put you to some further work. Justice Tipping was more solicitous. If we can have a memorandum which, preferably, would be a joint memorandum, identifying the evidence that is relevant, if you have different views of it, file separately. And within a week would help us, thank you. We will reserve our decision, thank you, Counsel.

COURT ADJOURNS: 12.15 PM