BENTLEYS

BENTLEYS' BULLETIN

January 2016

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SUBSTITUTE VESSELS UNDER GAFTA CLAUSES

In *Ramburs Inc v Agrifert [2015] EWHC 3548 (Comm)* Agrifert were FOB buyers of a cargo of maize under a contract on amended GAFTA 49 terms. Delivery under the contract was to take place between 15 and 31 March 2013 (both dates included) with no extension, and 10 days' pre-advice of the vessel's name and ETA was to be given. The terms of the contract also included the GAFTA FOB Period of Delivery clause, which provided as follows:

"…Nomination of Vessel. Buyers shall serve not less than …….. consecutive days' notice of the name and probable readiness date of the vessel and the estimated tonnage required. The Sellers shall have the goods ready to be delivered to the Buyers at any time within the contract period of delivery.

Buyers have the right to substitute the nominated vessel, but in any event the original delivery period and any extension shall not be affected thereby…"

On 20 March 2013, Agrifert nominated the M/V "PUFFIN" with a loadport ETA of 26/27 March 2013. Subsequently they sent another message changing this to the M/V "SEA WAY" with ETA 28 March 2013.

Ramburs protested. They contacted the buyers describing the original nomination as "Mickey Mouse". In their view the whole thing was a complete fabrication. Not only that, they said it was "highly" unlikely that the substitute ship would arrive within the later ETA. Even if it did, they could not see how loading could be completed within the contractually agreed period. They went on to say:

"In the premises, your nomination of the "Puffin" and purported substitute "Sea Way" represents a false nomination and in turn constitutes repudiatory breaches which we accept".

Buyers commenced arbitration claiming the cost of buying a substitute cargo. The First-Tier Tribunal agreed with the sellers, but the GAFTA Board of Appeal allowed buyers' appeal. The sellers appealed to the High Court.

The starting point is that, subject to any contractual provisions to the contrary, a buyer will be permitted to substitute an originally nominated ship for another. The question considered by the court was whether a substitute nomination was required otherwise to comply with the contract terms in relation to pre-advice or whether the GAFTA wording not only provides an express right to substitute but also a complete code defining and limiting the right to substitution. In other words whether, for a substitution to be contractual, all the buyers must do is ensure that their substitution does not affect the agreed delivery period.

The GAFTA Board clearly felt the identity of the ship itself mattered very little to the sellers. All they would need was sufficient notice to have the goods ready for delivery. The Board apparently went so far as to say it would be "bizarre" for the right to substitute to be subject to the same requirements for pre-advice as the original nomination.

Smith, J. disagreed. In his judgment, the GAFTA wording is to be read alongside the pre-advice requirements and those requirements must be complied with. In his view:

"….it would be more bizarre to give the contract an interpretation that requires the buyers to give detailed pre-advice information, but for information about a vessel that was never used to suffice."

The first paragraph about nomination in the GAFTA wording refers to the vessel that is going to load the cargo. In his words: *"…that is the only vessel whose name and "probable readiness date" could possibly matter"*.

The buyers also wanted to argue that, even if the "SEA WAY" nomination was invalid, the breach was not repudiatory and did not entitle sellers to terminate the contract. There is no decided case on the point. Since, however, the buyers in this case had not argued the point before the GAFTA Tribunals and it is in part a factual point, the High Court refused to address it.

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DAMAGES FOR EARLY REDELIVERY: WHAT HAPPENS WHEN YOU SELL THE VESSEL?

In the *"NEW FLAMENCO" [2015] EWCA Civ 1299* time charterers redelivered the vessel in October 2007, where the minimum charter period ended in November 2009. The vessel was a small cruise ship and there was no available market for a substitute charter on redelivery. Owners therefore sold the vessel, and achieved a price of around US$24m. If the charter had been performed and the vessel redelivered in November 2009, the vessel's value would have been only US$7m.

Owners commenced arbitration against charterers, seeking damages calculated by reference to the net loss of profits which would have been earned during the remaining two years of the charter. Credit was given for operating expenses which would have been incurred in performing the charter but which had been saved as a result of the vessel's sale. The amount claimed was around US$7.5m. Charterers argued that owners had to bring into account the difference between the sale price achieved and her value in November 2009.

The issue of law in this case was whether the increased value realised by the sale was a benefit to owners which should be brought into account when assessing damages for charterers' early redelivery. The arbitrator found that the sale of the vessel by owners was caused by charterers' breach and was undertaken in reasonable mitigation of damage. He agreed with charterers that credit should be given in respect of the difference in value of the vessel, and therefore awarded owners no damages (since the difference in value was greater than the €7.5m claimed). Owners appealed to the High Court under section 69 of the Arbitration Act 1996.

At first instance Popplewell, J. held that owners' decision to sell the vessel was independent of the breach in legal terms. The difference in the value of the vessel could therefore not be taken into account when assessing damages. Charterers appealed to the Court of Appeal.

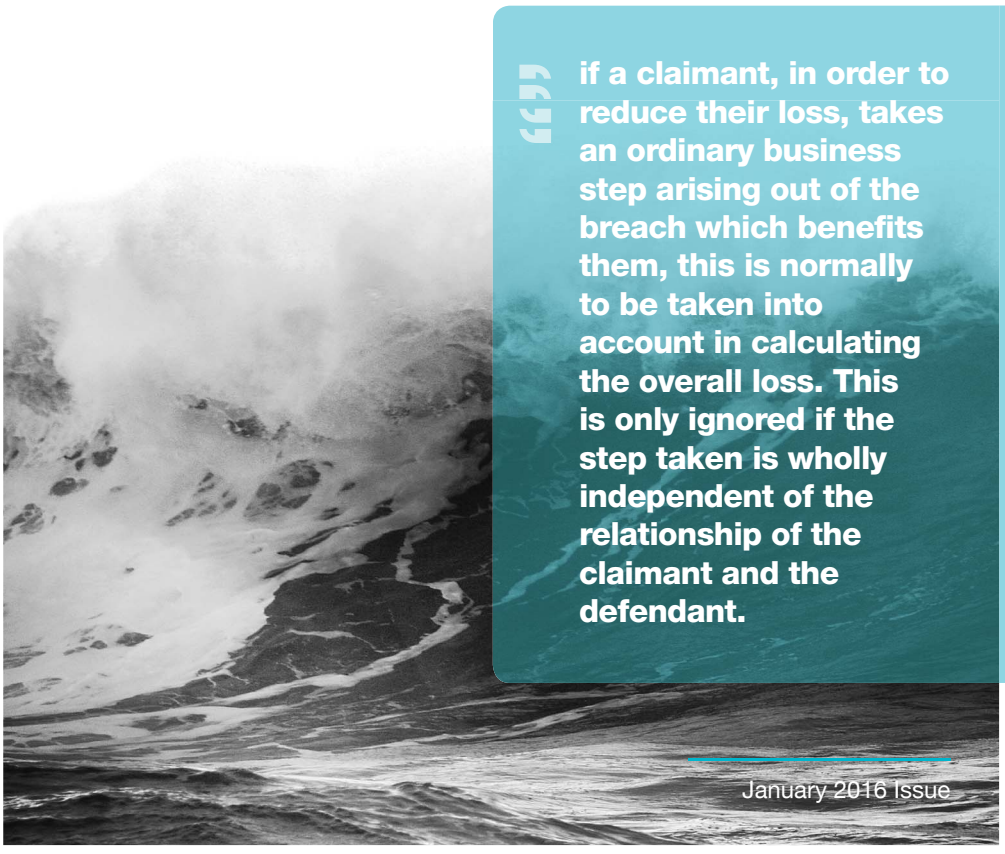
The judgment in the Court of Appeal provides some insight into the current thinking on the "notoriously difficult" task of laying down "principles of law in the realm of mitigation". The court held that if a claimant, in order to reduce their loss, takes an ordinary business step arising out of the breach which benefits them, this is normally to be taken into account in calculating the overall loss. This is only ignored if the step taken is wholly independent of the relationship of the claimant and the defendant.

Where there is no available market the starting point is that the *prima facie* measure of loss is the difference between the contractual hire and the cost of earning that hire. But an owner will not be awarded this in full if they are able to mitigate that loss by trading the vessel. The profits received by trading are the consequences of a decision to mitigate loss and those consequences will generally arise from the consequences of the charterers' breach of contract.

Accordingly, in the court's view it was not easy to see why the benefit (if any) which an owner secures by selling the vessel should not also be brought into account just as much as benefits secured by spot trading. There is no requirement that, to be brought into account, a benefit must be of the same kind as the loss being claimed or mitigated. The requirement is that the benefit must arise from the consequences of the breach. The arbitrator found as a fact that the benefit did so arise. The sale was both the cause of the benefit to owners and an act of mitigation.

Looked at another way, however, the owner had been placed in a very difficult position and was compelled to make a fortuitous and risky decision because there was no business available for the vessel. If there had been, the losses would have been assessed by reference to the difference between the contract and market rates of hire at the time of termination. Any additional loss suffered or gain made by owners by selling the vessel is likely to have been treated as the owners' independent decision to speculate rather than taking advantage of the available market.

Charterers should note that this decision could open the door to claims by owners where they sell a vessel shortly after termination in order to mitigate, and argue that her value would have risen, not fallen, by the end of the original charter length.



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ANTI-SUIT INJUNCTIONS: WHEN IS DELAY ALONE FATAL?

In *Essar Shipping Ltd v Bank of China [2015] EWHC 3266 (Comm)* the High Court was asked to restrain the Bank of China from pursuing proceedings in the Qingdao Maritime Court.

The claimant was the operator of the M/V "KISHORE" under a bareboat charter. The vessel was sub-chartered and all charters in the chain provided for English law and London Arbitration. A cargo of iron fines was loaded in Australia for transport to China in December 2013. The bill of lading for the cargo was on a Congenbill 94 form with the consignee named as "to order". The reverse of the bill of lading expressly incorporated the law and arbitration clause of one of the charters in the chain, and also contained a general paramount clause (meaning that there was a one-year time bar in respect of claims under the bill pursuant to the Hague/ Hague-Visby rules).

The cargo was sold to Cargill, who sold it on to an entity called Haixin. Under the sale contract, Haixin was required to open an irrevocable letter of credit for payment of the purchase price to Cargill. Cargill and other parties provided letters of indemnity in order that the cargo be discharged at Lanshan, China, without production of the original bills of lading. The vessel arrived at Lanshan and discharged the cargo without production of the bill of lading between 9 and 11 January 2014.

In February 2014, upon request by Haixin, Bank of China opened a letter of credit in Cargill's favour for the sale price. The bank paid Cargill the sale price in May 2014, against presentation of the original bills of lading. However, despite receiving most of the cargo, Haixin never paid the majority of the sale price to Bank of China (almost US$9m).

In September 2014 the bank commenced substantive proceedings under the bill of lading in the Qingdao Maritime Court claiming damages of US$11m. In November 2014 the claimant filed a formal challenge to the jurisdiction of the Qingdao court, alleging that the bill of lading contract incorporated a London arbitration clause.

However, although this would have been open to them at any stage, the claimant chose to delay their application to the High Court for an anti-suit injunction until July 2015. By then, the Hague Rules time bar had come into operation and would provide a complete defence under English law. Shortly after that, the Chinese courts dismissed the challenge to their own jurisdiction.

The bank then moved its sights to the UK and opposed the grant of an injunction on the basis that the application was not issued promptly. It also argued that unless it was unreasonable for the bank not to have commenced an English arbitration within the limitation period, granting the injunction would be unjust because it would deprive the bank of all claims (because any English claim would be time-barred).

*Continued On Page **Five***

Walker, J. made it clear that the bank should have made its claim in London arbitration. Nonetheless, he refused to grant the injunction – so why was that? In granting an injunction discretionary and equitable principles will be engaged. The concept of "comity" - respect for the courts in other jurisdictions is important in English law.

Comity calls for challenges to be made promptly in the appropriate court. Lack of promptness increases the danger that such injunctions will be seen as inappropriately interfering with the jurisdiction of the foreign court. That, of course, begs the question of what is or is not "prompt".

In this case the judge pointed out that there was more than nine months between the commencement of the Chinese proceedings and the issue of the London application. In the context of a 12-month time bar for claims under the bill of lading, a few months of delay should be regarded as significant. Furthermore, the Chinese law evidence before the English court was that the jurisdictional challenge in China was doomed to failure.

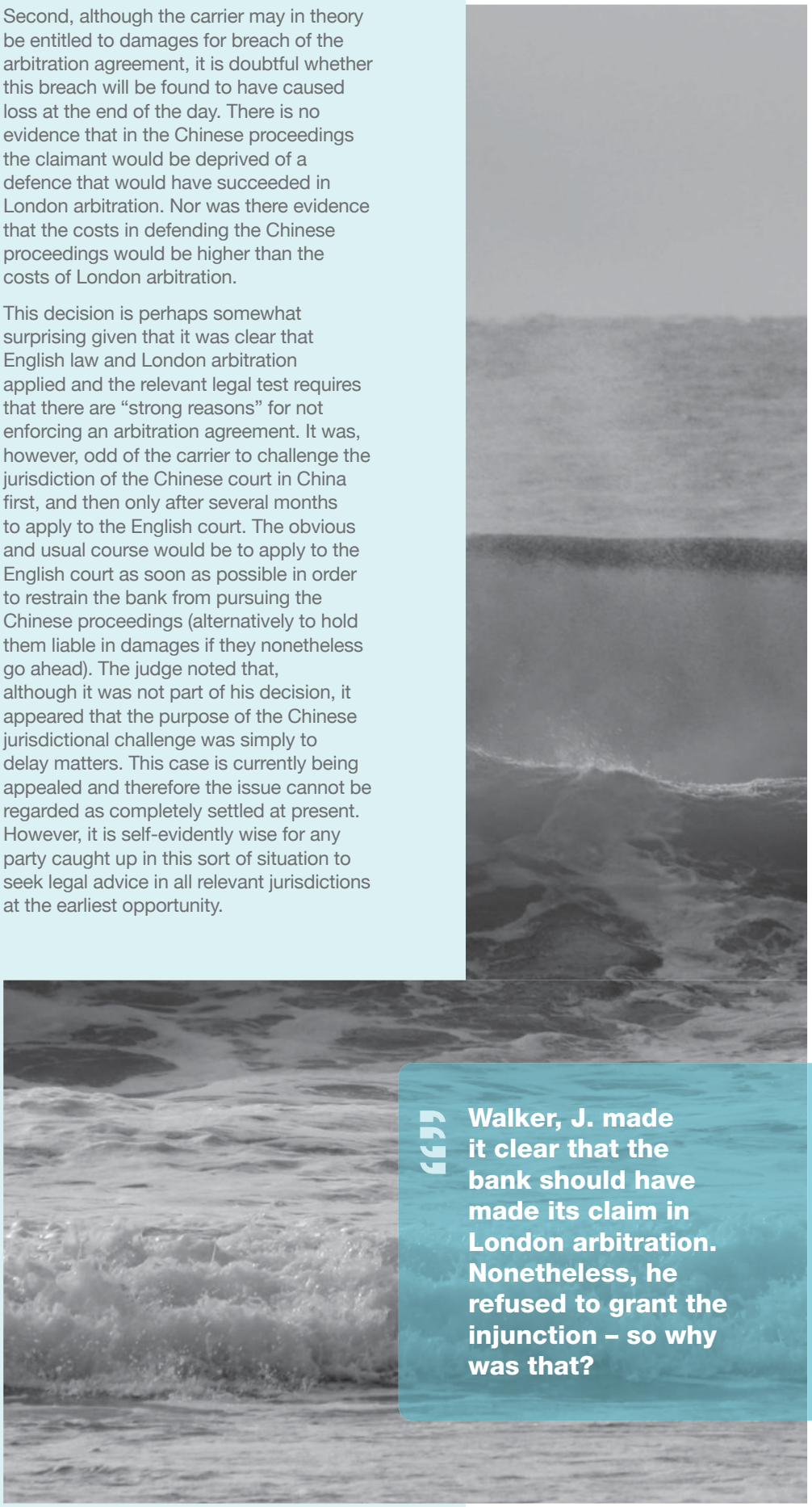
In the judge's view, where there was a potential time bar expiring in January 2015, the claimant should have issued and served a claim form seeking an anti-suit injunction no later than November 2014. The decision to delay this pending the outcome of the jurisdictional challenge in China was not a good reason because it was inconsistent with comity. There was, in particular, no objective justification for thinking that the Chinese jurisdiction challenge would be successful or resolved speedily.

The judge found, therefore, that the lack of promptness was so serious that the proposed injunction would be neither just nor convenient. On those grounds he refused to grant it.

He also made a couple of observations which did not form part of his decision. First, if the bank had had to rely upon prejudice they would not be able to do so. It was unreasonable not to have commenced London arbitration proceedings within the time bar. The bank obtained legal advice from a Beijing law firm. Once the Chinese jurisdictional challenge had been made in November 2014, the bank had notice that English law might be relevant. There was, therefore, sufficient time to commence arbitration before the time-bar expired in January 2015.

Second, although the carrier may in theory be entitled to damages for breach of the arbitration agreement, it is doubtful whether this breach will be found to have caused loss at the end of the day. There is no evidence that in the Chinese proceedings the claimant would be deprived of a defence that would have succeeded in London arbitration. Nor was there evidence that the costs in defending the Chinese proceedings would be higher than the costs of London arbitration.

This decision is perhaps somewhat surprising given that it was clear that English law and London arbitration applied and the relevant legal test requires that there are "strong reasons" for not enforcing an arbitration agreement. It was, however, odd of the carrier to challenge the jurisdiction of the Chinese court in China first, and then only after several months to apply to the English court. The obvious and usual course would be to apply to the English court as soon as possible in order to restrain the bank from pursuing the Chinese proceedings (alternatively to hold them liable in damages if they nonetheless go ahead). The judge noted that, although it was not part of his decision, it appeared that the purpose of the Chinese jurisdictional challenge was simply to delay matters. This case is currently being appealed and therefore the issue cannot be regarded as completely settled at present. However, it is self-evidently wise for any party caught up in this sort of situation to seek legal advice in all relevant jurisdictions at the earliest opportunity.



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COLLISIONS AND APPORTIONMENT OF LIABILITY: WHOSE FAULT IS RELEVANT?

"NORDLAKE" and "SEA EAGLE" [2015] EWHC 3605 (Admlty) **provides very helpful guidance on what to do if one or more of the ships at fault in a collision are not before the court. Can that court take into account the degree to which they were at fault when apportioning liability.**

Mr Justice Teare had to consider the complex facts of a collision involving five ships all alleged to be at fault. The vessel "NORDLAKE" narrowly avoided colliding with the "SEAEAGLE" in the entrance to the port of Mumbai, but shortly thereafter collided with the Indian warship "VINHYAGIRI". Following the collision a fire broke out onboard "VINHYAGIRI" and she sank. Proceedings were commenced in India concerning the liability of "NORDLAKE" to the Union of India, owners of the "VINHYAGIRI". The owners of "NORDLAKE" then brought a claim in England against the owners of "SEAEAGLE", alleging that the collision was caused by the negligence of the crew aboard "SEAEAGLE" and by the negligence of three Indian warships "VINDHYAGIRI", "GODHAVARI" and another vessel described as the "Lead Warship". The owners of "SEAEAGLE" also brought a claim in England against the owners of "NORDLAKE" alleging that the collision was caused by the negligence of the crew aboard "NORDLAKE" and the same three Indian warships.

Under section 187 of the Merchant Shipping Act 1995 the court had to decide whether the various allegations of navigational fault had been substantiated and, if there was fault by two or more vessels, apportion liability in proportion to the degree in which each vessel was at fault. The Union of India were not party to the English proceedings and the court therefore received no evidence from the crew of the three Indian warships alleged to be at fault.

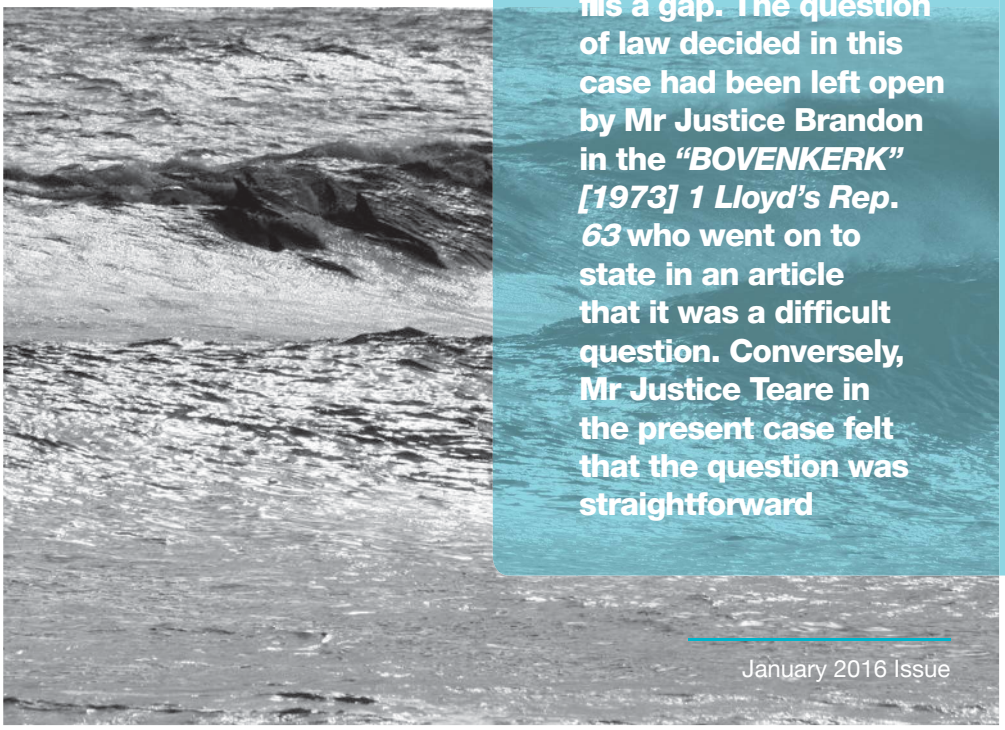
Mr Justice Teare (with assistance from two Nautical Assessors) went through the facts and navigation of each vessel leading up to the collision in detail in a lengthy judgment. His conclusion was that all five vessels were guilty of fault (e.g. breaches of the collision regulations), and that all apart from the "Lead Warship" were guilty of fault which was causative of the collision between "NORDLAKE" and "VINDYAGIRI".

The judge found that the court was entitled to take into account the fault of the ships not before the court.

He noted that Section 187 of the Merchant Shipping Act 1995 states that the liability to make good collision damage or loss *"shall be in proportion to the degree in which each ship was in fault"*. Unless, therefore, account was taken of the degree of fault on the part of "VINHYAGIRI and "GODAVARI" the proportions in which "NORDLAKE" and "SEAEAGLE" are held liable for the damage will exceed the degree in which those vessels were at fault.

Out of interest he then went on to find that liability should be apportioned as follows: 60% to "NORDLAKE"; 20% to "VINHYAGIRI", 10% to "GODAVARI" and 10% to "SEAEAGLE".

This case is going to be welcomed because it fills a gap. The question of law decided in this case had been left open by Mr Justice Brandon in the "*BOVENKERK" [1973] 1 Lloyd's Rep. 63* who went on to state in an article that it was a difficult question. Conversely, Mr Justice Teare in the present case felt that the question was straightforward, and it is useful to have some clear guidance in this respect. Of course, the English court could not enter judgment against "VINDHYAGIRI" and "GODAVARI" in respect of their part in the collision, because those vessels were not party to the actions before the court, but the decision ensures that the owners of the ships before the court do not bear a higher proportion of the liability than their individual fault deserves.



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