Singapore Journal of Legal Studies
[1992] pp. 415 – 434

TIME CHARTERPARTIES: FINAL VOYAGES AND CONTRACTUAL RIGHTS

The position of a charterer under a time charterparty in respect of his obligation to give contractually valid orders as to the employment of the vessel have spawned numerous problems. Amongst these are the matters which pertain to orders relating to the employment of the vessel as the termination of the charter period approaches. This article discusses the position of the contracting parties in respect of such orders.

I. INTRODUCTION

THE debate over the contractual legitimacy of orders for final voyages under time charterparties can hardly be classified as new, with cases stretching back as far as the late nineteenth century.[1] It is still, however, ongoing, although recent decisions, in particular, of the Court of Appeal in England in *The Peonia,*[2] have resulted in considerable clarification of the issues and the position of the contracting parties. This article will examine these issues in the light of the recent cases.[3]

II. CONTRACTUAL FRAMEWORK

It has long been established that time charterparties are nothing more than contracts for the services of the shipowner, the master and crew. Expressions found in standard form time charterparties which tend to suggest a transfer of possessory rights, such as "hire", "delivery" and "redelivery" of the vessel are not strictly accurate since the shipowner remains in possession of the

1 See for example, *Gray* v. *Christie* (1889) 5 T.L.R. 577. For a general discussion on the charter period see Wilford, Coghlin and Kimball, *Time Charters* (3rd ed., 1989), at 88-96.

2 *Hyundai Merchant Marine Co. Ltd.* v. *Gesuri Chartering Co. Ltd.*(*The Peonia*) [1991] 1 Lloyds Rep. 368. Other cases are *Torvald Klaveness A.S.* v. *Ami Maritime Corporation (The Gregos)* [1992] 2 Lloyd's Rep. 40, *Shipping Corp. of India Ltd.* v. *N.S.B. Niederelbe Schiffahrtsgesellschaft m.b.h. & Co. (The Black Falcon)* [1991] 1 Lloyd's Rep. 77 and *Chiswell Shipping Ltd. and Liberian Jaguar Transports Inc.* v. *National Iranian Tanker Co. (The World Renown)* [1991] 2 Lloyd's Rep. 251 and [1992] 2 Lloyd's Rep. 115 (C.A.)

3 For a discussion of some of these cases, see F.M.B. Reynolds, "Legitimate Last Voyage" [1991] L.M.C.L.Q. 173, Dimitrios F. Sofianopoulos, "Last Voyages: Another View" [1991] L.M.C.L.Q. 470 and David Chong, "Muddying the Waters of the Legitimate Final Voyage" [1991] 1 M.L.J. cxxi.

time chartered vessel through his master and crew.[4] Notwithstanding this, the time charterer has the power to direct the master as to the commercial operations of the vessel during the currency of the time charter. The source of the power to direct flows out of the nature of the bargain. In the absence of express terms, there will be little difficulty in implying a contractual power to issue orders in respect of the commercial use of the chartered vessel. In most cases, however, there will be an express term, often referred to as the "employment clause", on the matter.[5] Time charterparty contracts are, of course, comprised of multiple rights and obligations, many of which are interlocking. The power to direct the master as to the commercial use of the vessel may be limited by obligations imposed by the contract on the charterer. An order which will take the vessel outside of trading limits, or to proceed to an unsafe port, will not be one which can be validly given, and if insisted on, will place the time charterer into breach of contract.[6] Conversely, a failure by the master to obey a legitimate employment order will have the result of placing the owner into breach (possibly, repudiatory) of contract. Where the charter period is nearing expiration, the issue as to the legitimacy of voyage orders rears its head. The time charterer may want to maximise his use of the services of the master and crew. The owner, especially if charter hire or freight rates have gone up, will be understandably keen to contract his vessel out again with the minimum of delay at the higher rates. The issue then arises as to whether the order for the final voyage is one which the time charterer is entitled to give. This, however, is not the only matter which arises, for irrespective of the contractual legitimacy of the final voyage order, a question arises as to the effect of delays (which may well be unexpected) which prevent redelivery until after the expiration of the charter period. Are these separate and distinct issues or are they related such that a decision that the order was contractually legitimate, results in an extension of the charter period up to the date of actual redelivery? In the event that the obligation to give legitimate orders and the duty to redeliver on time are separate, the consequential issue which then arises is the effect of breach of the duty to redeliver on time.

---

[4] Contrast the position of a demise or bareboat charterer who does acquire a possessory interest, see *Candlewood Navigation Corp. Ltd.* v. *Mitsui O.S.K. Line* [1986] A.C. 1.

[5] For example, clause 9 of the BALTIME form provides that: "The Master to be under the orders of the Charterers as regards employment, agency or other arrangements...." Employment refers to the employment of the vessel and does not indicate an intention to establish an employer/employee relationship between the time charterer and the master and crew. See *Larrinaga S.S. Co. Ltd.* v. *The King* [1945] A.C. 246. Similarly, clause 11 of the New York Produce Exchange Form provides that "The Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions in writing..." Clause 8 further provides, *inter alia,* that, "... the Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency...."

[6] In some circumstances the breach might even be repudiatory.

III. The Contractual Legitimacy of the Order

Where the charter period is nearing completion, the first issue that arises is in the context of the contractual legitimacy of the final order; legitimate in that the order is one which the charterer is contractually entitled to give under the "employment clause." The nature of the issue requires the contractual legitimacy to be viewed from the perspective of the question of whether the charterer can give the order and not from the standpoint of the (arguably) separate promise to return and redeliver on time.

Three points arise in connection with the contractual legitimacy of the final voyage order. First, the test to be applied to determine the contractual legitimacy of the order. Second, the relevant date on which the legitimacy is to be assessed. Third, whether the time charterer is contractually bound to change his order if between the date of the order and the date of compliance, events occur which make it impossible for the final voyage to be completed on time.

In many respects, these issues are similar to the question of the nature of the time charterer's obligation to nominate a safe port. Both involve a prediction as to future events. In the case of the order for the final voyage, the test for its contractual legitimacy is whether or not the charterer has given orders for the employment of the vessel which can reasonably be expected to be performed by the end of the charter period. If so, the order is legitimate.[7]

In applying the test the parties will have to determine what the charter period is. The charter period does not necessarily expire at the date fixed in the charterparty for a term may be implied to give the charterer a reasonable margin of flexibility.[8] The use of the implied term to give the charterer breathing room at the end of the charter period is now well established and the only remaining question concerns the ability to imply a margin of flexibility when the parties have agreed on an express margin. As a matter of principle, it must be extremely unlikely that a further implied margin of flexibility can be tagged onto an express margin. Whether or not the basis of implied terms lies in the "officious bystander" test[9] or "the business efficacy" test,[10] or a combination of the two, the express agreement of the parties on the margin of flexibility will in many cases preclude the implication of further implied margins which, after all, are founded on the presumed

---

7 See *Hyundai Merchant Marine Co. Ltd.* v. *Gesuri Chartering Co. Ltd. (The Peonia)* [1991] 1 Lloyd's Rep. 100 esp. Saville J. at 104 and Bingham L.J. at 107-108. See also generally Wilford, Coghlin, Kimball, *op.cit., supra,* note 1, at 88-94.

8 *Gray* v. *Christie* (1889) 5 T.L.R. 577.

9 *Shirlaw* v. *Southern Foundaries (1926) Ltd.* [1939] 2 K.B. 206 at 227, affirmed [1940] A.C. 701.

10 *The Moorcock* (1889) 14 P.D. 64 at 68.

intention of the parties.[11] The provision of an express margin might, however, in some cases leave room for doubt; especially so if the express margin itself anticipates further flexibility. In *The Peonia,* the express margin was "about minimum ten months maximum twelve months. Exact duration in charterer's option." Bingham L.J. (as he then was) was prepared to hold that the word "about" was sufficient to provide for an additional margin or tolerance although on the facts of the case nothing turned on this additional margin.[12] At the end of the charter period (including any express or implied margin or tolerance), referred to as the "final terminal date" in *The Peonia,* the charterer comes under an obligation to redeliver the vessel.[13] It is by reference to this final terminal date that the legitimacy of the final voyage order is to be assessed.

The decision in *The Peonia* represents a departure from the view of Lords Reid and Cross in *The London Explorer.*[14] In that case, the time charter

---

[11] See *Watson S.S. Co.* v. *Merryweather* (1913) 5 Com. Cas. 294, *London and Overseas Freighters Ltd.* v. *Timber Shipping Co. S.A. (The London Explorer)* [1972] A.C. 1. Note that in the latter case, the majority of the House of Lords held that the expression "12 months 15 days more or less in Charterers' option" did not preclude a further implied margin, whilst the minority held that it did. In The *Alma Shipping Corporation ofMonrovia* v. *Mantovani (The Dione)* [1975] 1 Lloyd's Rep. 115, Lord Denning M.R. and Browne L.J. followed the minority decision in the *London Explorer* and concluded that the express margin of "20 days more or less" excluded the implication of any further margin. See also *Hyundai Merchant Marine Co. Ltd.* v. *Gesuri Chartering Co. Ltd. (The Peonia)* [1991] 1 Lloyd's Rep. 100 esp. Saville J. at 103 and Bingham L.J. at 107. It has been suggested that if the Court of Appeal in *The Peonia,* preferred the views of the majority in *The London Explorer* on the position of last voyages and the duty to redeliver on time, then it should also have followed the majority's views that an extension of a "reasonable time" should be allowed on top of the express margin. See Dimitrios F. Sofianopoulos, *supra,* note 3, and David Chong, *supra,* note 3 at cxxvi. With respect, it is submitted that this does not necessarily follow. The decision of the majority as to the existence of an independent duty to redeliver on time, is conceptually distinct from the question of when time expires.

[12] Curiously in *Torvald Klaveness A.S.* v. *Ami Maritime Corporation (The Gregos)* [1992] 2 Lloyd's Rep. 40 both parties accepted the arbitrator's finding that the expression "about 50 to maximum 70 days" allowed for no further tolerance or margin beyond 70 days. Where the word "about" has been deleted from a standard form clause on the charter period, the argument against adding an implied margin to the express margin should be even stronger. See *London and Overseas Freighters Ltd.* v. *Timber Shipping Co. S.A. (The London Explorer)* [1972] A.C. 1 and *Jadranska Slobodna Plovida* v. *GulfShipping Lines Ltd. (The Matija Gubec)* [1983] 1 Lloyd's Rep. 24.

[13] *See Hyundai Merchant Marine Co. Ltd.* v. *Gesuri Chartering Co. Ltd. (The Peonia)* [1991] 1 Lloyd's Rep. 100 at 107 *per* Bingham L.J. See also the remarks of Slade L.J. at 119 that there was no authority for the proposition that the duty of the charterer to redeliver by the final terminal date was merely a duty to use best endeavours to do so by that date. Not only is he under an obligation to redeliver on time, but also to redeliver in compliance with other obligations such as terms relating to the place for redelivery and the condition of the vessel on redelivery.

[14] See *London and Overseas Freighters Ltd.* v. *Timber Shipping Co. S.A. (The London Explorer)* [1972] A.C. 1.

was "from the time of delivery, for twelve months 15 days more or less in charterer's option." The charter hire was expressed in clause 4 as continuing "until the hour of the day of her redelivery...." The vessel was delivered to the charterers on December 29, 1967. In October 1968 she left Japan on her last voyage bound for New Orleans and Houston. The vessel arrived at New Orleans on December 11, 1968. In the ordinary course of events she would have been able to discharge her cargo at New Orleans and to proceed to Houston for redelivery well within the charter period. Unfortunately, she was delayed by strikes at both New Orleans and Houston and was only redelivered on April 24, 1968. The off-hire clause did not cover strikes and the charterers conceded liability to pay for the whole period up to April 24. The main contention was as to the proper basis for the payment. Charter rates had fallen substantially since the date of the charter. The charterers contended that they were only liable to pay the chartered rate until expiry of the charter period: December 29, 1968 or alternatively January 13, 1969. Thereafter, their liability was to pay damages for breach of contract for the period from expiry to April 24, assessed at the then current market rate. The owners, not surprisingly, argued that the charter hire remained payable for the whole period until actual redelivery. Lord Reid in referring to the old case of *Gray & Co.* v. *Christie & Co.*[15] on last voyages observed that "there are two quite different questions involved in such a case. First, was the last voyage one on which the charterers were entitled to send the vessel; and secondly, if that voyage was a legitimate voyage, are unexpected delays to be paid for at the charter rate?"[16] Lord Reid, on the assumption that the charter period expired on January 14, opined that it would have been a breach of contract if the charterers had sent the vessel on a voyage expected to end on January 14 or any later date. On the facts, there was no breach by the charterers in sending the vessel on the last voyage since it was expected that it would be completed within the charter period. The ship was redelivered late because of unexpected delays for which the charterer was not responsible. Lord Reid was unable to accept that the charterers were in these circumstances in breach of contract by failing to redeliver the vessel on or before January 13. He concluded that, "there still remains the separate presumption that the parties intended that, if unexpected delays on the last legitimate voyage caused redelivery to be delayed beyond the agreed date, the charter should nevertheless continue in operation until the end of the voyage."[17] His Lordship was

[15] (1889) 5 T.L.R. 577.

[16] [1972] A.C. 1 at 15.

[17] *Ibid.*, at 16. Note that Lord Reid at 16 also denied that there was room to infer that a new implied contract arose as to the duration of the charter hire. The extension of the charter period to the date of actual redelivery in the case of legitimate last voyages arose from Lord Reid's interpretation of the original charter party.

reinforced in this conclusion as to the existence of the presumption by the fact that clause 4 provided for the payment of the charter hire until the hour of the day of her redelivery. Lord Cross agreed with the views of Lord Reid.

Lord Morris (with whom, Lords Guest and Donovan agreed) took a different approach and held that the charter hire remained payable until the hour of redelivery because the obligation to pay charter hire under clause 4 existed irrespective of whether or not there was a breach by the charterers in failing to redeliver when they should have done.[18] The expression "until the hour of the day of her redelivery" referred to the date of actual redelivery and not the termination date of the charter period. Lord Morris, however, continued to note that if the charterers failed to redeliver within a reasonable time of the expiration of the charter period, the charterers would then be in breach of contract. In such a case he stated that, "It might well be, therefore, that with a clause similar to clause 4 a charterer would be liable to pay hire at the contractual rate to the time of actual redelivery and in addition (if the current rate exceeded the contractual rate) to pay damages in respect of his failure to deliver within a reasonable time...."[19] On the facts, Lord Morris concluded that there was no breach by the charterers in sending the vessel on the last voyage as it was a reasonable one and, further, there was no breach of the duty to redeliver within a reasonable time. Accordingly, the only liability of the charterer was to pay charter hire.

The view of the majority in *The London Explorer* clearly denies that in the case of last legitimate voyages there is an implied extension of the charter period to the date of actual redelivery. At best, the charterer may, depending on the wording of the charter party, enjoy a reasonable time after the expiration of the stated period to redeliver the vessel. Failure to do so would place the charterer into breach of contract.[20] On the other hand, the view of the minority was that in the case of the last legitimate orders there was a presumption that the parties intended an extension of the charter to the end of the voyage. The views of the minority, prior to the decision in *The Peonia,* dominated legal thinking on the issue of the charter period and the decision in *The Peonia* must have come as a surprise to many in the shipping field.[21] Nethertheless, it is submitted, with respect, that the

---

[18] *Ibid.,* at 19.

[19] *Ibid.,* at 20.

[20] Lord Morris however averted at 20 to the fact that in some cases it may be possible to argue that the parties had impliedly agreed that the charterers should continue to use the ship on the basis of the contractual terms or had mutually conducted their business on the basis that the contractual terms still applied.

[21] See for example Wilford, Coghlin and Kimball, *Time Charters, op. cit., supra,* note 1 at 89 and see also Scrutton, *Charterparties and Bills of Lading,* (1984), at 359. For a comment on *The Peonia* see David Chong, *supra,* note 3. Chong argues at cxxvii that *The Peonia* created "ripples of disquiet in the hitherto tranquil waters of the legitimate final voyage."

decision in *The Peonia* is correct. The charterer is under an obligation to give legitimate orders and to redeliver on time. Whilst it may be possible to tag on implied margins of tolerance to the charter period, it is more difficult to see why it is necessary to read in a further implication that the charter period is to be extended to the actual date of redelivery in the case of legitimate last voyages. To borrow the words of Lord Morris, although time may not be of the essence in time charter parties the charterer is still bound to redeliver at the end of whatever latitude the contract expressly or impliedly provides for. In *The London Explorer,* Lord Reid came to a contrary conclusion because:

> ... it seems ... to be highly unlikely that any parties would agree that, if the completion of the last voyage is delayed beyond a particular date, by some cause for which neither is responsible, the charterers should have no right at all to give any directions as to the future movement of the vessel. The vessel might then still be in mid-ocean and it would seem odd, to say the least, if the owners then became free to use the vessel as they chose subject only to any liability they might have under bills of lading of the cargo to its consignees.[22]

Accordingly, Lord Reid preferred the view that there was a presumption that the parties intended that an order for a last legitimate voyage had the effect of extending the charter period so that it became co-terminus with the date of actual redelivery. Few will not feel sympathy for the plight of a time charterer who has sent the vessel out on a last legitimate voyage which has become delayed without his fault. Sympathy, however, is a doubled edged sword. The reality is that the charterparty is a commercial document negotiated at arms length. Express provisions are nearly always found dealing with the charter period. This is not surprising given the obvious commercial importance to both parties, right from the outset, of knowing the duration of the charter period with reasonable certainty. Hence, the provisions for express tolerances on the charter period. Similarly, to avoid problems as to the period for which charter hire is to be paid, Charterparties often provide that the charter hire is to continue to the hour of the day of redelivery. If the charterer desires the charter period to be extended to the actual date of redelivery, in the case of a legitimate last voyage, an express term should be inserted into the contract. In the absence of such a term, its implication may be reasonable from the perspective of the charterer, but hardly necessary to give business efficacy to the contract. Business efficacy is not the same as commercial sympathy. Business efficacy needs to be addressed from the point of view of both parties. The owner may have entered into other

[22] *London and Overseas Freighters Ltd.* v.*Timber Shipping Co. S.A. (The London Explorer)* [1972] A.C. 1 at 14.

arrangements to charter his vessel out at the end of the charter period. It seems just as hard on the owner if, when the charterer sends the vessel on a last legitimate voyage which is delayed without the owner's fault, that the charter period is thereby extended for a period which may be wholly unpredictable and (subject to frustration) indefinite. Further, the delay may well expose the owner to liability under other contracts that he has entered into in respects of his vessel. Indeed, in *The Peonia,* Bingham L.J. noted that the failure to redeliver on time:

> ... is not of a term going to the root of the contract: the owner's right is to damages only: the contract does not automatically terminate and he has no right to treat the contract as at an end so as to entitle him to cease to perform, a course which in mid-voyage is likely to be impracticable anyway.[23]

Similarly, in *Torvald Klaveness A.S.* v. *Ami Maritime Corporation (The Gregos)*,[24] Evans J. held that *The Peonia:*

> ... necessarily implies that the obligation to redeliver by the agreed date, notwithstanding that further time is required to complete a legitimate last voyage, is a term, the breach of which sounds in damages only. There can be no question of the owner refusing to complete the voyage and in most cases it would be impracticable for him to do so...The analysis ... must be that the charterparty continues until redelivery but that the charterer commits a breach of contract when the agreed period ends without redelivery taking place. In other words, the charter agreement does not include an implied (or express) extension of the charter period until redelivery after a legitimate last voyage. The risk of the "exigencies of maritime business" in this respect rests upon the charterer alone.[25]

It is submitted, with respect, that these views are preferable to those expressed by Lord Reid in *The London Explorer.*

The next problem which arises in connection with the contractual legitimacy of the order for the final voyage relates to the degree of knowledge by reference to which the test is to be applied. It is submitted that since the obligation is on the charterer to give a contractually legitimate order,

[23] [1991] 1 Lloyd's Rep. 100 at 108.

[24] [1992] 2 Lloyd's Rep. 40 at 43.

[25] *Quaere,* whether the damages can include losses sustained as a result of the owner being unable to perform other engagements fixed for the end of the charter. It would be advisable for the owner to make the commencement of subsequent fixtures conditional to the conclusion of the time charter in issue. Otherwise, in respect of the owner's liability to parties under other fixtures, he is likely to be on risk as to the possibility of clashing engagements.

it is likely that the test is to be applied from the standpoint of the charterer and not the owner. In making the final voyage order, the charterer will essentially be making a prediction for the future and what is required is that the prediction be founded on reasonable expectations. This suggests that the degree of knowledge is that which a reasonable charterer ought to have had (including facts on which he was put on inquiry) at the relevant time.[26]

The remaining issue on the legitimacy of the order concerns the date for assessment and if the relevant date is sometime prior to actual commencement of the final voyage, whether there is any duty to give fresh orders if events have occurred which will prevent redelivery by the final terminal date. Three possible dates arise for consideration: the date on which the charterer made his decision on the last voyage, the date on which the order was actually given to the owner or master and the date for compliance. The first date is clearly inappropriate. Not only would it create tremendous commercial uncertainty for the owner, it also does not fall within the ambit of the obligation which is to give orders that are legitimate. The earliest date for assessment is the date on which the order is given, an approach which clearly gives the contractual advantage to the charterer. In an extreme case, the charterer may well be tempted to protect his position by giving the order for the final voyage considerably in advance, at a time of his choosing, thereby making it difficult for the owner to contest the legitimacy of the order.[27] The charterer's position would be even stronger if the obligation

---

[26] Similarly, in voyage charterparties, it has been held that compliance by the owner with the date of expected readiness to load, means that the owner had reasonable grounds for his estimation based on the knowledge which he ought to have had or in respects of which he was put on inquiry. See R. *Pagnan & Fratelli* v. *N.G.J. Schouten N.V. (The Filipinas 1)* [1973] 1 Lloyd's Rep. 349 and *Maredelanto Compania Naviera S.A.* v. *Berbau Handel G.m.b.H. (The Mihalis Angelos)* [1971] 1 Q.B. 164. Similar issues are likely to arise in the context of the charterer's duty to nominate ports which are prospectively safe. It is submitted that the test is to be applied from the perspective of the reasonable charterer with the knowledge that he had or ought to have had. For a contrary view, see David Chong, "Revisiting the Safe Port" [1992] S.J.L.S. 79.

[27] See generally *Torvald Klaveness A.S.* v. *Ami Maritime Corporation (The Gregos)* [1992] 2 Lloyd's Rep. 40. Evans J. held that the charterers contention that the lawfulness of the order was to be assessed at the time when the order was given was to be rejected. He concluded at 46 that: " The charterers obligation is to give a lawful order before-how much before is not relevant here-the last voyage begins. Whenever the order is given its lawfulness can be tested, and then the shipowner may accept it in circumstances where he cannot subsequently refuse to perform it when the date for performance comes. Subject to such advance acceptance the owner's obligation is to perform whatever order the charterer gives, or has given, when the time for performance arrives, provided the order is lawful. If the order is lawful but the vessel fails to comply with it then the owner is in breach of the charter. If it is not then the owner can elect whether or not to comply. The time for deciding whether the owner is bound to perform the order or not is when the time for performance arrives .... It also means that the charterers obligation to give voyage instructions is similar

to give an order for a legitimate last voyage is held to comprise a one-off obligation and not to constitute an affirmative promise that the last voyage will continue to remain legitimate. The proposition that the obligation translates into a continuing promise is untenable as no charterer would enter into a time charterparty on that basis, any more than he would enter into a continuing obligation to ensure that nominated ports are and will remain safe at all relevant times. The duty, after all, is to make a prediction on a reasonable basis. What is much more likely is that the courts will interpret the agreement as imposing primary and secondary obligations on the charterer. The primary duty will be to give orders that are contractually legitimate. Prima facie this will mean that the orders must at least be valid at the time when they are given. This is not, however, the end of the matter, for secondary obligations may arise. In the case of the safe ports obligation, it is now well established that the time charterer will be under a secondary duty to change his orders if the nominated port, though prospectively safe at time of nomination, becomes unsafe. Of course the secondary obligation cannot be interpreted as requiring the impossible; if the ship is already trapped, the duty to re-nominate will not arise. Likewise, in the case of the duty to give legitimate final voyage orders, secondary duties can arise. Even if the date for assessment is the date of the order, the charterer will be under a secondary duty to re-nominate, if before the last voyage commences, events occur which make it no longer reasonable to expect completion by the end of the charter period. This secondary obligation to re-nominate, it is submitted, is based on an implied term, and ceases once the ship has commenced its final voyage.[28] Thereafter, the shipowner can no longer require a change in the orders, at least, not on the basis that the last voyage has ceased to be legitimate from the point of view of length alone. His remedy, should the ship be redelivered late, will flow from the breach of the separate obligation (discussed below) to re-deliver at the end of the charter period. In effect, what this means is that the effective date at which the order must be legitimate is at or about the time for commencement of the last voyage. This does not mean that the test of compliance at the earlier date of the giving of the order is irrelevant. The shipowner will be

---

to their obligation to order the vessel only to safe ports. If a port, safe when ordered, becomes unsafe, then a secondary obligation to change the order arises... I cannot see any distinction in principle between the two cases save that the charterer remains at risk of a port becoming unsafe after the vessel has proceeded to it, which is immaterial here. But it is unnecessary to decide whether the analogy is otherwise exact."

[28] *Quaere,* however the position where the nominated port becomes unsafe after the final (legitimate) voyage has commenced. The charterer may be under a secondary duty to re-nominate under 'his obligation to employ the vessel between safe ports' and this raises tricky questions as to whether a renomination in such circumstances imports a duty to nominate both a prospectively safe port and one which can be reached so as to enable redelivery by the final terminal date.

able to reject orders on that date which are illegitimate, without having to wait and see. This is not so much because there is an anticipatory breach of the duty to re-deliver by the final terminal date, but because the order itself was not one which could validly be given. Once the last voyage has started, the duty to re-nominate ceases. It cannot be the parties' intention that the owner has a right to call for fresh nominations right up to the point of arrival. If there was such a right, the charterer would, in effect, be guaranteeing that the final voyage remains legitimate throughout its prosecution. This, it is submitted, would be completely unnecessary to safeguard the owner since he will have an alternative remedy for breach of the duty to re-deliver on time.

It should be noted, however, that although the nomination of the final voyage becomes effective at the date for compliance, the time charterer may come under a secondary obligation to re-nominate because of events occurring which render the port unsafe.[29] Conditions of danger may, of course, result in considerable delays in the voyage.[30] If the time charterer insists that the vessel waits for the danger to cease, the redelivery of the vessel may well be delayed beyond the final terminal date. If that should occur, the time charterer will, at the very least, be in breach of his duty to redeliver on time. In addition he may be in breach of his secondary duty to change the nominated port. This secondary duty flows out of the time charterer's obligation to nominate safe ports only. Tricky questions arise as to the position of the time charterer in respects of the secondary duty to re-nominate. Is he contractually obliged, not just to choose a prospectively safe port, but also one which is legitimate in the sense that it is reasonably anticipated that the vessel will be redelivered by the final terminal date? Where there are other safe ports within reach so as to enable redelivery by the final terminal date it is tempting to answer this in the affirmative. The secondary duty to re-nominate protects the position of the owner and it would be strange if the time charterer was in a better position under the secondary duty, from the perspective of legitimate final voyage orders, than when the original order was given. What is more difficult is the situation where there are no other safe ports that can be reached in time. Possible solutions include: (i) Arguing that the owner by requiring the charterer to re-nominate because of the condition of unsafety, impliedly agrees to waive the obligation to give employment orders that can reasonably be expected to enable completion

---

[29] See *The Evia (No. 2)* [1982] 2 Lloyd's Rep. 307 and *The Lucille* [1984] 1 Lloyd's Rep. 244.

[30] Delays caused by dangers or obstructions may render a port unsafe if the delay is of sufficient duration to frustrate the charter party. See *The Hermine* [1979] 1 Lloyd's Rep. 212 and *S.S. Knutsford Ltd.* v. *Tillmanns & Co.* [1908] A.C. 406. It is submitted that an important factor in determining whether the delay is of sufficient length to constitute frustration is the remaining period left before the final terminal date.

by the final terminal date, with the added consequence that the charter period is impliedly extended to the date of actual redelivery. (ii) To take the position that whilst the time charterer is under a secondary duty to re-nominate, this is without prejudice to his obligation to redeliver on time. It is likely that the latter view will be the one which prevails. The duty to employ the vessel in safe ports only, and the duty to give legitimate final voyage orders and the duty to redeliver on time are separate obligations. Where unforeseen events occur on a legitimate final voyage, including subsequent events giving rise to conditions of unsafety, which make it impossible to redeliver on time, the charterer will be in breach of contract once the final terminal date has passed. This breach of contract will not necessarily be repudiatory in nature. If there are other safe ports which can be reached within a reasonable time after expiration of the final terminal date, the shipowner will not be able to treat the contract as discharged. He will have to be content with his claim for damages for late redelivery.[31] If the delay in reaching an alternative safe port is going to be so long as to constitute a frustrating delay then, it is submitted, the shipowner will be entitled to treat the contract as repudiated and discharged.

IV. Contractual Modification and the Charter Period

It is trite law that a time charterparty contract comprises of multiple interlocking, but separate, obligations. The mere giving of a legitimate order for the final voyage does not relieve the charterer from other obligations imposed on him. He will be under a duty to nominate safe ports only, and as noted already, may be under a duty to change the nomination if subsequent conditions of unsafety arise. The time charterer is also under a duty to redeliver at the right place, in the right condition and at the right time. The law regarding the duty to redeliver at the right time has now been clarified by the decision of the Court of Appeal in *The Peonia.* It is now established that the giving of a legitimate final voyage order does not result in an implied extension of the charter period up to the date of actual redelivery. Failure to deliver on time is breach of contract but, as noted, it may not be one which is repudiatory.

If the time charterer wishes to enjoy the advantage of an extension of the charter period to the date of actual redelivery, then this should be expressly provided for in the charter party. Clear words should be used, although in *The Peonia* the expression, "the charterer is to have the option to complete the last voyage", was held to be sufficient to allow the time charterer to

[31] It is probable that the obligation to re-deliver on time is an intermediate term and not a condition. Indeed in *The Peonia,* the Court of Appeal expressed the view that the failure to redeliver on time sounds in damages only. *Cf.* Evans J in *Torvald Klaveness A.S.* v. *Ami Maritime Corporation (The Gregos)* [1992] 2 Lloyd's Rep. 40 at 47.

complete a last legitimate voyage which had overrun without liability to pay damages. Such clauses have given rise to some difficulties of construction. Charterers have on occasions sought to persuade the courts that the option to complete the last voyage allows them to complete both legitimate and illegitimate last voyages without liability to pay damages. This was rejected in *The Peonia* and a similar decision was reached by Steyn J.in *The Black Falcon.*[32]There, by a charterparty dated May 14, 1986, the vessel was chartered for a period of about nine months, charterers option further three months, 15 days more or less on final period. Charterers having option to complete last round voyage under performance prior to delivery at charterparty rate. By an addendum dated August 17, 1987 the charter party was extended "in direct continuation for a period of six or eight months 15 days more or less in charterers option – exact period to be declared latest 21/12/1987." The charter party was therefore to continue either until March 31 or May 31, 1988. The charterers exercised the option one day late on the December 22, 1987. The owners rejected this late exercise and contended that the charterparty had only been extended under the addendum for six months expiring on March 31,1988. On January 29,1988 the charterers sent the owners orders for a last voyage from Europe in March 1988 in order to perform a round voyage to India. The owners performed the voyage under protest and the vessel was redelivered on May 23,1988. On the option Steyn J. held that the addendum created a true option and that the primary period was for six months, 15 days more or less. The late exercise of the option was validly rejected by the owners.[33] Having failed on the construction of the option, the charterers next sought to rely on the clause giving the charterers the option to complete the last round voyage at the charterparty rate. The charterers sought to argue that the clause permitted them to complete the last voyage at charterparty rate even if it was started only a few days before the latest date for redelivery. Steyn J. rejected this argument and upheld the arbitrator's decision that the clause merely allowed the charterers to complete a last legitimate voyage which was unexpectedly delayed at the charter rate. In reaching his conclusion, Steyn J. preferred to be guided by "business common sense" rather than by the dictionary and the "conveyancer' s approach" to interpretation. Business commonsense was to prevail over detailed semantic and syntactical analysis of words, at least where such

---

[32] *Shipping Corp. of India Ltd.* v. *N.S.B. Niederelbe Schiffahrtsgesellschaft m.b.H. & Co. (The Black Falcon)* [1991] 1 Lloyd's Rep. 77.

[33] The charterers had argued that the addendum merely created a performance option. There was no primary period and it was up to the charterers to elect between two alternatives. The late election whilst it might be a breach of contract constituted a valid election. Steyn J. in rejecting this argument commented at 79 that "the charterers' interpretation would only have appealed to a black letter man. It is an artificial interpretation which would never have occurred to a commercial man."

an analysis leads to commercial nonsense. Steyn J. concluded that the charterers' interpretation would lead to an absurd position:

> ... It envisages that on the very last day of the charter party period, as carefully defined and qualified with options, and a contractual tolerance ('15 days more or less'), the charterers can give orders for a round trip Europe-India-Europe lasting, say, 10 weeks and then expect to pay only at the charter party rate if that voyage is performed ... The charterers construction introduces a very high degree of business uncertainty. For example, as has been pointed out on behalf of the owners, it entails the consequence that the owners cannot rely on the terms of the addendum relating to the redelivery date when seeking to negotiate the next fixture...[34]

Notwithstanding the decisions in *The Peonia* and *The Black Falcon,* it is, of course, still open to the parties to contract on the basis that the charter period is to be extended to the end of the last voyage, even if the order was given at a time when it would be impossible for the vessel to complete the voyage within the charter period. Commercial commonsense must ultimately yield to the bargain made by the parties and it is trite law that the court cannot in the name of commercial commonsense rewrite the contracted bargain for the parties. In the recent case of *The World Renown*[35] the second plaintiffs chartered their vessel to the defendants in the Shelltime 3 form which provided, *inter alia,* in clause 3 that the charter period was for "a period of six months fifteen days more or less in Charterers option." Clause 7 provided that the charter hire was to be paid until "the time and date of her redelivery to the owners." Clause 18 then provided that:

> ... Notwithstanding the provisions of clause 3 ... should the vessel be upon a voyage at the expiry of the period of this charter, Charterers shall have the use of the vessel at the same rate and conditions for such time as may be necessary for the completion of the round voyage...

The charterers exercised the option for a 15-day extension. Accordingly, the charter period would under clause 3 expire on December 24, 1988. On October 4, the charterers ordered the vessel on a last voyage to Sirri to pick up cargo for carriage to Rotterdam and Milford Haven. The vessel was not redelivered until January 18,1989. The dispute revolved essentially around the relationship between clauses 3 and 18 of the charter. Hobhouse

---

[34] [1991] 1 Lloyd's Rep. 77 at 80.

[35] *Chiswell Shipping Ltd. and Liberian Jaguar Transports Inc.* v. *National Iranian Tanker Co. (The World Symphony and World Renown)* [1991] 2 Lloyd's Rep. 251 and [1992] 2 Lloyd's Rep. 115 (C.A.)

J. at first instance had no doubt that in the absence of clause 18 the charterers would on the authority of *The Peonia* be in breach of two obligations: not to give orders for illegitimate last voyages and in failing to redeliver on time. However, both *The Peonia* and *The Black Falcon* were distinguished on their facts since there was no equivalent to clause 18 of *The World Renown* charter. Prior case law had already construed provisions equivalent to clause 18 as effecting a contractual extension of the charter period to cover the final voyage.[36] Hobhouse J. commented that:

> It is axiomatic in English commercial law that where certain contractual provisions have achieved an established and recognised meaning the Courts should not decline to follow earlier authorities in which that meaning is recognised unless those previous authorities are clearly wrong. Without such a principle the certainty of commercial law is lost and there is a risk of frustrating rather than giving effect to the intentions of the parties ... Similarly it is the duty of the Court ... to construe (in their context) the words which the parties have chosen to use in that contract.[37]

Later on in his judgment Hobhouse J. echoed the words of Steyn J. in *The Black Falcon* and remarked that:

> That is not to say that a tribunal, be it arbitral orjudicial, should construe a commercial document made by commercial parties as if it were a conveyance. It is to be construed as a businessman's bargain made by persons who know their business and have informed themselves about the relevant law.[38]

However, Hobhouse J. took pains to emphasise that the bargain to be enforced was the bargain of the parties and not the bargain which the court deems to be more businesslike:

> It is also trite to say that any Court should be very careful before it chooses to characterise the bargain of two commercial parties as being unbusinesslike .... But if on the natural meaning of a given commercial contract the words lead to a certain result it is not for the Court to remake the parties' bargain to make it conform to what the Court considers to be business commonsense .... The variety of contractual structures that can be adopted by charterers and shipowners

---

[36] *Bucknall Brothers* v. *Murray* (1900) 5 Com. Cas. 312 and *Dene Steam Shipping Co.* v. *Bucknall Brothers* (1900) 5 Com. Cas. 372.
[37] [1991] 2 Lloyd's Rep. 251 at 257.
[38] *Ibid., at 257*

> for any given transaction are as various as the ingenuity of chartering brokers and the ever changing demands of the market may determine. It is not for the Courts to fit the parties transactions within a strict and limited frame-work which the parties themselves may have chosen not to adopt....[39]

Turning to the terms of the charter in *The World Renown* Hobhouse J. held that under clause 18, the charterers were entitled to give orders to take advantage of their rights under clause 18. To do so would be to send the vessel on a legitimate and not illegitimate last voyage. Provided that the round voyage was started before the expiry of the calender period, it would be a round voyage which the charterers were entitled to require the vessel to complete before redelivery. Clause 18 overrode clause 3 and the charterers were entitled to give the order for the last voyage even though it was obvious that the voyage would overrun the time stipulated in clause 3.

The decision was upheld by the Court of Appeal. Lord Donaldson M.R. accepted Hobhouse J.'s comments on interpretation of contracts and he added:

> I accept unreservedly that owners and charterers are free to make any contract which in their view meets their commercial needs. I also accept, equally unreservedly, that arguments based upon the apparent commercial absurdity need to be regarded with caution not least because, whilst Judges of commercial experience are in a position to make some evaluation of the benefits and the burdens of liberties and limitations contained in a charter party, they are unlikely to be able to evaluate the countervailing burden or benefit of a particular rate of hire or length of charter, which depends upon current market conditions and because the alleged absurdity of a particular provision has to be judged in the context of the whole package.[40]

V. The Effect of Late Redelivery

In the absence of provisions which extend the charter period to the end of the final voyage, it is most unlikely that the courts will be able to imply the existence of such a term. Without such a provision, redelivery after the final terminal date is breach of contract. Following the decisions in *The Peonia* and *The Black Falcon* this would be so even if the last voyage was a legitimate one in terms of its order. This does not, however, mean that the entire contract is at an end. The charter period may have expired

---

[39] *Ibid.,* at 257

[40] [1992] 2 Lloyd's Rep. 115 at 117.

but other residual obligations under the contract may continue. The time charterparty may, for example, provide for the payment of the contractual rate of hire right up to the date of actual redelivery.[41] This provision does not mean that the parties have agreed that the charter period is thereby extended to the actual date of redelivery, if it did, the charterer would not be liable in damages for the overrun even if the last order was illegitimate. The proper interpretation, it is submitted, is that the charterer is in breach of the duty to redeliver on time, and continues to be under the duty to pay the contractual rate of hire to the date of actual redelivery. This clause is inserted to protect the position of the ship owner. Even if rates of hire have fallen, the time charterer has agreed to pay the contractual rate for the period of the overrun to the date of actual redelivery. Thus in *The Peonia,* Saville J. at first instance preferred the view that the redelivery obligation was not:

> ... one automatically bringing the contract to an end, or as giving the owners the automatic right to cancel the contract if it was broken, but as a lesser term, the breach of which, unless frustrating in nature, would give the owners only the right to such damages as they might thereby sustain. This would accord with the realities of the situation. The adventure would continue unless the delay was sufficient to frustrate it, the charterers would continue to have to pay hire and the owners would recover any losses sustained through the failure of the charterers to perform their promise to redeliver the vessel by the end of the agreed period.[42]

Without such a clause linking the payment of the charter hire to the date of actual redelivery, the payment of the contractual rate of hire would be coupled to the charter period and the remedy for the ship owner for the overrun would lie in damages based on the then market rate.[43] If this has fallen, the ship owner may find it difficult to claim the higher contractual

---

[41] See, for example, *London and Overseas Freighters Ltd.* v. *Timber Shipping Co. S.A. (The London Explorer)* [1972] A.C. 1 and *Hyundai Merchant Marine Co. Ltd.* v. *Gesuri Chartering Co. Ltd. (The Peonia)* [1991] 1 Lloyd's Rep. 100.

[42] [1991] 1 Lloyd's Rep. 100 at 104.

[43] In *London & Overseas Freighters Ltd.* v. *Timber Shipping Co. SA. (The London Explorer)* [1972] A.C. 1 at 19 Lord Morris held that the clause imposing the duty to pay charter hire to the hour of the day of her redelivery created an obligation which existed whether or not there was a breach by the charterers in failing to redeliver when they should have done. The time charterer may try to argue that the provision for the contractual rate of hire in such circumstances is void as it is really a disguised penalty. It is unlikely that the argument will succeed since the shipowner's claim for the charter hire rate flows from the linkage of the contractual rate of hire to the date of actual redelivery. It is not a claim by way of damages. Note the reservations of Chong, *supra,* note 3 [1991] 1 M.L.J. cxxi at cxxvii.

rate by way of damages.[44] The linking of the contractual hire rate to the time of redelivery (as opposed to the charter period) also allows the ship owner to claim for damages based on higher market rates should the rates have gone up for the period of the overrun.

Similarly, where the vessel has been sent on an illegitimate last voyage, the owner will be entitled to claim damages for breach of contract. In the first place, the owner would, of course, be entitled to reject the order and to insist on a proper order. Failure to give a fresh legitimate order will ordinarily constitute a repudiatory breach of contract. If the owner proceeds on the illegitimate last voyage without waiving his right to claim damages, the owner will be able to maintain an action for damages either on the ground of the giving of the illegitimate order or for the late redelivery.[45] If, contrary to expectations, the vessel is redelivered by the final terminal date, then the damages for the giving of the order for the illegitimate last voyage should be nominal only. Where the vessel is redelivered late, substantial damages will be payable.[46] In *The Black Falcon* Steyn J. rejected the contention that damages were payable as from the date when the charterers would have been able to redeliver the vessel if they had not sent her on the illegitimate last voyage. This date being sometime before the final terminal date. He held that:

> In awarding compensation for breach of contract various interests may have to be considered, such as expectation, reliance and restitution. Here the relevant interest is the owners' expectation interest. That expectation was always to receive no more than the charter party rate until April 14 [the final terminal date]...To award to the owners a higher market rate for the period up to April 14 is to confer on them an unwarranted windfall.[47]

Accordingly, he held that the owner was only entitled to receive the

---

[44] See, however, F.M.B. Reynolds, *supra,* note 3 argues at 174 that in *The London Explorer,* the charterer's contention that he was only liable to pay damages at the lower current market rate could also have been rejected on the grounds that the charterer should not be able to profit from his own wrong.

[45] See Hobhouse J. in *The World Renown* [1991] 2 Lloyd's Rep. 251 at 254. In order to avoid any possible argument on waiver of the breach, as opposed to election to affirm the contract, the owner should proceed on the illegitimate last voyage under protest. On waiver in general see *The Motor Oil Hellas (Corinth) Refineries S.A.* v. *Shipping Corp. of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391.

[46] See also Bingham L.J. in *The Peonia* [1991] 1 Lloyd's Rep. 100 at 108.

[47] See *Shipping Corporation of India Ltd.* v. *N.S.B. Niederelbe Schiffahrtsgesellschaft m.b.H & Co. (The Black Falcon)* [1991] 1 Lloyd's Rep. 77 at 80 and *Alma Shipping Corp.* v. *Mantovani (The Dione)* [1975] 1 Lloyd's Rep. 115. Note that the charter party might contain provisions requiring the charter rate to be paid to the date of actual redelivery. Note that in *Torvald Klaveness A.S.* v. *Ami Maritime Corp (The Gregos)* [1992] 2 Lloyd's Rep. 40,

charter rate until the last permissible date for redelivery, and thereafter to damages based on the market rate until actual redelivery.

VI. Conclusion

The recent decisions on the last voyages in time charter parties have clearly demonstrated that careful attention has to be paid to the precise words of the charter party in issue. Commercial commonsense, the need for certainty in business transactions, whilst very important as guides, must not be elevated to the point where they become a vehicle for re-writing the bargain made by the parties. The decisions also demonstrate the interlocking, but legally distinct, nature of the charterer's obligations. The orders given pursuant to the employment clause must be contractually valid. In the context of the duration of the time charter, the legitimacy of the order is assessed by reference to the charter period (including any margins that may be expressed or implied). Its nature is in essence a prediction. That is not, however, the end of the matter. The charter period rears its head again in the context of the separate duty to redeliver by the final terminal date. This duty is an absolute one and is not one merely to use best endeavours. The mere fact that the order when given was legitimate does not effect an extension of the charter period so as to make the duty to redeliver contemporaneous with the conclusion of the last voyage. If that is what the parties intend, then clear words will be needed. The charterer's duty to pay charter hire needs also to be carefully related to the terms of the bargain made. The duty to pay the contracted charter rate may not necessarily be contractually pegged to the charter period. It often is pegged to the date of actual redelivery. Where the vessel has overrun the charter period, the breach of contract does mean that the contractual obligations as a whole are discharged. This would be so even if, which is unlikely, the failure

---

Evans J. stated at p. 42 that "if the charterers order is unlawful, the owner can refuse to obey it. If he chooses to perform it, then he is entitled to recover the charter rate of hire until the end of the agreed period and in addition damages based on the rate of hire thereafter until the vessel becomes free and is redelivered. (Whether if the market rate has fallen he can recover the charter rate of hire in excess of the market rate until actual redelivery has not, I think, been expressly decided. But there are clear reasons of principle why he should do so – the charterers cannot contend that the overrun was not or did not become part of the agreed charter service – and in any event there are good practical reasons why this situation is unlikely to arise)" Presumably the main reason is the existence of clauses linking the charter hire to the date of actual redelivery. In the absence of such clauses it is hard, with respect, to see what the principles are which would link the assessment of damages to a sum above the relevant market rate. Query the possibility of an implied contract arising from the performance of the illegitimate last voyage whereby the charter period is extended to the date of actual redelivery. This is unlikely, and if established, would mean that the claim would no longer be for damages. *Quaere,* also, estoppel, and the argument that the charterer must not profit out of his own wrong. See F.M.B. Reynolds, *supra,* note 3 at 174.

to redeliver on time is regarded as repudiatory in nature. A repudiatory breach gives the innocent party the right to elect to affirm the contract or to treat it as discharged. Whilst the recent cases[48] have clarified some of the basic issues; new ones are being thrown up. The date on which the legitimacy of the order is to be assessed has yet to be firmly settled, the degree of knowledge and the perspective from which the prediction is to be made is still open to doubt and the question of whether there is a duty to re-nominate has yet to be fully explored by the courts. The saga of the last legitimate and or illegitimate voyage is not yet fully over.

GEORGE WEI*

[48] It is still possible that the House of Lords might take a different view from the recent Court of Appeal and first instance decisions.

* Dip. Law, LL.M. (Lond.), Barrister (I.T.), Advocate & Solicitor (Singapore), Associate Professor, Faculty of Law, National University of Singapore.