CITATION: *Blums-v-Perkins Shipping Pty Ltd [2003] NTMC 041*

PARTIES:	DONNA ANN BLUMS
	v
	PERKINS SHIPPING PTY LTD
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	MARINE ACT NT
FILE NO(s):	20214267
DELIVERED ON:	5 September 2003
DELIVERED AT:	DARWIN
HEARING DATE(s):	1 JULY 2003
DECISION OF:	D LOADMAN, SM

CATCHWORDS:
Marine Act NT – Alleged contravention Section 79(a) and 25(1). Vessel, the subject of charges not owned by Defendant. Defendant not the Master of the vessel.

Defendant a time charterer, the Charter Party, being "Baltime 1939 uniform time-charter [Box Layout 1974]".

Whether Defendant, the owner or operator of the Vessel, within the meaning of the Marine Act.

REPRESENTATION:

Counsel:

Complainant:	Mr Roper
Defendant:	Ms Kelly

Solicitors:

Complainant:	Clayton Utz
Defendant:	Noonans Lawyers

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 041
Number of paragraphs:	

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20214267

BETWEEN:

DONNA ANN BLUMS
Complainant

AND:

PERKINS SHIPPING PTY LTD
Defendant

DECISION

(Delivered 5 September 2003)

Mr David LOADMAN SM:

PRELIMINARY

1. The Defendant is charged on complaint with the following offences:-

On the 3rd day of September 2002

At Groote Eylandt in the Northern Territory of Australia.

1. permit a vessel, namely CEC Pioneer, to operate without a certificate of survey in force for that vessel.

Contrary to section 79(a) of the Marine Act.

AND FURTHER

On the 3rd day of September 2002

at Groote Eylandt in the Northern Territory of Australia.

2. did send or take a vessel, namely CEC Pioneer, to sea, or permit the vessel to remain at sea with a lesser number of certified and uncertified persons on board than that required by the Regulations.

Contrary to section 25(1) of the Marine Act.

2. The relevant provisions of the Northern Territory Marine Act are the following:

7. Interpretation

(1) In this Act, unless the contrary intention appears –

"certificate" means a certificate of competency, a certificate of satisfactory service or a temporary permit issued under, or recognized for the purposes of, Part III;

"certificate of survey" means a certificate of survey issued under section 86 and includes –

(a) a certificate referred to in section 84; and

(b) in the case of a vessel which is being towed, a towage permit;

"certificated person" means a person who holds a certificate issued or recognized and endorsed under this Act that is evidence that the person is qualified to be a seaman of a specified designation, class or grade;

“master”, in relation to a vessel means the person having lawful command or charge of the vessel, but does not include a pilot.

“uniform code” means the code know as the Uniform Shipping Laws Code adopted for the time being by the conference of Commonwealth and State Ministers known as the Australian Transport Council and certified by a Minister of the Commonwealth in accordance with section 427 of the Navigation Act of the Commonwealth as amended from time to time;

(6) Unless the contrary intention appears, a reference in this Act to the owner of a vessel shall, in the case of a vessel that is operated or managed by a person other than the owner, be read as including a reference to the operator or manager of the vessel.

25. Vessels to be properly manned

(1) Subject to this section, neither the owner nor the master of a vessel may send or take the vessel to sea or permit the vessel to remain at sea with a lesser number of certificated and uncertificated persons on board than that required by the Regulations, being persons having the designation, class or grade so required.

Penalty: 100 penalty units.

(2) The owner or the master of a vessel may send or take a vessel to sea from a place, with the written approval of a shipping officer or surveyor, notwithstanding that it carries fewer certificated or uncertificated persons than the number prescribed in respect of that vessel.

(3) A shipping officer or surveyor shall not grant an approval referred to in subsection (2) unless he is satisfied that –

(a) the safety of the vessel and the person on board the vessel will not be endangered by reason of its carrying fewer persons than the prescribed number;

(b) the number of certificated persons required to make up that prescribed in respect of the vessel is not available for employment at the place at which the vessel is; and

(c) it would be unreasonable to require the owner to make up the prescribed number with certificated persons employed from another place.

79. Survey certificates

Subject to this Act, the owner shall not permit nor the master undertake the operation of a vessel unless –

(a) a certificate of survey is in force for that vessel;

(b) the vessel is being operated in compliance with the terms of that certificate; and

(c) such evidence of compliance with the terms of the certificate as is approved by the Director is displayed on board.

Penalty: For an offence against paragraph (a) or (b) – 100 penalty units.

For an offence against paragraph (c) – 15 penalty units.

Marine (Safety Manning) Regulations: Left Hand Man 6

Safety Manning Requirements

The number of certificated and uncertificated persons required to be on board a vessel for the purposes of Section 25 of the Act shall be determined by the Authority in accordance with the Code.

3. At least for the purposes of the safety manning levels, there does not seem to this Court to be a provision of the Code which has relevance.

HISTORY

4. For some time prior to the charter of CEC Pioneer the defendant operated a coastal shipping freight service to dedicated terminals located in Gove, Groote Eylandt and a variety of "coastal ports". In essence, the service was the lifeline between Darwin and/or the outlying Aboriginal communities in the Northern Territory. It also served the needs of the mining operations carried on in Gove now by "Alcan" and on Groote Eylandt by "Gemko". The good ship "Frances Bay" in August 2002, was required to undergo maintenance and repairs and was necessarily taken out of service. The vessel chartered by the defendant and relevantly utilised by it, and to carry its normal freight business was the *CEC Pioneer*.

5. Part of the exhibit 'P3' is a "fixing note", which, in relation to the original conception of utilising "CEC Dream" relevantly specified that the basis upon which the vessel's use was contracted was in terms of a specified

Charter party and addenda 16 which had application in relation to named vessels which do not need to be specified. Both it and the under-mentioned Charterparty are of equal application to the contractual arrangements which are in place in relation to the defendant's use of CEC Pioneer.

6. That Charterparty is the "BALTIME 1939 Uniform Time-Charter (Box Layout 1974)" ("The Charterparty"). Clause 1 of the Charterparty is in the following terms:-

> 1. Period/Port of Delivery/Time of Delivery
>
> The Owners let, and the Charterers hire the Vessel for a period of the number of calendar months indicated in Box 14 from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers between 9am and 6pm, or between 9am and 2pm, if on Saturday at the port stated in Box 15 in such available berth where she can safely lie always afloat as the Charterers may direct, she being in every way fitted for ordinary cargo service.
>
> The Vessel is to be delivered at the time indicated in Box 16.

7. The additional Clauses to the Charterparty which form part of it and which are relevant are Clauses 30 and 31.

CL.30

The vessel's cargo gear and all other equipment shall comply with the regulations of the countries in which the vessel will be employed and the owners guarantee that all relevant certificates are up to date and cover the full period of charter including any period of extension. Owners further guarantee that no classification society surveys are due on the vessel during the potential charter period. In the event of any time being lost to the charterers during the charter due to the owners having to meet unforeseen statutory requirements with regard to certificates and classification society will be subject to suspension of hire.

CL. 31

The owners guarantee that the vessels manning and arrangements comply with the Australian requirements. In the event of loss of time due to boycott of the vessel by shore labour or due to government restrictions or ITF recommendations all caused by the flag or nationality of the owners, master or crew or by reason of the term and condition under which the crew are employed or by reason of any trading of this or any other vessel under the same ownership or operation or control, payment of the hire shall cease for the time thereby lost and the owners to reimburse the charterers for all and any expenses caused thereby.

8. Exhibit 'D1' is a certificate of a British registry emanating from the Isle of Mann. That document establishes the following:

(a) Ksemk Sprogo of a Danish address is the owner of *CEC Pioneer*. Although no part of the evidence, the Court does not believe it is contentious, but notes that 64 shares in *CEC Pioneer* are held by the owner. That comprises the maximum number of shares or the entirety of ownership of a British registered ship.

(b) The demise charterer is Sprogo IOM Ltd.

(c) The owner entrusted the operation and management of the ship to a management company namely Graig Ship Management Company Ltd, described by Ms Kelly as "a Cardiff company – a Welsh company".

(d) Exhibit 'D5' refers to "**the Company",** (referring to paragraph 1.1.2 of the ISM Code) [reference to International Convention for the Safety of Life at Sea, 1974 as amended]. That, the Court mentions in passing is a document headed "Document of Compliance".

(e) Exhibit 'D6' with similar references to the convention is a "Safety Management Certificate issued in respect of the *CEC Pioneer* and also refers to the "Company", as Graig Ship Management Company Ltd.

(f) The address on Exhibits 'D5' and 'D6' for the "Company" is minutely different one from the other, but in relation to such difference this is, on the Court's understanding of no consequence.

9. It is apparently common cause that on behalf of the demise charterer Sprogo IOM Ltd, Graig Ship Management Company Ltd is a corporation presumably incorporated in accordance with the laws either of the United Kingdom or the Isle of Man, ("Graig"). By consent, the Court perceived, during the ventilation of the matter a document styled "Marine Orders Part 58, International Safety Management Code issue 2 ("Marine Orders"), it was common cause that the *CEC Pioneer* was a "foreign flag cargo vessel of 500 gross tonnes or more".

10. Marine Orders Part 58 relevantly provide the following:-

> **2. Definitions of words and phrases used in this Part**
>
> **company** means the owner of the ship or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all the duties and responsibility imposed by the ISM Code;
>
> **4 Application**
>
> 4.1 This Part applies to and in relation to:
>
> (a) a ship registered in Australia; and
>
> (b) a ship registered in a country other than Australia that is in the territorial sea of Australia or waters on the landward side of the territorial sea.
>
> as follows:
>
> (c) all passenger ships, including passenger high-speed craft;
>
> (d) all cargo ships, including cargo high-speed craft, of 500 gross tonnage or more; and

(e) mobile offshore drilling units propelled by mechanical means of 500 gross tonnage or more,

and to any company owning, operating or managing such a ship.

7 Safety management requirements

The master of a ship must not take the ship to sea unless: (a) there is in respect of the ship a valid Safety Management Certificate; and (b) there is on board the ship a copy of a valid Document of Compliance in respect of the company operating the ship.

This is a penal provision.

9 Issue of Document of Compliance

9.1 Application

A company may apply to the Manager for the issue of a Document of Compliance

10 Issue of Safety Management Certificate

10.1 Application

A company in respect of which a Document of Compliance has been issued or applied for may apply to the Manager for the issue of a Safety Management Certificate in respect of any ship operated by the company.

11. The Court was handed also by consent the "Uniform Shipping Laws Code (as amended to October 1993)" for assistance in reaching *its* decision in this matter.

12. Self evidently, on reference to the submissions made by the parties, there is no absolute certainty or rigidity in respect of the classification of a Charter Party. The most significant treatise in relation to Charterparties is the work "Australian Maritime Law" (2nd Edition – MWD White QC) It is helpful in this Court's finding to quote the learned author and hereafter set out extracts from the chapter on Charter Parties.

Introduction

A charterparty is a contract by which the ship, either in its entirety or a major part of it, is hired to the charterer by the ship's owner.

Generally, charterparties are divided into 3 classes:

(a) a time charterparty – that is, where the ship is chartered for a specific period of time;

(b) a voyage charterparty – where the ship is chartered for a specific voyage or voyages;

(c) a demise charterparty – that is, where the charterer assumes total control and possession of the ship, including the employment of her Master and crew.

Charterparties, as all contracts, are created by the parties to suit their needs. Some charterparties, because of their extensive use, have come to be considered as "standard". For example, the New York Produce Exchange ("NYPE") time charter, or the Baltic and International Maritime Conference Uniform time-charter, "Baltime". One can find a variety of examples of hybrid charterparties which have developed to suit individuals needs. For example, *in Ocean Tramp Tankers Corp-v-Sovfracht (The Eugenia)* there is an example of a "trip charter". An example of a "consecutive voyage" charterparty can be found in *Anglo-Saxon Petroleum Co Ltd-v-Adamastos Co. Shipping Ltd* and *Sanko SS and Co Ltd-v-Propet Co* Ltd. An example of an "intermittent voyage" charterparty can be found in *Associated Portland Cement Manufacturers Ltd-v-Tegliend Shipping IS (The Oakworth).* This form of charterparty involves a number of consecutive voyages from point A to point B, which allow the shipowner to use the ship during the trip back to point A. For a discussion on the effect of default by one of several sub-charterers, see *Mutual Export Corp-v-Australian Express Ltd* and as to jurisdiction in a claim by a charterer, *see Gardner Smith Pty Ltd-v-The Ship Tomoe 8.* In the 20th century there has been a progressive tendency to assimilate, as far as possible, the rules relating to voyage charters and time charters; see *The Cebu (No 2).*

Time Charterparty

Under a time charterparty, the ship owner offers his ship and , frequently, her crew and Maser, for hire to the charterer for a fixed period of time. A classic example of such a time charter, one that is

extensively used throughout the world, is the New York Produce Time Charter ("NYPE").

In Skipsaktieselskapet Snefohn-v-Kawasaki Kishen Kaisha Ltd (The Berge Tasta) Donaldson J said:

"Under a time charterparty, not being a charterparty of demise, the shipowner undertakes to make the vessel available to the charterer for the purposes of undertaking ballasts and loaded voyages as required by the charterer within the specified area over a stated period. The shipowners remuneration known as "time chartered freight" or "hire" is at a fixed rate for a unit of time regardless of how the vessel is used by the charterer. Risk of delay this falls on the charterer. The shipowner meets the cost of maintaining the vessel and paying the crew's wages but the cost of fuel and port charges fall on the charterer".

This issue is further elaborated *in Sea and Land Securities Ltd-v-William Dickinson and Co Ltd* and The *Nanfri.*

Whilst one must look at the time charter to establish the exact terms of the contract, a quick perusal of time charters should reveal that there are certain provision to be found in most charterparties. These provisions are usually necessary to give definition and scope to the contract.

13. It is also interesting to observe that in the learned author's view, as he states at page 129, "under a time Charter, the obligation to provide a seaworthy ship attaches at the time of delivery of the vessel under the Charterparty".

14. After discussing "Hong Kong Fir", which he cites at page 130 of his work, the learned author makes the following statement at page 131,

"In Australia, in the related area of marine insurance, it has been held that where the crew are either insufficient in number properly to attend to the ship, or insufficiently qualified, then the ship is not seaworthy. Authority for the proposition of course is conventionally set out. That would certainly seem to provide the opportunity for the contention that it was the owner (and therefore the "operator or manager") who bore the responsibility of ensuring that the CEC Pioneer did not sail "with a lesser number of certified and uncertified persons on board than that required by the Regulations".

15. In the event as will become apparent, this Court has dealt with that matter without descending to making any formal finding about the matters that are set out above.

16. The work is also helpful in it's description and definition of a demise Charterparty and consequently the learned author's categorisation is set out hereunder.

> Demise Charterparty
>
> A demise charterparty is one where the vessel has been placed in the possession and control of the charterer, to which the services of the master and crew may, or may not, be appended,. A charter by demise of a ship without a master or crew provided by the ship owner is sometimes called a "bareboat" charter. The demise charter operates as a lease of this ship itself. An example of the Bareboat charter can be found in the Barecon 89 Form, issued by the Baltic and International Maritime Conference (BIMCO).
>
> In determining whether a charter amounts to a demise charter, one looks at whether the owner of the vessel has parted with the whole possession and control of it.
>
> In *Australasian United Steamship Navigation Co Ltd-v-Shipping Control Board,* the High Court was called upon to consider whether the form of charterparty contained in the schedule of the National Security (Shipping Requisition) Regulations had the effect of passing possession or property in the ship from the owner to the commonwealth.
>
> Latham CJ observed:
>
> All charterers of ships, by virtue of the charter party have some control over the ship. Such control may relate only to a particular voyage: it may operate during the specified period. If the charterparty is by way of demise, property in the ship temporarily passes to the charterer –for the duration of the charter. If possession, as well as some degree of control, passes to the charterer, then the property passes to the charterer and he is "pro-tempore" the owner. But no property in the ship passes if possession is not given to the charterer by virtue of the terms of the charter. If the control of master and crew in the navigation of the ship passes to the charterer, he has possession. If, on the other hand, he acquires only a right to the use of the ship – a right to use her carrying capacity... there is no

demise, but only a contract for services.... Thus, the general test is, "whose servant the master and crew were"... If the owner has the power of appointing and dismissing the master and crew, he remains owner of the ship, while if, under the charter, the charterer obtains that power, possession of the ship passes to him....".

His Honour went on to conclude that the charterparty included in the regulations did not create a charter by demise.

Latham CJ examined some of the expressions used in the charterparty; expressions such as, "the owners let and the charterer hires the ship", a clause referring to the ship being placed at the disposal of the charterer, other clauses referring to delivery and re-delivery and sub-letting by the charterer.

His Honour commented that such provisions suggested that a true letting of the ship so as to pass property in her by way of demise, but that it had long been settled that the use of such terms, which were derived from forms of charter (namely charters by demise) which had become almost obsolete, did not necessarily bring about that result.

His Honour came to the conclusion that, inter alia, there were two clauses that made beyond doubt that possession of the ship was not delivered to the charterer. The first clause, one that normally appears in a time charter, provides that the owners shall, throughout the required period maintain the ship in a thoroughly efficient state in whole machinery, equipment and cargo gear. The second clause stated that the master was to be solely under and obey the orders and directions of the charterer or any officer or agent authorised by the charterer as regards employment of the ship, agency or other arrangements, but that he was to be solely responsible for the management, navigation and handling of the ship. (Similar clauses are found in the NYPE Form cl 8, and in the Baltime Form. cl. 19)

His Honour said that in his opinion, those clauses conclusively showed that possession of the ship was not delivered to the charterer. In the judgement of Williams J, his Honour also refers to the words "let" and "hire" and "lease" of the ship, and says that, although such words would point to a demise of the ship, they do not necessarily lead to a demise and whole of the chaterparty must be considered.

In *Oswald-v-Australian Steamship Ltd*, the defendant was the owner of the ship The Tyrian, and chartered her to the Western district Steamship Co Ltd under a verbal agreement, incorporating by

reference terms printed in a form of charterparty which was proved to be a "common form". The printed form, inter alia contained the following terms:

> (2) The owners agreed to let and the charterers agreed to hire the said steamship for... to commence from the time of her being placed at the disposal of the charterers at.... and a full compliment of officers, engineers and crew and ready in every way to commence the service under this charter.
>
> (3) The owners shall provide throughout the term of this charter and maintain a full complement of officers, engineers, firemen and crew and pay for all provisions and wages of the captain, officers, engineers, firemen and crew....

While the ship was being loaded, under the direction of the second officer, the plaintiff was injured, and sought to recover damages for the alleged injury of the second officer. The defendant sought to argue that the second officer was the servant of the charterer and not the owner. The Victorian Full Court at the time of the accident the second officer was the servant of the defendant Cussen J said:

"The modern view is that a "demise" in the proper sense of the term only takes place where possession of the ship and control of the master, officers, and crew are completely transferred to the charterer, and not to construe a charterparty as a amounting to such a demise unless it clearly so appears. To put it another way, in the case of a valuable ship, manned by experts chosen by the owner, it is prima facie unlikely that an owner intended to make such a demise. But, of course, each case depends on the actual bargain made".

Another way of distinguishing between a demise charter and other forms of charter is to contrast the hire of a self-drive or rent-a-car with that of engaging the services of a taxi. Or to use a more maritime example, that of MacKinnon LJ *in Sea and Land Securities-v-Dickinson*, where His Lordship said, "The distinction between the demise and other forms of charter contract is as clear as the difference between the agreement a man makes when he hires a boat in which to row himself and the contract he makes with the boatman to take him for a row".

In determining whether a charter is by demise or otherwise, the Court must look at the substance of the agreement and not on the description put on it by the parties. *In Andersons Pacific Trading-v-Karlander NG Line*, Hunt J said: "The charter in question here is entitled 'uniform time-charter'. That title, however, cannot be

> conclusive; the relationship between the parties to the charter must be determined by the law and not by the label the parties choose to put on it"
>
> His Honour said that, on the facts before him, the master was placed under the orders of the defendant "as regards employment, agency and other arrangements," but, if dissatisfied with the master, officers or engineers, the defendant had the right only to complain to the owners who, there upon, were obliged to make a change in the appointments, if necessary and practicable. His Honour commented.
>
> "In my opinion, the owners under the charterparty of not wholly part with either possession or control of the vessel to the defendant. Nor could it be said that the master and crew become to all intents and purposes the defendant's servants. I am satisfied that the charter is both in name and in law a time charter and not a demise charter".
>
> Although time charters will usually contain expressions such as "letting", "hiring", "hire", "delivery", and "re-delivery", which are only appropriate in charters by demise, the use of such expressions will not in themselves characterise such charters as ones by demise.

17. It is interesting to observe the learned author's reference to the hire of a self-drive or rent-a-car with that of engaging the services of a taxi, particularly in light of the criticism by the prosecution of the analogy, indeed adopted by Counsel for the defendant. Perhaps the prosecution would be less bold about attacking the analogy adopted by MacKinnon LJ. Lest this be missed in the reading, MacKinnon said that the distinction between demise and other forms of charter "is as clear as the difference between the agreement a man makes when he hires a boat in which to row himself and the contract he makes with a boatman to take him for a row".

EVIDENCE

18. The Court has endeavored in this decision to confine recitation of any evidence or reference otherwise, to matters discretely germane to the resolution of any fact in issue or any aspect of the applicable law.

19. **Mr Wayne Fielder** the Ports Operation Superintendent at Groote Eylandt gave evidence that on 3 September being the fifth visit of the *CEC Pioneer* to Groote Eylandt there was a collision with the main wharf. It seems that it was this particular incident which was the genesis of inquiries which led to the charges before the Court being laid against the defendant by way of complaint. The circumstances of the collision are unremarkable and not relevant to the matters to be resolved by the Court.

20. **Erica Seipel** gave evidence that she was the relevant employee of Darwin Port Corporation and identified Exhibit P1 in relation to pilotage charges raised by the Darwin Port Corporation in respect of charges levied as a consequence of movements of *CEC Pioneer*.

21. **Donna Ann Blums** the complainant gave evidence. She stated that no exemption in terms of section 80 of the Marine Act nor section 84 of the Marine Act had been obtained in respect of the *CEC Pioneer*. She also testified that the necessary survey required by section 79 of the Marine Act had been obtained.

22. Further, that no safety manning determination had either been made or applied for.

23. Further, that no exemption existed to exonerate the defendant from the provisions of section 25 of the Marine Act. Blums identified P5 as a request for determination of safety manning levels in respect of MV Frances Bay and P6 as an application for survey, also in respect of MV Frances Bay. The first document is dated 10 December 1996, the second 2 July 2002.

24. When cross-examined by Ms Kelly, Blums indicated that in relation to MV Frances Bay, to the best of her knowledge the manning level was determined and advised. Further that the manning levels were subsequently complied with.

25. Likewise Blums advised that a survey certificate was issued in respect of MV Frances Bay as far as she was aware. She said that she was not aware of the provisions of the international convention for safety of life at sea; the ISM code; the Marine Order 58; the certificates under the International Safety Management Code; and that she had never instigated an inquiry for a certificate of compliance or a safety management certificate under that Code.

26. **Garry Roy Mayer** deposed to being the producer of P7, a collation of documents relating to the collision of the *CEC Pioneer* with the wharf at Groote Eylandt.

27. Through Mayer, the endorsed crew list, Exhibit P8, was handed in and he deposed to the fact that none of the mentioned crew were the holders of any "NT Certification".

28. Mayer further stated that his review of the relevant records enabled him to say that no application had been made or exemption granted under section 80 of the Marine Act. Further, that no application had been made for recognition of a certificate of survey under section 84 of the Marine Act prior to the collision with the wharf at Groote Eylandt on 3 September 2002.

29. Leaving aside matters relating to events after the said collision, Mayer gave evidence that prior to 3 September 2002 no exemption was granted to the defendant or any other party under section 25 of the Marine Act.

30. Mayer said that a vessel such as the CEC Pioneer operating within 200 nautical miles off the coast of Australia, would as a trading vessel require an appropriate certificate of survey. Further that pursuant to the requirement specified in the uniform shipping laws Code, a master "plus other crew" was required. The reference to a master would normally be a reference to a Master Class 2. In relation to P8, none of the specified crew, Mayer said,

held certification. The Master, Dubouzet, he said did not hold "a certificate, recognized by the NT authority".

31. In cross-examination Mayer said that he had never looked at Dubouzet's master's certificate and acknowledged familiarity with a standard concerning training certification referred to as STCW 95. He acknowledged that the Uniform Shipping Laws Code contains specifics relating to training courses and certification requirements for masters, officers and crew operating vessels in Australian waters.

32. As a result of some examination by Ms Kelly and exchanges with Mr Mayer this Court concludes that STCW 78 might have been the original standard, but that it was amended from time to time and the latest amendment and the relevant governing provision was STCW 95.

33. Mayer agreed that the Statutory Marine Authority of the Commonwealth of Australia for the purposes of the Uniform Shipping Laws Code was the Australian Maritime Safety Authority, which apparently is known by the acronym AMSA. Further that the Marine Branch is the relevant authority for the Northern Territory.

34. Mayer conceded that he had made no search of AMSA in relation to the certification of Dubouzet. He said that he had never looked at the document of compliance kept on board *CEC Pioneer* nor had he looked at the Safety Management Certificate in relation to that vessel.

35. **Robin William Rowstron** gave evidence, but nothing germane to the issues before this Court was adduced.

36. That was the end of the prosecution case.

37. The defendant called **Mark Norman ("Norman")**, the proprietor of Norman Marine Services, a project shipping and consultancy service. He testified that he was a qualified lead auditor, for the purposes of the International

Safety Management Code. By virtue of his qualification he was enabled "to form a recommendation that documents of compliance and safety management certificates be issued".

38. Norman worked for the defendant from 1988 until 2002, but at all relevant times was involved in the defendant's chartering arrangements. He estimated his involvement pertained to some 30 to 50 charters in all, comprising bare boat charters, time charters, or other forms of charter.

39. He said that the "actual operation of a ship" comprised what the master did on a day to day basis, primarily being responsible for proper navigation, operation of maximum efficiency of the engines and equipment of the vessel, maintenance and repair, the tasking of the crew and day to day operation of the vessel in general. Further, the actual operation of the ship "entailed the implementation of the requirements of the ISM (Code) and the safe management aspects of the ship being embraced and necessarily having to make sure there were adequate provisions and supplies to keep the ship running and operating".

40. By contrast to what is set out in the preceding paragraph, he said that the management of the vessel in many ways had similar aspects to those pertaining to the obligations of a master, but were of "broader areas" and entailed ensuring the vessel complied with the requirements of the flag stated belonged to; the requirements of the ISM Code being properly planned and put into place and ensuring the requirements of the classification society were complied with including survey and inspection of the vessel "on time". He described these items as being of a "technical management nature" He said that these functions together with the plans and processes for the repairs and maintenance of the vessel were part of it's management. He said further, that management involved ensuring the correct crew number properly qualified for safe operation were installed on the vessel. Further, responsibility reposed in the management to ensure the crew

travelling to and from the vessel and the crew's training leave and the like. Finally, he said it entailed adequate supply, provisions, oils, spare parts and a whole range of shackles which included ropes. Finally, he said the acquisition of the relevant documentation such as survey certificates was an area, generally in his view, the responsibility of the management of the vessel.

41. Norman said in a demise (bare boat charter) the owners handed over "the fabric of the ship" and that having occurred "*its* the charterer's responsibility to put its own crew on there". Further

> "to do all the provisions, to actually do those items that I spoke about, for, in terms of actually managing the ship. The charterer then becomes responsible for the repairs and maintenance to the vessel, ensuring that it complies with the requirements of the flag state and the range of issues that the managers might normally be responsible for. And in many ways they become, and I think the phrase is, the disponent owner of the vessel under a bare boat charter. And a time charter arrangement then, essentially, the owners/managers of the vessel provide the charterer with a manned vessel and the charterer is really only making use of the cargo space on that vessel and the owner remains responsible for all those issues of crewing, maintenance and the like."

42. Exhibit D2 was a table prepared by Norman differentiating the various operations and areas of responsibility and the differing types of charter arrangements.

43. Norman said that from the time of introduction of the Code, he checked that ships chartered by the defendant had "up-to-date safety management certificates and documents of compliance". He said further,

> "And particularly in relationship time charters we felt that both those certificates were of great significance, because to a certain extent, as a time charter we were only responsible for telling the ship where to go. Whereas those certificates, to a certain extent, gave us – they proved that the Code was being applied, that the appropriate procedures for the safe management and operation of the ship were in place, and that we could then rely on the vessel to be run and

operated in a proper manner because it was an item what was essentially out of our control".

44. Norman explained that whilst *CEC Pioneer* was under charter the defendant

1. Carried out no navigation;
2. Carried out no watchkeeping;
3. Conducted no activities in relation to operation of the engine and other equipment;
4. Did not conduct any routine or other maintenance for the vessel;

although as an independent contractor and outside of the operation of the charter party the defendant may, at the cost of the "owner" effect, if necessary, repairs;

5. Never undertook vessel operations;
6. Never discharged the tasks solicited under the heading technical management;
7. Did not attend to crewing or crew management;
8. Did not purchase and supply;
9. Undertook no issues relating to insurance management;

45. Norman explained that the "Company" was a term defined in the ISM Code. Since the owner might be a "consortium of doctors and dentists in Denmark …", the Company was that organisation to which the owners had delegated management of the vessel and under the ISM Code that would be the company nominated on the "Document of Compliance and the Safety Management Certificates as the managers of the vessel".

46. Norman said that the defendant had to pay hire for use of the vessel. The vessel was told where the defendant wanted it to travel to. Further, the defendant made arrangements to deliver cargo to the ship's side, but it was the ship that placed the cargo on and removed the cargo from the vessel. He said that issues such as loading and unloading were activities strictly under the control of the ship. The ship had the control over the location or

movement of cargo which involved questions of stability and proper safe maritime practice, and such analogous matters.

47. Norman also deposed that the defendant and generally any time charterer was responsible to provide fuel and for the arrangements for "putting the fuel on board". He expressed the thought that the defendant probably took out insurance to protect their own liabilities as charterers. Charges such as pilotage fell to the time charterer and the defendant looked after the customs entry of the vessel when it first came into Australia.

48. Norman was then cross-examined by Mr Roper. He said that in his evidence concerning "what is a manager of a ship" that was limited to a "Technical manager". He said that communication with the various ports concerning times of arrival involved a combination of the master and "the sort of relevant agents in each port". He explained that voyage scheduling on the tables prepared by him involved communications with the ports. Further that the master had responsibility for maintaining the unloading and unloading equipment of the vessel. He also said, although it seems to be fictitious in the modern world, that whoever signed the bill of lading or authorised the signing of the bill of lading would not necessarily be the person in whom reposed the operation of the vessel or the management of the vessel.

49. Norman deposed that the "Company" (in accordance with ISM Code) was Graig Ship Management Limited, they being responsible for day to day running of the ship. Had there been non-compliance Graig Ship Management Limited would have been advised and the ship would have been detained.

50. **Chowdhury Sadarudoin** gave evidence, he being a marine surveyor with the Australian Maritime Safety Authority ("AMSA") and included in AMSA's duties was an inspection involving "Port state control of ships" and after a history which is not particularly relevant for purposes of this

decision confirmed that AMSA carried out port state control inspections of a vessel sailing under foreign flag or coming into Australia from a foreign port which entailed a physical survey of the vessel. Further that an inspection was carried on the *CEC Pioneer* on 5 June 2002 and that a written document was brought into being in respect of that inspection by him. He identified that the safety management certificate ("SMC") was issued under the International Safety Management Code. Further that the document of compliance ("DOC") was likewise issued under the SMC. He said he inspected both of those documents on board the *CEC Pioneer*. Exhibit D4 was a report relating to an inspection he carried out with one Robinson the senior surveyor in his office, being an extract of the report rather than the whole report. Copies of those documents, Exhibits D5 DOC and D6 SMC, were then exhibited.

51. That is the summary of relevant evidence of relevant witnesses.

SUBMISSIONS

52. The prosecution ("complainant") and the defendant elected to take advantage of any invitation to make written submissions as to what the appropriate finding of this Court ought to be. Some comment will be made in relation to aspects of the submissions it not being the intention of the Court to exhaustively canvass each and every aspect of those submissions.

Complainant's Submissions

53. Before dealing with these submissions the Court expresses surprise that the charges against the defendant do not assert, as they may have, that the contraventions were alleged to have arisen on the part of the defendant "as owner" although notionally contravention could equally have been committed by "the master." Self evidently whatever the defendant's classification is found to be it cannot entail any omission or act as "the

master". That is in any event defined in the Marine Act and set out for convenience earlier in this decision.

54. In the event, in paragraph 16 of the complainant's submissions, it is asserted the charges have been brought against the defendant "on the basis of the definition of 'owner' in section 7(6) of the Act". That section has already been set out in this decision. The obligation in terms of that section rests either on "owner" or as is the case in this matter where the owner is not the actual operator or manager, on that person who is in fact the "operator or manager of the vessel".

55. In paragraph 17 of the complainant's submissions, a definition of "operator" and "manager" attributed to presumably the 3rd edition of the Macquarie dictionary is set out. That as pointed out in the defendant's submissions is not entirely in accordance with the facts. The full definition is in the following terms:

> ***operato**r / noun 1. a worker; one employed or skilled in operating a machine, apparatus, or the like: a wireless operator; telephone operator. 2. one who conducts some working or industrial establishment, enterprise or system: the operators of a mine. 3. one who deals in shares, currency etc., especially speculatively or on a large scale. 4. Colloquial one who successfully manipulates people or situations: he's a smooth operator . 5. Grammar, the auxiliary verb which comes first in a verb space and makes it finite, as had in It had just been announced.*
>
> ***manager/** noun 1. one who manages. 2. one charged with the management or direction of an institution, a business or the like. 3. one who manages resources and expenditures, as of a household. 4. a person in charge of the business affairs of an entertainer or group of entertainers. 5. a person in charge of the performance and training of a sporting team or individual. [The Macquarie Dictionary. Third Edition.*

56. Furthermore, in the Concise Oxford English Dictionary, the definitions are in the following terms:

operator *n. one who operates; one who makes connections of lines in telephone exchange; person who engages in business, esp. (colloq.) speculatively or shrewdly; (Math.) symbol or function denoting an operation.*

manager *(nij) n. 1. person conducting a business, institution, etc.; person controlling activities of person or team in sports, entertainment, etc. 2. Member of either House of Parliament appointed with others for some duty in which both Houses are concerned. 3. good, bad, etc., - (of money, household affairs, etc.) 4. (Law) person appointed usu by Court or Chancery to manage a business for benefit of creditors etc. 5. Hence –ESS (or E-'s), -SHIP, ns., manager IAL a. [MANAGE +-ER] [The Concise English Dictionary. Seventh Edition]*

57. Further, the Shorter Oxford English Dictionary contains the following definitions:-

Operator 1597. [a. late L., f. operari] One who operates. 1. One who does or effects something; a worker, an agent 1611. 2. One who performs the practical or mechanical operations belonging to any process, business, or investigation; a person professionally or officially so engaged 1597. 3. One who performs surgical operations; an operating surgeon or dentist 1597. A quack manufacturer of drugs, etc.-1710. 4. One who carries on financial operations in stocks, shares, or commodities 1828. 5. One who works a machine, telegraph etc. 1870. 6. One who works a business, undertaking, etc. U.S. 1877. 7. *Math.* A symbol indicating an operation or series of operations, and itself subject to algebraical operation 1855.

Manager 1. One who managed (something specified). Now *rare* in general sense 2. One skilled in managing affairs, money, etc. 1670. 3. One who manages a business, as institution, etc 1705. 4. One of several members of either house of parliament appointed for the performance of some duty in which both houses are concerned 1667. 5. *Law*. A person appointed, usu. by a court of chancery, to manage a business for the benefit of creditors or others; usu. *receiver and m.* 1793.

2. She is not what is called a good m. 1806. 4, The conference [between Lords and Commons] is conducted by 'Managers' for both houses 1840. Hence Manageress, a woman m., e.g. of the theatre or hotel. Managerial a. of, pertaining to, or characteristic of a m. Managership, the office or control of am

> **Manage** v. 1561 [ad. It. *maneggiare* to handle = F *manier:-* pop.L.*manidiare,* f. L. *manus* hand] 1. Trans. To train (a horse) in his paces; to put through the exercises of the manege. Now merged in sense 2 and 7. B. intr. Of a horse: To perform the exercises of the manege-1719. 2. *trans*. To handle, wield (a weapon, toll, etc.) Now only, to make (a weapon, instrument, etc.) serve one's purpose (well or ill) 1586. B. <u>To handle, work (a ship or boat) 1600. (This Court's underlining).</u>
>
> Note: There are further definitions being from 3-10 inclusive which are not set out in this decision.

58. It seems to this Court, inescapable to conclude that an operator or a manager is in essence someone holding a position to be distinguished from the position held by a time charterer. In essence, the element of control, which in this Court's finding, is central to someone who neatly fits the relevant definitions is absent from the power of the defendant in his contractual relationship as a time charterer.

59. It is also significant to refer to the Short Oxford English Dictionary of "manage" to the portion particularly underlined by the Court. There is no power reposing in a time charterer to "handle, work" (the CEC Pioneer). Whatever powers the time charterer has do not comprise either handling or working the vessel in question.

60. It is of course trite that unless words are defined in any piece of legislation the canons of interpretation and the Interpretation Act, or the combination of same, have historically and relevantly, currently, still require construction of the word according to their ordinary English meaning. The complainant's submissions use the word "plain". That may be a recent innovation of which this Court has no knowledge.

61. On this Court's analysis of the meaning set out above, the Court finds that the Defendant is not within the terms of those definitions either an operator or a manager.

62. In paragraph 19 of the complainant's submissions, there are set out 4 criteria said by the complainant to comprise the elements in respect of which the Court ought be satisfied that the charge is proven. Without more, the Court rejects the validity of submission 19(a) and 19(b). To dwell on those issues briefly. It may be the case, and this Court does not have any knowledge as to what in fact the position is, that the MV Frances Bay was owned by the defendant in the conventional sense.

63. The Court further assumes that the property in that vessel reposed in the defendant and that the defendant utilised that vessel to carry on it's business. To construe there exists an analogy with a situation with CEC Pioneer, whose services are temporarily acquired while MV Frances Bay is being repaired, such that for reason of such analogy, the defendant's position can be one of "owner" and "operator" is untenable in this Court's finding. It is simply not a logical exercise. In any event, the task of this Court is to ascertain whether or not the defendant was, by virtue of the definitions and applicable sections of the Marine Act and/or regulations "the operator or manager of the vessel". The complainant makes reference in the submissions to a history of "the Charter Agreement". The nomenclature represents a choice of words foreign to the marine industry. The contract in question historically and within every formal classification is known as a "Charter Party".

64. In paragraph 23 of the Complainant's submissions, reference is made to the decision that is cited. This Court is indeed happy to embrace that classification. It does not intrinsically however, dispose of the issues that require to be decided upon.

65. The Complainant's submissions then descend into some further examination of the construction of the Charter Party by various Courts in various jurisdictions. None of the decisions referred to in this Court's perception are helpful in discharging *its* obligation.

66. In paragraph 30 of the Complainant's submissions, there is further descent into the interesting issue as to what a "disponent owner" comprises. That may be of some academic interest. It is not helpful in relation to this Court's function.

67. Persisting in classifying the contractual arrangement as a "Charter Agreement", in paragraph 36 of the Complainant's submissions, the contention is made that clause 2 of the Charter Party must lead to the conclusion that for the reasons set out, the defendant "has the absolute discretion to require the Vessel to carry whatever cargo Perkins Shipping deems fit". That is not a true construction in this Court's perception. The defendant could, as the time charterer of the vessel, undoubtedly require the Vessel to load that which *its* tackle was capable of loading and to carry cargo which was lawful and capable of being safely stowed. In this Court's finding, the aforesaid was the full extent of it in relation to that particular aspect of the matter.

68. The Complainant's submissions in paragraph 36(b) refer to clause 4 of the Charter Party and assert this makes it clear that the defendant has the primary responsibility "for the day to day management and operation of the Vessel". That is not in accordance with the finding of this Court. The clause is then set out and self evidently harks back in history to the time when the matters that are referred to in it were part of everyday aspects of maritime trade. If there are still Vessels using coal fire boilers they are certainly not Vessels that are currently in commercial operation, but they may be found undoubtedly in maritime museums. The point is that to use an archaic clause that has obviously been recited over hundreds of years to try and derive support for the contention that is thereafter advanced is simply invalid. Much reliance is placed on clause 8 where reference is made to "the hullage and burthen of the Vessel". Presumably, but by no means certainly, hullage applies to the hull of the Vessel. Quite what the word "burthen" comprises, this Court doesn't know and hasn't taken the trouble to endeavour to

ascertain. Focusing on the words that in any event, the Vessel is to be at the "Charterer's disposal", as compelling evidence in relation to cargo simply echos the submission in 36(a) and is invalid.

69. No-one has contended in this Court's perception, that there is a relationship between the contract for the CEC Pioneer and a contract where the defendant has "rented cargo space on the Vessel". If such a contract is or was customarily an incident of maritime legal relations, it is certainly a category of contract not known to the Court. A person wishing to dispatch cargo on any commercial Vessel plying for trade, generally received from the master of the Vessel at least historically, a signed bill of lading for cargo that had been loaded on board. In those cases of course, the relationship between the person dispatching the cargo and the person carrying same is entirely to be found within the parameters of the Bill of Lading. The contentions set out in paragraph 36(d) of the Complainant's submissions are not well received by the Court.

70. In paragraph 36(e) of the Complainant's submissions, the submission is made that the defendant has the capacity to direct CEC Pioneer to sail when instructed to do so, however the submission goes further and alleges that the Vessel had to sail on those courses designated by the Charterer. That is not in this Court's finding, the right reposing in the defendant. The defendant was entitled to stipulate the port of intended delivery. The course to be sailed by the Vessel to that destination, is in this Court's finding, a matter for the master of the Vessel.

71. The Court rejects the contentions set out in paragraph 36(g) as a basis from which this Court can conclude the defendant was the "operator or manager". Again the Court points out it is not incumbent upon, or required of the prosecution to establish and indeed it doesn't even allege the defendant is "the principal operator and manager". The legislation makes a distinction between the party who is "the operator" and the party who is "the manager".

Proof that the defendant was either one would at first instance entitle the prosecution to succeed.

72. Paragraph 36(h) of the Complainant's submissions are simply unhelpful. The law relating to the consequences of deviation and whether that constitutes a breach of contract are matters that are not relevant to this Court's function and finding.

73. The Court does not also find any satisfaction in the contention advanced in paragraph 36(i) of the Complainant's submissions.

74. The point that the defendant relies upon in any event, is that those clauses provide the necessary evidence, or some of it, to advance the proposition that the classification of the defendant is the owner or the operator. The complainant again perpetuates *its* error of asserting that the Court will find that the Court was "operator and manager".

75. Whilst it may in the perception of the Complainant be the case that *its* submissions ought to result in this Court being "clear" as to repository of the day to day control of the Vessel, it certainly isn't this Court's finding obviously, from the remarks already set out in it's decision thus far.

76. Furthermore, there are several factual errors made and "the compelling evidence" the complainant's asserts exists, is not found to exist by this Court. The Court has already commented on the fallacy which is behind the submissions set out in paragraph 38 and no further comment is warranted. The submission is rejected as totally invalid.

77. The remaining submissions set out firstly in paragraphs 40-53 take the matter nowhere, because it is beyond dispute the relevant certificate was never brought into existence. It is also beyond dispute that no exemption exists. The question is whether the defendant is the entity or person at law which ought to have obtained either.

78. The same reasoning applies to the commentary set out in paragraphs 54-61 of the complainant's submissions, as a consequence is of little assistance or value to the Court.

79. The critical issue in relation to charge number 2, as it was and is, in relation to charge number 1, was whether the defendant was the owner, the operator or the manager possessed of the requisite authority to be able to "send or take" the vessel to sea. It is this Court's perception then, that to succeed in relation to the second charge, the prosecution must establish whether pursuant to section 25(1) with the Marine Act, the defendant was the owner stricto sensu or the owner or operator as set out in section 7 (6) of the Marine Act. It is, patently obvious, the defendant was not the master of the vessel. The following and further propositions, whilst interesting in some respects are of little consequence, unless the defendant can be categorised in the appropriate manner in such a way as to attract criminal responsibility for the "sending or taking" of the vessel to sea.

The Defendant's Submissions.

80. The next aspect of the matter is to consider the defendant's submissions.

81. In paragraph 2 of the defendant's submissions, it is correctly asserted the prosecution has an obligation to prove either what is alleged or that the defendant was "the master". Otherwise the Court accepts the submission as being correct. Succinctly, this Court also accepts the submissions set out in paragraphs 6, 7 and 8.

82. In respect of paragraphs 9-10 of the defendant's submissions, this Court find they accurately set out the law. It is interesting to focus on paragraph 9.3 from which focus one derives the obvious conclusion that there is no reference in the definition of "company" to a "time charterer". In paragraphs 11, 12 and 13 of the defendant's submissions, further argument is advanced to urge upon this Court and finding that "company" as set out in marine

Orders paragraph 58 clause 2, was Graig Ship Management Company Ltd of Cardiff as alleged in paragraph 12 of the defendant's submissions.

83. The defendant's submissions then turn to the evidence of Mr Mark Norman at the relevant time, the international manager for the defendant who actually organised the time charter party relating to the *CEC Pioneer*. He observed the various facets of responsibility and the party to whom they should be attributed. Although an attack has been levelled upon some of this evidence in relation to some aspect comprising of the classification as "technical management", this Court accepts his evidence in relation to responsibility.

84. Much more importantly, this Court accepts unequivocally the submission made in paragraph 18 of the defendant's submissions. To adopt the verbiage, the Court finds that "Perkins operated a freight business, using the services of the *CEC Pioneer* provided by the owners of the vessel through their management company, "Graig Ship Management Company Limited". Further, because Perkins was neither the owner, the operator or the manager, this Court accepts that it had no authority to "permit" anything. That *its* rights were as recited in paragraph 19 of the defendant's submissions and no more.

85. In dealing with the second charge the Courts adopts the matters that are the subject of paragraphs 21 and 22, of the defendant's submissions.

86. It follows that the need to deal with the remaining aspects of the matter and the remaining submissions of the defendant technically do not arise.

87. For reason of eccentricity, something similar thereto, or perhaps lack of either, it is delightful in this Court's finding to emphasise the validity of the exchange referred to in the extracts from Lewis Carroll's work recited in paragraph 27 of the defendant's submissions. Although, in this Court's

perception humorous, it is also apposite, and for the sake of enlivening this decision, the Court sets it out in full:-

> "Take some more tea," the March Hare said to Alice earnestly.
>
> "I've had nothing yet," Alice replied in an offending tone: "so I can't take more."
>
> "You mean you can't take *less*," said the Hatter: "it's very easy to take *more* than nothing."

88. Expressly, this Court upholds the submission made in paragraphs 26 and 27 of the defendant's submissions.

89. Further, insofar as the prosecution contends for its meanings to be attributed, as they do, to the words "operator" and/or "manager", the Court is reminded of another passage of an exchange, this time from another work of Lewis Carroll, namely Through the Looking Glass:

> 'There's glory for you!' 'I don't know what you mean by "glory",' Alice said. 'I meant, "there's a nice knock-down argument for you!"' 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected. 'When *I* use a word', Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less'. Lewis Carroll, Through the Looking Glass (1872) ch.6

That, in this Court's finding is what the prosecution is seeking to urge upon this Court. Namely, that it should follow the philosophies ascribed to Humpty Dumpty and the quote above. As is apparent from this Court's findings, earlier recorded, it rejects the complainants submissions in that respect.

90. Therefore, from what is said above, it must be obvious that canvassing issues not yet canvassed is not necessary for the purposes of reaching a decision. The Court arguably ought not then, indulge upon further ventilation of any other issue. Nevertheless, for the sake of completeness, the Court accepts and adopts the submissions set out at paragraph 20 of the defendant's submissions.

91. Appendix 2 of the defendant's submissions in light of comments already made in this decision will briefly be the subject of scrutiny and observation.

92. Paragraph 1.3 of the defendant's submissions is adopted by this Court expressly as being representative of *its* own conclusions and findings.

93. The Court further, similarly adopts the submission as set out in paragraph 3.2 of Appendix 2 of the Defendant's submissions. In the absence of some express, contrary wording, which is not to be found in relation to this matter, the proper classification of the contract is the supply of services by the owner to the charterer. It is not a contract of letting and hiring.

94. The last task then of the Court is to examine the Complainant's submissions in reply.

Complainant's Submissions in Reply.

95. The defendant's Counsel has never advanced the proposition that "operator and manager", (which the Court has pointed out repeatedly, is inappropriate) means "master". Much of what is said is incomprehensible. The Court has never entertained the notion that "operator or manager" means or qualifies "master". Such an exercise would be completely nugatory.

96. Since it is self evidently the case, that the defendant is not the "owner" of the vessel, in the true sense of the word, the only way the prosecution can succeed, is to establish, referring to section 7(6) of the Marine Act, that it is the "operator or manager of the vessel". The matters do not bear further dwelling upon and the genesis of the propositions are simply a complete mystery to this Court.

97. The criticisms and categorisations of Mr Norman's evidence have already been referred to and nothing said in the Claimant's submissions in reply warrant any further commentary or focus.

98. In paragraph 14 of the Complainant's submissions in reply, there is an assertion made that the defendant had authority to prevent the Vessel from operating without a survey certificate. That is not accepted, bearing in mind in any event, there is an obligation on the prosecution to prove beyond reasonable doubt, the essential elements of the offence. There is no evidence to suggest that the defendant knew a survey certificate did not exist. The mere fact that this may have given rise to a capacity on the defendant's to mount an action, for breach of contract, is in this Court's finding an irrelevancy.

99. Without comprehensively, or at all examining the submissions made up to and including paragraph 32 of the complainant's submissions, for reason of the Court's finding, the Court does say that exhibits D5 and D6 are of real assistance to it in coming to it's conclusion, contrary to the proposition of the complainant. The utility in ascertaining for the purpose of the relevant legislation, what is meant by "company" is served by those exhibits.

100. Nothing said in the remaining submissions calls for any comment as a consequence of observations or findings by this Court, already set out in the decision.

CONCLUSION

101. It follows by reason of the preceding stated reasons it is the formal finding of this Court that it is not satisfied that the prosecution has proved the elements of the offences. It is required that to have proved beyond reasonable doubt such elements. Although, obviously completely superfluous comment, and otiose for that very reason, in this Court's finding, the prosecution has not established any of the elements necessary to complete a fictitious finding even on a balance of probabilities.

102. It is this Court's finding that the defendant is entitled to be found not guilty in respect of each of the charges laid against it. The Court so finds.

103. Whilst it is the case, that the complainant requested an opportunity to address the Court prior to any issue of costs being ventilated, and the Court will accede to that request, it seems to the Court to be a task which will ultimately be an exercise in futility.

104. The High Court, in the decision of Latoudis-v-Casey (1990) 170 CLR 534 dealt with the issues of costs. The Chief Justice, His Honour Mr Justice Mason, with the concurrence of all other Justices said,

> "In ordinary circumstances, it would not be just or reasonable to deprive a Defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to dispose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge, which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bare the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs, or to make a qualified order for costs".

105. His Honour went on to say that an award of costs was not punitive but compensatory, and further,

> "Once, the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings".

106. Nevertheless, since there may, at least conceivably be reasons, not perceived by this Court which ought be considered, and whilst, in any event, there must be, or may be issues in relation to quantum, the Court will extend to the prosecution, the liberty to which it seeks.

107. If the parties are not in a position to address cost issues upon the delivery of this decision, the Court will fix a suitable day for the purposes of such argument, save only, that if the parties choose instead, to perpetuate

delivery of written submissions in relation to such issues, the Court will accede to same.

Dated: 20 August 2003

DAVID LOADMAN
STIPENDIARY MAGISTRATE