DOI: https://doi.org/10.67203/abulj.2019.2x85jyu3

AN EXAMINATION OF THE OBLIGATION OF SEAWORTHINESS IN CARRIAGE OF GOODS BY SEA CONDITION OR WARRANTY?

By

Jamila Shuaibu *

Abstract

The carrier's duty to provide a seaworthy vessel has received considerable attention, worldwide, from courts, scholars and others in the shipping industry. This attention has resulted in the production of different national laws and international conventions to govern the shipping industry in general and seaworthiness in particular. Every voyage at sea has an antecedent phase, the loading stage. It is established that, during the loading, the vessel must be fit to receive the cargo and to encounter the ordinary perils of the loading stage. In its most fundamental sense, providing a seaworthy vessel requires the vessel being structurally fit for the intended voyage, 'fit to meet and undergo the perils of sea and other incidental risks to which of necessity she must be exposed in the course of a voyage'. However there is no precise definition of what is seaworthiness, as seaworthiness is not usually defined in modern standard form charter parties. The meaning of the concept has to be ascertained from cases decided at common law. The effect of the breach determines whether it's a condition or warranty, the court classify seaworthiness as either condition or warranty depending on the effect of the breach. . On this note the statement of problem justifying the concern for this paper is that, the lack of precise definition of the subject matter and fluctuation in determining whether it is a condition or warranty that has caused lack of legal certainty, even though some courts describe the duty as the "warranty of seaworthiness". This is misleading because, a breach of this

*LL,Lecturer , Department of Commercial Law, ABU, Zaria

duty sometimes lead to a repudiation of the contract not only entitle the innocent party to damages. Thus, the objective of this paper is to espouse the challenges faced by the court in classifying it as a condition or warranty, some of the things that can cause unseaworthiness can be so trivial that they could be remedied quickly without delay, but other causes can be so major that they cannot be remedied within a reasonable time. This means that the vessel will not be fit for its purpose because of that, and it is difficult to describe the seaworthiness obligation as either a condition or as a warranty. The paper adopts doctrinal method to arrive at the intended objective. Therefore, this paper found out that the classification as condition and warranty is done by the inclination of individual judges, which creates confusion. In conclusion It is recommended that it should be classified as an in nominate term one which means that the result of breaching the obligation will differ from obligations classified as warranties or conditions and a test must be established in order to assess the rights of the cargo-owner in a case where the obligations are breached.

Keyword: Seaworthiness, Condition, Warranty, Shipping, Goods and Cargo

1.1 Introduction

In almost all shipping and carriage of goods by sea cases the issue of seaworthiness is considered the corner stone in these cases. Its importance comes from the fact of its direct relation with commercial law and maritime law. Seaworthiness affects the liability of the carrier, the marine insurance, the environment and many issues related to carriage of goods by sea.

The carrier's duty to provide a seaworthy vessel has received considerable attention, worldwide from courts, scholars and others in the shipping industry. This attention has resulted in the production of different national laws and international conventions to govern the shipping industry in general and seaworthiness in particular. However, this has resulted in some confusion as to whether seaworthiness means the same in different branches of Maritime Law, whether the obligation is a condition or warranty or if it is neither. Because, it is upon this classification that it can be determined if the cargo-owner has the right

to cancel the contract or if his rights are limited to claim damages and also whether the carrier can use the protection of the law or the contract. Therefore, this paper will examine the challenges faced by classifying the obligation of sea worthiness as a warranty or condition with a view to making necessary recommendations to address the subjection of the obligation as a warranty or condition.

1.2 Definition of Sea worthiness and its importance under Carriage of goods by Sea.

The term "seaworthiness" is a very broad one, as it does not only include the physical state of the vessel but also extends to other aspects or factors. Under common law, Field J in **Kopi off v. Wilson**[1] stated that the carrier should provide a vessel "fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage". Also, Channel J, in **McFadden v. Blue Star Line**[2], cited Carver, Carriage by Sea, which defined seaworthiness as "... that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it". Under common law, the duty of seaworthiness means that the carrier is under an absolute obligation, hence 'the vessel *must* have that degree...', to provide a vessel that is fit, in every way, to receive the cargo and to encounter the ordinary perils of the sea which a ship of its kind at that time of year, might be expected to meet in such a voyage. But this absolute obligation does not mean that the ship must be perfect; it means that she should be made "as seaworthy as she reasonably can be or can be made by known methods" [3]to undertake that particular voyage, since Carver's definition takes into consideration the behaviour of the prudent carrier. This means "if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the ship-owner does not know of and it is no excuse for the existence of such a defect that he used his best endeavours to make the ship as good as it could be made"[4]. Under common law, the carrier has an absolute obligation to provide a sea worthy ship when the loading of cargos begin.[5]It is not a continuing obligation. As the warranty of seaworthiness under common-law started out as an absolute warranty, it could not be discarded by show of due diligence. This was therefore an implied warranty; so

[1]Kopitoff v Wilson (1876) 1 QBD 377 at P.380
[2] McFadden v. Blue Star Line, [1905] 1 K.B. 697, at P.706.
[3] Ibid
[4] Ibid P.7063
[5]MC fadden v Blue star Line [1905] 1 KB P.697, 703 and Stanton v Richardson (1877) LR 7 CP 421

it could only be excluded if it was expressly stated in the contract.[6]The strict liability to ensure the "absolute seaworthiness" of the vessel does not mean that the vessel must be perfect. The duty is to provide a ship that is ready to withstand the ordinary perils of the voyage[7] and cargo worthy, i.e. suitable for carrying the cargo contemplated on the voyage contemplated.[8]In assessing whether the carrier has complied with this obligation, the Courts have often asked whether a prudent ship-owner would have required that the defect in question be made good before the voyage, had he been aware of it.[9]

Further, once the necessary degree of seaworthiness has been ascertained, this obligation is an absolute one and it is no excuse that the ship-owner took every possible precautions to make her so, if in fact he failed to make her seaworthy But it must be noted that the undertaking of seaworthiness does not require absolute perfection or an absolute guarantee of safe carriage[10]

To satisfy the definition of seaworthiness, the vessel:

(a) . Must be efficient as an instrument of transport and that be achieved if her hull, tackle and machinery [11]are in a state of good repair, if she is sufficiently provided with fuel[12] and ballast and is manned by efficient crew. It is submitted that the 'efficiency' of the crew should be limited to the exercise of their skill and knowledge in proper performance of their duty and is not related to their perfect state of health provided that he carrier adopts an ordinary standard of care in choosing a fit crew. The ship-owner generally in practice satisfies himself by inspection of the seaman's documents, interviews and enquiries from their previous employers that he is reasonably fit to occupy the post to which he disappointed.
In **Widen v. Court Line Ltd.**[13],Glyn-Jones J. rightly brushed aside an argument by plaintiff's counsel, that as the shop-owner had employed a bullying seaman who injured the plaintiff, the ship-owner had committed a breach of the 'warranty' of seaworthiness.

[6]Indira C (2010) International Trade Law, Routhledge, Cavendish Oxford.P.235
[7]*McFadden v Blue Star Line ,Supra*
[8]*Rathbone Bros & Co v D. MacIver, Sons & Co* ([1903] 2 KB P.378.
[9] Macgregor Op.Cit
[10]M.She (2016) Legal aspect of Seaworthines in the International Maritime Law based on the Iranian Judicial Precedent retrieved from http://www.ijhcs.com/index.php/ijhcs/index on 12 of August 2019 at 12am
[11]r. Union of India v. N.V. Reederji Amsterdam. [1962]
2 Lloyds Rep. 336, where the Court of Appeal held that the ship was unseaworthy
because of a defect in its reduction
[12]M clver v. Tate, (1903) 1 K.B. 362. It was held that, 'It is the duty of master to make sufficient amount of fuel. otherwise the ship-owner is liable for unsea worthiness of the ship
[13] (1965) 1 Lloyds Rep. 214 (Q.B.)

As this suit was between a member of the crew and the ship-owner, the warranty of seaworthiness cannot be used to cover this type of cases for the carrier owes the duty of seaworthiness only to a shipper and his consignees, if any. It is probable that a shipper can bring an action on this basis if on the facts; it can be proved that employing a bullying seaman constitutes an inefficiency of the crew which in turn constitutes unseaworthiness.

(b) As a storehouse for cargo (cargo worthiness)

(i) That the vessel must be sufficiently strong and equipped to carry the particular kinds of cargo which she has contracted to carry[14] and her cargo must be so loaded [15] that it is safe for her to proceed on her voyage. But it must be noted that bad stowage by itself does not create unseaworthiness,[16] it is only when such bad stowage endangers the safety of the ship, then it may amount to seaworthiness.

(ii) Further the ship must be equipped not only to carry the contracted cargo but also to prevent its deterioration during the voyage.[17] It is submitted that if the machinery and equipment of the ship are in proper running order and if the shipper does not inform the carrier at what exact temperature his goods must be carried throughout the voyage, then the carrier ought not to be made liable if the goods deteriorate due to their being carried in the way in which goods of similar kind are always carried.[18]

The term "seaworthiness" occurs in charter-parties, bills of lading and marine insurance policies. In principle it has the same meaning in all three contracts but there is a certain danger in treating affreightment and marine insurance cases relating to seaworthiness on same footing, [19]for the state of

[14] In Stanton v. Richardson, (1872) L.R. 7 C.P. 421, it was decided, that the ship was not fit to carry wet sugar as her pumps could not be made ready in a reason able time

[15] Kopitoff v. Wilson, (1876) 1 Q.B. 7. It was held, that the vessel was un seaworthy because of bad stowage of armour plates, which went through the side of the ship in rough weather and were lost

[16] The Thorsa, [1916] P. 257. It was held, that it was bad stowage to stow chocolate and Gorgonzola cheese together but the vessel was seaworthy, as it could safely proceed, inspite of the bad stowage

[17] Maori King (The Cargo-owners) v. Hughes, [1895] 2 Q.B. 550, it was held, that there is an implied warranty that the ship and refrigerating machinery were fitto receive and carry the frozen meat safely on the agreed voyage and therefore the ship was unseaworthy, when the cargo of meat deteriorated because of the fault in refrigerating machiner

[18] Alhacorra v. Westcott. (1965) 2 Lloyds Rep. 37

[19] Chorley, op. cit., at p. 108

seaworthiness is a relative and not an absolute one. It must be determined with reference to the particular voyage and adventure in contemplation. Moreover the effects of unseaworthiness differ in affreightment and marine insurance contracts. The reason for this difference is that in ordinary parlance, seaworthiness as such is an absolute expression, while in law; ships are seaworthy in relation to certain contracts.[20]The duty of the carrier to provide a seaworthy vessel has significant importance. Although it is not required in all seafaring activities, it still has a serious impact on different aspects of maritime law, e.g. Marine Insurance, Carriage of Goods by Sea, Salvage, etc. Therefore, it is important to define the term, and its different aspects, in order to recognize the consequences of the compliance with or the breach of such a duty.

Defining seaworthiness was not only a job for the courts as scholars in this area of law had their own input to clarify an important issue in Maritime Law. However, all these definitions have more or less the same meaning. For instance, Tetley defined seaworthiness as "the state of a vessel in such a condition, with such equipment and manned by such a master and crew, that normally the cargo would be loaded, carried, cared for and discharged properly and safely on the contemplated voyage"[21].

The duty of the carrier to provide a sea worthy vessel cannot be under estimated but has significant importance in different aspect of maritime law, ranging from carriage of goods by sea, marine insurance, and salvage. The importance of the duty under carriage of goods by sea starts before and at the beginning of the voyage. Therefore, if the carrier was able to prove that the vessel was seaworthy at the relevant time[22] then he has discharged his obligation and can benefit from the exceptions or limitation available to him by law.[23]

1.3 Classifying the obligation of Sea worthiness as a condition

A Condition is a major term of the contract, a term of such importance that any breach of it is considered to go to the root of the contract so as to entitle the innocent party to treat the contract as discharged.[24] Originally, the term "condition" denoted not a contractual undertaking by A to B but simply a prerequisite of B's duty to perform or continue to perform an obligation to A.[25]

[20] Ibid P. 109
[21] Tetley W (2008) Marine Cargo Claims,ÉditionsYvonBlais,
[22]Robin Hood Flour Mills. Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc), [1967] 2 Lloyd's Rep. 276. p.280.
[23]McFadden v. Blue Star Line, [1905] 1 K.B. 697
[24] Ewan .M (2010) *Goode on Commercial Law*, Penguin Group,Newyork.P.305
[25] Ibid

The Sale of Goods Law of Kaduna State,[26] Nigeria is helpful when it defines the word as:

A term which goes directly to the substance of the contract for the sale of goods and so essential to it very nature that it non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all and so gives him the right to repudiate the contract and reject the goods, in addition to a claim for damages.

Contracts may sometime be suspended until a certain condition is satisfied, which means that the performance of that contract will not start until the party responsible for complying with the condition satisfies it; such a condition is called Condition Precedent. A condition precedent can also trigger what each person must do under a contract. On the other hand, some conditions may bring a contract to an end if a certain situation occurs after the contract starts; such a condition is called Condition Subsequent.[27] Both of these types of conditions are different from the Promissory Condition which constitutes the subject matter of the contract and whose breach will allow the aggrieved party the right to cancel the contract during its performance. The other two types allow the aggrieved party to terminate the contract either before the performance starts or after it ends.[28] The breach of a condition, no matter how trivial it is will allow the party to consider the contract as repudiated.

Taking the definition of a contract into consideration, it can be deduced that the aggrieved party has the right to cancel the contract or treat it as discharged, the moment the other party breaches the condition. In certain situations the failure of the carrier to make the vessel seaworthy can give the charterer/cargo-owner the right to treat the contract of carriage as repudiated.

For example, In **Stanton v. Richardson**[29], the charter party provided that the charter had a choice of different cargos, including wet sugar, and the charter specified a different freight rate for each type of cargo. A cargo of wet sugar was loaded on board but after the loading was finished it was found that there was an accumulation of molasses in the holds, and the pump, although sufficient to drain the moisture from normal cargo, was unable to deal with the amount of moisture coming out of the wet sugar and the cargo had to be unloaded. The charterer decided to consider the contract as discharged because the carrier failed to make the vessel cargo-worthy. The Court held that

[26]Section 3 (1).
[27] Oxford Dictionary of Law. 4th ED. 1997. Oxford University Press. p.94.
[28]Ewan M Opcit
[29](1871-72) L.R. 7 C.P. 421.

"The ship-owner, by entering into the charter party, undertook that the ship

Should be reasonably fit for the carriage of a reasonable cargo of any the

Kinds of goods specified in the charter party, and consequently of a reasonable cargo of wet sugar; and that, upon the findings of the jury that she was not so fit, and could not be made so in such a time as not to frustrate the object of the voyage, the charterer was entitled to succeed in both actions."

In this case the court considered the option of providing an extra pump to deal with the accumulation of molasses but found that it would have taken a long time to do which would have caused a long delay to the cargo owner. Therefore, he was allowed to cancel his contract. The question is if the obligation of seaworthiness had been a condition the shipper/charterer/cargo-owner would have been able to terminate the contract straightaway without considering the option of remedy. Furthermore, not all seaworthiness cases arrived at the same result, i.e. that the shipper/cargo-owner has the right to terminate the contract once the breach arises. It should further be realised that the right to terminate the contract arises before the carriage contract starts or the vessel sails, but this would not be of great benefit if the vessel was half way through the journey when it was discovered that she was unseaworthy. This means that the carrier's obligation of seaworthiness is not a condition and that its breach cannot be considered a breach of a condition.

For a long time it was thought that "seaworthiness" was a condition in contracts of affreightment and it was accepted in early cases that the charterer can throw up the contract if he finds the ship unseaworthy before the beginning of the voyage. But in **Mac Andrew v. Crappie,** [30]the Court clearly decided that, such breaches of warranty of seaworthiness as do not defeat the object of the charterer in chartering the ship, give rise only to actions for damages, and this was also laid down in later case. Generally in practice, the ship is found to be unseaworthy, by the aggrieved party only after she has sailed; this coupled with indiscriminate use of the words 'condition' and 'warranty' have led the courts to give cumbersome decisions.

In this situation of doubtfulness, the Court of Appeal's judgment in **Hong Kong Fir Shipping Co. v. Kawasaki KisenKaisha**[31] is illuminating. The Court

[30] 1866) L.R. 1 C.P. 643.
[31] [1962] 2 Q.B. 26 (C.A.).

affirmed the judgement of Salmon J.[32] that a breach of the undertaking of seaworthiness entitles in most cases the charterer or bill of lading holder to recover damages against the ship-owner; the breach can only lead to a repudiation of the contract if it gives rise to circumstances that frustrate the contract. Dip locks L.J.went further and said:[33] "It is not a condition at all .... Unseaworthiness is a breach of an obligation but it does not entitle the injured party to avoid the contract. . ."

The Court gave the judgment for the ship-owner on the basis that the circumstances in that case did not frustrate the contract and disallowed the charterer from repudiating the contract even though the ship was unseaworthy. It is probable, that if the charterer had not accepted the unseaworthy ship at the beginning of the voyage, knowing it to be unseaworthy, then the decision would have been otherwise.

1.4 Classifying the obligation of Sea worthiness as a warranty

Warranty as defined in section 61 of Sale of Goods Act, 1979, UK as:

An agreement with reference to goods, which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated.[34]

This can be infer that the breach of a warranty does not go to the root of the contract and as a result does not deprive the aggrieved party of the benefits of the contract, therefore, the party will only be entitled to claim damages and not able to terminate the contract. It can be seen that in some cases of unseaworthiness the breach was so trivial that the court only allowed the charterer/cargo-owner to claim damages if the damage was caused by unseaworthiness and did not allow them to cancel the contract of carriage.

For Example Hong Kong Fir Shipping[35] hired out their elderly ship, the "Hong Kong Fir", under a two-year time charter-party to Kawasaki Kisen Kaisha. It was to sail in ballast from Liverpool to collect a cargo at Newport News, Virginia, and then to proceed via Panama to Osaka. A term in the charter party

[32][1962] 2 W.L.R. 716.

[33]1962] 2 Q.B. 26 at p. 71.

[34]In general, a warranty is a contractual promise by the seller regarding the quality, character, or suitability of the goods he has sold. See James Banrnes et al.,(2009), Law for Business, 10 ed, (New York: Hill Irwin, p.336.

[35]Hongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd., (The Hongkong Fir), [1961] 2 Lloyd's Rep. 478

agreement required the ship to be seaworthy and to be "in every way fitted for ordinary cargo service." However the crew was both insufficient in number and incompetent to maintain her old-fashioned machinery; and the chief engineer was a drunkard. On the voyage from Liverpool to Osaka the engine suffered several breakdowns, and was off-hire for a total of five weeks, undergoing repairs. On arrival at Osaka, a further fifteen weeks of repairs were needed before the ship was seaworthy again. By this time, barely seventeen months of the two-year time-charter remained. Once in Osaka, market freight rates fell, and Kawasaki terminated the contract citing Hong Kong's breach. Hong Kong responded that Kawasaki were now the party in breach for wrongfully repudiating the contract. At first instance, it was held that although the ship was a seaworthy vessel on delivery in Liverpool, Hong Kong Fir had not exercised due diligence to maintain the vessel in an efficient and seaworthy state. However, the trial judge found that this breach was not substantial enough to entitle the charterer to repudiate the contract.

In the Hong Kong case, the issue was not whether the unseaworthiness was "serious" or "minor"; rather the question was whether the undoubtedly serious unseaworthiness had had an effect sufficiently grave to allow the charterer to repudiate. On the facts, given that the charterer had had the "substantial benefit" of the contract for some 80% of the time period, the court held that the breach was adequately remedied by damages.

The decision in this case could mean that the obligation of seaworthiness is a warranty but, as was seen above, in certain cases the court allowed the cargo owner to consider the contract as discharged because the breach of the obligation was not remediable. This means again that the carrier's obligation is not a warranty.

1.5 The effect of classifying the obligation of seaworthiness as a condition.

The obligation of seaworthiness can be broken for so many reasons, e.g disrepair left in a ship, deficiency of force in the crew or skill in the master or mate etc Some of the things that can cause unseaworthiness can be so trivial that they could be remedied quickly without delay, but other causes can be so major that they cannot be remedied within a reasonable time[36], which means that the vessel will not be fit for its purpose. Because of that, it is difficult to describe the seaworthiness obligation as either a condition or as a warranty. This is left to the inclination of individual judges, depending on the circumstances of the case. Moreover, the fact that the parties to the contract of carriage and the courts

[36]Snia v. Suzuki (1924) 17 Ll.L.R. 78.

describe the duty as the "warranty of seaworthiness" does not help and it is a misleading phrase in the context of Carriage of Goods by Sea. For example Lord Blackburn stated[37] "That is generally expressed by saying that it (the vessel) shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit". The term may have been borrowed from the Marine Insurance Act where Section 40 is entitled the Warranty of Seaworthiness[38].\

The fact that the parties to a contract call a certain clause in the contract a condition or a warranty does not necessarily make it such, because the clause has to be construed by looking at the contract as a whole, taking into consideration the commercial practice and the law, and through looking at the terms of the contract of carriage in order to find out the actual intention of the parties and the legal classification.[39] The question is the duty of sea worthiness a condition or warranty? **TheHouse of Lords in Honking Fir Shipping Company, Ltd.** [40]refused to categorise the duty as a condition, which would entitle the claimant the right either to terminate the contract or carry on with the contract and claim damages, or as a warranty, the breach of which would entitle the claimant the right of damages only. Dip lock L.J. in his judgement stated

"It is, ..., by no means surprising that among the many hundreds of previous cases about the ship owner's undertaking to deliver a seaworthy ship there is none where it was found profitable to discuss in the judgments the question whether that undertaking is a "condition" or a "warranty"; for the true answer, as I have already indicated, is that it is neither."The under taking as to sea worthiness is not a condition but an "in nominate" or "intermediate term". Breach of such a term would not give rise to a right to treat the charter party as repudiated unless the conduct of the ship-owners and the actual and anticipated consequences of the breach were so serious as to frustrate the commercial purpose of the venture. The reason was thus explained by Upjohn LJ[41].Why is this apparent basic and underlying condition of seaworthiness not, in fact, treated as a condition? It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted "in every way" for service...if a nail is missing from one of the timbers of a wooden vessel or if proper medical supplies or two anchors are not on board at the time of sailing, the owner are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances

[37] Steel v. State Line Steamship Co, (1877) 3 App. Cas. 72. Lord Blackburn ,at p. 86.
[38] LFN Cap. M2 LFN, 2004
[39]Supra, at p.490.
[40] Ibid
[41]Ibid

the parties contemplated to that the charterer should at once be entitled to treat the contract as at an end for such trifling breaches.

Consequently the effect of a breach of the carrier's obligation should vary according to the nature of the problem and the speed of rectifying it. Therefore, the carrier's obligation can be classified as an in nominate or intermediate term which falls between the above two categories, warranties and conditions. English cases seem to treat the undertaking of seaworthiness as an intermediate term and not as a condition. As such chatterer's right to rescind the contract depends on the facts and circumstances of the breach. The undertaking of sea worthiness is so far reaching that it would be unreasonable for a minor breach in some trivial way to allow the charterer to terminate the charter.

It is submitted that this obligation of seaworthiness is a hybrid between a warranty and a condition and is peculiar to the law of carriage by sea. It operates as a condition before the ship sails and as a warranty after she has sailed. Further, if the charter accepts the ship at the beginning of the charter-party, knowing it to be unseaworthy, when he could have repudiated the contract, then his only recourse will be for damages unless on the facts of the case, he proves that subsequent operation of initial unseaworthiness has frustrated the commercial purpose of the contract.

1.6 Remedies available as result of classifying seaworthiness as a an in nominate term

What remedies are then available to the charterer in the event of a breach of this inter mediate obligation by the ship-owner? A distinction has to be drawn between the situation where the breach is discovered before performance of the charter party has commenced and the position where the breach only comes to light after the vessel has sailed. In the former case the charterer will be able to treat his obligations under the contract as discharged if the breach deprives him of substantially the whole benefit of the contract and it is a breach which cannot be rectified within such time as would prevent the object of the contract from being frustrated. Thus in the case of *Stanton* v *Richardson*,[42] where the pumping equipment on the chartered vessel was inadequate to deal with the surplus water from a cargo of wet sugar, the charterer was held entitled to repudiate the contract when it was established that new pumps could not be installed within a reasonable time. On the other hand, if the effects of the breach are less severe, the charterer will be restricted to his remedy in damages. In this respect it must be remembered that the permissible time allowance in which to remedy the defect will vary as

[42] supra

between a voyage and a time charter. While a relatively brief delay may be sufficient to frustrate the object of the former, the Court of Appeal held in the *Hong Kong Fir* case that the absence of a vessel for five months undergoing repairs was insufficient to frustrate the objects of a 24-month time charter party. In **theKamsar Voyager**[43] , the vessel was unseaworthy because one of the pistons, No 1, had a crack which was not checked before sailing. If the piston had been isolated the vessel would have been able to carry on her voyage using her own power. However, the engineer attempted to fix the problem with a spare part available on board the vessel but this part was not designed for the particular engine of the vessel[44]this problem could not have been discovered even with a prudent check; the only way to discover it was actually to fit the spare part. The fitting of the wrong spare part resulted in total stoppage of the engine and the vessel was immobilized and had to be towed for repair. The cargo-owners sued the ship-owner to recover the general average they had paid and the court granted them this on the basis that the vessel was unseaworthy and this unseaworthiness led to the fitting of the wrong spare part and the incurring of the general average.

The provisions of the time charter itself may, however, provide the charterer with an opportunity for escape if the ship-owner cannot make good the defect before the cancelling date, even though the breach would not otherwise have entitled the charterer to repudiate. The charterer in **The Madeleine**[45] was able to take advantage of this clause when the ship-owner was unable to produce the required deracination certificate by the cancelling date. In the words of Rosily J, 'there was here an express warranty of seaworthiness and unless the ship was timorously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel'.[46] Such right to cancel is not, however, dependent on any breach of obligation by the ship-owners. Where the unseaworthy state of the vessel is not discovered until after it has set sail, mere acceptance of the vessel does not amount to a waiver of the charterer's right to damages.[47] Nor does it necessarily amount to a waiver of the right to repudiate the charter provided that the breach, when discovered, is sufficiently fundamental. This is particularly true of the time charter[48] though, in the case of the voyage charter, if the breach is not apparent before the vessel sails, for all practical purposes the charterer may have little opportunity to discover it

[43]The Kamsar Voyager, [2002] 2 Lloyd's Rep. 57.
[44]The spare part was wrongly delivered by the suppliers although the shipowner sent the right engine description.
[45][1967] 2 Lloyd's Rep 224
[46] Ibid P.241
[47]*The Democritos*[1975] 1 Lloyd's Rep 386 at p 397.
[48]*The Democritos*[1975] 1 Lloyd's Rep 386 at p 397.

before the vessel arrives at its destination and performance of the contract is complete.

Consequently, it can be said that the test to see whether unseaworthiness frustrates the contract of carriage or not is: if unseaworthiness is so severe that it cannot be remedied with reasonable time, and as a result it goes to the root of the contract depriving the other party substantially from the whole benefit which was the reason for the contract of carriage, e.g. carrying the goods to their destination, then the charterer/cargo -owner has the right to terminate the contract.

Usually the obligation to provide a seaworthy ship is referred to as the 'warranty of seaworthiness'[49]However, the obligation to provide a seaworthy vessel is neither a condition, breach of which will allow the aggrieved party to cancel the contract if he chooses to do so else just claim damages, nor a warranty the breach of which will allow the aggrieved the right to claim damages only. The obligation is classified to fall somewhere between the above two and can be called an in nominate or an intermediate obligation. Therefore, the effect of the breach of such obligation will vary depending on the severity of the breach, the time it takes to rectify it and the type of contract. Involved[50]. The use of the word "warranty" by the courts and the scholars to describe the obligation of seaworthiness in the context of Carriage of Goods by Sea is misleading, as it confuses it with "warranty" as a term whose breach will give the aggrieved party the right in damages. However, the use of the word "warranty" is meant to make reference to the promise by the carrier that the vessel will be seaworthy at the relevant time.

1.7 Conclusion

It is established that Seaworthiness is a prerequisite obligation in carriage of goods by sea. However, it is found that when this obligation is breached the description of the obligation as warranty or condition has caused lack of legal certainty resulting to divergent decisions leaving claimant to be wary of whether their claim will succeed as a condition entitling them to repudiate the contract no

[49]Steel v. State Line Steamship Co, (1877) 3 App. Cas. 72. Lord Blackburn at p. 86 stated: "That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a
"warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit".

[50]ongkong Fir Shipping Company, Ltd. v. Kawasaki Kisen Kaisha, Ltd., (The Hongkong Fir), [1961] 2 Lloyd's Rep. 478.
Diplock L.J Stated that the obligation of Seaworthiness "can be broken by the presence of trivial defects easily and rapidly
remediable as well as by defects which must inevitably result in a total loss of the vessel." At p.494

matter how trivial it is or as warranty giving them only the right to claim for damages and not to repudiate the contract.

Therefore, it is recommended that seaworthiness be addressed as an in nominate term since the effect of the breach of the obligation will vary depending on the severity of the breach, the time it takes to rectify it and the type of contract involved and a test must be established in order to assess the rights of the cargo-owner in a case where the obligations are breached. Also Section 40 of the marine insurance act which addressees the obligation as "Warranty of seaworthiness" be deleted and replace with the term "Obligation of Seaworthiness".