

QUEEN'S BENCH DIVISION
(ADMIRALTY COURT)

Mar. 4, 6, 7, 8, 11, 12, Apr. 17, 18; July 18, 2002

THE "TOREPO"

[2002] EWHC 1481 (Admlty)

Before Mr. Justice DAVID STEEL

Unseaworthiness - Due diligence - Grounding - Chart discrepancy - Whether cause of grounding navigational error - Whether vessel unseaworthy - Whether defendants exercised due diligence - Discrepancy in Chilean charts - Whether claimants could recover salvage remuneration and return of general average security.

On Feb. 12, 1997 the defendants' vessel *Torepo* was chartered to Euromar S.p.A. under a time charter in the Shell Time form which provided inter alia:

27(a) The vessel, her Master and owners shall not . . . be liable for any loss or damage or delay or failure. . . resulting from any act, neglect or default of the . . . pilot . . . in the navigation. . . of the vessel.

On Apr. 30, 1997 *Torepo* was sub-chartered by Euromar to BP Oil International as voyage charterers on the BP VOY form. On May 28, 1997 BP converted it to a time charter on broadly the same terms. Clause 2 of the BP VOY standard form provided:

2. Owners shall before, at the commencement of, and throughout the voyage exercise due diligence to make and maintain the vessel. . . in good order and condition.

Torepo arrived in La Plata, Argentina on June 10, 1997. On June 30, 1997 the vessel duly completed loading the claimants' cargo of gasoline. It had been anticipated that the vessel was to proceed to Jebel Ali but on June 19 instructions were received that the vessel's next discharge port would be Esmeraldas, Ecuador.

Despite the change of routing the bills of lading identified the discharge port as Jebel Ali, were expressly subject to the Hague-Visby Rules and further provided that:

This shipment is carried under and pursuant to the terms [of the] Charter Party. . . And all terms whatsoever of the Charter. . . apply to and govern the rights of the parties concerned in this shipment.

There was a discussion as to which route the vessel would take to the Esmeraldas, via Cape Horn or the Magellan Straits. In the event the route taken was via the Magellan Straits.

The vessel rendezvoused with two pilots at Possession Bay off Punta Dungeness at about 01 00 hours on July 7, 1997. The pilots brought with them their own Chilean charts which included charts for a passage through the Patagonian Channels.

The Patagonian Channels lay on the west side of South America between the off lying islands and the mainland of Chile.

At about 08 00 hours on July 8 the vessel had reached a position near the western end of the Magellan Straits and then diverted into the Patagonian Channels through the Canal Smyth. By 23 30 hours on July 8 the vessel was in Canal Wide and at about this time the master left the bridge and retired to his cabin for the night.

The pilot, chief officer, cadet and helmsman were on the bridge. By 05 30 hours the vessel was approaching the northern end of the Grappler Canal. In the vicinity of Punta Hayman the pilot asked for the engine to be put slow ahead from full ahead.

The planned track as laid off on the Chilean chart required the vessel to alter course to 328 deg. off Punta Hayman and thereafter alter course to 013 deg. off Foot Island. In the event the pilot either did not alter course off Punta Hayman or reverted to 312 deg. shortly thereafter. The pilot remained at the chart table. The vessel was now in a position that would involve a transfer from Chilean chart 917 to Chilean chart 941. There was in fact a discrepancy of about one mile between the lines of longitude shown on the two charts. The pilot claimed that he discovered this for the first time as the vessel was approaching Foot Island and thereby became distracted.

The vessel grounded on July 9, 1997 on the coast of Wellington Island which formed the western bank of the Paso del Indio. Salvors were subsequently engaged on LOF 95 terms and the defendant owners declared general average.

The claimants sought to recover the amount they were obliged to pay the salvors by way of salvage remuneration and the return of the general average security that they posted.

The issues for decision were: (a) the sequence of events leading to the grounding; (b) the cause of the grounding, whether it was due to navigational error or whether it was due to (1) the unseaworthiness of the vessel; (2) the charts contained discrepancies; (3) the pilot was not properly rested at the time when he boarded the vessel; (c) whether the defendants failed to exercise due diligence to make the vessel seaworthy; (d) whether the defendants could rely on art. III, r. 2 to avoid liability if they were in breach of art. III, r. 2; (e) the terms of the bill of lading; (f) whether the defendants were in breach of a continuing obligation to exercise due diligence to maintain the vessel in a seaworthy condition arising from the incorporation of the terms of either the head charter-party or the sub-charter party; (g) whether if the bill of lading incorporated the terms of the head charter the defendants were liable to indemnify the claimants in respect of the consequences of the pilot's conduct.

-Held, by Q.B. (Adm. Ct.) (DAVID STEEL, J.), that (1) the submission that if the cadet had reported Wellington Island when it first became visible, it was likely that the vessel would not have grounded, or at least not to such a degree as to call for salvage assistance, would be rejected; there were no grounds for concluding that the cadet would have observed the coastline any earlier than the pilot or chief officer;

however Foot Island light was visible as from about 05 47 hours and if the cadet had reported its opening to the chief officer promptly it was at least possible that the grounding would have been avoided (*see* p. 546, col. 2; p. 547, col. 1);

(2) to the extent that the cadets were used as a lookout neither the owners nor the master had any reason to believe they were not competent to perform that function (*see* p. 547, col. 2);

(3) the complaint that the chief officer was not monitoring the progress of the vessel had not been made out and the claimants had not established even a *prima facie* case of unseaworthiness in this respect; and the submission that the chief officer had not read and/or taken on board the requirements of the defendant's Navigational Procedures Manual would be rejected; there was no reason for the owners to suspect that on the assumption that the signature sheets had been appropriately filled in the chief officer would nonetheless not have taken its contents on board (*see* p. 548, cols. 1 and 2);

(4) passage planning was not a science; there was inevitably an element of judgment as to what annotations needed to be added to the chart; the passage plan was prepared by pilots who had regularly taken vessels through the Patagonian Channels with no recorded difficulty; and the pilot's passage plan would not have been condemned as deficient by any competent mariner as a consequence of the absence of (a) a notation that when Foot Island light opened the vessel was approaching the next alteration of course; (b) a range line which should have been added off Wellington Island to show the closest permissible range for the vessel; and (c) a parallel index which should have been added for the 013 deg. track (*see* p. 549, col. 1);

(5) even if the pilot's passage plan was defective it could not be inferred that the master was inefficient or incompetent simply by reason of his failure to identify those defects in a very long passage plan for transit through difficult waters (*see* p. 550, col. 2);

(6) it could not be concluded that no reasonably careful master would have failed to require his presence for the turn off Foot Island; it was not arguable that the fault was other than one of an isolated act of negligence and it was certainly not something which called into question the diligence of the owners (*see* p. 551, col. 1);

(7) the discrepancy in the charts did not render the vessel unseaworthy; it was not a material defect in the chart portfolio and the disparity was not causative; and it was not arguable that there was any want of due diligence in furnishing the vessel with the only available large scale charts (*see* p. 551, col. 1);

(8) the discrepancy between the charts was not of itself the cause of the casualty; if the pilot's attention truly was deflected more than momentarily, it was in any event negligent navigation on his part; and a failure to arrange adequate rest periods between the pilots during the voyage itself constituted faulty navigation; so that the defendants were not deprived of the protections of art. IV, r. 1(2) (*see* p. 551, col. 2);

(9) whatever charter-party was incorporated in the bill of lading the effect was to create a continuing

obligation of due diligence to render the vessel seaworthy (*see* p. 551, col. 2);

(10) the issue of an indemnity only arose if the head charter was incorporated in the bill of lading; on the facts and the evidence it was the sub-charter that was incorporated (*see* p. 552, col. 1);

(11) the claimants had failed to establish that the casualty was occasioned by causative unseaworthiness; their claim failed and the defendants were entitled to judgment on their counterclaim for general average (*see* p. 552, col. 2).

The following cases were referred to in the judgment:

Empire Jamaica, The (H.L.) [1956] 2 Lloyd's Rep. 119; [1957] A.C. 386;

Eurasian Dream, The [2002] EWHC 118 (Comm); [2002] 1 Lloyd's Rep. 719;

Nanfri, The [1978] 1 Lloyd's Rep. 581;

SLS Everest, The [1981] 2 Lloyd's Rep. 389.

This was an action by the claimants, the owners of cargo lately laden on board the ship *Torepo* owned by the defendants, seeking to recover the amount they were obliged to pay the salvors by way of salvage remuneration in respect of the grounding of *Torepo* in the Patagonian Channels near the Wellington Island, Chile on July 9, 1997 while carrying 23,700 tonnes of gasoline owned by the claimants.

Mr. Timothy Brenton, Q.C. and Mr. Robert Thomas (instructed by Messrs. Clyde & Co.) for the claimants; Mr. Jeremy Russell, Q.C. and Mr. Timothy Hill (instructed by Messrs. Holman Fenwick & Willan) for the defendants.

The further facts are stated in the judgment of Mr. Justice David Steel.

Judgment was reserved.

Thursday, June 18, 2002

JUDGMENT

Mr. Justice DAVID STEEL:

Introduction

1. This action arises out of the grounding of the defendants' vessel *Torepo* in the Patagonian Channels near Isla Wellington, Chile. The grounding took place on July 9, 1997. At the time of the grounding, she had been laden with approximately 23,700 tonnes of gasoline, the property of the

claimants. The vessel required salvage assistance. Both shipowners and cargo-owners accordingly incurred liability to the salvors, who were engaged on LOF 95 terms.

2. The defendant owners declared general average. By this action, the claimants seek to recover the amount they were obliged to pay the salvors by way of salvage remuneration, together with interest and costs. They also seek the return of the general average security that they posted.

3. It is the claimants' case that the grounding and the consequences thereof were caused by actionable fault on the part of the defendants. The defendants contend that the grounding was caused by the negligence of the pilot in and about the navigation of the vessel for which they are not liable. In the alternative, the defendants contend that, if contrary to their primary case there was causative unseaworthiness, they exercised due diligence to make the vessel seaworthy.

The vessel

4. *Torepo* is a motor tanker of 14,943 tons gross and 10,429 tons net. Her summer deadweight is 25,602 tons. She is some 171.4 metres in length and 25 metres in beam and powered by a BMW diesel engine of 9,000 b.h.p. giving her a design sea speed of 12.5 knots. Her manuvring speeds are as follows: dead slow ahead (35 r.p.m.) 4.5 knots, slow ahead (45 r.p.m.) six knots, half ahead (60 r.p.m.) eight knots and full ahead (80 r.p.m.) 10.5 knots.

5. Her bridge and accommodation were aft. She was equipped with the usual navigational aids including three radars, two of which were within the main body of the wheelhouse and the third situated on the chart table which lay at the rear of the wheelhouse, separated by a curtain. She was also equipped with a gyro compass and repeaters, a GPS navigator, an echo sounder and an rpm indicator. Her course recorder was not in working order at the time of the grounding.

6. *Torepo* had been built in 1974 for her original owners BP. On May 11, 1997 she had been acquired by Lorsil Shipping of Valletta and was renamed *Torepo*. The managers of the vessel were Comomar under the overall supervision of Gemarfin, with the former focusing on technical matters and the latter on operational matters. At the time of the casualty the vessel was in the process of obtaining ISM accreditation with RINA as the auditors.

7. The vessel had a total complement of 27 crew, all of Indian nationality. The master at the time of the grounding was Captain Nesari. He had originally been engaged by Comomar in 1991. He joined *Torepo* as chief officer on Apr. 11, 1997. He took

over as master on June 30, 1997, immediately before the commencement of the voyage under consideration. This was his first command. Captain Nesari was called to give oral evidence at the trial.

8. The chief officer was Mr. Agrawal. He obtained his Indian chief officer's certificate in March, 1996. He joined *Torepo* on June 11, 1997 as chief officer. It was his first appointment as such. The second officer was Mr. Chandrabose. He had obtained his Indian second officer's certificate in 1991. He joined *Torepo* as second officer in April, 1997.

9. The crew member purporting to act as lookout at the time of the grounding was a Mr. Rauf. He was in fact an officer cadet, albeit identified on the crew list as an ordinary seaman.

10. *Torepo* had been chartered by her former owners to Euromar SpA under a time charter-party dated Feb. 12, 1997. This charter-party was on the Shell Time form and provided inter alia as follows:

1. At the date of delivery of the vessel under this charter. . .
(b) she shall be in every way fit to carry crude petroleum and/or its products; (c) shell shall be tight staunch and strong, in good order and condition and in every way fit for the service, with her machinery, boilers, hull and other equipment. . . in a good and efficient state . . . ;

2a. At the date of delivery of this vessel under this charter (1) she shall have a full and efficient complement of Master, officer and crew for a vessel of her tonnage . . .

3. (1) Throughout the charter service the owners shall whenever the passage of time, wear and tear or any other event (whether or not coming within Clause 27 hereof) requires attempts to be taken to maintain or restore the condition stipulated in Clauses 1 and 2(a), exercise due diligence so to maintain or restore the vessel . . .

16. . . Owners hereby indemnify charterers, their servants and agents against all losses, claims, responsibilities and liabilities arising in any way whatsoever from the employment of pilots, tug boats and stevedores, who although employed by charterers shall be deemed to be the servants of and in the service of the owners and under their instructions . . .

27. (a) The vessel, her Master and owners, shall not, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure arising or resulting from any act, neglect or default of the Master, pilots, mariners or other servants of the owners in the navigation or management of the vessel. . . unless caused by the actual fault or privity of the

owners: collision or stranding: dangers and accidents of the sea.

11. On Apr. 30, 1997 *Torepo* was sub-chartered by Euomar to BP Oil International as voyage charterers on the BP VOY form. On May 28, 1997, pursuant to an option made available by amendment of the voyage charter, BP converted it to a time charter trip on broadly the same terms.

12. Clause 2 of the BP VOY 3 standard form provides:

2. Owners shall before, at the commencement of, and throughout the voyage exercise due diligence to make and maintain the vessel, her tanks, pumps, valves and pipelines, tight, staunch, strong, in good order and condition, in every way fit for the voyage and fit to carry the cargo provided for in Clause 3, with the vessel's machinery, boilers and hull in a fully efficient state, and with a full and efficient complement of Masters, Officers and crew.

The common ground

13. *Torepo* arrived in La Plata, Argentina on June 10, 1997. There was some uncertainty as to her next voyage. For a time it was anticipated that the vessel was to proceed to Jebel Ali with a bunker call at Cape Town, but on June 19, instructions were received that the vessel's next discharge port would be Esmeraldas, Ecuador.

14. On June 30, the vessel duly completed loading a cargo of gasoline. Despite the change of routing, the bills of lading identified the discharge port as Jebel Ali. More significantly, from the perspective of the issues that arise in the case, the bill of lading was expressly subject to the Hague-Visby rules and further provided:

This shipment is carried under and pursuant to the terms Charter Party dated at between and as Charterer. And all the terms whatsoever of the said Charter, except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.

15. In the meantime, the master had been considering the state of his chart portfolio. His requirements depended upon the route to Esmeraldas which the vessel was going to take. The master's calculation was that, if the vessel was loaded to her summer marks, the vessel would have to proceed via the Panama Canal, albeit the voyage would thereby be lengthened by some 1000 miles. In contrast, if the vessel only loaded to her winter marks, the vessel could proceed via Cape Horn or the Magellan Straits. He did not have appropriate charts or publications for either route and on June 28, he contacted Gemarfin, Comomar and his local agents for their supply.

16. For the purposes of the voyage, the master concluded that he needed a large number of British Admiralty (BA) charts. The charts were not available in La Plata. In response to a telephone call from the master, Gemarfin informed him on July 1 by telex that they were seeking to make arrangement for a delivery of the charts within the next three days, but the master had already been in touch with agents in Montevideo for provision of the charts. On July 2, after having left La Plata, he reported as follows:

Most charts and publications received Montevideo. However, in view of vessel's trading possibilities in Central and South America kindly arrange with Thomas Gunn to supply relevant portfolios at Esmeraldas, Ecuador.

17. There had been discussions with BP as to the route the vessel might take, whether around Cape Horn or the Magellan Straits. Up to and including July 1, the charterers were insisting that the vessel should negotiate Cape Horn. However, it appears that on July 2, the claimants indicated they had no objection to the vessel passing via the Magellan Straits. For that purpose Messrs. Inchcape Shipping Services were retained as agents for the defendants.

18. The vessel duly rendezvoused with two pilots at Possession Bay off Punta Dungeness at about 01 00 hours on July 7, 1997. The pilots brought with them their own Chilean charts. These included charts for a passage through the Patagonian Channels. Such charts were not available in the BA series.

19. The Patagonian Channels lie on the west side of South America between the off lying islands and the mainland of Chile. The channels form a smooth water inland route which enables vessels to avoid the bad weather which affects the offshore route. The general features of the channels are high and abrupt shores with innumerable peaks and headlands. As the Admiralty pilot observes, they give the appearance of "gloomy grandeur rarely seen elsewhere."

20. The sailing directions contain the following general cautions: (a) there has been no complete survey of the channels; (b) some headlands may be incorrectly charted and positions obtained by bearings may be inaccurate; (c) buoys and beacons cannot be relied upon.

21. The grounding with which this action is concerned occurred at the northern end of the Canal Grappler. Canal Icy and Canal Grappler form the eastern route from the northern end of Canal Wide to the southern end of the Paso Del Indio. At the northern end of the Canal Grappler, a light is located on Punta Hayman. As northbound vessels exit the Canal Grappler they are required to make a

broad alteration of course to starboard off Foot Island. As vessels thereafter steady on their new course, they pass through a narrow channel some six cables wide. A light tower is located on Foot Island which becomes visible to northbound vessels as they approach the alteration of course position off Foot Island.

22. At about 08 00 hours on July 8 the vessel had reached a position near the western end of the Magellan Straits and then diverted into the Patagonian Channels through the Canal Smyth. By 23 30 hours on July 8 the vessel was in the Canal Wide. At about this time the master left the bridge and retired to his cabin for the night. Before doing so he wrote up his night orders.

23. Shortly before 04 00 hours on July 9 the chief officer arrived on the bridge to take over the watch from the second officer. Also present on the bridge with the chief officer was the pilot Mr. Higuera, Mr. Rauf the cadet and a helmsman. By 05 30 hours the vessel was approaching the northern end of the Grappler Channel. In the vicinity of Punta Hayman, the pilot asked for the engine to be put slow ahead from full ahead. This reduction is recorded in the Bell Books as occurring at 05 35 hours. A photocopy of part of the working chart furnished by the pilots, Chilean chart 917, records a fix off Punta Hayman albeit apparently timed 05 53 hours. This may or may not coincide with a fix on the smaller scale BA chart 561 at 05 35 hours.

24. The planned tracks laid off on the Chilean chart required the vessel to alter course to 328 deg. off Punta Hayman and thereafter alter course to 013 deg. off Foot Island. In the event the pilot either did not alter course off Punta Hayman or reverted to 312 deg. shortly thereafter. The pilot remained at the chart table. The vessel was now in a position that would involve a transfer from Chilean chart 917 to Chilean chart 941. There is in fact a discrepancy of about one mile between the lines of longitude shown on the two charts. The pilot claimed that he discovered this for the first time as the vessel was approaching Foot Island and thereby became distracted.

25. The vessel grounded on the coast of Wellington Island which forms the western bank of the Paso Del Indio. It was common ground that the grounding occurred sometime between about 05 45 and 05 50 hours. Her heading after grounding was 314 deg. On the face of it the vessel had overshot the new alteration of course position south west of Foot Island and had proceeded straight ahead without material alteration of course.

26. The engine log recorded the grounding as having occurred at 05 45 hours. This time coincided with an entry in the Bell Books for full astern. Quite when the full astern order was made in relation to

the time of grounding was a matter of controversy. However, it is common ground that following the grounding, the engines continued to work at full astern for a prolonged period without achieving any movement astern or change of heading. The engines were eventually stopped at 06 29 hours.

27. Salvors were subsequently engaged on LOF terms and the vessel was refloated at 08 05 hours on July 14. Following redelivery to the owners at Puerto Eden, the vessel proceeded under her own power to Valparaiso arriving on July 21. In the event her discharge port became Callao, not Esmeraldas, where she arrived on July 31.

The issues

28. In this action the claimants seek to recover damages in the sum of U.S.\$557,762.11 in respect of their liability to pay salvage remuneration. The defendants counterclaim U.S.\$76,610.72 in respect of general average.

29. The primary issues were as follows:

(a) What was the sequence of events leading up to the grounding?

(b) What was the cause of the grounding? In particular, whether the sole cause of the grounding was navigational error (as the defendants contend) or whether any or all of the following were co-operating causes (as the claimants contend): (1) Unseaworthiness of the vessel. (2) The fact that the charts brought onboard and used by the pilot contained discrepancies. (3) The fact that the pilot was not properly rested at the time when he boarded the vessel.

(c) Did the defendants exercise due diligence to make the vessel seaworthy?

(d) Whether, if the grounding was caused by either of the matters referred to in (b) (1) or (2) above, the grounding was caused by the defendants' breach of art. III, r. 2 and, if so, whether the defendants can rely upon art. IV, r. 2 to avoid liability.

(e) What were the terms of the bill of lading?

(f) Whether the defendants were in breach of a continuing obligation to exercise due diligence to maintain the vessel in a seaworthy condition arising from the incorporation of the terms of either the head charter-party or sub-charter-party.

(g) Whether, if the bill of lading incorporated the terms of the head charter, the defendants are liable to indemnify the claimants in respect of the consequence of the pilot's conduct.

History of the claim

30. In order to see how the allegations of unseaworthiness developed in the course of preparations

for trial, it is necessary to study the history of the claim in some detail. The claimants issued proceedings on Apr. 23, 1998. There ensued a stand-still agreement pending publication of the GA Adjustment. Particulars of the claim were eventually served on Apr. 6, 2000. The relevant passage containing the allegations of unseaworthiness as initially served was notable for its lack of detail. It read as follows:

PARTICULARS

Pending disclosure and/or the provision of further information by the Defendants, the Claimants will contend that the vessel was not properly manned and/or equipped and/or supplied and/or the vessel was unseaworthy in that:

(a) There was no or no proper system of bridge team management on board the vessel so as to ensure that there was on duty at all times a bridge team of adequate numbers and/or experience for the particular circumstances prevailing;

(b) There was no or no proper system of either instructing the crew in the navigation of the vessel in confined pilotage waters and/or ensuring any such instructions, if given, were complied with;

(c) There was no or no proper passage plan for the part of the voyage during which the grounding took place;

(d) The vessel was equipped with inadequate charts for the area in which the vessel grounded. In particular, the scale on the British Admiralty Chart 1286 with which the vessel was equipped was far too small to be of any navigational value in the safe and precise passage planning and execution required in the confined waters in which the vessel grounded;

(e) The echo sounder was defective;

By reason of the matters aforesaid, and each of them, those on the bridge at and shortly before the grounding were liable to and did fail to appreciate that the vessel was approaching dangerously close to shallows and/or dry land until it was too late to take any or any effective action to avoid grounding.

31. A similar observation as to lack of particularity can be made concerning the alternative case of breach of art. III, r. 2 of the Hague-Visby Rules:

Further or alternatively the Claimants' loss and damage and the circumstances leading up thereto as averred above were caused by the Defendants' negligence and/or breach of contract and/or breach of the duty averred in paragraph 3C above and/or breach of Article III rule 2 of

the Hague-Visby Rules and the terms of the bills of lading in that they failed properly and/or carefully to carry and/or keep and/or care for the cargo.

PARTICULARS

Claimants rely upon the fact that the vessel grounded and/or that the cargo was exposed to peril and/or that the cargo became subject to a salvage lien and/or the matters set out in paragraph 16 above as sufficient evidence of the Defendants' negligence and/or breach of duty and/or failure properly and carefully to carry keep and/or care for the cargo.

32. The defence and counterclaim was served on May 2, 2000. Shortly thereafter the defendants served on the claimants a CPR Part 18 request for further information. This at least extracted further detail of the contentions as regards passage planning and the provision of charts. However, the answers were less than revealing as regards the complaint pertaining to bridge team management and instructions. In response to questions regarding alleged failures in the system of bridge team management and defects as regards numbers of personnel and experience, the answer was:

1.1 The matter has been fully and sufficiently pleaded and the Defendants are not entitled to any further particulars. Without prejudice to the foregoing, the Claimants deny that the procedures set out in the Navigation Procedures Manual disclosed by the Defendants had been implemented either completely or at all. Further it is denied that there was any proper system to ensure that those procedures were adhered to on board the vessel. The Claimants presently make no positive case as to there being any other system of bridge team management.

1.2-1.3 The Claimants will contend that there ought to have been in place a system which complied with the relevant international regulations such as the IMO STCW Convention 1978. In so far as the alleged procedures had not been implemented either completely or at all, the system was either non-existent or not proper.

2.1 It is the Claimants' case that there were on the bridge at the time of the grounding the Pilot, the Chief Officer and Helmsman. The Claimants put the Defendants to strict proof that the crew had the experience alleged and reserve the right to plead further when full and proper disclosure has been provided by the Defendants.

2.2 It is the Claimants' case that at the time of the incident there ought to have been on board the bridge at the material time, in addition to those people identified in 2.1 above, a dedicated look-out who was properly qualified to act as

such in accordance with the STCW Regulations II/4 and A-II/4.

33. By way of response to a request for further details as to the case on the adequacy of the system of instructions, this response was simply repeated. It is to be noted that, as regards numbers of personnel and experience, the complaint appeared to be that there were only three relevant people on the bridge at the time of the grounding, namely the pilot, the chief officer and the helmsman (without any specific complaint vis-à-vis their experience or lack of it) while there ought to have been a fourth person on the bridge namely a dedicated lookout properly qualified so to act.

34. Following a CMC in October, 2000 the trial was fixed to begin on Mar. 4, 2002. Shortly thereafter the claimants sought disclosure of documents relating to the qualifications and rank of Mr. Rauf. No disclosure appears to have been forthcoming but nor was any application made to the Court at any later stage in respect of such documentation. This is in stark contrast to persistent applications in regard to other aspects of disclosure.

35. The witness statements were duly exchanged in January, 2001. The claimants then sought further disclosure, particularly relating to the vessel's call at Montevideo for the provision of charts. The stance adopted by the claimants at this stage was: (a) That the defendants' pleaded case was inconsistent with the documents that had already been disclosed, in particular the allegations that prior to departure a voyage plan had been completed for a passage to San Antonio (for bunkers) via Cape Horn, that a departure checklist had been properly completed and that on departure the vessel shaped a course for Cape Horn. (b) That the claimants' expert could not complete his report until the further disclosure then sought was made.

36. The claimants' application for specific disclosure was due to be heard on May 18, 2001. On May 16 the defendants provided disclosure with regard to the Montevideo visit. In the light of their concerns about the defendants' pleaded case, the claimants had also been seeking a revision to the time table to allow the defendants time to review the defence in so far as it touched on the question of passage planning and the provision of charts (if such was asserted to be the purpose of the visit to Montevideo). In the event, the order made on May 18 was by consent. It included a provision that, if so advised, the defendants were to serve an amended defence by June 8.

37. The defendants delayed provision of an amended defence pending a further interview with the master and interview of the second officer (the officer responsible for preparing any passage plan).

The claimants' attitude at that stage is exemplified by their letter of July 18, 2001:

4. We should also point out that in so far as your clients may wish to produce further factual evidence in particular from the vessel's then 2nd Officer, they do not have permission to do so and any application your clients may be contemplating in that regard will be vigorously resisted.

5. Our clients are therefore not willing to consent to any amendments your clients may wish to make and further any application they may be contemplating in that regard would also be vigorously resisted not least on the ground that by consent your clients should have issued the relevant applications not later than the 22nd June 2001.

6. We are presently in the process of formulating an application to the Court on behalf of our own clients for an order that those parts of your client's defence and counterclaim together with the further information to the defence and counterclaim which are untenable should be struck out.

38. Supplementary statements from the master and a statement from the second officer were served on Oct. 22 followed immediately by a draft amended defence solely directed to the issues of chart provision and passage planning. The defendants' application for leave to amend the defence and adduce further evidence came before me on Nov. 16. I granted leave. I also granted leave for the claimants to serve an amended statement of case "arising out of the aforesaid amendments".

39. Amended particulars of claim and an amended reply were served on Dec. 7. Far from being confined to matters arising out of the amended defence, the opportunity was taken to adduce amendments across the board as regards the allegations of causative unseaworthiness. Indeed only one of the amendments even touched on the issue of passage planning. The amendments were as follows:

(b) It was not the Master's practice to be present on the bridge during periods of critical navigation and/or he did not appreciate the need or and/or it was not his practice to insert in the Night Order Book a requirement that he be called to the bridge in areas of critical navigation such as the Grappler Channel;

(c) It was not the Master's practice to insist that the navigation of the vessel was always based on a proper passage plan and/or he did not properly appreciate the need to navigate by reference to a proper passage plan when a pilot was on board;

(f) It was the practice on board the vessel to fix her position at inappropriate intervals, at least

when pilots were on the bridge and/or the Master was content to and/or it was his practice to allow the practice of fixing the vessel's position at such inappropriate intervals. When in coastal waters the vessel's position should have been fixed at least every 15-20 minutes and more frequently when an alter-course position was approaching and/or in areas of critical navigation such as the Grappler Channel;

(g) There was no dedicated lookout and/or it was not the practice on board the vessel always to require a dedicated lookout when navigating in coastal waters;

(h) If (which is not admitted) the Navigation Procedures Manual was on board at the commencement of the voyage, it had not been read and/or signed by the vessel's navigating officers and/or was incomplete in that pages were missing and/or blank;

(i) When under pilotage, it was the Chief Officer's practice to delegate the navigation of the vessel and/or his duty to ensure the safe conduct of the ship to the pilot(s) and/or it was not his practice to maintain positive control of the vessel when the pilot(s) were on the bridge;

(j) It was the intention to, and/or it was contemplated that the vessel might, transit via the Magellan Straits and between Punta Delgada and Golfo Coronados and follow the pilot's advice and reply upon their charts and/or passage plans, which charts were defective in that there was a discrepancy of about 1 mile between the tracks depicted on consecutive charts in about the area of the grounding and/or they bore no or no adequate passage plan(s) and/or which passage plans did not exist and/or where inadequate in that they bore no clearing bearings or cross track margins.

40. The particulars of breach of art. III, r. 2 were also amended:

Further or alternatively

(a) Prior to boarding the vessel, the pilot who was later to be on duty at the time of the grounding was not sufficiently rested;

(b) Prior to boarding the vessel, the pilots produced charts containing (at least) the errors set out at paragraph 16(j) above;

(c) By reason of (a) and/or (b), which were not errors in the navigation or management of "TOREPO", shortly before the grounding the pilot failed to advise the Chief officer to alter course (as he ought to have done) and failed to appreciate that the vessel was standing into danger until it was too late to take any effective action to avoid grounding.

41. Only two weeks later the claimants served their expert's report. This purported to take matters yet further. For example the expert summarized his views as follows:

(a) The Pilot and Helmsman were suitably experienced but the Chief Officer lacked appropriate practical experience of navigation in close waters . . .

(b) Further there was no system in place to ensure that the Master's standing orders were being adhered to and similarly there are no records to indicate that the owners had taken any steps to ensure that their operational guidelines/instructions were being followed . . .

(d) The vessel did not have suitable charts on board for the passage through the Magellan Straits and the Patagonian Channels. Navigation depended on the use of the Pilot's charts, which, in the event, were defective. There was sufficient opportunity for the Master to have arranged for a set of Chilean Charts to have been brought on board by the Pilots for the sole use of himself for his watch keepers . . .

42. These supplementary complaints furnish a good example of a certain lack of realism on the part of the claimants' expert. The last point led him to contend that the vessel was unseaworthy by reason of the provision of defective Chilean charts and in the same breath to assert that the vessel was unseaworthy for not having two copies of them. Not surprisingly, these points did not in due course feature at the forefront of the claimants' case.

43. I have taken this part of the procedural history at some length because the preparation and presentation of the pleaded cases has been conspicuously undistinguished. The defendants have taken an inordinate time to plead a coherent case on the updating of the vessel's chart portfolio (if such occurred) and the preparation of passage plans (if such occurred) and to produce the associated documentation. The claimants, on the other hand, while having a legitimate interest in getting the defence formulated in a manner consistent with the discovery, have spent far too much effort on tactical manuvring to take advantage of the inconsistencies rather than focusing on their own pleaded case on unseaworthiness.

44. While the defendants, perhaps from a position of weakness, did not express more than a relatively mild objection, the fact remains that the scope of the amendments to the particulars of claim was not responsive to the amended defence upon which the claimants were in fact insisting (albeit characteristically not disposed to concede). To a significant extent the defendants, in my judgment, have been ambushed by the enlarged allegations of unseaworthiness. Whatever the merits of the point

as between the parties, the haphazard development of the issues has certainly increased the burden on the Court to decide them fairly.

The witnesses and their statements

45. Before turning to the issues of primary fact, I should make some preliminary observations about the evidence.

46. The master, as already recounted, gave oral evidence at the trial. The claimants submitted that he was a dishonest witness. While, as will appear, I am not able to accept all the master's evidence (indeed there were manifest inconsistencies as between his statements and his oral evidence), he struck me as an intelligent and capable man who sought to respond to cross-examination in a straightforward manner. He gave his evidence fluently in English. I was not left with any impression, either by reference to the contemporary material or the probabilities, that he was deliberately seeking to mislead the Court.

47. The claimants made an equally vigorous attack on the defendants' failure to call the chief officer and the cadet. As regards to the chief officer, I have already outlined the development of the case directed against the abilities and performance of the chief officer culminating in the amendments to the particulars of claim made in December, 2001 (and the expert's report served shortly thereafter). The defendants adduced evidence as to their attempts to locate the chief officer thereafter, including the engagement of a detective agency. Their efforts proved unsuccessful, perhaps not surprisingly given the passage of time and the fact that the chief officer had withdrawn from service at sea sometime earlier.

48. As regards the cadet, I accept the defendants' submission that the claimants' pleaded case was, and indeed remains, that Mr. Rauf was not a dedicated lookout (and as such not to be numbered among the watch keeping staff at the time of the casualty). This was confirmed by the amendment in December, 2001. Given that the experts agreed in January, 2002 that "a senior cadet should have the abilities to fulfil the duties of a dedicated lookout", I do not find it surprising that no statement was obtained from the lookout let alone that the expense of calling him to give oral evidence was not incurred.

49. These complaints by the claimants were, in my judgment, provoked by their own failure to plead their case clearly and promptly. The submission that the Court should infer that, if either or both had been cross-examined, the results would have been unfavourable to the defendants is misconceived. Such inferences would be wholly unfair.

50. One last introductory comment on the evidence. The claimants made a broad ranging attack on the defendants' expert, Captain Gains, as being partisan. This was said to be exemplified by the adoption of unreasonable assumptions of fact, the failure to refer to material parts of the evidence and a reluctance to abandon propositions which had been undermined. I regarded this attack as greatly exaggerated, reflecting more the difficulties that can arise when an expert is invited to express his views on the evidence generally. While I may not be able, by any means, to accept Captain Gain's evidence in its entirety, I reject the suggestion that he was *partie-pris*. In my judgment he sought to give his evidence in a measured and sensible way.

51. In the event, the expert evidence was only of modest assistance in resolving the issues of seaworthiness and causation. In part this was because many of the matters dealt with in the reports and the oral evidence fell by the wayside during the hearing. If anything, it was the evidence of Captain Fox-Braddock, the claimants' expert that lacked realism and proportion. I have already mentioned one matter. There were others that he developed which were purely prejudicial or simply smacked of pedantry.

Primary facts

52. It was common ground that the vessel had undergone a routine drydocking at Buenos Aires between June 20 and 26, 1997. Following the drydocking, class was confirmed with no outstanding items. The vessel fully complied with the minimum safe manning certificate of her flag state. At about the same time, a representative of Comomar, Mr. R. M. Karanjia, performed an inspection of the vessel and filed a detailed report.

53. On June 29 and 30 the vessel was inspected by a BP vetting surveyor. This was the latest of some 50 such inspections of the vessel by surveyors from oil majors over the previous three years. The report recorded as follows:

The vessel is under the technical management of Comomar, but the operational management is Gemarfin. They had just received the ISM Rules and Regulations from Gemarfin and they have also just opened a manning agency in India to run these vessels. The standard of record keeping was very good with everything readily available. . . All in all operational practices on board were good. The main problem is the hardware. She is an old ship and seems to be going downhill. A lot of problems could be sorted out but they were only there six days. Operational is no problem, competence of personnel is no problem, but the hardware - ship could be a problem as there are now two and a half years to

the next dock. The vessel is a fail, but as to whether it requires reinspection I think would depend on the standard of the owner's response. Here it is the condition of the ship that is borderline.

54. The formal order to discharge at Esmeraldas was not given by BP until June 30, but the master had already discussed three possible routes to Esmeraldas with the previous master, Captain Kohli, in anticipation, namely the southerly route either via Cape Horn or the Magellan Straits and the northerly route via the Panama Canal. In due course instructions for a passage via Cape Horn were given at 17 45 hours on June 30:

Confirm that intention is still to discharge in Ecuador. Therefore please instruct Master that upon completion of loading, vessel is to proceed to Ecuador via Cape Horn.

To this end the charterers originally arranged for bunkering to take place at San Antonio in Chile.

55. It was expected that BP would in due course approve a passage via the Magellan Straits. However, the vessel was not equipped with the appropriate large-scale charts for that passage and the same were requisitioned for supply at Montevideo after departure from La Plata. In these circumstances the second officer drew up a temporary passage plan via Montevideo and then onto a southerly track to a deviation point from where the vessel could proceed either via the Cape or the Straits.

56. The vessel duly called at Montevideo on July 1 and a number of charts were delivered. They included most but not all of the charts that had been requisitioned. The precise degree of the shortfall remains obscure. It would appear that most of the large-scale charts for the western end of the Magellan Straits were not provided. To the extent that it matters (and I do not think it does) I reject the submission made by the claimants (contrary to their pleaded case) that chart BA 1286 (needed for the offshore route along the coast of Chile) was not onboard. Indeed it was referred to expressly in the new passage plan formulated immediately after the grounding at a time, when I accept, no additional charts had been brought onboard.

57. Once confirmation of the charterers' approval of a passage through the Magellan Straits was received, the master's evidence was that he contacted Inchcape, the agents appointed for that purpose, by telephone, speaking to a Mr. Zamora. This was prompted, the master said, by the fact that he had been notified of a change in the bunkering port from San Antonio to Valparaiso and accordingly a large-scale chart for Valparaiso was required. His evidence was that Mr. Zamora informed him that, while British Admiralty charts

were not available from Punta Dungeness, pilots had now been engaged and would be bringing their own large-scale charts for the trip through the Magellan Straits and on to Valparaiso.

58. The claimants contended that no such conservation ever took place. The basis for this submission was essentially that the master's evidence lacked credibility in general and more specifically by way of reliance on the absence of any reference to the conversation in his initial statements. However, I see no good reason to reject his evidence. It seems wholly in accord with the probability that he would discuss arrangements for the pilots with the agents and, in the context of his request for a chart for Valparaiso, that he would have been informed about the fact that, as proved to be the case, the pilots would bring all the necessary large-scale charts with them.

59. Meanwhile, on confirmation of a transit through the Magellan Straits, the second officer drew up a final passage plan via the Magellan Straits and on to Valparaiso. The plan itself was written up in the vessel's planning register. This plan, as regards to that part of the passage between the rendezvous with the pilots through to the Gulfo Coronados, simply stated: "Pilotage 'till Gulfo Coronados 589 miles" without any waypoints, courses to be steered or distances to run. Further it would appear that the tracks associated with the plan were plotted on small-scale BA charts 554 and 561 respectively. These matters were strongly criticized by the claimants and, to the extent that those criticisms are material, I will deal with them in due course.

60. The claimants, however, went so far as to contend that the plan already anticipated a passage through the Patagonian Channels. Despite some confusion on this topic during the course of the master's cross-examination, I reject this submission. The master was probably aware of the existence of the channels from his reading of the Admiralty Pilot Book but I accept his evidence that he was wholly unaware of the possibility that his vessel might be required to negotiate them. Indeed the contents of the plan itself are only consistent with an off-shore track after transiting the Magellan Straits. For instance the references to the Admiralty Sailing Directions contained in the plan do not include chapter 8, the chapter relevant to the Patagonian Channels. Furthermore note 4 reads:

Rough weather may be encountered near Straits of Magallanos and on the West Coast of Chile in the Pacific Ocean. The vessel to prepare accordingly and Master to be informed well in time of any situation.

The point is further reinforced by the tracks that are plotted on the photocopy extract from Chart 561 running off-shore.

61. In the early hours of July 7, the vessel rendezvoused with the two pilots at the entrance to the Mallegan Straits. As anticipated, they brought with them a set of large-scale Chilean charts for the passage through the Magellan Straits which were duly used by both the pilots and the navigating officers.

62. During the course of the day, the pilots advised the master that, having negotiated the Magellan Straits, the vessel should then proceed via the Patagonian Channels rather than the Pacific coastal route. For this passage, the pilots also had appropriate large-scale Chilean charts, permanently marked with course lines and parallel index ranges. I accept the master's evidence that he considered this proposal by reference to the charts and the sailing directions. Having discussed it with his navigating officers, the master accepted the suggestion. BP were duly notified of the decision to go to Valparasio via the "Inner Channel" that evening.

63. The master had standing orders, one of which directly related to navigation under pilotage:

Navigation with pilot embarked:

The presence of a pilot does not relieve the OOW from any of his duties and obligations. He should co-operate closely with the pilot and maintain an accurate check on the vessel's position and movements. Any alterations in course and/or wheel orders and/or engine movements must be transmitted through the OOW. And he should ensure that they are carried out accordingly. If the OOW is in any doubt as to the pilot's actions or intentions he should seek clarification from the pilot and if still in doubt, notify the Master immediately.

64. In addition I accept the master's evidence that he called a meeting of the navigating officers prior to entry into the Patagonian Channels to discuss how to deal with the unusual situation of being entirely dependent on the pilot's charts (there being no large-scale charts for the channels in the British Admiralty portfolio anyway). He instructed his officers to monitor progress on the charts by parallel indexing. They were also instructed to transfer the position of the vessel to BA 561 about once an hour as a record.

The grounding

65. On July 8 at about 23 30 hours the vessel was approaching the section of the Patagonian Channels called the Canal Wide. Having written up his night orders, the master retired to his cabin. The night orders read:

1. Observe standing orders.
2. Keep a close watch on vessel's position as per pilot's charts.
3. Call me any time in doubt.
4. Keep a close watch on air temperature.

66. These night orders were duly signed by the respective officers of the watch. They were subjected to criticism by the claimants, in particular on the failure to require that the master should be called to the bridge as the vessel approached the proposed turn off Foot Island.

67. The chief officer took over the watch from the second officer at 04 00 hours having confirmed the vessel's position (near the southern tip of Saumarez Island) and completed the prescribed watch handover checklist. Pilot Higuera had already relieved his co-pilot at 03 00 hours. There was a quartermaster at the helm. Cadet Rauf was acting as lookout. At 04 30 hours the vessel entered the Grappler Channel, this being recorded on chart 561 by the chief officer. A further position was plotted at 05 00 hours. At 05 38 hours the chief officer recorded the position of the vessel passing abeam of Punta Hayman light. This is broadly consistent with her engines working at full ahead (manuvring) making about 10 knots over the ground.

68. The pilot also fixed the vessel's position just short of being abeam of Punta Hayman light on the large-scale Chilean chart No. 917. The time recorded is in fact "0553". I am not sure it was a matter of controversy but I conclude that this was simply an erroneous transposition of the figures for 05 35.

69. At about this time, the pilot ordered the engine slow ahead. While there was some material before the Chilean inquiry that the engine revolutions were only reduced in response to 55 r.p.m. and not 45 r.p.m., I consider this to be wholly improbable. No reason is advanced as to why the engineers would fail to reduce revolutions to the prescribed rate. Indeed it would involve the risk of choosing a rate within the critical range. I accordingly hold that the vessel's speed fell to six knots through the water following the slow ahead order at about 05 35. This speed would of course not be accomplished immediately. Using the Stopping and Distance tables prepared by The Hon. Company of Master Mariners, I conclude that her speed would probably have fallen to about seven-eight knots after 10 minutes and about six-seven knots after 20 minutes.

70. The passage plan marked on the Chilean chart originally contemplated an alteration from 312 deg. true to 328 deg. true from a position about two cables southeast of Punta Hayman. The track then led to a position of about two cables southwest of Foot Island whereupon course was to be altered

from 328 deg. true to 013 deg. true. The pilot decided to maintain the original course of 312 deg. true. He informed the chief officer about this change of plan and added, as was the case, that the next alteration would occur about 112 miles further along the new track.

71. The pilot appears to have remained at the chart table after plotting the vessel's position off Punta Hayman. The approaches to Foot Island coincide with the overlap between chart 917 and the next chart 941. In accomplishing the transfer, the pilot asserted that he became distracted by the difference between the latitude and longitude grids on the two charts. Whatever the true explanation, he certainly appears to have failed to monitor the vessel's approach to the east coast of Wellington Island.

72. The chief officer also failed to use the radar with a view to anticipating the alteration to starboard on the newly established course, or to monitor the approach to the shoreline ahead. Neither the chief officer nor the cadet reported seeing the light on Foot Island, which would have opened on a bearing of about 003 deg. at about 05 43 hours. (There are no good grounds for concluding the light was not operational or otherwise not visible.)

73. Whether it was the pilot or the chief officer who first appreciated the vessel was standing into danger is obscure and is not an issue which needs to be resolved since on any view any observation was very late: (a) it was only the loom of the coastline in the darkness which provoked any action; (b) that action was to go full astern and not to attempt to come to starboard; (c) the vessel grounded broadly on her original heading; (d) the momentum was such as to cause considerable damage to the bulbous bow and the bottom in way.

74. Quite when the full astern order was given in relation to the grounding remained a matter of dispute. On one view, the resolution of that dispute would hardly advance the issues in the case but merely help categorize the quality of the lookout as variously poor or very poor. The defendants placed great emphasis on the entries in the Bell Books recording full astern at 05 45 hours. The claimants placed equal emphasis on the responses to the Chilean inquiry, which suggested that full astern was rung at about the time (or even after) grounding.

75. If my findings as to speed set out earlier are correct, the vessel would still have been some five cables off the coast at 05 45. Indeed she would have been one or two cables short of the intersection of her course line with the extension of the planned new track of 013 deg. An order of full astern at that stage would seem slightly surprising given the possibility of coming to starboard. Furthermore

such an order would have led to at least three or four minutes of astern action. From a speed of seven knots I would have expected a heavy grounding to have been avoided let alone on the original course line. Notably the engineroom records do not refer to any impact. The timing of full astern I conclude was entered after the grounding and was probably inaccurate.

76. On the other hand, in my view, the contents of the evidence taken in the Chilean inquiry must be taken with some caution. This questioning was fairly cursory. The most detailed response to a relevant question in any non-leading form in the Chilean inquiry was given by the pilot:

I then went to the chart room in order to calculate the time required to reach the point of changeover of pilot when sailing at the current speed. At this moment in time I notice that there was a difference of 1 mile between the chart being used and the next. On checking the position of the vessel on the radar, I notice the proximity between the bows and the coast (2.5 to 3 cables) and subsequently ordered the engines to be stopped and the course maintained in order to cause as little damage as possible to the vessel.

77. This would put the timing of the order at about grounding minus three minutes. Allowing for about one or possibly two minutes for the engines to be stopped, started astern and for revolutions to begin building up, this would lead to grounding at about 05 50 hours while still maintaining significant headway on her original course. Those accordingly are my findings.

The law

78. There was, unsurprisingly, no issue as to the law. There is a helpful summary of the relevant principles, together with reference to many of the leading authorities, in the recent judgment of Mr. Justice Cresswell in *The Eurasian Dream* [2002] EWHC 118 (Comm); [2002] 1 Lloyd's Rep. 719 at pars. 120 to 136 which I gratefully adopt.

Lookout

79. The claimants' case in regard to Mr. Rauf was promoted in the course of the trial from a subordinate submission to their primary case. In summary it was put in this way:

The cadet did not observe or report Foot Island light when it opened or Wellington Island when it became first visible. The Claimants contend that this was because the cadet was not properly qualified to stand watch as lookout and/or he was not standing watch as a dedicated lookout.

80. As regards causation, I reject the submission that if the cadet had reported Wellington Island

when it first became visible, it is likely that the vessel would not have grounded, or at least not to such a degree as to call for salvage assistance. There are no grounds for concluding that Mr. Rauf would have observed the coastline any earlier than the pilot or chief officer. However, I do accept that Foot Island light was visible as from about 05 47 hours and, if the cadet had reported its opening to the chief officer promptly, it is at least possible that the grounding would have been avoided. This is an area in which it is difficult to make confident findings in the absence of both the chief officer and the cadet, but I will assume it would.

81. The claimants' case in their closing submissions was that the cadet did not report the light because "he did not recognise that it was his duty to do so - either because he had not been instructed to act as a lookout or because of his lack of qualifications".

82. As regards instructions, the suggestion that Mr. Rauf had not been instructed to act as a lookout is another way of asserting (as pleaded) that he was not a dedicated lookout. I reject that assertion. The chief officer's statement said in terms that the cadet "was acting as lookout". That that was his role on the bridge is clear, whether or not he concurrently derived some benefit for training purposes. In short he was properly to be regarded as part of the bridge team and not as simply a guest observer.

83. Further, proper instructions had been laid down by the defendants as to the occasions upon which a lookout should be appointed and to the tasks which such an appointment required. For instance, in the owners' Navigation Procedures Manual there was the following section:

Lookout

5.1 Lookout shall be maintained during the period of darkness and in situations where so required such as poor visibility, proximity to land, heavy traffic and others . . .

5.2 In maintaining a lookout the following shall be observed:

(a) The lookout must be able to give full attention to the keeping of a proper lookout and no other duties shall be undertaken or assigned which could interfere with that task; (b) The duties of the lookout and helmsman are separate . . .

84. In his standing orders the master devoted a section to lookout as follows:

The officer of the watch is responsible for the maintenance of continuous and alert lookout. This is the most important consideration in avoidance of casualties. The keeping of an efficient lookout includes the following: . . .(c) Identification of ship and shore lights.

These standing orders had been duly signed by Mr. Rauf as one of the two cadets. As regards monitoring by the owners, the inspection conducted on the owners' behalf by a Mr. Karanjia noted that (albeit under the previous master) lookouts had been maintained from 20 00 to 08 00.

85. No complaint was made by the claimants as to the adequacy of these and other instructions as to lookout. However, the claimants sought to rely on the fact that the cadet was not certificated in accordance with the provisions of the STCW Convention. This prescribes the minimum requirements for certification of ratings who are to form part of a navigational watch:

1. Every rating forming part of a navigational watch. . .shall be duly certificated to perform such duties

2. Every candidate for certification shall: (1) Be not less than 16 years of age (2) Have completed 2.1 Approved Seagoing Service including not less than 6 months training experience. . .(3) Meet the standard of competence specified in. . .the STCW Code.

86. So far as keeping a proper lookout is concerned the standard of competence there referred to encompasses "knowledge, understanding the proficiency" in the responsibilities of a lookout "including reporting the approximate bearing of a sound signal, light, or other object in degrees or points".

87. This complaint of non-certification in my judgment fails on the evidence available, any shortfall in respect of which is attributable to the absence of any direct allegation in the particulars of claim relating to the certification of the cadet:

(i) The qualification requirements for a rating are not directly in point in considering the use of a cadet in a navigational watch as a lookout.

(ii) In common with the experts, I conclude that a senior cadet should have the ability to fulfil the duties of a dedicated lookout (even if not a helmsman).

(iii) All the more so where the cadet concerned is some 23 years old, has already had three years' sea service and was treated by the flag state as constituting an ordinary seaman for the purposes of the manning certificate.

(iv) Thus to the extent that cadet Rauf or the other cadet was used as a lookout, neither the owners nor the master had any reason to believe they were not competent to perform that function: see *The Empire Jamaica*, [1956] 2 Lloyd's Rep. 119; [1957] A.C. 386.

The chief officer

88. The complaint in regard to the chief officer was summarized in the closing submissions of the

claimants as follows: (i) The chief officer was not monitoring the progress of the vessel. The claimants contend that this was a consequence of the fact that he believed it was acceptable, and/or it was his practice, not closely to monitor the progress of the vessel once he had satisfied himself that a pilot was generally competent. (ii) The chief officer had not read and/or taken on board the requirements of the defendants' Navigation Procedures Manual.

89. I deal first with the alleged practice of delegating the navigation of vessels to pilots. I have already drawn attention to the late plea in this regard. The suggestion that the content of his statement taken in 1997 revealed that the defendants had in some way anticipated the plea as simply naïve. The fact remains that the claimants' challenge to the competence of the chief officer was raised so late that the defendants had no fair opportunity to meet it in full.

90. In any event, on the material available, the complaint is not made out. I recognize that in the period between fixing the vessel's position at about 05 38 hours and realizing the vessel was closing the coast about 10 minutes later, the chief officer was not monitoring the vessel's progress. It is also true that the explanation tendered was reliance on the pilot. In his statement the chief officer said as follows:

It is possible that I was diverted by the engine manuvre and was waiting for the reduction in rpm. However, as a result, I was not at the No. 1 radar using the VRM on the shoreline ahead, which I had been doing at previous course alterations. In any event, I thought that the pilot was perhaps planning to alter course to starboard further along the coastline because of his knowledge and experience of the currents in the area. I also thought that there was sufficient time to make the course alteration. I had trust in him since to this time he appeared to be navigating very efficiently and carefully.

91. The claimants' expert accepted that there was no adequate material on which he could criticize the chief officer for his conduct prior to 05 35 hours. But, absent any substantial criticism of the method of review of the pilot's navigation during the passage through the Patagonian Channels up to Punta Hayman, it is impossible to transpose the lack of affirmative action, however reprehensible, over the ensuing period of 10 minutes into a persistent habit and thus establishing the incompetence of the chief officer. The difficulty is exemplified by the reaction of the claimants' expert to one of my questions:

[Q.] Strandings occur, I regret to say, every day of the week. What is it that you say demonstrates that this was not simply a piece of

negligent navigation by a competent officer but a piece of negligent navigation by an incompetent officer? [A.] . . . I believe that the differentiation between the two terms is outside my scope of experience or expertise. The actions of the Chief Officer, and certainly after 0535, I would view to be not the actions of a prudent watch keeper. There is nothing particularly difficult about the alteration of course, although it is in very restrictive waters.

92. I would simply say that the claimants have not established even a prima facie case of unseaworthiness in this respect. I would add that I also have considerable sympathy with the defendants' submission that a deficiency of the kind relied upon by the claimants is not likely to be identified whatever diligence was exercised by the owners.

93. This leaves a submission that the chief officer had not read the Navigational Procedures Manual (and the associated allegation that the master's standing orders had been produced by the master and then signed by the chief officer after the casualty).

94. Taking the latter point first, I reject the allegation that the master's standing orders are a forgery in the sense that they only saw the light of day after and in the light of the casualty. The master in his oral evidence confirms that they were prepared when he took over command and I accept his evidence. Indeed, the chief officer in his statement says in terms that he was fully aware of the standing orders and had signed them (albeit he does not expressly distinguish between them and those of the master's predecessor).

95. As regards the Navigation Procedures Manual, the master stated that a copy of the signature sheet (including the signature of the chief officer) was posted in the wheelhouse as required by all oil majors. Correction of any deficiency in that respect was likely to have been prompted by the content of the owners' own inspection report in Buenos Aires which expressly called for the manual "to be read and signed by newly joined shipstaff": see Box 299. The BP vetting took place thereafter. In short, I accept the master's evidence and reject the submission that the chief officer had not read and signed the manual prior to grounding. Furthermore, there was no reason for the owners to suspect that, on the assumption that the signature sheets were appropriately filled in, the chief officer would nonetheless not have taken its contents "on board".

Passage planning

96. The claimants' case in this on this topic was summarized as follows:

There was no proper passage plan in place to assist the officer of the watch or to encourage him actively to monitor the progress of the vessel. Claimants contend that this was because the Master possessed a flawed attitude towards passage planning in general and passage planning whilst under pilotage in particular.

97. The starting point, accordingly, is to consider the quality of the passage plan contained on the pilot's large-scale charts on which the master and officers of *Torepo* were relying. The claimants contended that, as regards the approaches to Foot Island, it was deficient in three principal respects: (i) that a notation should have been added to the effect that when Foot Island light opened the vessel was approaching the next alteration of course; (ii) that a range line should have been added off Wellington Island to show the closest permissible range for the vessel; and (iii) that a parallel index should have been added for the 013 deg. track.

98. Passage planning is not a science. There is inevitably an element of judgment as to what annotations need to be added to the chart (or recorded elsewhere). I certainly accept that the passage plan would have been improved by the addition of the three matters referred to. But it must be remembered that the passage was not prepared by the master or officers of *Torepo* whose expertise in this field is criticized by the claimants. It was prepared by pilots who had regularly taken vessels through the Patagonian Channels with no recorded difficulty.

99. In any event, I am not persuaded that the pilot's passage plan would have been condemned as deficient by any competent mariner as a consequence of the absence of these three annotations:

(i) As regards Foot Island light, the relevant charts contained their own notation by way of a pecked line to demonstrate the bearing at which the light opened. The addition of the words, as recommended by the claimants' expert, of "watch out for Foot Island light opening" might be helpful. But to declare its absence as unacceptable calls for a nice judgment as to whether a similar notation should be added by reference to every light or beacon so as to emphasize the use to which it could be put in supporting safe navigation of the vessel.

(ii) As regards the range off Wellington Island, it would be an unavoidable part of the task of seeking to keep the vessel on its planned track as marked on the chart to monitor the approach of the shoreline ahead. The vessel was navigating in close waters. On her original track she was due to alter to 013 deg. with the coast some half-mile off her port bow (and some three quarters of a mile away on an extension of her course line). Soundings and con-

tour lines were marked on the chart. An additional line marked about 212 cables off the coast might have been useful but hardly necessary.

(iii) The claimants' best point, it seemed to me, was the absence of a parallel index distance off Foot Island. However, parallel index distances had been marked on chart 917 for Punta Hayman and the coast of the Promontorio Exmouth in the approaches to Foot Island. The particular value of the parallel index range off Foot Island would have accrued at the time when the vessel had altered her course onto 013 deg. true. Since the relevant chart for negotiating the channel to the north of Foot Island was chart 947, it seems probable that there was such a parallel index distance marked on that chart.

100. But let me assume in the claimants' favour that the passage plan was defective in one or more of the respects suggested, it was not in the event contended that this flowed from any failure of the defendants to provide a proper system in the sense that the guidance and instructions furnished by the owners were in any sense inappropriate. Section 5 of the Navigational Procedures Manual was devoted to passage planning including the requirement that the planning should include any passage through pilotage waters (5.1.1 and 5.2.8). Those instructions (taken with the additional publications furnished on board such as the Bridge Procedures Guide) were agreed to be fully appropriate and sufficient.

101. Against this background, the focus of the claimants attack became the newly pleaded allegation relating to the competence of the master. Again in summary form, the point made was:

The Master's flawed attitude towards the passage planning was compounded by a flawed attitude towards the responsibilities of the vessel when under pilotage. By reason of the Master's flawed attitude, he was not a suitable person to be in command of *Torepo*. Hence the vessel was not properly manned.

102. The factual basis of this allegation was the inference that it was said could be drawn from the master's approach to passage planning for the proposed transit of the Magellan Straits, the proposed route off the coast of Chile and the proposed passage through the Patagonian Channels.

103. The original route was to be via Cape Horn. The claimants only agreed to the shorter route after the vessel had called at Montevideo. However, the claimants were correct to say that the master had in fact anticipated that the charterers would so order and to that end had ordered the appropriate charts at Montevideo. In the event not all the charts requisitioned were available. As already recorded, this left the vessel without appropriate large-scale charts at

least for the western section of the Magellan Straits.

104. The initial passage plan took the vessel to a position from which the vessel would either turn west to the Magellan Straits or continue south around Cape Horn. Nothing turns on this. However, once the chosen route was established, the passage plan through the Magellan Straits and up the coast of Chile was prepared. It is clear that much of this plan must have been prepared using charts 554 and 561 which were not of a suitable scale for navigational purposes.

105. However I am quite unable to infer from this that the master was inefficient or incompetent: (i) He had ordered all the appropriate charts at Montevideo. (ii) Initially the vessel shaped for a rendezvous with the pilots. The vessel was equipped with the appropriate charts for that part of the passage (and if necessary a transit via the Cape Horn). (iii) Once the route via the Magellan Straits was confirmed, the second officer prepared a detailed passage plan, which was entered in the register. (iv) The plan was a satisfactory one having regard to the limited material available. (v) The plan could not be completed or implemented without large-scale charts. (vi) The master was informed that pilots would be bringing on board Chilean charts of an appropriately large scale. (vii) Those charts could properly be used for installing the plan as prepared or for review of any plan prepared by the pilots.

106. Faced with difficulties about the supply of charts, the master coped sensibly and properly with passage planning requirements. The decision to transit the Straits was a reasonable decision and not indicative of incompetence on the part of the master. Put shortly, the attack on the master with regard to his attitude to passage planning is no more and no less than a suggestion that he was minded, in the absence of the appropriate large-scale charts, to navigate the Magellan Straits using charts with inappropriate scale. Indeed the matter was put to the master in that way as follows:

[Q.] From the outset of the voyage, it was your intention that if the vessel went through the Magellan Straits you would simply rely on the pilots and whatever charts the pilots brought on board with them? [A.] That is not true, because you look at the practical aspect of it, I was the 1st Command Master, most concerned about what kind of navigation I am going to do, what kind of performance the vessel is going to have, and without charts or a passage plan to go via the Magellan Straits, which are one of the most difficult areas, it would have been unthinkable, even now, and as a First Command Master, I do

not think anyone can think about those risks to be taken.

107. I accept the genuineness and honesty of that answer.

108. As regards the Patagonian Channels, I have already found that the master had no expectation of his vessel transiting them until after the pilots boarded. The pilots had brought with them their own charts on which a passage plan had been marked. The allegation that the master should not rely upon that plan (subject to review by himself and his officers) was not pursued; let alone any suggestion that the owners' instructions should have forbidden such reliance.

109. In any event I would have rejected such an allegation. The advice in the Bridge Procedures Manual was as follows:

2.2.2. After his arrival on board, the pilot, in addition to being advised by the Master of the manuvring characteristics and basic details of the vessel for its present condition of loading, should indicate the passage plan he intends to follow. The general aim of the Master should be to ensure that the plan is safe and the expertise of the pilot is fully supported by the ship's bridge personnel.

110. The claimants' expert commented upon this aspect in response to some questions by myself as follows:

[Q.] Forgive me for interrupting. As I understand it, in this present case, there is no dispute between the experts that, given that the pilots turned up with the relevant charts and the only charts that were useable for the purposes of this passage, it was not required for there to be a separate passage plan prepared by the crew, but that they should check and, if necessary, supplement the pilot's passage plan. [A.] That is correct . . .

[Q.] The big question is whether there was a proper review of the passage plan and proper supplementation to it and whether that in any way reflects upon the competence of the crew. [A.] That is correct my Lord. Yes.

111. Even on the assumption that the pilot's passage plan was defective in the respects that I have already discussed, I cannot infer that the master was inefficient or incompetent simply by reason of his failure to identify those defects in a very long passage plan for transit through difficult waters. The best advice which the master could and did give was that the progress of the vessel should be monitored along the planned track by parallel indexing. This view was enhanced by the Bridge Procedures Manual as follows:

3.7.2. . . In restricted waters where continuous monitoring of the ship's position is desirable,

radar can be used for parallel indexing. . .and can replace visual fixing altogether.

Night orders

112. I now turn to the complaint that the master was not on the bridge at the time of the approach to Foot Island:

Claimants contend that he ought to have been and that this absence was due to a flawed belief that it was not necessary for him to be on the bridge when the vessel was transiting narrow passages under pilotage.

113. This complaint was said to follow from the inadequacy of the night orders issued by the master on July 8 which required that he be called if the officer of the watch was "in doubt". The claimants contended that the night orders ought to have contained a requirement that the master be called as the vessel approached the end of the Grappler Channel. The rationale was that "the turn off Foot Island involves a reasonably large alteration of course in an area where the width of the channel is substantially less than 1 mile."

114. The master's evidence was to the effect that, having discussed matters with the pilots, he considered that the critical area of requiring his presence on the bridge was the passage through the Angostura Inglesa. Indeed that was the explanation for the pilot's order for slow ahead off Punta Hayman, so as to ensure that the vessel only reached that section of the channel in daylight.

115. It is not an easy complaint to assess without surrendering to the benefit of hindsight. On balance, I would not conclude that no reasonably careful master would have failed to require his presence for the turn off Foot Island. But it is not necessary to reach a final view. It is not arguable in my judgment that the fault is other than one of an isolated act of negligence. It is certainly not something which calls into question the diligence of the owners.

The Chilean charts

116. The last cause of the casualty relied upon by the claimants was the grid of discrepancy between chart 917 and chart 947. The short answer in my judgment is that the vessel was not even arguably thereby rendered unseaworthy. It is not a material defect in the chart portfolio. Disparities in such matters as co-ordinates, contour lines, soundings and so on are commonplace. In any event, the discrepancy was not causative: see below. Furthermore, it is not arguable that there was any want of due diligence in furnishing the vessel with the only available large-scale charts.

Article III, r. 2

117. The claimant submits that the protections of art. IV, r. (1)(a) are not available to the defendants in respect of: (a) The discrepancy between the two Chilean charts and (b) The lack of rest on the part of the pilots.

118. I disagree. The discrepancy between the charts is not of itself the cause of the casualty. If relevant at all (and I doubt whether the discrepancy was really new to pilots who were transiting the channels on numerous occasions), it would not have reasonably called for more than a moment's reflection, once the discrepancy was unearthed, to realize that it had no significance as regards the position of the vessel which was being monitored by parallel indexes, ranges off the coast and times abeam lights and promontories. If the pilot's attention truly was deflected more than momentarily, it was in any event negligent navigation on his part.

119. As regards the assertion of lack of rest, this is simply not made out on the evidence. The only material is some self-serving evidence from the pilot. In any event, failure to arrange adequate rest periods between two pilots during the voyage itself constitutes faulty navigation.

Incorporation of the charter-party

120. The failure to fill in the body of the bill of lading gave rise to a dispute as to the identity of the charter thereby incorporated into the bill of lading. The claimants' initial case was that the bill of lading incorporated the sub-charter and thus the continuing obligation to exercise due diligence to make and maintain the vessel in a seaworthy condition under cl. 2. The defendants' initial case was that the bill of lading incorporated the head charter thereby conferring upon the defendants the benefit of the exemptions contained in cl. 27.

121. In response the claimants asserted an alternative case that, if the bill of lading did incorporate the head charter, this not only also imported a continuing obligation to exercise due diligence to maintain the vessel in a seaworthy condition under cl. 31 but also by virtue of cl. 16, imposed an obligation on the defendants to indemnify the claimants against losses arising from the employment of pilots (cl. 27 being said not to apply to claims in connection with cargo).

122. In the event, the defendants also changed tack and contended after all that it was indeed the sub-charter that was incorporated and that accordingly no question of an indemnity arose.

123. Whichever charter-party was incorporated in the bill of lading, the effect was to create a continuing obligation of due diligence to render the vessel seaworthy. This adds nothing to the claimants' case having regard to my findings on passage

planning, the night orders and the adequacy or otherwise of the Chilean charts.

Indemnity

124. The issue of an indemnity only arises if the head charter-party was incorporated to the bill of lading. In common with the claimants' pleaded case, I consider it was the sub-charter that was incorporated:

(a) The sub-charter was a voyage charter. The presumption is that it is incorporated rather than the head time charter: see *The Nanfri*, [1978] 1 Lloyd's Rep. 581; *The SLS Everest*, [1981] 2 Lloyd's Rep. 389.

(b) The rationale for that presumption is not undermined by the later addendum to furnish an option to convert the voyage charter into a time charter trip and the exercise of that option.

(c) The more so where the incorporation clause itself makes a direct reference to the payment of freight.

(d) Furthermore, the shippers and receivers were associated companies of the voyage charterers.

(e) Before loading the charterers had given express instructions to the master that the bill of lading should refer to the sub-charter.

125. I should add that I should not be taken as having been persuaded: (a) that cl. 16 of the head charter was concerned with other than third party liabilities; or (b) that it was in any event permissible to manipulate the wording so as to turn "charterers" into "Bill of Lading holders" for the purposes of the indemnity.

Conclusion

126. This case has raised some interesting questions in regard passage planning in pilotage waters. In the event, I have concluded for all these reasons that the claimants have failed to establish that the casualty was occasioned by causative unseaworthiness. Their claim accordingly fails and the defendants are entitled to judgment on their counterclaim.