# AO KARELRYBFLOT V ARTHUR UDOVENKO (CA)

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA129/99**

**BETWEEN**

**AO KARELRYBFLOT**

**Appellant**

**A N D**

**ARTHUR UDOVENKO AND OTHERS**

**Respondents**

**Hearing: 11 November 1999**

**Coram: Richardson P, Gault J, Keith J, Blanchard J, Tipping J**

**Appearances: P W David and A N Tetley for Appellant**

**I J D Hall and H R Kenworthy for Respondents**

**Judgment: 17 December 1999**

**JUDGMENTS OF THE COURT**

**RICHARDSON P, KEITH, BLANCHARD AND TIPPING JJ (DELIVERED BY BLANCHARD J)**

**Introduction**

1. This appeal arises out of the same event of forfeiture and release of some Russian fishing vessels as is described in the Court's contemporaneous decision in *Kareltrust v Wallace & Cooper Engineering (Lyttelton) Ltd* (17 December 1999, CA192/99 and 211/99). In that decision the Court holds that the ownership of the vessels and the right of Wallace & Cooper to bring proceedings *in rem* under ss4(1) and 5(2) of the Admiralty Act 1973 for work done on them was unaffected by that event; and that upon release the vessels were restored to the ownership of Karelrybflot subject to all encumbrances and rights of claim which existed before forfeiture. The decision also determines that the elements of the statutory jurisdiction could be met if the vessels were in the same beneficial ownership when the *in personam* claim arose and when the proceedings were commenced, notwithstanding the intervening forfeiture and release. The proceedings were begun only after the release. Wallace & Cooper failed, however, to establish their *in rem* claims because they had not shown that beneficial ownership of the vessels remained with Karelrybflot at the time when the proceedings were commenced (s5(2)(b)). They had by then been sold to Kareltrust.

2. In this appeal the plaintiffs/respondents are six seamen who crewed on three of the vessels (the "Orlovka", the "Om" and the "Olennino"). They successfully brought *in personam* claims for unpaid wages, general damages for failure pay wages (together with interest on both sums) and the cost of

repatriation from Christchurch to Murmansk, and also obtained from the High Court a declaration that they have maritime liens in relation to those claims. Section 5(1) of the Admiralty Act enables the admiralty jurisdiction of the High Court to be invoked by an action *in rem* in any case in which there is a maritime lien on any ship for the amount claimed. It follows from the decision in *Kareltrust* that a maritime lien survives the process of forfeiture and release. Unlike a statutory *in rem* claim under s5(2), a maritime lien follows the ship in respect of which services are rendered and is not defeated by a change of ownership. It is not possessory in nature; the claimant seaman does not need to have remained with the ship. There is therefore no basis for disturbing the declaration made by the High Court as it is accepted by the appellant that some moneys are due to each respondent for wages unpaid since 1 October 1997. The disputed questions relate to their quantum and to the other claims.

3. It is worth noting in passing that the Judge appears to have determined the respondents' claims as if they were for "wages" under s4(1)(o), i.e. statutory *in rem* claims which have a lower priority ranking than maritime liens, yet the declaration the Judge made is that the respondents have maritime liens, which we regard as the correct declaration. The distinction could have been of some moment because of the sale to Kareltrust and also because the respondents commenced their proceedings before the release of the ships from forfeiture (although, as it happened, they went to trial on an amended statement of claim filed after that event). There was apparently no preliminary objection to jurisdiction.

**The contract terms**

4. The seamen were brought to New Zealand by the appellant to serve on the vessels, which were chartered to the now insolvent Abel Fisheries Ltd (Abel). The original employment contracts were signed in January 1997 but they were replaced by new contracts in July 1997. The exact commencement dates of the contracts do not appear from the materials before the Court but it seems to be common ground that they were intended to run for six months from 1 July 1997, with provision for a three month extension. It was not disputed that when the forfeiture happened on 23 February 1998 under s107B(2) of the Fisheries Act 1983 the contracts were still on foot (though the conditions of employment had been varied by a further agreement of October 1997).

5. There were three parties to the July contract form – Karelrybflot, called "the employer", Abel, called "the charterer", and the crew. In the High Court it was contended by Karelrybflot, continuing a posture that it took soon after its purported termination of the employment, that it was not the employer and not responsible for wages and such other payments as might be due to the seamen. This optimistic submission was rejected by Young J and Karelrybflot now accepts that it had the responsibility of an employer as regards crew members.

6. Clause 3.1 of the July contract provided that the contract could not be terminated "by the employee's own initiative" except in the case of his serious illness or the death or serious illness of an immediate relative.

7. Clause 7, headed "Salary", provided for the employee to receive a certain share of 10% of the sale price of fish products for every fishing trip and that, should the charterer elect to keep the vessel in port, the whole crew would receive US$510 per day for the vessel. As will be seen, this clause was supplanted in October 1997.

8. Clause 8 dealt with terms of payment and provided for a final wage payment for each crew member to be calculated by the master at the termination of the contract. Cash advances were to be at the discretion of the master and all such advances were to be deducted when final wage calculations were done. A guaranteed travel allowance of US$5.00 per day for each seaman was also to be taken into account in calculation of the final pay. In an appendix to the July document there was provision for the engagement of an employee to be terminated on expiry of the contract or on failure to perform duties as an employee or to obey lawful commands or for wilful misconduct. In that event, all accommodation and transport costs for returning to Russia were to be at the expense of the employee.

9. Finally, clause 4(f) of the Appendix provided that if the charterer breached its obligation to provide the employee with the wage stipulated by the contract and provisions and other benefits in accordance with the requirements of the Labour Code of Russia, then the employee would have the right to appeal to the courts.

10. The October document applied from 1 October 1997. One of its purposes, according to witnesses for Karelrybflot, was to bring the contractual arrangements into compliance with the Minimum Wage Act 1983. It stated a "renewed hourly system of wages payment". The standard payment for one hour of labour time for a member of the crew was to be no less than NZ$7 (the minimum hourly wage provided for in the Minimum Wage Act). A labour logbook kept on each vessel was to be completed and signed by each crew member. On entry into port all records were to be checked and signed by the authorised representative of Karelrybflot "after which they may serve as the basis for payments to members of the crew."

11. Clause 5 provided that the labour time while at sea for the command staff on duty on the bridge and for the engine room staff should be recorded according to actual time on duty. "[In] any case where there is full staffing, the labour time of the Captain, head mechanic, navigators and mechanics staff may not be less than 6 (six) hours per day while the ship is at sea." During the time the vessel was in port all command staff were to have a four hour work day. For the command staff not required to carry out watch duty and also for a chef, steward and boatswain, a four hour working day was set. Clause 7, which also appears to relate to the situation at sea, provided that for the other "ordinary (rank & file)

staff" the work day was set at a minimum of two hours. In clause 18 standard hourly payments in NZ dollars were set out for various classes of seamen. They ranged from stewards at NZ$7 to a captain at NZ$10.20.

12. Clause 19 provided:

All members of the crew before arriving in port must confirm their agreement with these hourly payments by signing in the working logbook. In the case of refusal to sign, the wages employees may not be calculated, or may be calculated according to the Captain's.

(The clause finishes abruptly but seemingly is intended to refer at this point to the Captain's logbook.)

**Minimum Wage Act 1983**

13. Section 6 overrides anything to the contrary in any employment contract and requires that every worker who belongs to a class of workers in respect of whom a minimum rate of wage has been prescribed under that Act (which it is agreed included the respondents) is entitled to be paid not less than that minimum rate. Wages and time records must be kept of certain information including hours of work, days of employment in each week and the method of calculation (s8A).

14. The relevant wage order was the Minimum Wage Order 1997 in which cl3 provided:

The minimum rates of wages payable to all workers (whether male or female) who are workers to whom the Minimum Wage Act 1983 applies and who are of the age of 20 years and upwards are the following:

(a) If the worker is paid by the hour or by piece work, $7.00 an hour or an equivalent amount having regard to the rate of production of the worker;

(b) If the worker is paid by the day, $56.00 for each day plus $7.00 for each hour in excess of 8 worked by the worker on each day;

(c) In all other cases, $280.00 for each week, plus $7.00 for each hour in excess of 40 worked by the worker in each week.

15. Young J summarised the plight of the men as a result of the financial collapse of Abel and the forfeiture which occurred because of quota management offences committed by Abel, long before the men came to New Zealand, in 1995 and 1996:

The criminal charges relating to the 1995/1996 quota management offences were heard in the District Court at Wellington. The hearing commenced on 20 October 1997. On 18 December 1997 Abel was placed in receivership. That company entered guilty pleas on 20 January 1998. The result was that, in the absence of special circumstances, the vessels were required to be forfeited to the Crown pursuant to s107B of the Fisheries Act. The District Court judge declined to make a finding of special circumstances (in a judgment delivered on 23 February 1998) with the result that the vessels, that day, became forfeited to the Crown.

…

The seamen on the vessels were not paid from 1 October 1997. Up until 1 October 1997 payments to the men had been funded from the fishing receipts generated by the vessels. After 1 October 1997 there were comparatively few fishing receipts and, as far as I can see, none of those were made available to Karelrybflot. From the point of view of Karelrybflot, the operation of the vessels in New Zealand was intended to be self-funding. In a direct sense, the reasons why the men were not paid wages from 1 October 1997 arose from a combination of the following factors: the financial impecuniosity of Abel and in particular its receivership in December 1997, the associated lack of any significant fishing returns from the vessels, the refusal of Karelrybflot to pay, in New Zealand, the wages which the men claimed, the criminal proceedings and the eventual forfeiture of the vessels.

**Events after forfeiture**

16. On 28 February, some five days after the forfeiture, an executive of Karelrybflot made an announcement to the crews that the employment was at an end. They were directed to return to Russia. Air tickets would be provided and Karelrybflot promised to pay what it said was owing to the men, on the basis of the logbooks, once they had returned to Russia. It seems that this was put to the men as being a guarantee that Karelrybflot would pay them what it said Abel owed them for wages based on the logbooks.

17. Many of the crew were unwilling to accept termination on these terms. They claimed to be owed substantially more, saying that the logbook calculations were inaccurate and unacceptable, and had been signed under pressure. Furthermore, they wanted payment in NZ dollars, whereas, contrary to the contract documents, Karelrybflot would offer payment only in Russia and in roubles. There seems to have been an element of distrust about Karelrybflot's intention to make any payment once they had left the vessels and New Zealand.

18. On 12 June 1998 the vessels were released under s107C(2) on payment to the Crown of $500,000 and immediately sold to Kareltrust. The sale agreement made provision for Kareltrust to pay to Karelrybflot a sum of $300,000 to cover claims against Karelrybflot by crew members.

19. There were originally 101 seamen in dispute with Karelrybflot but in October 1998 the High Court ordered that possession of the ships be given up, and by the time the matter came to trial, after lengthy delay which appears to have been mostly attributable to the seamen and counsel then acting for them (until legal aid was withdrawn), only eight plaintiffs remained, of whom six (the respondents) gave evidence. The claims of the other two were dismissed for want of prosecution.

20. At the first (five day) hearing in February 1999 the plaintiffs appeared in person, with Mr Udovenko conducting the case on their behalf. The transcript of the hearing shows how difficult it was for the Judge

to deal with litigants in person whose spokesman was not only unfamiliar with legal procedures but also lacking a full command of the English language. A translator was used where evidence was given in Russian and to assist where difficulties in comprehension of English occurred. Much of the transcript is hard to follow. Mr Udovenko was given to sweeping assertions, many of which were of doubtful relevance to the real points in issue. There was clearly considerable antipathy between him and witnesses for Karelrybflot. Unfortunately, there was very little focus on some crucial matters, particularly on the exact position adopted by Karelrybflot at the time when it first ordered the men to return to Russia and they refused to go. Nor was there any questioning directed at the process whereby Karelrybflot obtained redemption of the ships from the New Zealand authorities, although there is an important letter on this subject which became part of the evidence at trial and will be referred to later in this judgment.

**The first High Court judgment**

21. Young J reached the view that the Court had jurisdiction under s4(1)(o) of the Admiralty Act in respect of claims for "wages" extending to claims for damages for non-payment of wages. (He does not appear to have considered a common law claim as recognised by s5(1)). There was no pleading seeking such damages but the Judge felt able to treat the claim as if it had been made on that basis without requiring any formal amendment. No doubt he took that course because it would have been impossible for Russian seamen acting on their own behalf to redraft the pleadings which had been prepared by their former legal advisers. It should be mentioned also that there was no pleading seeking general damages for distress arising from the manner in which the employment relationship had come to an end or for suffering caused by the conditions on board the ships while they were under the occupation of the crews.

22. Another matter not mentioned in the pleadings was the intention underlying the October contract variation to ensure that there was compliance with the Minimum Wage Act 1983. The legal advisers for the plaintiffs had, however, given formal advice that it was intended to amend the pleadings to allege that there was such a minimum wage entitlement, but it was later intimated that they would not be doing so. The Judge nevertheless seems to have taken the view that he was bound to give effect to the Act. He referred to s332(6) of the Fisheries Act 1996, which governs its application to the situation of crews on foreign owned fishing vessels holding permits under the Immigration Act 1987, and said that from 1 October 1997 the parties had acted on the basis that the Act applied.

23. The Judge gave a summary of the position, as he saw it, under the employment terms: that there was to be payment in part by reference to actual hours worked and in part by reference to standard working days, with pay "not necessarily being directly related to the amount of work carried out." Labour logbooks were to be kept, which were to be the wage books for the purposes of the Minimum Wage Act,

and were to be the basis for payments to the crew. The Judge found that wage records broadly followed the hours specified in the contract, but there was an inconsistency of wage records as compared with bridge and engine logs. All seamen had signed the wage books showing a position consistent with that adopted by Karelrybflot. The Judge accepted that they were placed under pressure to sign. The seamen said that they actually worked longer hours than had been recorded, and the Judge accepted this evidence. He made a finding that the wage books simply recorded what was in the contract and not what work was actually performed. Therefore he found that the logbooks were not of evidential significance.

24. The Judge also found that the command staff on duty were to be paid on an hourly basis while on watch and at sea. Otherwise all men were to be paid by the day and were working a seven day week – thus, he said that in accordance with the Minimum Wage Order, they had to be paid $56 per day or $392 per week.

25. Young J had been given schedules of wages claims compiled by the plaintiffs. These had been worked out down to 10 March 1998 – a date seemingly chosen at random, although the Judge later adopted it in his calculations, for reasons of convenience.

26. The Judge found that Karelrybflot had breached the men's contracts by requiring them to return home without being prepared to pay what they were owed. He said that the men were entitled to keep the contracts on foot, but that they expired by April 1998. (It does not seem to be in dispute that the effect of the July contract and the three month extension which became operative was that the contracts were to expire at the end of March.) After 10 March 1998 the best that the men could recover would be their Minimum Wage Act entitlements. The Judge proceeded to make some calculations and provisionally arrived at sums to which the men were entitled up to that date. He said that he did not think that he should regard Karelrybflot as having successfully "turned off the meter" on 10 March and that the proper course was to award damages for the failure to pay. In the absence of any other concrete evidence, Young J thought that the most pragmatic approach was to award a further six months' income (at minimum wage rates) on top of the claims as at 10 March 1998. He awarded $10,200 to each plaintiff but reserved the position in relation to Mr Selugin because he had been dismissed from his employment (for drinking) on 8 December 1997. Nevertheless, in his later judgment the Judge was prepared to award Mr Selugin some $17,000 in general damages for the failure to pay an amount of $4,502.60 which he found was owing to that respondent for the period from 1 October 1997 until his dismissal. Mr Selugin had stayed on in New Zealand and joined the other plaintiffs in their claims, notwithstanding that it was apparently accepted that there was, in terms of his employment contract, justification for his dismissal.

27. The Judge adjourned the hearing, recommending that the plaintiffs be granted legal aid so that issues of law could be properly argued.

**The second High Court judgment**

28. At the resumed hearing in May 1999 the plaintiffs were represented by senior counsel. Karelrybflot first argued that the employment contracts had been frustrated in law by the forfeiture on 23 February. The Judge said that Karelrybflot must have known of the risk of forfeiture when bringing the men to New Zealand and entering into employment contracts. He said it would be unjust and unrealistic to treat their employment as being frustrated by forfeiture in the circumstances of the case.

29. Karelrybflot argued in the alternative that, if the contracts had not come to an end because of the forfeiture, it was entitled to terminate them very soon afterwards because of the insubordination of the men, who were refusing to work. It had given valid notice of termination. The Judge's response was that Karelrybflot could hardly complain about insubordination when it had failed to pay wages for such a long period. He recognised that there must be limitations on this approach in a maritime environment where the orders of superiors had to be obeyed, but here the vessels were in port and the situation was unusual. He found that the contracts had not been validly cancelled by Karelrybflot.

30. The Judge also dealt with the entitlement of the plaintiffs to airfares back to Russia. An award was made to all of them (other than Mr Selugin) for such airfares using June 1999 figures rounded up to $1,500. These awards did not appear to be seriously in dispute upon appeal, subject to the frustration argument, but even that point did not seem to be really pressed by Karelrybflot in this context and rightly so, in our view, because it would seem to be so contrary to ordinary practice – and the requirements of New Zealand's immigration laws – for foreign crews not to be repatriated at the expense of the employer, at least where they are not dismissed for cause.

31. At the resumed hearing the major issues were whether damages could properly be awarded for the post 10 March period and whether the plaintiffs were entitled to claim a maritime lien in respect of such damages. The Judge confirmed his provisional award of damages in the equivalent of six months wages for the failure of Karelrybflot to promptly pay the wages properly due to the seaman – for the refusal to make any payment to them in NZ dollars, to which they were contractually entitled, and the imposition of a requirement that they must return to Murmansk and there be paid only what was shown in the logbooks. Young J said that in these circumstances it was reasonable for the respondents to remain in New Zealand in order to recover the wages to which they were entitled. He said there was evidence of loss in that they had been unable to send money home to their families and that they had been living on charity in New Zealand and had not worked in this country after March 1998. The Judge said that he was satisfied that the respondents would have had to have abandon their legal rights against Karelrybflot if they had returned to Russia on its terms.

32. Ordinarily, he said, if an employer does not pay, an employee can obtain other work. But in this situation the damages fell within the second limb of *Hadley v Baxendale* (1854) 9 Exch 341, 354. He recorded his findings in this way:

The defendant brought Russian seamen to New Zealand to serve on particular vessels and then refused to pay them wages. It was willing to repatriate them to Russia only on terms which involved the abandonment by them of their legal rights. It was always likely that such behaviour would provoke some of the men to stay on in New Zealand to litigate against Karelrybflot in order to vindicate their rights, that such litigation would take time to bring to a conclusion and that during that time the men would be unable to secure other work (because of their immigration status) and would have to live on charity.

33. Young J noted Karelrybflot's acceptance that "wages" in s4(1)(o) catches wages which, but for the breach, would have been earned and claims for wrongful dismissal. But it contended that claims relating to a period after the expiry of a seaman's contract did not come within "subsistence or maintenance" moneys which have been recognised by the Courts as "wages". The submission for Karelrybflot was that such moneys relate to the period between discharge and the ability to return home. Here it was argued that there was an immediate ability to return home.

34. The Judge found, however, that the reality of the situation was that Karelrybflot had "marooned" its employees in New Zealand and that this was "in circumstances where its obligations extended not only to paying them what they were owed but also to repatriating them to Russia." He saw no reason why its obligation to pay subsistence should not extend until it had met both obligations.

35. Young J also confirmed that the respondents were entitled to a maritime lien in respect of all of the moneys owing to them. As indicated at the outset of this judgment, we consider that view to be correct. The questions remaining on this appeal therefore relate to the sums actually awarded. The issues are whether the contracts were frustrated or validly cancelled for breach; if not, whether the outstanding wages were properly calculated; and whether it was open to the Judge to award damages equivalent to six months wages (or any sum) because of the refusal to pay wages earned under the contracts except upon Karelrybflot's terms.

**Frustration**

36. Mr David has satisfied us that the doctrine of frustration is applicable to contracts of employment. Mr Kenworthy, who argued this part of the case for the respondents, accepted this as a general proposition but endeavoured to persuade the Court that it applies only in limited situations: where an employee is seriously ill or has been imprisoned or, in war-time, interned, or where the employer's ability to act as such is prevented by a legislative change. Mr Kenworthy submitted that no authority can be found for

the proposition that the doctrine applies where an employee is still ready, willing and able to perform the duties required under the employment contract.

37. We would be hesitant about accepting Mr Kenworthy's proposition, firstly because it seems to conflict with the legislative change example which he provided and, secondly, because it is not difficult to conceive of situations in which a supervening event might produce consequences for an employer which would render the situation, and the performance of an employment contract, particularly one for a fixed term, radically different from what had been undertaken when the contract was entered into. Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of a contract of employment the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees – the present respondents being an example (*Halsbury's Laws of England*, 4 ed, Vol 16, para 283). We bear in mind also the observation of Bingham LJ (as he then was) in *J. Lauritzen AS v Wijsmuller BV* (*The "Super Servant Two"*) [1990] 1 Lloyds Rep 1, 8 that:

Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.

38. We do not consider that the contracts under which the respondents were employed were frustrated by the forfeiture in the circumstances of this case, particularly having regard to the short period between the forfeiture and their expiry date. In the first place, the Court would be slow to find frustration where, despite its protestations to the contrary, the Judge found that at the time of entering into the employment contracts and undertaking obligations to the seamen Karelrybflot must have known that Abel was facing proceedings under the Fisheries Act which could result in forfeiture. It elected to offer the crews term contracts and must be taken to have assumed the risk of loss of the vessels by forfeiture until such time as a release could be negotiated or was finally refused. Secondly, the statutory scheme of the forfeiture provisions has to be taken into account. There is express provision in s107C(2) for negotiation of a release. It was always likely that the Minister would agree to this because Karelrybflot was not implicated in the quota management offences, as the District Court made clear when finding that there were no "special reasons" not to order forfeiture under s107B. It is plain from a letter written by the Ministry of Fisheries to Karelrybflot's solicitors in Auckland the day following the forfeiture order that release procedures were already in contemplation, for the Ministry was "willing to allow you to leave no more than 10 specialist tradesman onboard if you desire." There would seemingly be no purpose in Karelrybflot's doing so, at its expense, if the forfeiture was not to be succeeded by a release. The letter refers to a separate letter on the subject of forfeiture written to Russell McVeagh's Wellington office. The

existence of that communication (which is not before the Court) also points to an immediate ongoing dialogue with the Ministry. At this time the employment contract term had only about five weeks to run (out of nine months). It seems to us that in these circumstances the employer's obligation could not be said to have become a thing radically different from that which had been undertaken by Karelrybflot. After all, the ships had already been in port for some months. How much difference would another five weeks make?

39. Mr David cited the decision of the House of Lords in *Horlock v Beal* [1916] AC 486. That case involved a claim for wages on behalf of a crewman who had been imprisoned after a British ship was detained in a German port on the outbreak of the First World War. Three of their Lordships held that further performance of the contract had become impossible from the date of detention of the ship and that it was frustrated. Earl Loreburn agreed with the result but considered that there was no frustration until it became clear that the German authorities would keep the ship and would not follow the established procedure of exchanging ships caught up in such a situation on the outbreak of war. The Hague Convention of 1907 had stated the desirability of allowing a merchant ship in an enemy port to depart freely either immediately or after a reasonable number of days' grace. It was not couched in terms of absolute obligation. The case obviously turns upon its own facts, but to the extent to which it may provide any guidance in the present case we prefer the view expressed by Earl Loreburn who asked whether or not, and at what date, the performance of the contract of service became impossible, which meant impracticable in a commercial sense. He said (at 492):

Looking back upon what happened, we may think that there never was any hope. Or we may think that there was a period of suspense during which it was not determined whether there should be, in accordance with common practice, a release on both sides of ships so situated.

40. We should add that we would still be of the same view that there was no frustration in the circumstances of this case even if we had been persuaded that the forfeiture came upon Karelrybflot like a bolt from the blue.

**Termination for breach**

41. There is little that need to be said about the appellant's argument that, if the contracts were not frustrated, it validly terminated them a few days later because of the crews' insubordination. We entirely agree with what Young J said on this point (see para 29 above). It is not surprising that where the employer had failed to pay them their wages for nearly five months and where they were on the other side of the world from their families and unable to send money home for their support, and the employer was attempting to visit upon them the consequences of offending by its chosen charterer, the seamen should have adopted the attitude that they would suspend performance of their duties until paid. As it

happens, there existed also a lawful order from the New Zealand Government that they should leave the vessels. In these circumstances Karelrybflot can hardly have been prejudiced by any refusal to work. The argument that Karelrybflot had an entitlement to terminate the contracts for breach by the seamen is unsustainable.

**The wage books**

42. The Judge found that the wage records and the logbooks were "significantly inconsistent" with other logs. He accepted that the respondents had been pressured into signing them; that they recorded what was in the contract and not the work actually performed. He found that the logbooks were not of evidential significance.

43. The appellants urged this Court to take a different view, submitting that the wage books provided the proper contractual basis for the calculation of the wages which had been done by the captain of each ship. However, in concluding that the books had not been kept as intended by the contract documents the Judge was making an assessment based on both a perusal of the books themselves and, importantly, his impression of the credibility of persons who gave evidence before him. The appellant put nothing before this Court which would justify us in departing from the conclusion reached by the Judge. He did not regard the logbooks as reliable and we are not prepared to take a different view.

**Application of Minimum Wage Act**

44. The appellant argued, as it had in the High Court, that the Judge was not entitled to make an assessment of wages on the basis that the minimum amount which the seamen must receive was governed by the Minimum Wage Act. In this Court there was raised for the first time a preliminary point that the High Court had no jurisdiction under that Act because s10(2) provides:

(2) All proceedings under this Act shall be commenced in the Employment Tribunal.

45. We reject this argument. It seems to us that s10(2) appears in the Minimum Wage Act for consistency with the Employment Contracts Act 1991 which generally excludes the jurisdiction of courts and tribunals other than the Employment Court and the Employment Tribunal where an employee is pursuing a claim for wages. However, the Admiralty Act, also a specialised statute, has long given the High Court a jurisdiction in relation to wages claims by seamen and that jurisdiction was unaffected by the Employment Contracts Act or earlier legislation dealing with questions of employment. A second consideration is that it is the obvious policy of the Minimum Wage Act that all wage claimants whose contracts are governed by that Act are to be entitled to pursue claims for the applicable prescribed minimum wage. It cannot have been intended that in order to be able to claim a minimum wage a seaman must forgo the benefit of an *in rem* proceeding, one of ancient origin and serving a protective function, in order to bring a proceeding in the Employment Tribunal. Nor can it have been intended that,

despite the policy underlying the Minimum Wage Act, the High Court in its admiralty jurisdiction is to have no power to order payment of the prescribed minimum. Agreeing with Young J, we go further and say that not only does the High Court have such power but that, upon becoming aware that the Minimum Wage Act applies to a particular employment contract of a seaman, the Court is obliged to give effect to the Act. This being the case, the criticisms of the position taken by Young J and of the lack of a pleading directed towards the Minimum Wage Act fall away.

46. Mr David's next submission was that if the Minimum Wage Act should be applied the Judge had wrongly used the daily rate of $56 per day (cl 3(b) of the Minimum Wage Order) instead of the hourly rate (cl 3(a)).

47. In the case of command staff and engine room staff (these expressions including Mr Udovenko, a chief officer, and Messrs Kremlev, Soluyanov, and Yakovtsev, all engineers (mechanics)), cl 5 of the October variation calls for them to be paid "according to actual time on duty". As they all appear to fall within the description of navigators and mechanic staff, their labour time is, under that clause, to be not less than six hours per day while the ship is at sea. While the ship is in port command staff have a four hour work day but nothing is said about engineers.

48. For other crew, cl7 sets a minimum work day of two hours with additional remuneration deemed to be earned from the processing of fish. This minimum work day appears to apply to such crew members whether or not the ship is at sea.

49. For all crew cl.1 fixes a standard payment of not less that $7 per hour. This was intended to ensure compliance with the Minimum Wage Order. But cl.18 then sets standard hourly payments ranging upwards from a second-class seaman @ $7.10 (Mr Selugin) to an electrician (tuner) @$7.50 (Mr Tsvetkov) to a fourth mechanic (engineer) @ $8.00 (Messrs Soluyanov and Yakovtsev) to a second mechanic (engineer) @ $9.00 (Mr Kremlev) and to a chief officer @ $9.40 (Mr Udovenko). (All figures in this judgment are in New Zealand dollars.)

50. Although these provisions are far from straightforward, we think Mr David is right and that all the respondents were, in terms of the Minimum Wage Order, workers paid by the hour. As the lowest hourly contractual rate complied with the Order, the contractual calculations are unaffected by it. Under the Minimum Wage Order both an hourly worker and a daily worker have to be paid the minimum rate only for time actually worked (*Hopper v Rex Amusements Ltd* [1949] NZLR 359, 368-9).

**The Russian Labour Code**

51. There is a further complication which is not mentioned in the judgment, probably because it was overtaken, in terms of quantum, by Young J's application of the Minimum Wage Order but which, as it happens, makes little difference at the end of the day. The evidence given by witnesses for Karelrybflot is at times difficult to follow but, as we read the evidence of Mr Grinavich, Karelrybflot's New Zealand-

based representative, he accepted in answer to questions from the Bench that there is a requirement under the Russian Labour Code for seamen to be paid for at least a 40 hour week. He appeared not to differentiate in this respect between time at sea and time in port.

52. Mr Grinavich seemed also to accept that, in order to comply with the Minimum Wage Order provision for an hourly wage of $7, the payment for the minimum 40 hours would have to be at least $280 per week "as well as for the catch." Mr Martos spoke in terms of 48 hours per week (and at one point 88 hours) but his evidence is particularly hard to understand and we think it safer to rely upon Mr Grinavich on this point. The Judge, after a lengthy exchange, asked Mr Grinavich:

Q. Did I understand you right that the company ought to pay to seamen minimum of $280 New Zealand dollars a week.

A. Under the contract that is correct.

53. Over the period 1 October 1998 to 10 March 1999 the earnings therefore could not be less than $6,422 ($280 per week for 161 days). If, for reasons which will become obvious later, the employment period is taken to be 1 October 1998 to 31 March 1999 (182 days) the minimum payment would be $7,260. We will call this the Russian Labour Code minimum.

**Calculation of wages**

54. Young J treated the seamen as paid by the day and therefore erred in his calculation in the way in which he applied the Minimum Wage Order. The case of Mr Udovenko may be taken as an example. For the first month (to 31 October 1997) his ship, the "Orlovka", was in port. The Judge found that he was on duty for 352 hours but would not have actually worked every hour. The Judge allowed $9.40 for 4 hours per day, but because for 26 days there was not a full complement of officers, and Mr Udovenko consequently had to substitute for part of the time of the "missing" officer, Young J treated him as having worked six hours on those days. This produced a total contractual entitlement for the month of $1,654.40. The Judge ordered that he should be paid a higher figure ($1,736) under the Minimum Wage Order. As that was in error, the award made for the month therefore must be reduced to $1654.40.

55. From 1 November to 8 December 1997 (38 days) the "Orlovka" was at sea. The bridge-log showed that Mr Udovenko worked 308 hours which @ $9.40 comes to $2,985.20. There was a crew shortage so the Judge made an allowance of an extra four hours per day, producing $1,428.80. The total was $4,324 which exceeded the Judge’s Minimum Wage Order calculation and that award must therefore stand.

56. For the balance of the period, to 10 March 1998 (91 days), the ship was in port. Young J awarded $56 x 91 = $5,096 on his application of the Minimum Wage Order. However, the contract rate was $9.40 x 4 = $37.60 x 91 = $3,421.60. The order made by Young J must be reduced accordingly.

57. The total for Mr Udovenko thus becomes $1,654.40 + $4,324 + $3,421.60 = $9,400.60, which, averaged over the entire period, exceeds the Russian Labour Code minimum. From this there has to be deducted board and advances, producing an entitlement for Mr Udovenko of $8422.60 (compared to $10,178 as assessed by the Judge).

58. It follows from this that we accept the method of calculation in the schedule submitted on behalf of the appellant during the hearing, but with the following adjustments:

(a) In the case of Mr Selugin, for the period 1 October – 21 October 1997 when his ship the "Olenino" was at sea, the Judge incorrectly awarded a daily rate under the Minimum Wage Order. Mr Selugin was employed on the basis of a*minimum* two hour day. It seems most unlikely that he would have worked only the minimum period. It has to be remembered that it was anticipated that earnings above the minimum would come from time deemed to be spent in the processing of fish. Rather than refer this question back to the High Court, since a very small sum is involved, we think it best to make an estimate of the time likely to have been worked and put this at six hours per day.

(b) In the case of Mr Tsvetkov, there was a period of 91 days from 9 December 1997 to 10 March 1998 when his ship the "Orlovka" was in port. He claimed that he had worked eight hours a day but Young J recorded that his evidence was challenged both as to the actual hours of work and as to whether he had been appointed as a cook (at a fractionally higher hourly rate). The Judge does not appear to have made any determination of actual hours of work. He again incorrectly applied the Minimum Wage Act provisions. In the calculations that follow we have given Mr Tsvetkov credit for working four hours per day during this period but we have applied the electrician's hourly rate of $7.50.

(c) The appellant's calculation attributed an hourly rate of $7.50 for Mr Yakovtsev, whereas the correct rate appears to have been $8.00.

59. With the foregoing corrections, the schedule produced by the appellant, taking the calculations up to 10 March 1998, is now reproduced:

| Crew Member | Minimum Wage Act applied on an hourly basis up to 10 March 1998 | Judge's Award |
|---|---|---|
| UDOVENKO | (26 x 6) + (96 x 4) = 540<br><br>308 + 152 = 460<br>460 + 540 x $9.4 = $9,400.60<br><br>less adjustments of $978 | $10,178 |

| | | |
|---|---|---|
| | *$8422.60* | |
| KREMLEV | (21 x 6) + (139 x 8) = 1238<br>1238 x $9 = $11142<br><br>less adjustments of $584<br>*$10558* | $10,600 |
| SELUGIN | (10 x 2) + (38 x 12) + (21 x 6) = 602<br>602 x $7.10 = $4274.20<br><br>less adjustments of $471<br>*$3803.20* | $4,502.60 |
| SOLUYANOV | (13 x 12) + 748 + (79 x 8) = 1536<br>1536 x $8 = $12288<br><br>less adjustments of $844<br>*$11444* | $11,444 |
| TSVETKOV | (31 x 2) + (38 x 12) + (91 x 4) = 882<br>882 x $7.5 = $6615<br><br>less adjustments of $828<br>*$5787* | $9,424 |
| YAKOVTSEV | (31 x 4) + (38 x 12) + (91 x 4) = 944<br>944 x $8 = $7552<br><br>less adjustments of $1,013<br>*$6539* | $9,239 |

60. All of these calculations (including those for Mr Selugin for the 69 days of his employment) exceed the Russian Labour Code minimum. There has been no challenge to the deductions made by the Judge for board and advances.

**Damages for non-payment of wages**

61. Young J awarded each respondent (other than Mr Selugin who received a much greater sum – para 26) the equivalent of wages for six months. That notional period overlapped the final three weeks of the contract period but the award was very largely related to a time from which Karelrybflot had undertaken no contractual obligations towards the respondents. It was apparently intended to compensate them for the opportunity loss they experienced after they decided to remain in New Zealand to occupy the ships and to commence this proceeding as a means of obtaining the wages due to them for the contract period.

62. The Judge considered that Karelrybflot had acted unreasonably and, in effect, had caused the respondents to be "marooned" in New Zealand until their claims could be resolved. He correctly held that Karelrybflot had acted in breach of their employment contracts. Then, in a crucial passage in his second judgment he said:

Its stance, following forfeiture of the vessels, was that it flatly refused to honour its legal obligations. It was prepared to fly the men back to Russia but if they accepted that offer it would have been quite impractical for them to litigate in New Zealand in respect of what I have held to be their entitlement. The men could therefore either abandon their legal rights against Karelrybflot (because I am satisfied that that is what would have been involved in returning to Russia) or alternatively stay on in New Zealand to litigate against Karelrybflot. They were not, however, able to work when the litigation was pending. As well, they have had to live in the meantime, substantially, on charity.

63. Counsel for the appellant said that the evidence did not support the view that when Karelrybflot originally announced to the seamen that they would have to leave the vessels and return home, it told them that they could do so only on the basis of accepting the terms it offered in full settlement of their claims and would have to abandon their legal rights against it.

64. It is apparent from the evidence that at a time after the respondents and other seamen refused to leave the vessels and commenced legal proceedings, the attitude of Karelrybflot did become inflexible and the offers it thereafter made were couched in terms which would not have allowed the respondents to continue to litigate either in the Russian Labour Court (referred to in the July contract) or in New Zealand after flying home at Karelrybflot’s expense. But we can find nothing in the evidence which indicates that at the critical time (in February/early March 1998) when the termination was announced and in its immediate aftermath Karelrybflot’s attitude was one of "take it or leave it"; that it was requiring the seamen to abandon their legal rights. The evidence of Karelrybflot’s witnesses is not open to the interpretation that this was so, and they were not cross-examined on the point. There was

nothing in the evidence to suggest that if the respondents had immediately gone back to Murmansk it would not have been possible for them to pursue their rights in the Russian Labour Court.

65. It was unfortunate that Karelrybflot took the stance that it was not the employer and was not therefore responsible for payment of any wages, but it did offer that upon return to Russia the seamen would be paid what the logbook showed was owing. There was evidence that it fulfilled this promise for crew members who decided to go back to Russia. And it was prepared to arrange repatriation by making air tickets available. In a physical sense, then, the respondents were not disabled from returning. They were not "marooned."

66. It is, in our opinion, a very serious step for a Court by the making of a damages award to affirm actions of the kind which the respondents chose to take. It seems to us that they elected to remain in New Zealand, where they knew they could not enter into employment, instead of accepting repatriation (at no cost to them), after which they might well have been able to obtain alternative employment either with Karelrybflot or another fishing company. By remaining in New Zealand they have brought upon themselves an avoidable loss of income for the period after the expiry of their contracts with Karelrybflot.

67. It can readily be accepted that after returning to Russia the respondents would have had difficulty in bringing proceedings against Karelrybflot in a New Zealand Court without returning here for preparation for trial and for the trial itself. But the contract documents, although not requiring that disputes be determined by the Russian Labour Court, expressly contemplated recourse to that Court. There was no evidence suggesting that a just solution to the dispute could not have been obtained by that means, and it would be wrong for this Court to make such an assumption.

68. We have concluded for these reasons that the Judge erred in awarding damages arising from the non-payment of wages. It is accordingly unnecessary to determine whether such an award could be secured by a maritime lien, as can amounts due for subsistence. We reserve our position on this question, remarking only that the instances given in the authorities referred to by Young J and those cited to this Court (including *The Madonna D'Idra* (1811) 1 Dod 36, *The Elizabeth* (1819) 2 Dod 403, *The Great Eastern* (1867) LR 1 A & E 384, *Phillips v Highland Railway Co (The Ferret)* (1883) 8 App Cas 329 and *The Justitia* (1887) 12 PD 145) all appeared to be related to payments due to seamen for wages and expenses during the period of their employment, or for wrongful dismissal, or for remuneration for the time which it took them to get home and expenses incurred in doing so, or for periods during which they were detained by local authorities. Also, on occasion, a sum for general damages for distress and inconvenience has been awarded but the respondents, as has been noted, were not making claims of this character. Indeed, although their claim was described as one for general damages, it was actually

put forward as one for special damage, as Young J recognised when he referred to the second limb in *Hadley v Baxendale*. On that basis we hold that it fails.

**Payment for period 11-31 March 1998**

69. The calculations in para 59 are up to 10 March 1998. The contracts expired at the end of that month. We consider that the respondents should receive for the intervening period what they would properly have been paid if the pre-10 March situation had continued for another three weeks. Mr Selugin is of course excluded as he had long since been validly dismissed.

70. In the case of Mr Udovenko that would have been $9.40 x 4 = $37.60 x 21 = $789.60 (see paras 47 and 56). We consider that the appropriate number of hours of work per day to be attributed to the remaining respondents is also four. At their respective hourly rates the further amounts which Karelrybflot should pay are:

Mr Kremlev $756.00

Mr Soluyanov $672.00

Mr Yakovtsev $672.00

Mr Tsvetkov $645.00

71. The Russian Labour Code minimum for the six month period to 31 March 1999 was $7,260. In the case of Mr Tsvetkov, his payment for the final three weeks has therefore been very slightly increased so that he will receive overall that minimum amount less a deduction for board and advances. There were presumably no advances in the period after 10 March, and in view of the condition on board the ships we do not make any further deduction for board.

**Result**

72. The appeal is allowed to the extent that the amounts which the appellant was ordered to pay to the respondents in the High Court are reduced to the following amounts:

| **Claimant** | **Respondent Net Wages to 10 March 1998 para 56** | **Wages to 31 March 1998 Para 70** | **Total wages** | **Air fares** | **Total** |
|---|---|---|---|---|---|
| Mr Udovenko | $ 8422.60 | $789.60 | $9212.20 | $1500 | $10,712.20 |
| Mr Kremlev | $10,558 | $756 | $11,314 | $1500 | $12,814 |

| | | | | | |
|---|---|---|---|---|---|
| Mr Soluyanov | $11,444 | $672 | $12,116 | $1500 | $13,616 |
| Mr Yakovtsev | $6539 | $672 | $7,211 | $1500 | $ 8711 |
| Mr Tsvetkov | $5787 | $645 | $6432 | $1500 | $ 7832 |

73. The amount payable to Mr Selugin is reduced to $ 3803.20 (para 59).

74. Interest will run on each sum at the rate of 11% pa from 31 March 1998 and, in the case of Mr Selugin, from 8 December 1997. We understand that some payments have been made on account of the High Court judgment and these will of course need to be brought to account.

75. Each respondent has a maritime lien against the ship in which he served for the amount ordered to be paid to him and for the costs of this proceeding. It was agreed that the matter of costs in the High Court will now have to be determined by Young J.

76. As the respondents are legally aided there will be no award of costs in relation to the appeal.

**GAULT J**

77. The judgment to be delivered by Blanchard J which I have read in draft sets out the material facts and the issues in this appeal. I agree with his reasons and conclusions on most aspects of the case, but I take a different view on the issue of frustration of the contracts. Because mine is a minority view I will express it only briefly.

78. The six seamen respondents were bought to New Zealand by the appellant for the purpose of taking employment pursuant to written contracts made between the appellant as employer, Abel Fisheries Ltd as charterer and the individuals as crew. Messrs Kremlev, Tsvetkov and Yakovtsev arrived in January 1997. Mr Kremlev was employed on the ship "Olennino", the other two on the "Orlovka". The charterer was engaged in fishing under quota in New Zealand. The form of contract used at that time provided that the charterer appointed the employee to the position to carry out work set out in the job description which included fishing and processing the catch. Remuneration was determined on the basis of the sale price of fish caught. The contract was for a fixed term of nine months with an agreed extension for a further three months. An appendix to the contract dealing with general responsibilities of the employee imposed upon the employee responsibility for the cost of return travel to Murmansk if he terminated his contract before the end of the agreed period (as well as the expense of bringing a replacement). The same was to apply in the event of termination for misconduct. These provisions inferentially recognised the obligation otherwise to repatriate the crew at the end of the term.

79. Messrs Udovenko, Soluyanov and Selugin arrived in July 1997. Messrs Udovenko and Selugin were employed on the "Orlovka" and Mr Soluyanov on the "Om". They signed a contract in very similar terms save that it was for a fixed term of six months extendable by the parties for a further three months.

80. Those respondents employed in January 1997 presumably agreed to the extension of their contract for the further three months as they continued to be employed after the initial nine month term. They were still employed in February 1998 even though by then the extended term also had expired. It seems the contracts would have been running on subject to termination on reasonable notice.

81. Those employed in July 1997 also were still employed in February 1998 so that they may be taken as having agreed a three month extension to the initial six month term. Their contract would have expired some time in April 1998.

82. All of the contracts were varied by the substitution of revised terms of the payment of wages in October 1997.

83. Prior to the arrival in New Zealand of the present respondents the charterer had (in October 1996) secured release of the vessels on bonds after they had been seized as a result of quota management offences committed by Abel Fisheries Ltd. Those offences were the subject of prosecutions to which Abel Fisheries (by then in receivership) pleaded guilty on 20 January 1998.

84. At the end of January 1998 the receivers of Abel Fisheries terminated its charter of the vessels.

85. On 23 February 1998 the decision of the District Court was delivered in which the claim of special reasons justifying non-forfeiture of the vessels on the conviction of Abel Fisheries (s107B(2) Fisheries Act 1983) was rejected. The vessels were forfeited to the Crown. The following day the Ministry of Fisheries required removal of the crews from the forfeit vessels.

86. At that point the charters were at an end, the charterer under whose control the employees were to man the ships and process the fish was in receivership and the vessels belonged to the Crown. It seems to me it was open to the appellant at least to give notice of termination to the respondents employed under the January 1997 form of agreement and to repatriate them to Russia. But in any event I consider in respect of the employment of all of the respondents (save Mr Selugin who had been dismissed in December) it was open to the appellant to treat the contracts as frustrated.

87. Young J was not of that view. He first recorded the absence of evidence as follows:

The exact understanding of the parties in relation to the criminal proceedings and the likelihood of forfeiture was not explored in evidence. There is no indication that the men themselves were conscious of the possibility of forfeiture, let alone that if there was forfeiture this might affect their entitlement to wages. Likewise there was no precise evidence as to the hopes, fears and expectations of Karelrybflot in relation to the criminal proceedings.

I cannot help but think that there is a distinct lack of merit in the position which Karelrybflot has adopted. The plaintiffs were brought out from Russia to New Zealand to serve on fishing vessels. I think it safe to assume that Karelrybflot must have known that there was a substantial possibility that the vessels would, sooner or later, be forfeited to the Crown. In particular, it seems almost inevitable that

Karelrybflot must have appreciated this in July and October 1997, that is when the important contracts of employment in this case were entered into. It did not, however, expressly provide for this contingency in the contracts of employment. The men who were leaving their families and homes in Russia could fairly expect a guaranteed period of employment of 6 or 9 months. It would be a strange and unjust view of the contracts which permitted Karelrybflot, upon the happening of an event which it must have appreciated was quite likely to happen, to disavow any further responsibility under the contracts and to leave the men marooned in New Zealand. They contracted on terms which provided them with specific and guaranteed periods of employment.

88. The Judge referred to two lines of cases without indicating a preference and then stated.
I have reached the following conclusions:
1. On the exiguous evidence before me I infer that Karelrybflot must have been aware both in July and October 1997 that forfeiture of the vessels was a possible and perhaps likely outcome of the criminal proceedings against Abel and its directors.
2. Despite this awareness it nonetheless entered into contracts of employment with the men in July and October 1997 under which it provided for fixed terms which, in the events which happened, were to expire in April.
3. I infer that Karelrybflot would have been far more aware and conscious than the men of the position in relation to the likelihood of forfeiture and the impact of forfeiture on its ability to continue to provide actual work. Yet despite this awareness, Karelrybflot entered into fixed terms of engagement with the men.
4. In those circumstances it is not realistic to regard the contracts as being frustrated by an event which Karelrybflot must have contemplated as being at least a substantial likelihood at the time that the contract was entered into.
5. If necessary, I would hold that Karelrybflot made provision for the contingency that there might be forfeiture by providing fixed but comparatively short term contracts of employment.

For those reasons I dismiss the defence of frustration.

89. The Judge did not base his conclusion on any likelihood that the vessels might be redeemed under s107C prior to the expiry of the contracts so that unavailability of the vessels was merely temporary and so not a frustrating event. Rather he found, in effect, that the appellant could not rely on an event it must be regarded as having contemplated. Indeed if necessary he would have held that the contracts in fact provided for that event – though he had earlier said they did not.

90. The principles by which frustration of contracts are to be determined are far from clear as is apparent from a glance at any of the leading texts. Certainly it is an essential requirement that further performance of the contract has become impossible or so radically different from what the parties agreed to because of some event for which neither party is responsible. I have no doubt that was the position in this case. These men were employed to man specific ships to fish and process the catch as required by the charterer. The charters had gone and with them the fishing quota. The ships had been forfeited to the Crown. In those circumstances, to maintain crews in a foreign state in which they were not entitled to remain and pay wages when there was no longer work would indeed have been radically different from what the contracts contemplated. The criminal prosecutions were not the fault of either party – in fact the evidence does not disclose their knowledge.

91. The fact that the initial contracts were for short fixed terms does not, in my view, justify an inference that that was to provide for the possibility of forfeiture at some time after those terms had expired.

92. The Judge appears to have been concerned that to find the contracts frustrated would mean the men would be left marooned in New Zealand. I do not accept that conclusion. Nor do I accept the assumption seemingly underlying it, that frustration is a matter of discretion to be applied only where that is seen as fair.

93. I do not consider that a finding that the contracts were frustrated would mean that the appellant was discharged from the obligation to pay for the return of the crews to their home port (viaticum). Just as the entitlement to wages up to the time of termination remains if further performance is frustrated, so does the entitlement to repatriation. Viaticum is, in effect, part of the wages earned aboard a ship. It is capable of creating a maritime lien. In essence it is part of the recompense for the exercise of the duty: *The Tergeste* [1903] P.26; *The Arosa Star* [1959] 2 Lloyd's Rep 396; *The Westport (No 4)* [1968] 2 Lloyd's Rep 559; therefore it is not an independent right created by the completion of the contractual duties. Like wages it is earned through the performance of the duties. The right arises from the start of the duties and not on completion and would fall within s3(3) Frustrated Contracts Act 1944. In fact the appellant recognised the obligation to repatriate the crews and made available air tickets.

94. I am not persuaded that the possibility of the appellant securing release of the vessels constitutes a reason for rejecting frustration. The parties gave no indication at the time that they regarded the unavailability of the vessels as only temporary. The appellant sought to treat the contracts as at an end and to repatriate the crews. The seamen chose to occupy the ships, albeit against the demand on behalf of the Crown as owner that they leave, plainly in an attempt to apply pressure to secure payment of unpaid wages.

95. I would treat the contracts as being discharged by frustration on 23 February 1998 but would recognise the continuing entitlement of the respondents to unpaid wages up to that date (or in the case of Mr Selugin, up to the date of his dismissal) and continuing by way of maintenance for such reasonable time as would have been taken for them to return to Murmansk at the expense of the appellant (against except in the case of Mr Selugin).

96. I agree with the views expressed in the judgment prepared by Blanchard J on the manner of calculation of the outstanding wages and that they support a maritime lien. I agree also that the reasonable course for the respondents was to return to Russia and pursue their claims for unpaid wages there. In the absence of proof of loss I agree that an award of damages for non-payment of wages was not justified.

97. I would allow the appeal though for the different reasons I have outlined.

**Solicitors**

**Russell McVeagh McKenzie Bartleet & Co, Auckland for appellant**

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