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Law



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As a consequence, the terms of a time charterparty are quite different to the terms of any other charterparty (voyage, demise). As Wilson states “ in the time charter the shipowner is placing his vessel for an agreed period at the disposal of the charterer, who is free to employ it for his own purposes within the permitted contractual limits. As the charterer controls the commercial function of the vessel, he is normally responsible for the resultant expenses of such activities and also undertakes to indemnify the shipowner against liabilities arising from the master obeying his instructions”[1], describing, in a nutshell, the main functions and duties of the charter parties. One of the most important clauses in a time charterparty, that aims to ensure the control of the charterer upon the vessel, is the employment clause. Most standard form charter parties have clauses in which the charterer’s right to give employment orders is clearly stated. We can see in the NYPE form, that article 8 points that: NYPE 1993 cl. 8 (a) :“(a) The Master shall perform the voyages with due despatch and shall render all customary assistance with the Vessel’s crew. The Master... shall be under the orders and directions of the Charterers as regards employment and agency... “ Gentime has a similar clause: Gentime cl. 12 paragraph one.“ The Master... shall at all times during the currency of this Charter Party be under the orders and directions of the Charterers as regards employment, agency or other arrangements. The Master shall prosecute all voyages with due dispatch...”. These clauses guarantee that the charterer will have the right to give orders concerning a wide range of problems/matters that may occur during a voyage such as orders about the loading and discharge ports, about the issuing of bills of lading, the type of cargo loaded etc. There is a problem though in the admiralty concerning what consists an employment order. Several opinions

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have been given on that matter, trying to outline better the content of the employment. Lord Wright in the *Larrinaga S. S. Co v The King*[2] case gave the following definition of employment “” Employment” means employment of the ship to carry out the purposes for which the charterers wish to use her”. The employment clause is almost always related to the time charter party, underlining thus its main function as this was described in “ *The Nanfri*”[3], where Lord Wilberforce stated that “ It is important in this connection to have in mind that the present charters are time charters, the nature and purpose of which is to enable the charterers to use the vessel during the period of the charters for trading in whatever manner they deem fit.” It is natural, since the right of the charterers in this type of contract is so wide, that they are liable to the shipowners for damages or loss that may occur when under their orders. According to *The Island Archon* case[4] it was held that a shipowner is usually entitled to an indemnity, implied or expressed of the loss happened as a result of the master's compliance with the charterer's orders. The charterer's right to give orders has some limits. To quote Dockray “ An impermissible order can be declined. If, on the other hand, the charterer is entitled to give a particular order, then the shipowner has a contractual duty to obey and usually a right to be indemnified against loss or damage sustained in direct consequence of the following order”[5]. Case law has made a distinction between the orders that a master/shipowner is not bound to obey (f. i order that the charterers are not entitled to give under the contract“ *The Sussex Oak*”[6], order to deliver cargo to a person not entitled to “ *The Sagona*”[7]). A problem exists though, when it comes to matters as danger and perils of the sea. To what extent the master can deny a charterer's instruction in order to maintain the safety of the ship? If he

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does so, is he in breach of the charterparty contract? If he does obey and sustain damage, is he entitled to a compensation? It is important at this point to make a separation between orders that have to do with the employment of the ship and orders that deal with the navigation of the ship. Under a time charter, the shipowner retains responsibility for all matters relating to navigation and ship management[8]. Comparing the words of the judges in the two given cases, with an important time difference between them, which dealt with the matter of the disobedience to the charterer's orders, one could say that there is great argue in the case law about what a master could deny to obey. In *Portsmouth Steamship v Liverpool and Glasgow Salvage*[9], J Roche said that “ it was for the captain, within the limits of obvious danger to follow the charterer's instructions without undue question”. In the more recent case of “ *The Hill Harmony*”[10] Lord Hobhouse concluded to this statement “ The Master remains responsible for the safety of the crew and the vessel. If an order is 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”. It seems that the two judges have diverse opinions as to the master's duty to comply with the charterer's employment instructions. Analyzing both statements along with the cases, we can conclude that there is no conflict between those statements whatsoever. In the first case, where the vessel was damaged due to the cargo the charterer instructed the master to load, it was held that the shipowners were entitled to an indemnity because they suffered damages straightly related to the charterer's employment instructions. J Roche underlined that “ It was not for him(the master) to question that(the type of the cargo loaded)”. He considered that the decision as to what cargo is to be

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loaded is one with straight commercial implications, thus an employment instruction which must be obeyed. He never denied the master his right to refuse to obey it, but within the limits of obvious grave danger, as strongly pointed out. (" That is a description of the employment without constituting in any way an agreement to take the cargo for the agreed rate of hire however dangerous it may be."). That means that if the master could easily foresee, based on his seamanship skills and his common sense that there is great peril for the crew and the vessel he could not comply with the order (" The danger was not so obvious, nor was the result so certain, that he would have been justified in taking any contrary view."), and this was not what happened in this case. It has been held in later cases and underlined to the point that now it is a principal that the safety of the crew, the ship and the cargo, for which the master is responsible, has priority over the charterer's commercial interests. (" The Houda." [11]) So, if one decomposes the exact wording of J Roche's statement, he will reach to the conclusion that he is of the opinion that the master must obey the charterer's instructions under his right to give employment orders, but when it comes to obvious danger provoked straight from the order itself, he has the right to refuse to obey, even if the order has commercial nature and not navigational. In the later case of Hill Harmony [12], L Hobhouse gave a wider approach of the subject, but based as well to the same principle. He also never tried to deprive the charterer his undoubted right to give orders but he stressed out the master's responsibility to care for the ship's and crew's safety as well as his right to deny an order that puts the vessel in some kind of danger, not necessarily grave, but not agreed by the contract. When looking these two statements separately, it is easy and obvious to think that there are contradictory. It

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seems that in the first one no liberty is given to the master not to obey charterer's orders, though in the second he has the choice not to follow an instruction, being also in opposition with his general duty to comply with the charterer's orders. In both cases, even if in their content have not so many similarities, it was common and strongly emphasized the fact that in a case of obvious grave danger, the master must give priority to the vessel's and crew's safety. It can be easily seen in the wording of both quotes that they mention the fact of the dangerous circumstances. The great importance of the second case and the second quote lies to the fact that after the *Hill Harmony*, a different approach was made as to what is a grave danger and to what extent can the captain deny to comply with an order that endangers the above. Wilford, Coghlin and Kimbal in their book "Time charters"[13] mention "It is not up to the master to question unduly the orders of the charterers as to the employment of the ship. One situation in which the master is not only entitled but may also be obliged to refuse the orders of the charterers is where these endanger the safety of the ship and the cargo". They, too, agree that not all employment orders are to be followed without any objection from the master, and can be overridden when they compromise the safety of the ship. Simon Baughen, in his article "Navigation or employment"[14] gives a clear explanation as to how one can judge the severity of the danger, when it is to disobey an order and also mentions the master's obligation to prove that there was indeed a good reason not to comply with the given orders "The consequence of these findings as to the proper definition of "navigation" was that the master's conduct put the shipowners in breach of both their obligations under cl. 8. Furthermore, the Hague-Visby Rules, Art. IV, r. (2)(a) afforded them no

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defense. Both “ navigation” and “ management” had to relate to issues of seamanship and neither term could cover a refusal by the master to obey the charterer’s orders in a situation where the safety of the vessel was not at issue. The practical significance of the decision is that the economic interests of time charterers will no longer be put in jeopardy as a result of an unjustifiable excess of caution on the part of the master. Unless the master can establish reasonable grounds for showing that compliance with charterer’s routing instructions will endanger the safety of the ship or the crew, he will have to follow those orders or else expose his owners to a liability in damages in respect of the consequent delay. If the master’s misgivings should, in fact, turn out to be justified, then, provided he has reacted to such perils with good seamanship, the shipowner will be entitled to claim any resulting losses from the charterer by way of indemnity as they will have resulted directly from compliance with an order as to the “ employment” of the vessel. The decision, therefore, enables a fair balance to be struck in the future between the legitimate interests of charterers and shipowners, although much will depend upon the extent to which arbitrators take a realistic view as to the margin of safety that may be adopted by a prudent master in following the orders of the charterer.” As we can understand, from the various opinions exposed in this paper, there has never been a controversy in the legal world about the right of the master to protect his ship and crew and cargo by denying a dangerous order. The problem has always been the definition of the peril and the burden to prove it, and after the Hill Harmony case a different approach is established to the way that the interests of the charterers and the safety of the ship will be balanced.