Neutral Citation Number: [2020] EWCA Civ 293

Case No: A4/2019/0730

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
MR JUSTICE TEARE
[2019] EWHC 481 (Admlty)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2020

Before:

LORD JUSTICE FLAUX
LORD JUSTICE HADDON-CAVE
and
LORD JUSTICE MALES

- -

Between:

ALIZE 1954 and CMA CGM SA	**Appellants**
- and -	
ALLIANZ ELEMENTAR VERSICHERUNGS AG And 16 ORS	**Respondents**

- -
- -

Mr Timothy Hill QC & Mr Alex Carless (instructed by **Reed Smith LLP**) for the **Appellants**
Mr John Russell QC & Mr Benjamin Coffer (instructed by **Clyde & Co LLP**) for the **Respondents**

Hearing dates: Tuesday 18 & Wednesday 19 February 2020

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The appellants, who are the Owners of the vessel CMA CGM LIBRA (to whom I will refer as "the Owners") appeal against the Order of the Admiralty Judge Teare J dated 8 March 2019 dismissing the Owners' claim against the respondents (to whom I will refer as "the Cargo Interests") for contribution in general average.

2. The appeal raises issues as to the scope of the obligation imposed upon a shipowner by Article III rule 1 of the Hague/Hague Visby Rules to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage. The central issue in the appeal is whether defects in the vessel's passage plan and the relevant working chart rendered the vessel unseaworthy because neither recorded the necessary warning derived from the Notice to Mariners 6274(P)/10 that depths shown on the chart outside the fairway on the approach to the relevant port, Xiamen in China, were unreliable and waters were shallower than recorded on the chart. The judge found that these defects did render the vessel unseaworthy, that the Owners had failed to exercise due diligence, so that they were in breach of Article III rule 1, that that breach was causative of the grounding of the vessel and the claim in general average failed.

Factual background

3. The essential factual background is set out at [9] to [43] of the judgment and is not challenged on appeal. I set out only a relatively brief outline to the extent necessary for understanding the issues on the appeal.

4. The vessel is a large container ship, carrying some 6,000 containers, most full of cargo, at the time of the grounding, which occurred as the vessel was leaving the port of Xiamen, where she had loaded cargo.

5. The passage plan prepared for the voyage from Xiamen to the next port of Hong Kong was prepared by the vessel's second officer. It was contained in two documents: a passage plan document provided to the vessel by the Owners in which the plan was to be recorded and the vessel's working chart. The first document, which included the under keel clearance ("UKC"), was described by the judge at [26] to [29] of the judgment.

6. The working chart (Admiralty chart no. 3449) contained a course line marked in blue on the chart to buoy 19, the pilot station, then from there to buoy 15, passing that buoy on the starboard side edge of the fairway with a danger area marked on the chart passed to port. The course line then took the vessel to the port side of the fairway so as to pass a danger area off buoy 14-1 to starboard. The course line showed the vessel as within the fairway at all times passing buoy 14 also to starboard. The judge found at [33] that there were no "no go" areas, marked with hatched lines on the chart, on either side of the fairway.

7. The judge's detailed findings about the actual navigation of the vessel are at [34] to [43]. In summary, she left the quayside at 01.33 on 18 May 2011, a little after high water, but with sufficient UKC in the channel. The second officer was on the bridge with the master. As the vessel approached buoy 15, she was on the starboard side of the

fairway and aimed to pass a dangerous shallow area to port, which brought her to a position on the chart just outside the magenta pecked line of the fairway, but still within the fairway.

8. As shown in the chart extract appended to the judgment (where the vessel's actual course is marked in red and the planned course in blue) the vessel was further west than intended. On passing buoy 15, the helm was put gradually to port. As the judge found at [39], the master must have been intending to cross over to the port side of the fairway. However, he then ordered the helm further over to starboard through almost 40 degrees with the consequence that the vessel passed buoy 14-1 and the danger area around it to port. This took the vessel out of the buoyed fairway.

9. As the judge said at [41], the master then ordered the helm hard to port, presumably to return to the fairway before buoy 14, but this attempt did not last long and he ordered hard to starboard, evidently with the aim of passing the rocks and shallow water at Jiujie Jiao to port. The second officer marked the vessel's position on the chart at 02.32 as about 2 ½ cables to the west of the fairway, shaping to pass buoy 14 to port. Various helm and engine movements were ordered but by 02.35 the master concluded the vessel had run aground. She was in an area where there were charted depths of over 30 metres.

The judgment of Teare J

10. Having made the findings as to the circumstances in which the vessel had grounded which I have just summarised, the judge went on, in what was a meticulous and pellucid judgment, to consider in detail from [44] onwards the master's evidence as to why he decided to pass buoy 14 to port and the expert evidence, with a view to determining whether the master's decision to do so and to leave the buoyed channel was negligent. At [50] he concluded that there was a formidable case that it had not been prudent for the master to rely upon the charted depths of 30 metres of water which the master had said he considered there would be if he left buoy 14-1 to port. The principal reason for this (and of relevance to the current appeal) was that: "Notice to Mariners NM 6274(P)/10, issued in December 2010, advised mariners at paragraph 2 that "numerous depths less than charted exist within, and in the approaches to Xiamen Gang". It is true that the "most significant" which were listed were not in this location but the warning was nevertheless clear that in the approaches to Xiamen there were "numerous depths less than the charted depths". The judge also noted that NM 6274(P)/10 informed mariners that the least depth within the fairway was 14 metres.

11. He referred to the conflict of expert opinion and said at [53] that he preferred the evidence of Captain Hart, the expert for the Cargo Interests. He concluded at [54] that the master's decision to part from the passage plan and navigate outside the buoyed fairway was negligent. As he said at [55] there could, however, only be actionable fault within the meaning of the York-Antwerp Rules if the grounding was caused by a failure by the owners to exercise due diligence to make the vessel seaworthy. He noted that, although the case of the Cargo Interests had developed during the course of the litigation, the focus at trial had been upon whether the passage plan had been defective and, if so, whether those defects were causative of the grounding and, if they were, whether there had been failure to exercise due diligence to make the vessel seaworthy.

12. The judge considered the issue of the burden of proof in relation to unseaworthiness, noting at [56] the conventional view that the burden was on the Cargo Interests to

establish that the vessel was unseaworthy and that this was causative of the grounding and that, if those matters were established, the burden was on the Owners to establish that due diligence was exercised to make the vessel seaworthy. At [57], the judge rejected an argument by Mr John Russell QC on behalf of Cargo Interests that, in the light of the decision of the Supreme Court in *Volcafé Ltd v Cia Sud Americana de Vaporesi SA* [2018] UKSC 61; [2019] AC 358, the burden lay on the Owners under Article III rule 1 of the Hague Rules to prove that the vessel was seaworthy. He considered that that case concerned only Article III rule 2 and was not concerned with the burden of proof in cases of unseaworthiness. The judge considered that the conventional view of the burden of proof in relation to unseaworthiness remained good law. Although the Respondents' Notice sought to challenge that conclusion, on the basis of *Volcafé*, at the hearing of the appeal, Mr Russell QC indicated that this argument was not pursued.

13. The judge went on to consider the criticisms of the passage plan. He noted at [64] that the IMO Guidelines on Passage Planning 1999 stated that the passage plan should include "all areas of danger". Whilst the working chart had been updated with a note placed on the fairway between buoys 15 and 18 advising the mariner to "see" NM 6274(P)/10, the judge said that the note did not in terms remind the mariner of the warning within the Notice to Mariners that charted depths outside the buoyed fairway may be unreliable.

14. He then went on to consider how the chart should have been marked to give this warning. At [67] to [69] he referred to Captain Hart's primary position that the chart should have been marked with hatched lines down the outside of the fairway indicating "no go" areas outside the fairway, but the judge considered this would make the chart too "busy" and that the same warning could be conveyed, as Captain Hart also suggested, by a note on the chart: "depths less than charted exist outside the fairway."

15. The judge then made these important findings at [70]:

> "Nevertheless prudent passage planning required the danger created by the presence of numerous depths less than those charted outside the fairway to be noted on the chart. Such a note, in the terms suggested by Captain Hart, would immediately remind the officer navigating the vessel that it was unsafe to navigate outside the fairway. Such a note would do that which the IMO guidance on passage planning requires, namely, it would give a clear indication of the danger in navigating outside the fairway…
>
> My conclusion, having considered the expert and other evidence, is that whilst it would of course be prudent to note the warning in the passage plan it would also be necessary (and prudent) to mark the warning on the chart since that is the primary document to which the officer navigating the vessel would refer when making navigational decisions in the course of the outward passage."

16. He went on to reject the opinion of the Owners' expert, Captain Whyte, that a more limited marking of a "no go" area on the chart and attachment of NM 6274(P)/10 to the chart would have been sufficient, concluding at [73]:

> "In the present case neither the passage plan nor the chart contained the necessary warning. It was therefore defective or inadequate and imprudently so. A source of danger when leaving Xiamen was not clearly marked as it ought to have been."

17. The judge then considered the issue of unseaworthiness. He stated the usual or conventional test of unseaworthiness taken by Channell J in *McFadden v Blue Star Line* [1905] 1 KB 697 at 706 from *Carver on Carriage by Sea*: Would the prudent owner, if he had known of the relevant defect have required it to be made good before sending his ship to sea? Applying that test he concluded at [78]:

> "Given that, as stated in the IMO Resolution of 1999, a "well planned voyage" is of "essential importance for safety of life at sea, safety of navigation and protection of the marine environment" one would expect that the prudent owner, if he had known that his vessel was about to commence a voyage with a defective passage plan, would have required the defect to be made good before the vessel set out to sea. This is particularly so where the defect in question is an absence from the passage plan and chart of a warning that numerous depths outside the fairway are less than those charted and where the Owners had advised their masters of the difficulty of navigating in Xiamen waters because of, amongst other matters, "shallow waters" and urged "utmost care and diligent caution". The appropriate warning in the passage plan and on the chart would serve to reduce the risk of poor navigational decisions during the passage. It seems to me inconceivable that the prudent owner would allow the vessel to depart from Xiamen with a passage plan which was defective in the manner which I have found."

18. The judge accepted at [79] that, as Mr Timothy Hill QC for the Owners submitted, passage planning was "the preparation" for safe navigation but said that it did not follow that it was not an aspect of seaworthiness. Seaworthiness extended to having the appropriate documentation on board including the appropriate chart. He considered that having the appropriate chart on board was another aspect of the preparation for safe navigation but it was also an aspect of seaworthiness, as was correcting the chart in accordance with notices to mariners.

19. At [80] the judge rejected Mr Hill QC's submission that production of a defective passage plan was an error of navigation and that it did not matter that it occurred prior to the commencement of the voyage. As the judge noted, that argument was founded on the speech of Lord Hobhouse in *Whistler International v Kawasaki Kisen Kaisha ("The Hill Harmony")* [2001] 1 AC 638 at 657. The judge said that that case concerned whether a decision not to follow a certain route was a breach of the obligation to proceed with utmost despatch in a time charter. It did not concern Article III rule 1 or the concept of unseaworthiness, so that the analysis in that case could not assist in the present case. At [81] the judge said that:

> "Article III r.2 is subject to Article IV r.2 (a) which provides that the carrier will not be responsible for loss caused by neglect in the "navigation or in the management of the ship". Article III r.1 is not so subject. If there is a causative breach of Article III r.1 the fact that a cause of the subsequent casualty is also negligent navigation will not protect the carrier from liability. Passage planning by the master before the beginning of the voyage is necessary for safe navigation. The document or documents in which it is recorded are for the benefit of the officers in fact navigating the vessel during the voyage. That circumstance does not remove passage planning from the scope of seaworthiness. Similarly, the ordering of sufficient engine room spares by the chief engineer is necessary for the safe management of the vessel during the voyage. But that circumstance does not remove the adequacy of engine room stores from the scope of seaworthiness. An adequate passage plan is now a required document at the beginning of the voyage to ensure that the vessel is reasonably fit to carry her cargo safely to its destination."

20. The judge then addressed the two cases relied upon by Mr Hill QC where the English courts had had to consider passage planning. First was the decision of David Steel J in *The Torepo* [2002] EWHC 1481 (Admlty); [2002] 2 Lloyd's Rep 535. Having analysed the facts of that case, the arguments raised and the judge's conclusions, the judge concluded at the end of [83]: "What is clear is that David Steel J. did not have to deal with the submission which has been made in this case in connection with Article III r.1 and that any such submission would have failed on the facts as found by the judge.". The second case was *The Jia Li Hai* [2017] EWHC 2509 (Comm); [2018] 1 Lloyd's Rep 396, a decision of Robin Knowles J on a summary judgment application. The judge rejected the submission by Mr Hill QC that that case was support for the proposition that a defective passage plan does not *ipso facto* render a vessel unseaworthy.

21. At [85] the judge dealt with the decision of the Court of Appeal in *The Apostolis* [1997] 2 Lloyd's Rep 241, upon which Mr Hill QC relied, as he did before this Court. He referred to what Phillips LJ had said at 257: "for a ship to be unseaworthy, or more strictly uncargoworthy, there must be some attribute of the ship itself which threatens the safety of the cargo." The judge concluded that:

> "However, it is well recognised that if a vessel's charts are not up to date that is an "attribute" of the vessel (or "intrinsic" to the vessel) which can render her unseaworthy. A proper passage plan is now, like an up to date and properly corrected chart, a document which is required at the beginning of the voyage. If a vessel carries a chart which the second officer has failed to correct to ensure that it is up to date or carries a passage plan which is defective because it lacks a required warning of "no go" areas then those are two aspects of the vessel's documentation which are capable of rendering the vessel unseaworthy at the beginning of the voyage."

22. The judge then rejected at [86] Mr Hill QC's argument that, because the defect in the passage plan was "one-off", it could not amount to unseaworthiness, saying that this

confused the issue of seaworthiness with the issue of due diligence which is a non-delegable duty. The judge also noted that the defect was probably not "one-off" as the same defect in the passage plan was probably present at the time of the previous voyage in March 2011.

23. In relation to Mr Hill QC's point that there was no previous case where it had been held that a defective passage plan rendered the vessel unseaworthy, the judge said at [87] that:

> "But just as the standard of seaworthiness may rise with improved knowledge of shipbuilding (see *Scrutton* at paragraph 7-025) so may the standard of seaworthiness rise with improved knowledge of the documents required to be prepared prior to a voyage to ensure, so far as reasonably possible, that the vessel is safely navigated. Before the need for passage planning to be adopted by "all ships engaged on international voyages" was recognised (see the fifth recital to the IMO 1999 Guidelines for Voyage Planning) it may have been the case that a prudent owner would not have insisted upon the preparation of an adequate passage plan from berth to berth. However, I am confident that by 2011 the prudent owner would have insisted on such a passage plan before the voyage was commenced. The vessel was, in my judgment, unseaworthy at the beginning of the voyage."

24. The judge went on to consider the issue of causation, concluding that it was more likely than not that the defect in the passage plan was causative of the master's decision to leave buoy 14-1 to port and thus of the grounding. In relation to due diligence, the judge cited Articles III rule 1 and IV rule 1 of the Hague Rules, noting that the carrier's duty of due diligence was a non-delegable personal duty. He then referred to a number of cases where the carrier had been held to have failed to exercise due diligence because of failures by the master or chief engineer before the commencement of the voyage, including *The Evje (No. 2)* [1978] 1 Lloyd's Rep 351. The judge said that the Cargo Interests contended that the negligence of the master and second officer in preparing the passage plan before the commencement of the voyage amounted to a failure by the Owners to exercise due diligence to make the vessel seaworthy.

25. The judge referred to the argument for the Owners that the obligation to exercise due diligence to make the vessel seaworthy only concerned things done by the Owners or their servants or agents in the capacity of carrier and did not concern things done by the crew in some other capacity, in the preparation of the passage plan in their capacity as navigators. This proposition was founded upon a statement in *Cooke on Voyage Charters* at 85.100 that: "the relevant want of due diligence must be by someone performing the functions undertaken in the capacity of carrier and not in some other capacity." The judge noted that the authority cited for that statement was the decision in *Northern Shipping v Deutsche Seereederei (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep.255. As the judge said at [104] to [106] the relevant unseaworthiness there concerned dangerous cargo stowed on deck, but not identified as such, and an attempt to argue that the owner's orbit of responsibility extended to stuffing the containers. That argument was rejected by Auld LJ who said: "Those responsible for the manufacture,

stuffing and shipping of containers are plainly not carrying out any part of the carrier's function for which he should be held responsible."

26. The judge said at [107]:

> "It does not seem to me that there is any analogy with the carrier's duty to exercise due diligence to make the vessel seaworthy by the provision of a proper passage plan. The provision of a proper passage plan is necessary to ensure, so far as reasonably possible, that the vessel will be safely navigated. The safe navigation of the vessel is necessary to enable the carrier to carry the cargo safely from the loading port to the discharge port."

27. Having dealt with various other authorities relied upon by the Owners, the judge concluded at [114]:

> "For these reasons the Owners' claim must fail. The Cargo Interests have established causative unseaworthiness and the Owners have failed to establish the exercise of due diligence to make the vessel seaworthy. That is the consequence of applying to the facts of this case established propositions of law, namely, the traditional test of seaworthiness, the principle that documentation is an aspect of seaworthiness and the non-delegable nature of the duty to exercise due diligence."

28. The judge went on to deal briefly with the various other respects in which the Cargo Interests alleged the vessel was unseaworthy, none of which he accepted, other than the allegation referred to at [116] that the working chart had not been appropriately corrected or updated to contain the warning in NM 6274(P)/10. The judge accepted this but considered that in terms of causative fault it added nothing to the allegation that there was an inadequate passage plan. He evidently considered that these were two aspects of what was essentially the same defect rendering the vessel unseaworthy.

The grounds of appeal

29. In summary, the two grounds of appeal advanced by the Owners for which I granted permission to appeal are:

(1) That the judge wrongly held that a one-off defective passage plan rendered the vessel unseaworthy for the purposes of Article III rule 1 of the Hague Rules and, in particular, failed properly to distinguish between matters of navigation and aspects of unseaworthiness;

(2) The judge wrongly held that the actions of the vessel's master and crew which were carried out *qua* navigator could be treated as attempted performance by the carrier of its duty *qua* carrier to exercise due diligence to make the vessel seaworthy under Article III rule 1 of the Hague Rules.

30. Shortly before the hearing of the appeal, the Owners sought to raise a third ground, which had not been pleaded or argued before the judge, but on the second day of the hearing, Mr Hill QC abandoned that ground, so it requires no further consideration.

The Respondents' Notice

31. I have already referred to the issue raised in the Respondents' Notice concerning the burden of proof in the light of the decision of the Supreme Court in *Volcafé*, which Mr Russell QC indicated at the hearing was not being pursued. The Cargo Interests maintained the other grounds for upholding the judgment set out in the Respondents' Notice which are, in summary:

    (1) That in addition to the finding that the passage plan was inadequate, the judge found that the vessel was unseaworthy because the working chart had not been updated and/or corrected to record and/or reflect the warning in NM 6274(P)/10 that: *"numerous depths less than charted exist within, and in the approaches to Xiamen…"* On the judge's factual findings, this was a further causative breach of Article III rule 1.

    (2) That on a proper analysis of the judgment the judge must be taken to have accepted the alternative argument of Cargo Interests that there was no proper system and/or culture in place and/or implemented to ensure that proper passage plans were produced. This was a further causative breach of Article III rule 1.

Summary of the parties' submissions

32. Mr Hill QC for the Owners submitted that passage planning constituted a navigational decision, notwithstanding that it took place whilst the vessel was at the berth or before the voyage began, relying in that context on what Lord Hobhouse said in *The Hill Harmony* at 537:

> "The character of the decision cannot be determined by where the decision is made. A master, whilst his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to execute a manoeuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners' obligation to execute the coming voyage with the utmost dispatch. The former come within the exception [of "act, neglect or default of the master…in the navigation or the management of the ship" under Article IV rule 2(a) of the Hague Rules]; the latter does not. Where the decision is made does not alter either conclusion."

33. Mr Hill QC submitted that placing the warning on the chart or in the passage plan was an act of navigation and that an error in navigation of this kind did not render the vessel unseaworthy. He submitted, on the basis of the decisions of the Court of Appeal in *The Aquacharm* [1982] 1 WLR 119 and *The Apostolis* [1997] 2 Lloyd's Rep 241, that seaworthiness was concerned with the attributes or inherent or intrinsic qualities of the vessel, which comprised the vessel herself, her crew and equipment. It extended beyond physical attributes in the sense that it encompassed having a proper system on board,

but that was still an attribute. The passage plan and working chart were not attributes of the vessel but the recording of navigational decisions. It was incumbent on the owner to have on board everything necessary for the crew to carry out proper passage planning, such as a competent crew, up to date charts and proper systems and instructions. However, the use which the crew then made of it went to navigation or seamanship. There was a fundamental distinction between having everything necessary on board, which was part of the Owners' responsibility to make the vessel seaworthy under Article III rule 1, and the actual navigation by the crew (of which the passage plan formed part) where any failure would be within the exception in Article IV rule 2(a).

34. He submitted that updating a chart was a mechanical exercise of writing on the chart updates in notices to mariners or tracing updates onto the chart, as in the case of NM1691/11. In contrast, any decision as to whether or not to write a warning on the chart or place a hatched area involved an exercise of judgment and seamanship, which was part of passage planning and thus an act of navigation. Whilst it was inherently likely that an error in management before or at the beginning of the voyage would affect an attribute of the vessel, it was inherently unlikely that an error in navigation would do so. There was no English case before the present decision where an error in navigation had been held to render the vessel unseaworthy.

35. He also submitted that the judge had only found that the defect in the working chart in not including the warning on the chart was a defect in passage planning. The judge had not found that this was a failure to update or correct the working chart (contrary to the first ground of the Respondents' Notice). Had he intended to make such a finding, it would have been a much easier and straightforward route to finding unseaworthiness.

36. Mr Hill QC relied, as he did before the judge, upon the decision of David Steel J in *The Torepo* where one of the particulars of unseaworthiness was that there was no or no proper passage plan for the part of the voyage where the grounding took place (see particular (c) quoted at [30] of the judgment). The judge ultimately found that there was no deficiency in the pilots' passage plan (see [97] to [99]) but then went on *obiter* to consider the position if that passage plan was defective, holding at [100] to [111] that there was no defect in the system on board in relation to the instructions for passage through pilotage waters and that the master was not incompetent. Mr Hill QC relied upon the fact that it was not argued and the judge did not find that there was a free-standing defect in the vessel's passage plan which rendered the vessel unseaworthy.

37. He also relied upon the judgment of Robin Knowles J in *The Jia Li Hai*. There, in defence to a general average claim following a grounding, the defendant alleged that the vessel was unseaworthy because of the absence of adequate systems on board for passage planning. On a summary judgment application by the claimant, the judge held the defendant's allegations were without foundation and entered judgment against the defendant (see [13] and [14] of the judgment). Mr Hill QC relied upon that case as showing that a one-off defective passage plan, as in the present case, did not, without more, render the vessel unseaworthy.

38. In relation to the second ground of appeal Mr Hill QC submitted that the carrier's obligation to exercise due diligence to make the vessel seaworthy was limited to acts by third parties *qua* carrier. The obligation on the Owners in the present context was (i) to put on board all materials needed for safe navigation; (ii) to give guidance and

instructions and (iii) to ensure that the vessel had a competent crew. Beyond that, a failure by the master and crew to navigate carefully, which was their responsibility, was outside the orbit of responsibility of the Owners.

39. In support of this proposition, Mr Hill QC relied, in particular, upon the decision of the Court of Appeal in *The Kapitan Sakharov*, in particular what Auld LJ said at 273lhc, by reference to *Riverstone Meat v Lancashire Shipping ("The Muncaster Castle")* [1961] AC 807:

> "…the ratio of [*The Muncaster* Castle] was that a carrier cannot absolve itself from its personal duty of due diligence by delegating its responsibility *as a carrier* to an independent contractor. The shipper's and the carrier's respective orbits of responsibility are normally quite distinct and neither is agent of the other outside its own orbit; cf per Lord Radcliffe in *Riverstone Meat*, at 863. Those responsible for the manufacture, stuffing and shipping of containers are plainly not carrying out any part of the carrier's function for which he should be held responsible. I can find nothing in the Hague Rules or at Common law to make a carrier responsible for the unseaworthiness of its vessel resulting from a shipper's misconduct of which it, the carrier, has not been put on notice. Nor can I see any reason in principle or logic why a carrier should be exposed to such an infinite liability in time, place and people. It is not liable for latent defects in a vessel before it acquired it; see *Riverstone Meat*, per Lord Radcliffe at 867 and cf. *W. Angliss & Co. (Australia) Pty v. Peninsular & Oriental Steam Navigation Co.* (1927] 2 KB 456. So why, as a matter of unseaworthiness, should it be liable for latent defects in cargo shipped on it?"

40. He also relied upon the decision of Gloster J in *The Happy Ranger* [2006] EWHC 122 (Comm); [2006] 1 Lloyd's Rep 649, a case where the judge rejected the argument that the Owners were responsible under Art III rule 1 for the negligence of third parties in relation to the construction of a newly built vessel before the Owners took delivery of her, applying *Angliss* and *The Kapitan Sakharov*: see [19]-[20].

41. On behalf of the Cargo Interests, Mr Russell QC emphasised the key findings of fact made by the judge in [70], [73] and [78] on unseaworthiness and [89] and [90] on causation. He submitted that the effect of those findings is that the working chart was defective because it did not contain any warning about the charted depths outside the fairway. Even if, which Mr Russell QC did not accept, the conventional *McFadden* test of unseaworthiness required the defect alleged to be an attribute of the vessel, a defective chart was clearly an attribute of the vessel. The chart was defective because the master failed to exercise due diligence to make the vessel seaworthy for which the Owners were liable under Article III rule 1.

42. He submitted that there was a temporal cut-off affecting the relationship between Article III rules 1 and 2 and Article IV rules 1 and 2 in the sense that the same negligent act or omission which, during the voyage, would fall within one of the exceptions in Article IV rule 2 to a breach of Article III rule 2 may lead to liability under Article III rule 1 if, before the voyage, it renders the vessel unseaworthy. He relied upon various

authorities, including the decision of the Court of Appeal in *Dobell v Rossmore* [1895] 2 QB 408, a case under the US Harter Act 1893, but stating principles equally applicable to the Hague Rules. The classic statement of the relevant principle that Article III rule I was an overriding obligation not subject to the exceptions in Article IV rule 2 is that of Lord Somervell of Harrow giving the judgment of the Privy Council in *Maxine Footwear v Canadian Government Merchant Marine* [1959] AC 589 at 602-3.

43. Mr Russell QC submitted that there are no conceptual limits to the types of defect which can constitute unseaworthiness if the *McFadden* prudent owner test is satisfied. In particular, he disputed that it was necessary, before the vessel could be unseaworthy, that the relevant defect affected an attribute of the vessel. An example of a case where it was difficult to say that the defect in question went to an attribute of the vessel was the decision of Rowlatt J in *Ciampa v British India Steam Navigation Company Ltd* [1915] 2 KB 774.

44. Mr Russell QC submitted that the suggestion by Mr Hill QC that an error of navigation could not make the vessel unseaworthy was simply wrong as a matter of law. There were at least two authorities where what was properly characterised as an error in navigation or navigational judgment had been held to render the vessel unseaworthy, the decision of the Privy Council in *Robin Hood Mills v Paterson Steamships* (1937) 58 Ll. L. Rep 33 (negligent adjustment of a compass by a compass adjuster) and the decision of the Court of Appeal in *The Evje (No. 2)* [1978] 1 Lloyd's Rep 351 (miscalculation of the amount of fuel required for a voyage as a consequence of doing so by reference to the wrong, shorter route). Equally, contrary to Mr Hill QC's submission, there were many cases where errors in the exercise of skill and judgment, not just "mechanical" tasks could cause unseaworthiness. In addition to those two cases, further examples were *The Muncaster Castle* [1961] AC 807 itself (failure by repairers' fitter to tighten properly the nuts on inspection covers allowing the ingress of seawater) and *The Friso* [1980] 1 Lloyd's Rep 469 (failure of master to press up double bottom tanks which were slack, leading to instability of the vessel). All those cases also demonstrated that it was not just systemic failings but one-off instances of negligence which could constitute unseaworthiness.

45. Mr Russell QC submitted that it was well established that failure to have necessary documents on board for the safe physical or legal prosecution of the voyage could constitute unseaworthiness. This included navigational documents such as charts. In that context, he relied upon the *obiter* statement by Kerr LJ in *The Derby* [1985] 2 Lloyd's Rep 325 at 331 that:

> "The second respect in which the scope of these words in line 22 [the relevant seaworthiness obligation] has been held to go beyond the physical state of the vessel is that they have been held to cover the requirement that the vessel must carry certain kinds of documents which bear upon her seaworthiness or fitness to perform the service for which the charter provides. Navigational charts which are necessary for the voyages upon which the vessel may be ordered from time to time are an obvious illustration."

46. He submitted that Kerr LJ regarded it as self-evident that having the right charts on board (which would include those charts having been updated) went to seaworthiness and that the same analysis should apply to having a proper passage plan which equally

concerned the safety of the vessel in the present case, particularly since part of the passage plan was the working chart. Having a working chart which was defective because it did not contain the necessary warning from NM 6274(P)/10 rendered the vessel unseaworthy in the same way as a chart which was defective because it had not been updated or corrected.

47. In relation to the second ground of appeal, Mr Russell QC submitted that it was misconceived. The law was clear that, if there is a defect which renders the vessel unseaworthy, the owners are liable for a failure to exercise due diligence on the part of anyone to whom they have delegated or entrusted the task of making the vessel seaworthy. The duty under Article III rule 1 is a non-delegable duty: see for example *The Muncaster Castle.* The decision of the Court of Appeal in *The Kapitan Sakharov* is not authority for the proposition that once the owners have assumed responsibility for the cargo, they are only responsible for the acts of the master and crew *qua* carrier and not *qua* navigator.

Discussion

48. In my judgment, there are a number of fallacies in the case advanced on behalf of the Owners on the appeal, the principal of which is the contention that, because the preparation of a passage plan can be said to be an act of navigation involving an exercise of judgment and seamanship, it falls within the exception in Article IV rule 2(a) and a defect in the plan cannot constitute unseaworthiness. It has been established, at least since *Dobell v Passmore* [1895] 2 QB 408, that a vessel may be rendered unseaworthy by negligence in the navigation or management of the vessel and, as *Maxine Footwear* established, the obligation to exercise due diligence to make the vessel seaworthy is an overriding obligation, to which none of the exceptions in Article IV rule 2 is a defence.

49. Furthermore, the submission that, whilst negligent management of the vessel before the commencement of the voyage can render the vessel unseaworthy, negligent navigation cannot, is wrong both in principle and on authority. There is no principled basis for concluding that a defect caused by navigational error by the master or crew before or at the commencement of the voyage cannot render the vessel unseaworthy. To the extent that Mr Hill QC's submission is founded upon the distinction he sought to draw between acts of the master and crew *qua* carrier and acts of the master and crew *qua* navigator, that distinction is misconceived for the reasons set out hereafter in relation to the second ground of appeal.

50. In terms of authority, as Mr Russell QC submitted, the decision of the Privy Council in *Robin Hood Mills v Paterson Steamships ("The Thordoc")* (1937) 58 Ll. L. Rep 33 is a case where there was an error in navigation which rendered the vessel unseaworthy. The owners had employed a compass adjuster to adjust the vessel's compass and he had done so negligently, and as a consequence, the vessel was involved in a collision. The Privy Council was considering a limitation action where the Owners were entitled to limit their liability unless there had been personal fault or privity of the Owners. However, in the judgment, Lord Roche contrasted that position with the position in the earlier cargo claim before the Canadian courts where the Owners were under an obligation under the Canadian Water Carriage of Goods Act 1927 to exercise due diligence to make the vessel seaworthy.

51. As Lord Roche noted at 40, that obligation was:

> "not fulfilled merely because the shipowner was personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose [citing *Dobell v Rossmore*]. Therefore in the cargo action want of diligence in the compass adjuster who adjusted the compasses or in the captain who said he checked or verified the adjuster's work would be material and a finding adverse to the shipowner could be arrived at upon the ground of want of diligence in these persons".

There is no suggestion in that judgment that, because the error of the compass adjuster was an error of navigation, the vessel was not unseaworthy or that the Owner was entitled to rely upon the exception for negligence in the navigation or management of the vessel.

52. The decision of the Court of Appeal in *The Evje (No. 2)* [1978] 1 Lloyd's Rep 351 concerned a miscalculation by the master of the amount of fuel required for the voyage because he mistakenly made his calculation on the basis of the shorter Great Circle route which was the wrong route. It was held that there was a want of due diligence by the owners to make the vessel seaworthy. As Mr Russell QC correctly submitted, that case involved a one-off error of judgment in relation to navigational skill. There was no suggestion that, because the case involved an error of navigation, the vessel could not be unseaworthy.

53. In my judgment, nothing in *The Hill Harmony* supports Mr Hill QC's submission that acts of navigation somehow fall outside the scope of seaworthiness. That case concerned the question whether the master's decision not to follow charterers' orders as to route and to take his own longer route was a breach of the obligation to prosecute voyages with the utmost despatch and to follow charterers' orders as regards the employment of the vessel under clause 8 of the NYPE form of time charter. The owners argued that the choice of route did not relate to employment of the vessel but its navigation, that matters of navigation were within the sole province of the master and that, in any event, if he was at fault, any liability was excluded by Article IV rule 2(a). The House of Lords concluded, upholding the arbitrators, that the choice of route was a matter of employment of the vessel not navigation, and that the owners were in breach of both aspects of clause 8.

54. It is true that, in the passage from his judgment set out at [32] above, Lord Hobhouse considered that decisions as to whether tug assistance was needed or whether the vessel's draft will permit leaving on a certain tide are still navigational decisions and so within the exception in Article IV rule 2(a), even if taken whilst the vessel is still in port. However, the case was not concerned with seaworthiness at all, nor is it in any sense authority for the proposition that, because the acts of the master and crew which would otherwise render the vessel unseaworthy are acts of navigation, the exception in Article IV rule 2(a) is available to the owners. Likewise, there is nothing in the decision which touches on the question whether a so-called act of navigation bears on the attributes of the vessel. As I have already said, it is well-established that acts of the master and crew which, if committed during the course of the voyage, would attract the exception, do not do so if committed before or at the commencement of the voyage, thereby rendering the vessel unseaworthy. In such cases the overriding obligation under Article III rule 1 comes into play.

55. Mr Hill QC also sought to rely upon the decision of the Supreme Court of New Zealand in *The Tasman Pioneer* [2010] 2 Lloyd's Rep 13. In that case, during the course of a voyage, because he was behind schedule, the vessel's master changed course and took a passage through a narrow channel, grounding the vessel. Any contention that the vessel was unseaworthy was rejected by the judge at first instance and the argument in the appellate courts was essentially as to the scope of the exception in Article IV rule 2(a). The judge at first instance and the Court of Appeal concluded that the exception did not apply because of the master's outrageous conduct in bad faith after the grounding. The Supreme Court reversed that decision holding that the exception in Article IV rule 2(a) did not import a requirement of good faith and, absent a plea of barratry, which the cargo interests had not made, the owners could rely upon the exception.

56. Mr Hill QC relied in particular upon [8] of the judgment of the Supreme Court given by Wilson J:

> "The scheme of the Rules is clear. Carriers are responsible for loss or damage caused by matters within their direct control (sometimes called "commercial fault"), such as the seaworthiness and manning of the ship at the commencement of the voyage. They are not however responsible for loss or damage due to other causes, including the acts or omissions of the master and crew during the voyage ("nautical fault"). This allocation of risk is confirmed by article 3.2 being made subject to article 4 and by the inapplicability of the article 4.2(b) and (q) exemptions in the event of "actual fault or privity" of the carrier. The allocation of responsibility between the carrier and the ship on the one hand and the cargo interests on the other promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums."

57. Mr Hill QC submitted that this passage supported his case that the Owners are not liable for "nautical fault", which he equated with "error in navigation", whether it occurs before or during the voyage. In my judgment, it does nothing of the kind. The passage is drawing a clear distinction between unseaworthiness before and at the commencement of the voyage, for which owners are responsible and to which the Article IV rule 2 exceptions do not apply, and what occurs during the voyage, where the exceptions do apply and qualify the obligation under Article III rule 2. The references to "at the commencement of the voyage" and "during the voyage" cannot be explained away as loose language, as Mr Hill QC sought to do. In any event, the case was not a seaworthiness case and does not support the proposition that an error in navigation before the commencement of the voyage cannot amount to unseaworthiness.

58. A further fallacy in the case advanced on behalf of the Owners is the distinction which Mr Hill QC sought to draw between mechanical acts of the master and crew which might in an appropriate case render the vessel unseaworthy and acts of the master and crew which require judgment and seamanship which would not render the vessel unseaworthy. As Mr Russell QC submitted, there are any number of cases (to some of which I have referred at [44] and [50] to [52] above) where it has been decided that the

acts of those for whom the owners are responsible, which have rendered the vessel unseaworthy, have involved the exercise of judgment and seamanship.

59. This misconceived distinction also infected Mr Hill QC's case in relation to defects in charts. As Mr Russell QC submitted, it is well-established that an aspect of the vessel's seaworthiness is that she has the appropriate, up-to-date charts on board. Mr Hill QC accepted that a failure by the vessel's master and crew to update a chart by reference to a notice to mariners, so that she sailed with an out of date and defective chart, would render the vessel unseaworthy. However, when it was suggested by the Court during the course of argument that it must follow that a failure to record the warning in NM 6274(P)/10 on the working chart made the vessel unseaworthy, Mr Hill QC submitted that this was not so because how the warning was placed on the chart would involve an exercise of judgment (for example whether to write the words: "numerous depths less than charted exist within, and in the approaches to Xiamen" on the chart or to draw on the chart hatched "no go" areas either side of the fairway). Therefore, this was passage planning, not updating of the chart.

60. However, that seems to me to be a distinction without a difference, for two reasons. First, although Mr Hill QC sought to contend that the judge had dealt with the matter as defective passage planning, the working chart was part of the passage plan and the relevant defect in the passage plan encompassed the defect in the chart, namely that it did not contain the warning. The judge was clearly deciding that the working chart was defective in that sense. Second, in each case, the effect of the relevant omission by the master and crew is that the chart is defective and unsafe. Mr Hill QC was constrained to accept that if NM 6274(P)/10 had contained a specific instruction to write the warning on the chart, failure to do so would render the vessel unseaworthy, because the master and crew would have failed to update the chart. However, there is no rational distinction between that case and the case where, without an instruction on the chart, the master and crew simply fail to record the warning on the chart. The distinction which Mr Hill QC sought to draw between charts which are defective because they are not updated or corrected and charts which are defective, as in the present case, because they do not record the necessary warning in a notice to mariners, is an unprincipled and wholly artificial one. As I have said, in each case, the chart is defective and unsafe and the vessel is therefore unseaworthy.

61. It seems to me that there is considerable force in the submission of Mr Russell QC that the Owners' case that a defect will not render a vessel unseaworthy, even if the *McFadden* test is satisfied, unless it affects an attribute of the vessel, places an unnecessary gloss on the test. As Mr Russell QC submitted, *The Apostolis*, upon which the Owners relied, is not an easy case. The judge at first instance was faced with two possible causes of the fire in the hold: a spark from welding on board and a discarded cigarette. The judge chose the former, which he found rendered the vessel unseaworthy. The Court of Appeal reversed the judge, finding that the cargo interests had failed to prove that welding was a more probable cause of the fire than a discarded cigarette, so that the damage to cargo was not attributable to actionable fault by the owners. It follows that what was said about unseaworthiness was all *obiter*.

62. Leggatt LJ at 245lhc considered that, because the welding was not being carried out to make the vessel seaworthy, it was not work to which the non-delegable duty under Article III rule 1 attached. As Mr Russell QC said, the position is different in the present

case because putting a warning on the working chart and/or in the passage plan was a task which was necessary to prepare the vessel for the voyage.

63. Mr Hill QC relied, in particular, upon a passage in the judgment of Phillips LJ at 257lhc:

> "The Judge was urged to find that the cargo was damaged by unseaworthiness on two alternative bases. First it was argued that, once the cargo caught fire, the fact of the burning cargo rendered holds Nos. 4 and 5 unfit for the preservation of the cargo in those holds and thus unseaworthy. The Judge rejected that contention, and I think that he was right to do so. For a ship to be unseaworthy, or more strictly uncargoworthy, there must be some attribute of the ship itself which threatens the safety of the cargo. If a hold is dirty, that is properly considered as an attribute of the ship. But the fact that a hold contains cargo which threatens damage to other cargo stowed in proximity is not an attribute of the ship and does not render the ship unseaworthy."

I agree with Mr Russell QC that it would be dangerous to place too much reliance on this passage, not least because the example given in the last sentence is irreconcilable with the *ratio* of the later decision of the Court of Appeal in *The Kapitan Sakharov*.

64. Ultimately, however, it is not necessary to resolve this particular dispute as to whether the alleged defect must affect or relate to an attribute of the vessel. This is because the judge concluded at [85] of the judgment that an uncorrected chart which is not up-to-date and a passage plan which is defective because it does not contain a warning of no-go areas are both aspects of the vessel's documentation which are capable of rendering the vessel unseaworthy at the beginning of the voyage, which is plainly correct. Given that, as he also concluded in that paragraph, having charts which are not up-to-date is an "attribute" of the vessel, it is implicit in his reasoning that having a defective passage plan is equally an "attribute" of the vessel. This must be all the more so where one of the reasons why the passage plan is defective is because the working chart which forms part of that passage plan is defective because it does not contain the necessary warning. In my judgment, both an out of date uncorrected chart and a passage plan and working chart which are defective because they fail to contain the warning in NM 6274(P)/10 are defects which are "attributes" of the vessel and render her unseaworthy.

65. The Owners relied upon a number of authorities in support of their submission that negligent passage planning cannot constitute unseaworthiness. On a proper analysis, none of those cases is of any assistance to them. In *The Torepo*, the vessel's passage plan had been drawn up on the basis that the vessel would navigate via the Magellan Strait and that part of that passage would be under pilotage, simply stating: "Pilotage 'till Gulfo Coronados 589 miles". In the event, the vessel proceeded under pilotage via the Patagonian Channels, using the pilots' large scale Chilean charts and the pilots' passage plan and ran aground. The Cargo Interests contended that the vessel had no proper passage plan in place because of the master's flawed attitude to passage planning (see [96]). The judge held at [97] to [99] that the pilots' passage plan was not defective as alleged, so that the defence based on criticism of the passage plan failed. As Mr Hill QC recognised, what the judge said from [100] onwards was all *obiter*. At [105] the judge rejected the argument that the master was incompetent, holding that he had ordered the appropriate charts, that the vessel's passage plan was satisfactory having

regard to the limited material available and that the pilots would be bringing large-scale Chilean charts on board for the purposes of transiting the Magellan Straits. The judge said at [108] that the master had not expected that the vessel would transit via the Patagonian Channels until the pilots came on board with their own charts, on which a passage plan had been marked, and noted that the allegation that the master should not have relied upon that plan had been abandoned.

66. The highest it can be put is that counsel for the Cargo Interests does not seem to have argued that the defects in the passage plan brought on board by the pilots in themselves rendered the vessel unseaworthy. There was a continuing obligation to exercise due diligence to make the vessel seaworthy in the contract of carriage in that case, but as Teare J said at [83] in the present case, how the classic test of unseaworthiness would have operated in that case, where the vessel was seaworthy at the beginning of the voyage but pilots later boarded with a defective passage plan, is not clear. It is difficult to see how the fact that counsel there did not run a point which would have failed on the facts in any event, so that David Steel J did not have to deal with it, can have any bearing on the issues raised by this appeal.

67. Likewise, *The Jia Li Hai* is of no assistance. Again, the highest it can be put is that it does not seem to have been argued by the defendant that a one-off defective passage plan, as opposed to a systemic failure, would render the vessel unseaworthy. It is true that at [13], Robin Knowles J observed that the defendant could "perhaps show that systems were breached on this occasion, but it cannot show inadequate systems or inadequate arrangements for implementation of those systems". There is no further reasoning in relation to this point, no doubt because the judge thought the whole defence was without foundation. As Teare J observed at [84] of his judgment in the present case: "Whether the judge had in mind a breach with regard to passage planning as opposed to bridge management or safety management systems is not stated. Further, it may be that, as suggested by counsel for the Cargo Interests, the "breach of the systems" which the judge had in mind was an error in navigation during the voyage which led to the collision." Like Teare J I do not consider that the judgment in *The Jia Li Hai* is authority for the proposition that a defective passage plan does not render the vessel unseaworthy.

68. Mr Hill QC also relied upon the decision of the United States Court of Appeals for the Fifth Circuit in *Usiminas v Scindia Steam Navigation Company Ltd ("The Jalavihar")* [1997] USCA5 1466; 118 F.3d 328, as authority for the proposition that an error of navigation before the commencement of the voyage does not amount to unseaworthiness. In that case the district court had found that the grounding of the vessel was caused by miscommunication between the master and the pilot which was navigational or management error within section 4(2)(a) of USCOGSA. The district court also found that this occurred after the commencement of the voyage so that there was no want of due diligence to make the vessel seaworthy and rejected the argument that the grounding was caused by the master's failure to discuss the proposed manoeuvre with the pilot before leaving the berth. On appeal, the appellant argued that any navigational error which occurred prior to the commencement of the voyage resulted from a lack of due diligence to make the vessel seaworthy and that section 4(2)(a) was restricted to navigational errors occurring after the commencement of the voyage.

69. The Court of Appeals rejected that argument, holding that the section 4(2)(a) exception would apply to navigational error occurring prior to the commencement of the voyage. It noted that the appellant could therefore only succeed if it could establish that the district court had erred in finding that the owners exercised due diligence to make the vessel seaworthy and that that unseaworthy condition was a cause of the grounding. The Court noted that the district court, whilst determining that the vessel was not in an unseaworthy condition, found that none of the alleged unseaworthiness had caused the grounding. The Court of Appeals upheld that finding on causation. It noted that the appellant had initially argued that the master's failure to discuss the manoeuvre with the pilot was an unseaworthy condition, but the owners relied upon an earlier decision of the Court of Appeals of the Fifth Circuit that failure to discuss the manoeuvre with the pilot was a navigational error not unseaworthiness. The appellant's response was to argue that the owners' lack of a company policy, requiring the master to discuss routine manoeuvres with the pilot, constituted an unseaworthy condition. However, as the Court said, first the appellant had to show that the district court had been incorrect in rejecting a failure to discuss as a cause of the grounding. The Court of Appeals went on to conclude that because they upheld the district court's finding that the alleged unseaworthy conditions were a cause of the grounding, they did not need to address the appellant's contention that the district court erred in finding that the owners exercised due diligence in preparing the vessel for the voyage.

70. Thus, it is clear that that case focused on the issue of causation. It is not authority for the proposition contended for by Mr Hill QC, that an error in navigation before the commencement of the voyage can never amount to unseaworthiness. Indeed, because the Court of Appeals upheld the findings of fact of the district court, particularly as regards causation, as they said, they did not need to decide the issue of unseaworthiness. In any event, even if that US decision were authority for the proposition for which Mr Hill QC contends, it would be inconsistent with English law, which is that an error in navigation before or at the commencement of the voyage is capable of rendering the vessel unseaworthy.

71. The judge was also correct to reject, at [86] of his judgment, Mr Hill QC's argument that because the defect in the passage plan was "one off", it could not amount to unseaworthiness. As Mr Russell QC pointed out, it is well-established that both one-off instances of negligence and systematic failings can cause unseaworthiness. Furthermore, as the judge noted in that paragraph and in [74], the defect in the passage plan was probably not one-off because it was present at the time of the earlier March 2011 voyage. However, it does not follow from that conclusion that there was no proper system or culture on board in relation to passage planning and I would reject the second ground of the Respondents' Notice.

72. In conclusion on the first ground of appeal, the judge was right to find that the defect in the passage plan (which included the working chart), that it did not contain the warning about the unreliability of charted depths outside the fairway contained in NM 6274(P)/10, rendered the vessel unseaworthy. It is necessarily implicit in the judge's reasoning that he considered that the working chart had not been appropriately corrected or updated to contain that warning (see [116] of the judgment) and that this constituted a defect in the chart, which was an attribute of the vessel. Even if that analysis were wrong, the Cargo Interests would be correct in the first ground of their Respondents' Notice, that the judgment should be upheld on the ground that the

working chart was defective because it did not contain the warning in NM 6274(P)/10 and that defect, which was an attribute of the vessel, rendered her unseaworthy.

73. The second ground of appeal, which seeks to draw a distinction between acts of the master and crew *qua* carrier (for which the Owners are responsible) and their acts *qua* navigator (for which the Owners are not responsible) is misconceived. Contrary to Mr Hill QC's submission, this purported distinction is not supported by the decision of the Court of Appeal in *The Kapitan Sakharov*. The relevant part of the decision in that case concerned an ambitious and somewhat extreme submission that the owners should be liable for the negligence of the shippers in stuffing containers, in this instance with dangerous cargo which rendered the vessel unseaworthy, in circumstances where the contract of carriage did not make the owners responsible for that task. That is the context in which Auld LJ held that this was outside the orbit of responsibility of the owners in the passage which I have cited at [39] above.

74. The case is simply not authority for the proposition that, once the owners have become responsible under the contract of carriage and have therefore come under the non-delegable duty under Article III rule 1 to exercise due diligence to make the vessel seaworthy, they somehow cease to be responsible if the acts of the master and crew are to be categorised as acts of navigation, notwithstanding that those acts are in preparation for the voyage and their negligent performance renders the vessel unseaworthy. Essentially the same point was made by Lord Merriman at 853-4 in *The Muncaster Castle* in discussing the *Angliss* case, in relation to the owners' responsibility for repairers to whom they have entrusted the task of repairing the vessel to make it fit for the voyage:

> "Whatever retrogression may be involved in an attempt to fix the shipowner with liability for bad workmanship before the ship comes into existence as a ship, or before an existing ship comes into his possession at all, there is, in my opinion, no question of undue retrogression in attaching to the shipowner responsibility for a person in the employ of those to whom he has entrusted the repair of his own ship."

75. In *Angliss* (as in *The Happy Ranger* and *The Kapitan Sakharov* itself) it was being sought to make the owners responsible for matters which had occurred before they came under any responsibility to the cargo interests under the contract of carriage. In the present case, what is contended is that, even though the owners had assumed responsibility for the cargo, that responsibility ceased if the acts of the master were *qua* navigator as opposed to *qua* carrier. None of the authorities relied upon by Mr Hill QC supports that proposition. Once the Owners assumed responsibility for the cargo as carriers, all the acts of the master and crew in preparing the vessel for the voyage are performed *qua* carrier, even if they are acts of navigation before and at the commencement of the voyage. The Owners are responsible for all such acts as a consequence of the non-delegable duty under Article III rule 1.

76. It follows that both grounds of appeal fail and the appeal must be dismissed.

Lord Justice Males:

77. I agree that this appeal must be dismissed for the reasons given by Flaux LJ. I add a short judgment of my own in view of the interesting submissions addressed to us. Ultimately, however, the judge's factual findings mean that this is a straightforward case.

The judge's findings

78. Notice to Mariners 6274(P)/10 warned in stark terms that depths shown on the chart outside the fairway on the approach to Xiamen were unreliable. The judge found that it was necessary as a matter of prudent passage planning that this warning should be marked on the chart, as this would be the primary document to which the officer navigating the vessel would refer when making navigational decisions in the course of the outward passage. However, this was not done:

> "73. In the present case neither the passage plan nor the chart obtained the necessary warning. It was therefore defective or inadequate and imprudently so. A source of danger when leaving Xiamen was not clearly marked as it ought to have been."

79. Applying the traditional test, the judge held that, as a result of this failure, the vessel was unseaworthy at the commencement of the voyage. It was inconceivable that a prudent owner would have allowed the vessel to depart from Xiamen with a passage plan which was defective in this manner. Equally, the presence on board of the appropriate chart, with corrections notified in Notices to Mariners properly marked, was also an aspect of seaworthiness:

> "85. … A proper passage plan is now, like an up to date and properly corrected chart, a document which is required at the beginning of the voyage. If a vessel carries a chart which the second officer has failed to correct to ensure that it is up to date or carries a passage plan which is defective because it lacks a required warning of no-go areas then those are two aspects of the vessel's documentation which are capable of rendering the vessel unseaworthy at the beginning of the voyage."

80. Moreover, the judge found that the failure to mark the warning on the chart was the cause of the grounding. If it had been marked, the master would not have attempted the manoeuvre that he did and would have remained in the fairway.

Seaworthiness

81. I do not think it matters whether this is viewed as a case of a defective chart or a defective passage plan. Either way, at the commencement of the voyage, the failure to mark the warning on the chart meant that it was not safe for the vessel to proceed to sea.

82. Mr Hill QC accepted, inevitably, that charts which are not up to date will render a vessel unseaworthy, but submitted that updating a chart is a purely mechanical exercise which consists of nothing more than following precise instructions contained in a Notice to

Mariners which leave no room for any exercise of judgment as to precisely how the chart should be marked. Thus, on the facts of the present case, even if prudence required that the warning about unreliable depths outside the fairway should be marked on the chart, the Notice to Mariners did not contain an instruction that this should be done, let alone specify exactly how it should be done. Accordingly, submitted Mr Hill QC, the chart in the form in which it was at the beginning of the voyage was up to date (and was in the same form as a new chart purchased from the Hydrographic Office would have been), and anything remaining was merely a matter of navigation.

83. I do not accept this submission. The purpose of correcting or updating a chart is to ensure that the vessel is navigated with the best available information. If prudent seamanship requires that information contained in a Notice to Mariners should be marked on a chart, it will be no answer to say that the Notice does not specify exactly how this should be done. If a prudent owner would not allow the vessel to depart without the warning being marked on the chart, the vessel will be unseaworthy.

84. As I read the judgment, this is what the judge concluded. Although much of his judgment focused on passage planning, he would also have been prepared to hold that the vessel was unseaworthy on the straightforward and conventional ground that the chart was defective, but concluded (rightly) that this way of analysing the case added nothing in terms of causative fault to his conclusion that the vessel was unseaworthy due to the defective passage plan.

Passage plan

85. The conclusion that the vessel was unseaworthy due to having a defective passage plan appears to have been novel, but was in my judgment no more than the application of well-established principles.

86. The Guidelines for Voyage Planning adopted by IMO Resolution A.893(21) on 25th November 1999 state that passage planning is "of essential importance for safety of life at sea, safety and efficiency of navigation and protection of the marine environment". It identifies four stages, namely (1) appraisal (i.e. gathering all relevant information), (2) detailed planning of the whole voyage from berth to berth, (3) execution of the plan and (4) monitoring of progress in the implementation of the plan. Strictly speaking, only the first two of these constitute passage planning, as the remaining two consist of executing (and modifying as necessary) the plan which has been made before the voyage begins. The guidelines require that, as part of the appraisal stage, account should be taken of "appropriate scale, accurate and up-to-date charts to be used for the intended voyage or passage, as well as any relevant permanent or temporary notices to mariners and existing radio navigational warnings". The passage plan should then be prepared "on the basis of the fullest possible appraisal"; the intended route should be plotted on "appropriate scale charts" with an indication of "all areas of danger"; and the plan should be "approved by the ship's master prior to the commencement of the voyage or passage".

87. It is clear, therefore, that a properly prepared passage plan is an essential document which the vessel must carry at the beginning of any voyage. There is no reason why the absence of such a document should not render a vessel unseaworthy, just as in the case of any other essential document.

88. Mr Hill QC submitted that it makes all the difference that the passage plan is a record of navigational decisions by those preparing it. But it is clear from the authorities that this is not a valid ground of distinction and that navigational decisions made before the commencement of the voyage are capable of rendering a vessel unseaworthy. *The Evje (No 2)* [1978] 1 Lloyd's Rep 351 is a striking example. The master made three decisions, all of which were concerned with navigation and management of the vessel: first by calculating the quantity of bunkers needed to cross the Pacific by reference to the wrong route; then by failing to allow for the effect of an adverse current; and finally by taking on the wrong fuel. As a result, the vessel did not have sufficient bunkers and was unseaworthy.

Due diligence

89. It is well established that the duty to exercise due diligence under Article III rule 1 of the Hague and Hague-Visby Rules is non-delegable: see e.g. *The Muncaster Castle* [1961] AC 807. This means that the shipowner will be liable for a failure of due diligence by whomever the relevant work of making the vessel seaworthy may be done. In the present case, the relevant work, ensuring that the chart had been updated and preparing the passage plan, was to be done by the master and deck officers.

90. Mr Hill QC submitted, however, that the principle of non-delegability only applied to work performed by the master and officers "*qua* carrier" and not "*qua* navigators" and that a failure of navigation by the master or officers was "outside the orbit" of the shipowner's responsibility.

91. I do not accept this submission. Once again *The Evje (No 2)* demonstrates that it is untenable. The errors in that case were by the master and were beyond the shipowner's practical control, but the shipowner was nevertheless liable as a result of the master's failure to exercise due diligence. In any event, the supposed distinction between work undertaken "*qua* carrier" and "*qua* navigators" to make the vessel seaworthy is illusory. If the vessel is not seaworthy, for whatever reason, there is a danger that the cargo will not be carried safely to its destination, as in this case.

92. The concept of the shipowner's "orbit of responsibility" provides no assistance. The term appears to have originated in the speech of Lord Radcliffe in *The Muncaster Castle*, speaking of the decision of Wright J in *W. Angliss & Co (Australia) Pty Ltd v P & O Steam Navigation Co* [1927] 2 KB 456. That case held that the shipowner is not responsible for lack of due diligence on the part of shipbuilders or their workmen which occurred during the construction of the vessel before the owner even acquired it. In affirming that decision Lord Radcliffe said at page 867:

> "It is plain to me that this conclusion turns on the consideration that the causative carelessness took place at a time before the carrier's obligation under article III (1) had attached and in circumstances, therefore, when the builders and their men could not be described as agents for the carrier 'before and at the beginning of the voyage to … make the ship seaworthy'. This is a tenable position for those who engage themselves upon the work of bringing the ship into existence. The carrier's responsibility for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to

> make sure by careful and skilled inspection that what he is taking into his service is in fit condition for the purpose and, if there is anything lacking that is fairly discoverable, to put it right."

93. It is clear that Lord Radcliffe, like the other members of the House of Lords, was making a temporal point, contrasting negligence of a shipbuilder for which the owner was not responsible with the negligence of a ship repairer for which it was.

94. There was reference to the shipowner's "orbit of responsibility" in a different sense in *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255. In that case a container vessel suffered a casualty when a container on deck containing an undeclared and dangerous cargo exploded, causing a fire which spread below deck. It was held that the presence of this cargo rendered the vessel unseaworthy, but that this was not due to a want of due diligence of the shipowner or those for which it was responsible. Auld LJ said at page 273 lhc:

> "The shipper's and the carrier's respective orbits of responsibility are normally quite distinct and neither is agent of the other outside its own orbit; cf. per Lord Radcliffe in *Riverstone Meat*, at p. 82; p 863. Those responsible for the manufacture, stuffing and shipping of containers are plainly not carrying out any part of the carrier's function for which he should be held responsible. I can find nothing in the Hague Rules or at common law to make a carrier responsibility [*sic*.] for the unseaworthiness of its vessel resulting from a shipper's misconduct of which it, the carrier has not been put on notice."

95. I do not doubt the correctness of this decision and the "orbit" metaphor may sometimes be helpful, but it is evident that this decision is far removed from the facts of the present case. The relevant function was not the shipowner's responsibility at all, but the shipper's.

96. *The Happy Ranger* [2006] 1 Lloyd's Rep 649 was an application of the *Angliss* and *Muncaster Castle* cases. The shipowner was not responsible for the existence of the relevant defect, a defective lifting hook on a heavy lift vessel, because that was a defect in the construction of the vessel. Gloster J said:

> "20. … *The Kapitan Sakharov* illustrates that relevant failure to exercise due diligence must relate to the performance of a function undertaken (by the sub-contractor) as a carrier or on behalf of the carrier rather than in an alternative capacity, namely shipper as in *The Kapitan Sakharov*. The Court of Appeal also confirmed (by reference to *W. Angliss & Co (Australia)* (*supra*) that a carrier: (a) should not be exposed to an infinite liability in time; and (b) is not, without more, liable for latent defects in a vessel before it acquired it.
>
> 21. Further, in *The Muncaster Castle* [1961] AC 807 the House of Lords unanimously considered that a shipowner's/carrier's duty under article III, rule 1 would not start, and he would not be responsible for work carried out until the transfer of ownership,

> or possession of the vessel, or until the vessel came into his 'orbit', service or control' …"

97. On the facts, however, the shipowner was held liable because it failed to discharge the burden of proving that it had exercised due diligence to make the vessel seaworthy after it acquired the vessel.

98. In the present case, the task of making the vessel seaworthy for the voyage in the relevant respects was entrusted by the shipowner to the master and officers. It was nobody else's responsibility and there was no question of a defect existing from a time before the shipowner had control of the vessel. There is no case in which a failure of due diligence by the master and officers has been held to be outside the "orbit" of the shipowner's responsibility and it is hard to think that there could be.

99. Accordingly, as the duty is non-delegable, the shipowner cannot avoid liability by delegating responsibility for making the vessel seaworthy to the master and officers.

Lord Justice Haddon-Cave:

100. I agree that this appeal must be dismissed for the reasons given by Flaux LJ and Males LJ and would just highlight one point.

101. Article III rule 1 of the Hague Rules draws a clear temporal line:

> "Article III
>
> 1. The carrier shall be bound *before and at the beginning of the voyage* to exercise due diligence to:
>
> (a) Make the ship seaworthy.
>
> (b) Properly man, equip and supply the ship. …"

102. This reflects the balance struck at the inception of the Hague Rules in 1924. The signatories to the Convention agreed to divide the allocation of risk for maritime cargo adventures into two separate regimes. The first regime imposes a non-delegable duty on carriers to exercise due diligence to make the ship seaworthy "*before and at the beginning of the voyage*" (Article III rule 1). The second regime excuses carriers from liability for loss or damage caused by errors of crew or servants "in the navigation or in the management of the ship" *thereafter, i.e.* during the voyage (Article IV rule 2(a)).

103. Mr Hill QC's submissions seek to elide these two separate regimes and are heterodox.