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# THE OWNER, THE MASTER AND THE BUSINESS OF RISK

## Issues for a new approach to the contract of employment

**Simon Daniels**

### **Introduction**

In this paper we examine the evolution of risk management for the carriage of goods by sea, and the evolution of the Master's rôle as agent of the shipowner. Seen through the medium of historical analysis, as the foundation for the position in law today, we can draw conclusions on the influence which normative ethics has had on the globalisation of maritime trade. This can play a fundamental part in devising a solution to the problem of just how we can identify the key factors which must be addressed, in the incorporation of risk protection for both parties in the Master's contract of employment. Following the Conclusions in the Author's PhD thesis, *The Criminalisation of the Ship's Master. A new approach for the new Millennium*, this is the first part of a task to analyse the key issues which must define and mould a new approach to the contractual relationship between the Master and the Owner.

### **Pioneers: The Nineteenth Century**

Scholte has got a problem. His definition of globalisation specifically embraces its understanding as the spread of transplanetary connections between people<sup>1</sup>. So far so good; but in the very next paragraph he says that the acceleration and growth of these connections have mainly occurred over the last 50 years. His problem lies in the historical evidence which places those connections not just in historical context but also in terms of a political commitment, responding to a social demand. In very real terms, maritime trade connected producers to consumers on trade routes around the world,

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<sup>1</sup> Scholte, J. A. 2005 (2nd ed), *Globalization: A Critical Introduction*, Macmillan, New York p 424.

which, consequently, developed markets, not just with regional but with global horizons<sup>2</sup>; and it was the nineteenth Century which saw the real acceleration and growth – pre-dating Scholte’s timeframe by more than a century<sup>3</sup>.

This can be illustrated perfectly by the development of maritime business. British merchant venturers in the nineteenth Century had learned the art of international trade during the Napoleonic wars, which had conveniently disabled foreign competition at a time when demand vastly outstripped supply to Continental markets, when the Royal Navy was busy enforcing blockades to keep Napoleon at bay. With victory at Waterloo in 1815, though, that would change and Continental customers gradually developed their own industries, reducing the demand for British goods and putting a lot of British workers out of a job - a dangerous problem in a post-war climate in which there were large numbers of unemployed soldiers and sailors. By the early years of the 1820s, the country was in heavy debt, with high prices and a depreciated currency. What is more, high taxation - the promise that income tax would only be a temporary, war-time measure proved to be hollow - was fuelling political unrest, which the Government predicted would escalate with the concurrent worry of overpopulation in large towns throughout the Kingdom. So, in 1824, the Government announced that it would give grants to aid emigration, which prompted thousands of people to make new lives for themselves in the New World and other colonies in the British Empire, where they would produce raw materials that would be carried by sea to British factories and then distributed, again by sea, to market places around the world.

Such an incentive offered all sorts of opportunities for maritime commerce and it is an exercise in pure logic to explain the rise of the great British merchant shipping companies from this time. At the core of their business lay the same analysis that is made in business today, for the principles are all but unchanged: the analysis of each of the possible alternative outcomes of the business venture, to determine that essential balance of opportunity – the chance to earn a positive return on capital - against the risk that the net assets will be outweighed by the net liabilities. Perhaps the only difference is that, today, we have a name for this analysis: commercial risk, which is managed by a number of treatment options, of which the principle one for us in this paper is the treatment by reliance upon

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<sup>2</sup> Burton, B and M Goldsby, 2005, The Golden Rule and Business Ethics: An Examination, *Journal of Business Ethics* 56 p 371.

<sup>3</sup> Although the origins of transcontinental trade in the modern sense can be traced back at least to the Anglo-Dutch struggle for supremacy in the East Indies trade in the Middle Ages.

the Master, which was a necessity in the era before instant global communications, and is a necessity today in the era of the ISM Code<sup>4</sup> and the limitation rules on the bill of lading.

It is, perhaps, stating the obvious, that a shipping company in the nineteenth Century had to rely on the confidence reposed by traders in the business of the port in which it was situated. Naturally, a port's ability to promote such risk development depended on the transport infrastructure – trade from a port can only prosper if you can get your imports out of the dock and your exports into it. On this basis, Aberdeen must have been capable of supporting a reasonably encouraging level of maritime trade in 1825 as there were no less than 138 carriers serving the city<sup>5</sup>. The evidence therefore leads to the satisfying corroboration of Cope Cornford's assertion that, as a seaport, Aberdeen had established itself as the foundation upon which local industry and commerce could thrive, depending, as it does, on the import of raw materials and the export of finished products, and, of course, the emigrants whose passages were encouraged by Government policy<sup>6</sup>.

In 1825, a young man began business in Aberdeen as part trader, part shipowner. Mr George Thompson, born on the 23<sup>rd</sup> June 1804, was then 21 years of age, and sent an open letter to local businesses in much the same way as an enterprising young businessman might do today:

I beg leave to acquaint you that I have commenced business as a Commission Agent, Ship and Insurance Broker, and having been bred in the mercantile line with a general acquaintance of people in business, I flatter myself I shall be able to afford satisfaction to those who may employ me.

I respectfully solicit your patronage with the assurance that my utmost endeavours shall always be used to execute what I may be entrusted with to the best advantage. I am, with respect,

Your obedient Servant,

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<sup>4</sup> International Management Code for the Safe Operation of Ships and for Pollution Prevention as adopted by the Assembly, as may be amended (last in 2010).

<sup>5</sup> Anon, 1825, A Directory for the City of Aberdeen and its vicinity, 1825-1826, pub privately by Messrs Gordon, Clark, Stephenson, Spark, Wyllie, Aberdeen.

<sup>6</sup> Cope Cornford, L, 1925, The Sea Carriers 1825-1925, The Aberdeen Line, London.

## GEO. THOMPSON<sup>7</sup>.

The investment risk at the time was much enhanced by recent expansion in manufacturing and associated trade in the region, which had created a demand for the raw commodity of timber – lots of it – and Thompson identified a real opportunity, taking advantage of the endless supplies of timber from Canada, where - by serendipity - endless streams of Scotsmen wanted to settle, thus making profitable voyages each way. With insufficient capital to finance the marine adventures himself, Thompson persuaded a number of people to pool the investment risk and accordingly share in the profits – the building blocks of management in a risk-prone society<sup>8</sup>.

There is a fact about business, that Risk and Reward are very subjective<sup>9</sup>. Their perception – even definition – will vary from business to business – and from individual to individual. The reason for this is that the values gauged in Risk and Reward depend upon the individual or business, and each has different dynamics with their own opportunities and tensions. For the businessperson, risk management is the absolute key to the justification of involvement in the firm, with the objective of reducing to an acceptable level the different risks related to the tasks which have to be managed within that firm.

As in partnerships subsisting today, so too, in 1825, each partner in the business had unlimited personal liability for all the debts of the business, so their personal assets were put at risk<sup>10</sup>. How convenient, therefore, for the risk management function of Thompson's new Aberdeen Line to be able to repose confidence in the Master of the vessel in order to bring that risk within a tolerance that made it worthwhile<sup>11</sup>; and to cement their confidence, the individual in whom they were placing their trust had been accredited by the Flag State, whose competency it would only be for the Flag State to withdraw upon investigation. By the same token, the Master's professional obligations had matured into two very clear strands: his Flag State

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<sup>7</sup> Ibid.

<sup>8</sup> Hudson, B, 2003, *Justice in the Risk Society*, Sage, London, p76.

<sup>9</sup> For a deeper understanding of the mental functions, see Levy, D and P Glimcher, 2011, *Comparing Apples and Oranges: Using Reward-Specific and Reward-General Subjective Value Representation in the Brain*, *The Journal of Neuroscience*, October 12, 2011, Society for Neuroscience, Washington DC.

<sup>10</sup> Charles Dickens was an intimate witness to nineteenth-century justice on debt, by which a debtor who was unable to settle his liabilities from his personal assets could be sentenced to the debtors' prison – and there he would stay until his debts were paid off.

<sup>11</sup> Bearing in mind that Thompson did not transfer risk to an insurer, this was an essential risk-treatment option.

responsibilities on the one hand, in which he was regulated and controlled on pain of criminal accountability, and on the other, his contractual duties, which would stand heavily against him if he broke his standard of duty to the Owners.

The core of this relationship was founded upon that most worrying of factors in risk management, which arises when the risk passes out of the managers' control: when once a ship was out of sight, Thompson and his partners had no choice but to repose their faith in the Master, not just to bring her safely to her port of discharge but also to secure a profitable return voyage. In this case he negotiated and bound the company in deals, far removed from the company's own control, buying timber, perhaps furs and wheat, on behalf of Thompson and his partners. It was, of course, the financial risk which was uppermost in their minds and we shall see how this had a crucial effect on the development of the law of Agency.

Initially, the investment risk involved only modest capital funding, as the business started trading by chartering little brigs, with crews numbering no more than 16, carrying emigrants to Quebec and returning with timber, which Thompson then traded as part of his core activity. As the business grew, that core activity would become the vessel operation itself, as they acquired the cash and the confidence to buy the ships with which they traded. A graphic example of how the principle works can be seen in a study of Glencore, whose core activity was in commodities trading but who expanded their operations to own the ships they need to carry those commodities, with a fleet of 203 ships as of the end of 2010, including 176 chartered vessels<sup>12</sup>.

Rapid expansion of the business saw the Aberdeen Line trading to the Mediterranean and Baltic and, as the size of the sailing ships increased, they ventured to South Africa, South America and the Far East. In 1842 one of Thompson's ships undertook an emigrant charter to New Zealand, carrying emigrants who, in the early years, depended upon supplies brought by sea for their survival, and thus increased the demand for tonnage. At this time his ship *Anemone* visited Melbourne, and by 1846 his ships had become established in the Australian trade. Initially this was to Sydney, but with the discovery of gold at Ballarat, the ships also traded to Melbourne. With the galloping rate of expansion which followed in the wake of the incredible Victorian work ethic, in a very short time George Thompson had established a foundation of strength for the Aberdeen Line, operating the liner service that made their fortune, running from London to Melbourne, Australia with

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<sup>12</sup> See <http://www.bloomberg.com/news/2013-03-05/glencore-profit-on-coal-arbitrage-hurt-by-stagnant-ship-rates.html>.

passengers and general cargo, thence to China with coal from New South Wales, where they would load tea for return to London. This same picture, of course, illustrates the globalisation of commercial risk management, a response by the risk-takers which assisted the industrial revolution that modern society had embraced, altering the social organisation but demanding some checks and balances – which lay at the heart of the risk society<sup>13</sup>.

So what was the Aberdeen Line's risk management response? They decided to focus on spending money on the ship rather than upon insurance premiums – in other words, they chose to treat the risk rather than transfer it. And the ships were beautifully built, well-found and excellently equipped - so they had to be, for an uninsured loss would have meant ruin to an Owner, and an unincorporated Owner at that, who could not recover compensation before his creditors pressed too hardly upon him – the underlying threat to a commercial risk that a debtor will be unable to pay its debts because of business events. In this respect their Masters had a special burden to meet and, therefore their personal professional abilities were essential to their employment – key features describing the landscape of what would become the Master's standard of duty in his contractual relationship with his employer. In Cope Cornford's words<sup>14</sup>,

Masters, skilled and courageous seamen, and shrewd men of affairs, served the line continuously, so that for many years their names recur in command of new vessels. They seldom lost a ship, and the speed of their passages standing high in the annals of the intense rivalry of the time.

### **The Solution to their Problems? The Master as Agent**

Thompson was aware, of course, that, while this era of deep sea maritime trade was truly blooming, they must never lose sight of the imperative that the investors be persuaded that their money was in safe hands – or at least, as safe as possible under the circumstances of all the risks that shadowed the opportunities for profit. With no established communication, and few trustworthy businessmen in the far-flung loading ports where cargoes had to be negotiated, the venturers had to place their trust in somebody to protect their interests, and the Master was the most

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<sup>13</sup> Giddens, A, 1999, Risk and Responsibility, Modern Law Review 1999 p3, The Modern Law Review, London.

<sup>14</sup> Cope Cornford, Op Cit.

reliable man on the spot. If his ship was arrested he had to secure her release. If supplies ran out or gear was lost or broken, he had to arrange for their replacement, and raise the necessary funds if need be<sup>15</sup>. Slowly, but with undeniable logic, the Master's contractual relationship was developing into partner, employee and agent.

This was a critical object-lesson in the evolution of the relationship between the Master and the Owners, which illustrates extremely well the principles which define the modern law of Agency. While there seem to be as many examples of an agent in maritime trades as there are tradespeople, the concept can be described simply as the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of third parties by the making of contracts or the disposition of property. The ancient case of *Tweddle v Atkinson*<sup>16</sup> was not a marine action but, nevertheless demonstrates the issue of Privity extremely well. The Claimant (known before 1999 as the Plaintiff) was the son of the late John Tweddle, who had arranged with the equally-late William Guy that a marriage portion would be given to the Claimant as part of the marriage arrangement. Although he was the individual who was to be the beneficiary under the contractual arrangement, he was neither the offeror nor the offeree. The Court delivered the clear general principle that parties who have not personally closed the contract do not derive any rights from that agreement, nor are they subject to any burdens imposed by it.

The birth of the law of Agency was essential in order to cure what would otherwise have been a fatal problem for contracts in maritime commerce; after all, it is one of the corner-stones of English Law that the only parties who can sue on a contract are those who have made valuable commitments to each other in the bargain<sup>17</sup>. The commercial logic was articulated by Blackburn J in *Ireland v Livingston*<sup>18</sup>, in describing the process by which cargo is to be delivered by the seller to the buyer (more properly described for the purpose of this exercise as the consignee, because the obligation for the carriage of the goods must be discharged by the carrier to the person entitled to receive them). Once the contract of sale is agreed,

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<sup>15</sup> See National Archive cataloguing system: HCA 13/78, 24 Oct 1676.

<sup>16</sup> *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762.

<sup>17</sup> While the Contracts (Rights of Third Parties) Act 1999 alleviated some of the unfairness in the general rule, maritime commerce had synthesised a solution generations earlier, with precedent leading up to the Carriage of Goods by Sea Act 1924.

<sup>18</sup> *Ireland v Livingston* (1872) LR 5 395.

the seller raises an invoice to the consignee, containing the sale price, the premium for the cargo insurance and the freight, and the contractual fee for the carriage by sea which must be paid upon delivery at the port of discharge. Although the seller is the party who has closed the contract with the carrier, the benefit of the contract goes to the consignee. By the same token, when the ship duly discharges the cargo it is the consignee who will be accountable to the carrier for the cleared payment of the freight<sup>19</sup>, in accordance with the contract with the carrier; unless of course that cargo is not delivered, in which case the contractual obligation will not have been met to deliver the cargo and, so, the consideration under that contract, the freight, cannot prima facie be demanded against the consignee. If the non-delivery is in consequence of some breach of the contract for the carriage of goods for which the carrier is held liable, then the consignee will recover the value of the cargo from the carrier; if the carrier is not liable, then the consignee will call upon the cargo insurance policy which the seller had arranged on the consignee's behalf, and who passed on the premium in his invoice. In substance, therefore, Justice Blackburn explained, the consignee enjoys the same rights and obligations as if he had been the original contracting party with the carrier (and, indeed, the cargo insurer). By the same token, unless the seller expressly assumed some personal liability for the carrier (who could then choose whom to sue), the seller would not enjoy any such rights and obligations.

The effect of the concept is that the agent is an individual in whom his principal can place his trust and so will not get him into trouble; or, indeed, would get him out of trouble as quickly as he had got into it. If this concept is taken to the context of the Master-Owner relationship, for the shipowner, this individual known as the 'agent' logically had to be the same one in whom he had contractually placed his trust to bring the ship safely home: the Master. From the viewpoint of the Master, the critical feature is that, having closed a contract on behalf of the Owner, he is not then personally liable to the third party on that contract. Only if the Master had not identified or named the Owner as his principal could the third party bring a claim against him – and even that would be an uphill struggle, for the third party could very easily make enquiries with the Flag State register as to the correct title of the principal<sup>20</sup>.

## **The Evolution of Cutting-edge Maritime Trade**

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<sup>19</sup> Today more closely identified with the standard terms of a CIF contract (cost insurance freight).

<sup>20</sup> See *Knight Frank LLP v Aston Du Haney*: CA (Civ Div): 12 April 2011 (currently unreported).

As colonisation expanded in Australia, the business phase inevitably moved from introduction to growth. The increase in passenger and cargo receipts was accelerated still by the marketing opportunity presented by the demand, and the publicity surrounding Thompson's service which responded to that demand. Of course, it was at this stage that they saw the competition creeping in; and the competition increased with a demand for better ships – a necessary response of course, but which involved a cost issue – it was a question of meeting the priorities of the cargo traders – fast passages, with minimal transit times in the docks before the cargo was sold, giving the traders a profit that made their risk worthwhile.

As the competition embraced the opportunities presented by their cost-benefit analysis, so the shipowners had to accept the cost of meeting that competition which, inevitably, involved increases in acquisition costs for the ships themselves, that enabled them to keep ahead of the race, and those investment costs had to be exceeded by the profitability of the voyage for which the Master was ultimately responsible. The age of the clipper, and her Master, was dawning.

The nickname 'clipper' had first been applied to fast horses before it became synonymous with the racing merchant ships that had originated in the Upper Chesapeake Bay not so many years before, and these 'Baltimore Clippers' were now at their zenith. With the fore-and-aft sails of a schooner, they boasted topsails on the foremast that allowed hard-on-the-wind sailing, while the hull was sharp and streamlined, making the most of the sailpower aloft. It was these audacious privateers, handled with all the skill and courage of their experienced captains, that humiliated the Royal Navy; but the American topsail schooners could not help but catch the eye of every man of business in great waters, and bred a new generation of British merchant ships that shone in the twilight of the sailing era. It was not a matter of aesthetics, though, but economics; for the rapidly-developing sailing clipper was being funded by freight rates that were paid for the fastest runs that would provide rapid turn-over for the traders, who were buying and selling cargoes whose commodity prices fluctuated then, just as much as they do today. British yards had to compete with the bold American builders and Walter Hood, who built ships for George Thompson, built the *Phoenician* in 1847. Two years later Captain Sproat sailed her from London to Sydney in 90 days – 29 days faster than the average<sup>21</sup>.

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<sup>21</sup> In 1852 the *Walter Hood*, commanded again by Sproat, made it in 80 days. In 1868, on her maiden voyage, *Thermopylae* made it to Melbourne, pilot to pilot, in 60 days; a feat never broken for a sailing vessel.

But much bigger American clippers were leaving British competitors struggling in their wake with outdated ships, on the trade routes of Britain's own empire. The risk-opportunity analysis was being viewed sceptically by investors in British shipping, sending a shiver down the spine of many a shipping business; so it was that one evening in 1851 at an after-dinner speech, British shipbuilder Richard Green of London, famed for the record-breaking Blackwall frigates, threw down the gauntlet to the Americans in thrilling style:

We have heard a great deal tonight about the dismal prospects of British shipping, and we hear, too, from another quarter, a great deal about the British lion and the American eagle, and the way in which they are going to lie down together. Now I don't know anything about that, but this I do know, that we, the British shipowners, have at last sat down to play a fair and open game with the Americans, and, by Jove, we'll trump them!<sup>22</sup>

It proved to be a bitter contest between Britain and America on the high seas of the Orient that gave birth to the new, streamlined ocean greyhound, dubbed with the superlative 'extreme-clipper', the China Bird of the tea trade. Perhaps disappointingly for the sportsman, the American clippers had passed their zenith by the early 1850s and rapidly disappeared from the race to return from Foochow with the season's first - and most valuable - tea cargo. Once the speed advantage had been lost, the Americans had to settle for coming in second, which meant that they had to struggle that much harder in order to find whatever cargoes were being offered for their ships' profitable employment. It was such uncertainty that drove the large American ships out of the race. In 1856, a premium of £1 a ton on the freight rate was offered for the first tea ship to arrive in London docks, and the resultant profit made the investment risk in clippers worthwhile. The short era which followed proved to be the most thrilling and, for the risk-taker, one of the most profitable, in maritime history, as the names of Ariel, Fiery Cross, Thermopylae and Cutty Sark captured the imagination of the world's investors. The extreme clipper was built for the speed that would race to win the premium for the first tea of the season and, carrying incredible square-yardage of sail, her narrow, streamlined hull cut through the oriental seas at speeds that far out-stripped the steamers of the time (indeed, outstripping the economical speeds of bulk carriers today). She made a wet and miserable sea-boat when confronted with the westerlies of the North Atlantic, but she

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<sup>22</sup> Cope Cornford, *Op Cit.*

was the asset with which the traders secured the highest prices at the sales in London – and that counts for just about everything in maritime business<sup>23</sup>.

The Thermopylae was launched on the 19th August 1868, for Thompson's Aberdeen Line. Grossing 991 tons, she was designed for speed<sup>24</sup> rather than deadweight tonnage, and although she was expensive for a sailing ship, she needed no expensive engines, and a crew of 35 would man her safely. On her maiden voyage from London to Melbourne, under the command of Captain Kemball, she left Gravesend on the 7<sup>th</sup> November 1868 and arrived at Melbourne on the 9th January 1869, a voyage of 63 days, or 60 days pilot to pilot, which broke the record<sup>25</sup> and prompted this from the Melbourne press:

The splendid and almost unprecedentedly rapid passage made by the new clipper ship Thermopylae, from London to this port, has created more than ordinary interest in nautical and commercial circles... It seemed almost impossible, and certainly never entered into the calculations of the most sanguine, that a voyage to the antipodes could be accomplished by a sailing-ship in 59 days, the period taken by the Thermopylae to within sight of the Australian coast<sup>26</sup>.

It was very apparent that her competitors would have to invest in equally cost-effective tonnage in order to stay in the business; and so was born the Cutty Sark. Launched on the 22nd November 1869, Cutty Sark was built for John, or Jock, Willis<sup>27</sup>, a seasoned sailing ship master who had taken over his father's firm of shipowners in the port of London. His ambition was for Cutty Sark to be the fastest ship in the annual race to bring home the first of the new season's tea from China. On the 16th February 1870, Cutty Sark left

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<sup>23</sup> When the commander of the crack Royal Navy warship HMS Charybdis once encountered the Aberdeen Line's Thermopylae on the same course, he decided to race her. But Thermopylae was on her business; and as the clipper rapidly drew away, leaving the warship in her wake, the Charybdis's commander gallantly signalled: Good bye. You are too much for us. You are the finest model of a ship I ever saw. It does my heart good to look at you.

<sup>24</sup>In 1875 she logged her best day, covering 348 miles, averaging 15 knots, surging up to 17 or 18 knots.

<sup>25</sup> Clark, A, 1910, The Clipper Ship Era, GP Putnam's sons, New York.

<sup>26</sup> Anon, Melbourne Argus, 13 January 1869. Follow the tag via <http://www.nla.gov.au/argus-index>.

<sup>27</sup> Better known as 'White Hat Willis' because he always wore a white top hat. PR was an important part of business even then.

London on her maiden voyage bound for Shanghai, via the Cape of Good Hope, on her first voyage. Commanded by Captain George Moodie, she reached Shanghai on the 2nd June, and sailed with approximately 1,450 tons of tea on the 25th June, arriving back in London on the 13th October 1870. Indeed, for all the partisan arguments which rage, even today, nobody has been able to conclude definitively whether Cutty Sark or Thermopylae was the swifter ship<sup>28</sup> – and such things served to escalate profit yields by the shipowners, even though the construction and development of merchant ships was still very much carried out by rule of thumb. While the Master was relied upon to bring the ship safely to her discharge port, the naval architect was best served by the old rule of trial and error in design origins<sup>29</sup>:

Just as the Baltimore Clippers owed their model to the clever draughtsmanship of some dead and gone French naval architect whose work, seen in the beautiful lines of some old Republican privateer, was thus perpetuated by the knowing Americans, so on the opposite side of the world in Bombay Harbour, the hulk of a French frigate, renowned in her time for speed, gave her form to one of the fastest clippers the world has ever seen, and added a further testimonial to the skill of the old French designers.

The remarkable thing is that Thermopylae and Cutty Sark were built at a time when the sailing ship's life cycle was drawing to a close. At the time when George Thompson opened his business in Aberdeen, the General Steam Navigation Company had been incorporated in London for over a year<sup>30</sup>. The corporate investment in this high-risk business which depended on the emergent but embryonic technology of steam power demanded

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<sup>28</sup> Cutty Sark had her moment of triumph with the upstart tribe of steamships on the 25th July 1889, as the crack Pensinsular and Oriental express mail steamship Britannia was running between 14.5 and 16 knots. Robert Olivey, Second Officer on Britannia, was officer of the watch when he watched with amazement the lights of a sailing ship overhauling his vessel. He called the Master, Captain Hector, and entered in the ship's log with great amazement: Sailing ship overhauled and passed us! It was the Cutty Sark, running at a good 17 knots (From National Maritime Museum archives).

<sup>29</sup> Lubbock, B, 1914, *The China Clippers*, Brown, Son & Ferguson, Glasgow, p185.

<sup>30</sup> In their first prospectus to persuade investors, the directors stated: It having been considered by the most experienced individuals, many of whom are engaged in steam navigation; that the formation of a Company can alone bring it to the fullest state of perfection... also profitable to those engaged in it by establishing between the United Kingdom of Great Britain and such places as may be deemed advisable a certain expeditious intercourse for the conveyance of passengers, merchandise, etc. These conditions having induced several respectable individuals to form the General Steam Navigation Company for the purpose of trading with vessels navigated by *steam to those countries in the first instance which have been visited.... the Company have determined on raising a capital of £2,000,000 sterling to be divided in shares of £100 each.*

nothing short of a leap of faith by the shareholder who invested £2 million in the risk, a staggering investment in 1824 which would equate to £196 million today. Half a century later, the extreme clippers were still beating the steamers on speed – but technology was building more steamships, that were becoming more cost-effective to operate and, if they could reduce the steaming times, the balance of profitability would turn in favour of steam. The Suez Canal would be pivotal in that balance.

The Master has a special contractual relationship with the Owner at Common Law, arising out of their common interest in the profitability of the voyage, which could be relied upon to maintain the bond between them. It was the traders who commanded the real profit, of course, so when the market rates softened, the freight rates suffered. For example, in 1865 the Omar Pasha loaded 3,550 bales of wool for London; but the next year saw a drought, followed by poor organisation in bringing the wool to the dockside, which meant that the Queen of Nations loaded just 484 bales<sup>31</sup>. When the vessel was alongside in a distant port, hopelessly out of contact with the owners, it was the Master's judgment that the vessel had waited long enough when other cargoes were offering elsewhere for her profitable employment, or whether she would have to sail in time to meet the tea or wool sales in London – too late would mean warehousing costs and loss of profit on the cargo that would be held against the Master in future. Nobody would employ a Master who might cause them to suffer a loss.

Captain Robert Thomson commanded the tea clipper Scawfell, a strongly-built full-rigged with teak beams and oak planking, with a deadweight tonnage of some 500 tonnes that meant that she could carry a cargo of just over one million pounds of tea. Robert Thomson achieved one of the fastest ever voyages from China to England, leaving the Canton River on the 14th January 1861 and arriving off Point Lynas, bound for Liverpool, on the 11th April - 85 days pilot to pilot. He wrote to his wife from the Scawfell while docked at Shanghai in June 1863:

We have been getting on very slow with the loading, the price of tea being so high that the merchants cannot buy it; the Whinfell had to be sent to Foo-Chow eight days ago, they being unable to load us both here, there are none of the ships here getting away so early as expected and in consequence of there being so many ships here and the teas so high in price the freights have come down, we are now loading at £5 10/- instead of £6 10/- expected when I came here besides being longer in getting away we are more likely to

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<sup>31</sup> Lubbock, B, 1921, *the Colonial Clippers*, Brown, Son & Ferguson, Glasgow.

make a long passage down the China Sea, so that you need not expect me so soon as last year.

The Chauzee sails today he is not quite full but he will not wait any longer he is in such a hurry to get first home, the Crulnakyle Capt Morrison sailed yesterday, the Gunnivere and Glen-Aros will be next and probably after that your humble servant....

It is very apparent from this that the Master's rôle as agent in the financial success of the venture weighed very heavily on Captain Thomson's attention – and his anxiety to clear for passage home is reflected in the relief so graphically conveyed in his next letter home, ten days later:

The last of our cargo is now alongside and we sail about 11 o'clock. I am not sure of getting clear of the river today as the winds are right ahead outside, the South West Monsoon today blowing strong. Now I must say goodbye until you hear from me again from the Downs which I hope will not be more than four months<sup>32</sup>.

So how will we compare this with the function of Captain Thomson's successors, 150 years later? The Master today is expected to be a business manager, something which they had not envisaged in the heady days of their youth as they embarked on their maritime career in the era which intervened between the clipper ships and the modern tankers. Professor Gold touches upon this in his paper<sup>33</sup> in terms of the management of the ship's business today; but this does an injustice to the Victorian Master who had to do much the same thing. It is just that, in the intervening period, global communications and shifts in the pattern of asset investment had fostered a closer, parental relationship between the Master and the Owner. By contrast, Gold illustrates the contemporary situation by articulating many of the complaints of today's Master, with fatigue high on the list, having to navigate through heavy traffic, sometimes in bad weather, and having to make judgments on the safety of the ship in balance with the commercial demands of the shareholders. The consequence of the Master's failure under

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<sup>32</sup> Private collection of Captain Ian Thomson.

<sup>33</sup> Gold, Professor E, The Protection of Masters and Seafarers from Criminalization: Emerging Problems for the Shipping Industry, Centre for Maritime Law, University of Queensland, Brisbane Prepared for the 31st Annual Conference 'Navigating the Sea of Change' The Maritime Law Association of Australia and New Zealand Adelaide, South Australia 29 September–1 October 2004.

such conditions could lead to a charge of criminal negligence. How the Master defends such a charge may well depend on just what decisions the Master made as a result of balancing legal duties against commercial demands.

This issue of the battle between legal duty and commercial pressure is not an emerging problem; at the very most, it is a re-emerging problem, for the changes in ship management have forced the Master back to the position in which they found themselves in the environment of maritime commerce which characterised the Victorian era. Writing of that period, and of the extreme clippers of the China tea trade, Basil Lubbock revealed the evidence underpinning the Master's rôle in the business of shipping, with personal knowledge of his witnesses, conveying a graphic picture of the Master, who must be responsible for the ship's business, and who tends to carry out that business in good faith. He observed that there were very few successful Masters in the trade, most being either too cautious or too reckless; it was just a few Masters

whose endurance equalled their energy, whose daring was tempered by good judgment, whose business capabilities were on a par with their seamanship, and whose nerves were of cast iron<sup>34</sup>.

Such qualities would be highly regarded by Owners today, provided that the Owners would not face criminal accountability if those qualities led to a catastrophe for which the Master was held to blame in some Port State jurisdiction. After all, you can insure against the risk of compensation in a civil claim, but not against the risk of criminal punishment.

That said, the élite sailing ship Masters of the day understood the value of their services to the Owners. Often well-bred and well-educated, they were in a position to negotiate contract terms which brought them remarkable rewards for a fast passage and made the risk management function profitable for both parties. A Master had a vested interest in securing a full hold of cargo and a healthy passenger manifest, for he was able to draw a percentage of the cargo and passenger receipts that were founded on his reputation; but he also ran the risk of losing his reputation on a slow passage which lost the race for the return trip. Accordingly, the successful Master was the one who conducted a risk-benefit analysis designed to maximise the commercial return, and mitigate the dangers if possible, and whose decision to carry on led to a profitable conclusion of the marine adventure. It is apparent, therefore, that the evolution of maritime

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<sup>34</sup> Lubbock, B, 1914, *The China Clippers*, Brown, Son & Ferguson Ltd, Glasgow, p106.

commerce was marked by the need for investors to repose their confidence in the Master, as a very sensible solution to the problem of an absence of communication and, therefore, management control over the entire voyage, once the vessel had sailed over the horizon. There is not a great deal of evidence about how the Master thought of this – save for the evidence of Captain Hilary Marquand (1825-1872) whose opinions, as revealed in his edited memoirs, were unrestrained – presumably thanks to the fact that they were not published until a century after his death. Writing of his appointment as Master, he glowed:

... let me appear to the world as really was a truly happy being at having attained to the summit of my ambition at so early an hour of my life. Proud of the preference shown to me over the many eager aspirants which were about. Proud with the feeling of competency, which until then I had thought buried in the recess of my own knowledge, but which was now publicly declared to the world by other tongues than mine, and stood as a halo of sunshine around me... It is no small charge, that of master of a ship trading round the world, with 'carte blanche' to act for the promotion of the owner's interest.<sup>35</sup>

Captain Marquand, however, held very firm views indeed about the commercial risks inherent in his appointment:

That man must be able to combine at once the essential qualities of merchant, and broker, to that of ship master, and I feel no reluctance to add that no man in whatever situation he may be, is surrounded with a greater set of disguised enemies in the mercantile world...<sup>36</sup>

The cause of such bitter commentary can be found, not in his memoirs but in the case of *Marquand v Banner*<sup>37</sup>. Captain Marquand had been Master of the sailing ship *Secret*, for which a voyage charter had been fixed in 1854 to Buenos Aires. The vessel was loaded with general cargo, for which the Master duly signed bills of lading. Then on the 23<sup>rd</sup> January 1855 the

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<sup>35</sup> Marquand, E (ed), 1996, *Memoirs of a Victorian Master Mariner*, Merton Priory Press, Cardiff, p230.

<sup>36</sup> *Ibid* p231.

<sup>37</sup> *Marquand v Banner* (1856) QB *The Jurist* Aug 2 1856 708.

charterers suspended payment and on the 19<sup>th</sup> February executed a general assignment of their property for the benefit of their creditors. Anxious to ensure that the freight payable by the consignees did not end up in the wrong hands, the Owners, via their agents, gave notice to the various shippers that the freight should not be paid to the charterers but to the ship-owners. The charterers' trustees, however, gave the Owners notice that they wanted the freights paid to them. When the ship arrived in Buenos Aires on the 13th March, Captain Marquand managed to collect a modest amount of the freight due, but the Owners were still badly at a loss for the charterers' default under the charterparty. The Owners were duly sued for the recovery of the freight which Captain Marquand had collected as their agent. In his judgment, Wightman, J held that the wording of the charterparty made the charterers the parties entitled to the freight. Much to his disgust, Captain Marquand had believed himself acting as agent to the Owners, when he tried to mitigate the financial loss caused by ruthless, very likely dishonest, charterers, only to have to deliver to them in the end, what money he could recover. Given this, though, the close commercial association between the Master and the Owner is clear and obvious.

Basil Lubbock had much to say about the Master of the clipper ships<sup>38</sup>:

No man had more to do with the reputation of a ship than her captain. In the China trade daring, enterprise, and endurance were the sine qua non of a successful skipper. . . . There were many safe, steady goers, but these were not the passage makers. It required dash and steadiness, daring and prudence to make a crack racing skipper, and these are not attributes of character which are often found in conjunction. . . . However there were a few men, who held the necessary qualities of a tea-ship commander, whose endurance equalled their energy, whose daring was tempered by a good judgment, whose business capabilities were on a par with their seamanship, and whose nerves were of cast iron. The clippers, like thoroughbred horses, responded to the master's touch like things of life; Robinson [of the *Sir Lancelot*], for instance, was said to be worth an extra half-knot on any ship.

The strain of a three months' race was tremendous. Some captains only went below to change their clothes or take a bath; others used the settee in the chart room or even a deck-chair as a bed. This was

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<sup>38</sup> Lubbock, B, Op Cit.

the habit of old Captain Robertson of the Cairngorm, who during the homeward run never turned in but dozed with one eye open in a deck-chair on the poop.

Many a man broke down after a few years of it, but the giants, such as Keay [of Ariel] or Robinson, went on and on without a rest, and, still more wonderful, with hardly a serious accident<sup>39</sup>.

In fairness, the evidence is not all so positive. In December 1877, the year in which Cutty Sark lifted her last cargo of China tea, she departed London bound for Sydney and then sailed on to Shanghai, where she arrived in April 1878. But her Master, Captain Tiptaft, could not consign a tea cargo – the steamers had taken all the trade. Unable to find a tea cargo, Captain Tiptaft died at Shanghai in October 1878. His First Officer, James Wallace, was promoted to take command of the ship. With tea no longer available, the ship started to take different cargoes of various qualities around the world. In 1880, the ship's First Mate, Sidney Smith, by all accounts a bully and disliked by the crew, killed (with considerable provocation) seaman John Francis. Smith was confined to quarters but, at Anjer, Captain Wallace connived at his escape. The crew, incensed, downed tools and refused to work, leaving just six apprentices and four tradesmen to sail the ship. On the 5th September the ship was becalmed in the Java Sea for three days. With the guilt, calm, steaming heat and realisation that his career was finished, Wallace jumped overboard. Although a rescue attempt was mounted, the only sign of Wallace was the number of sharks swimming furiously about<sup>40</sup>.

To make matters worse, on arrival at Anjer, William Bruce was transferred from the *Hallowe'en* and appointed Master of Cutty Sark. By all accounts, Bruce was an incompetent, drunken master who connived with the Mate to remove the expensive Australian crew members, pocketing their wages. He was also negligent, failing to pick up enough provisions, resulting in the crew becoming half starved. On arrival at New York in April 1882, it appears that an inquiry was held into the conduct of the Master and the First

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<sup>39</sup> Lubbock had equally high praise for the crews: *The crews of the tea clippers would make a modern shipmaster's mouth water. Britishers to a man, they were prime seamen and entered into the racing with all the zest of thorough sportsmen. Many are the stories of their keenness on the homeward run....In the great race of 1866, the crews of the Serica and Fiery Cross bet a month's pay against each other that they would be first home to London. Cope Cornford reflected on the risk of such voyages in the early years: These were real seamen, inured to hard fare, wet, cold, want of sleep, incessant toil, imminent danger, and holding a constant loyalty to their employer.*

<sup>40</sup> From the archives of the National Maritime Museum. See [www.rmg.co.uk/](http://www.rmg.co.uk/)

Mate, resulting in them being suspended from service, and the crew was given a discharge. As a result, Captain F. Moore and his Mate were transferred from the Blackadder to Cutty Sark. In stark contrast to her recent history, she then embarked upon the most successful period of her working life<sup>41</sup>.

In this way, the full picture of the ship's company in the clipper ship era is coming into perspective. Before the advent of the industrial age, when it was almost assumed – without question - that a ship's crew would come on board all hopelessly drunk, and would have to be kicked and drenched with cold water before they would stir themselves to work the vessel out of port, whole days would pass before anything like discipline could be established by the Master. The financial risk in clipper operations demanded more skill and commitment in the job and, once, they had signed Articles and the voyage was under way, the maintenance of order and discipline was essential if the premium on the freight rate was to be won. And there was only one person who had the absolute discretion under the law which enabled him to maintain order and discipline as he saw fit for the safe navigation of the vessel – the Master. That discretion was acknowledged by the Owners when they appointed him, for he had the power to act as their agent in disciplining, even dismissing, members of the crew who were in breach of the crew agreement. Naturally, far away at sea, or in some distant port without instant communication, the Owners had no influence over the shipboard management decisions that had to be made, and so they had to repose their trust in the Master to make those decisions which, for the benefit of the marine adventure, resulted in some alteration in their relationship with a third party (in this case, a seaman dismissed from the voyage) without any personal act or even knowledge of the facts on their part. It was of no consequence that the parties did not define this arrangement as an agency in express terms – and it still is not<sup>42</sup>.

The only difference with the Master's powers today is that the Master has the authority of SOLAS behind him, which is implemented under the UK flag by the Merchant Shipping (Safety of Navigation) (Amendment) Regulations 2011 (2011 No 2978):

The owner, the charterer, the company operating the ship (as defined) or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the

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<sup>41</sup> From the archives of the National Maritime Museum. See [www.rmg.co.uk/](http://www.rmg.co.uk/)

<sup>42</sup> *Garnac Grain Co. Inc. v HMF Faure & Fairclough Ltd* [1976] 2 All ER 353: an Agency will follow if the parties have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it.

master's professional judgement, is necessary for safety of life at sea and protection of the marine environment.

The ISM Code obliges the Company under Para 5.1 to define and document the Master's responsibility in the exercise of his professional judgment but 5.2 equally obliges the Company to ensure that the Master's authority is emphasised, and so a great deal of reliance is placed upon the Master's discretion. This applies to the maintenance of order and discipline as an element of shipboard management which is as crucial to the safety of the vessel as anything else; and when the financial risk increases, so the Master must ensure that the management function rises to meet that risk, essentially by addressing the standard of duty in fulfilling contractual obligations, whether that contract be between the seafarer and the Owner, or the Master and the Owner. The development of the emergent steamship technology illustrates the point: the increasing shareholding value and equivalent investment risk on the decision makers demanded a new type of crewman with which the Master could discharge his obligations: now the seafarer had to be sober and efficient when he came on board, and able to perform the much higher standards of work required in a steamship. For officers, examinations became much more demanding, because the larger ships brought with them greater responsibilities and technical knowledge, just as they also meant better conditions. The profession of seafarer had come of age and it is axiomatic that the demands cut both ways, so that the 'new' seafarer must be clothed with rights - including fair treatment - which reflect the level of their obligations. The revolutionary but highly expensive leap by businesspeople into steamship technology had the (possibly unexpected) effect of changing forever the life of the seaman, for the standard of duty now demanded of seafarers as a result of the increased risk by the investors had made ancient history of the recent past. With such demands upon the seafarer's employment, it is unsurprising that the provision for a written crew agreement, evidencing the detail of rights and obligations, required by the Merchant Shipping Act 1835 was strongly reinforced by the 1854 Act, and consolidated in the 1854 Act; and so well was it drafted, that it can be well-identified in the current legislation, under Section 25 of the Merchant Shipping Act 1995. The Master, therefore, is expected to carry out his shipboard management function in the maintenance of order and discipline with the discretion allowed – demanded – but he is not expected to be a lawyer; for assistance, he has the guidance of the Merchant Navy Code of Conduct. In making his decision, he is accountable only to the English law of contract; the company cannot tell him what to do. But there is some scope

for the company to avoid legal repercussions, however, in that it, and not the Master, will decide the seaman's fate under their permanent contract, so that any claim for unfair dismissal will not follow directly as a result of the decision of the Master<sup>43</sup>.

## **The End of the Era**

In many ways, the remarkable thing is how the clipper ships emerging towards the end of the era got on to the companies' balance sheets at all, because ships are not short-term investments, and the advantages of sail had been so seriously compromised by progress in steamship technology which offered cargo traders faster passages and the larger deadweight tonnage of iron and steel hulls which reduced the freight cost per ton-mile. In 1865, Alfred Holt, a mighty pioneer of steamship operations from Liverpool under the flag of the Blue Funnel Line, accepted delivery of three iron screw steamships with compound engines – Ajax, Achilles and Agamemnon, 2270 GRT, for their Far East liner service to China<sup>44</sup>. These vessels could steam from London to Mauritius – a distance of 8,500 miles – without coaling, and they made the passage from London to Foochow in 58 days. Under the command of Captain Isaac Middleton, the first of the trio, Agamemnon, sailed on her maiden voyage from Liverpool on the 19<sup>th</sup> April 1865 bound for Shanghai with calls at Mauritius, Penang, Singapore and Hong Kong. The total passage time was 77 days. It must be remembered that these ships pre-dated the Thermopylae and Cutty Sark, and just pre-dated the greatest tea race of all, the race of 1866 when Ariel and Taeping left Fuzhou together and arrived home on the other side of the globe still together, Ariel's winning time being seven thousandths of one per cent faster than her rival's. Truth to tell, the steamers were still expensive ships, with consequent impacts on the profit margins but, if they could sail by a short cut, they might have the edge. For all the glorious rewards of the bonus on the freight rate for the first tea home, the clipper owners must have considered this as they watched the Suez Canal being built.

In fact, the Canal was opened in 1869, the year of Cutty Sark's launch. Its advantages today are as valid as they were then, and cannot be described better than in a passage from the modern Canal Authority's website:

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<sup>43</sup> S199(1) Employment Rights Act 1996 states that Sections 1 to 7, Part II and sections 86 to 91 do not apply to a person employed as a seaman in a ship registered in the United Kingdom under a crew agreement the provisions and form of which are of a kind approved by the Secretary of State.

<sup>44</sup> <http://www.red-duster.co.uk/BLUEFUN5.htm>

The geographical position of the Suez Canal makes it the shortest route between East and West as compared with the Cape of Good Hope. The Canal route achieves saving in distance between the ports north and south of the Canal, the matter that is translated into other saving in time, fuel consumption and ship operating costs.<sup>45</sup>

In 1869, Alfred Holt's steamship *Agamemnon* lifted a cargo of 2,516,000 pounds of tea at Hankow – a record deadweight tonnage, for a total charge of £28,087 – a record freight rate with which the clippers could not compete and, with the steamship's voyage time expedited through the Suez Canal, an effective response strategy could not be found to carry on in the high-value cargo trades for which the clipper ships had been built. In terms of the management of maritime business, the clipper ship era had reached the Decline phase, almost without realising maturity. The end of the life-cycle was in sight, with profit levels falling and pressures of competition from steamships preventing any resurgence in the maturity stage; most serious of all for the prospects of investment growth in sailing fleets, the Limited Liability Act 1855 enabled investors to limit their liability in the event of the company's insolvency to the amount of the share value which they had purchased, so they could comfortably take a larger investment risk, knowing that their personal assets would be protected<sup>46</sup>.

In 1881 *Thermopylae* made her last voyage from China<sup>47</sup>. Prophetically, in the same year the company launched their first steam ship, the *Aberdeen*, the first ocean-going steamship to be fitted with triple expansion engines following the evolution of the modern steamer with steel instead of iron hulls and, later, even by quadruple expansion engines. The *Aberdeen* Line evolved with it and the extreme clippers rapidly became redundant. Having struggled to justify her place in the company's balance sheet, *Thermopylae* was finally sold in 1890 for £5,000 to a trading company in British Columbia; *Cutty Sark* followed the same fate shortly after when she was sold to a Portuguese firm for £2,100 after her last voyage home from Brisbane in 1895.

In 1905, ten years after the *Aberdeen* Line lost its leader and founder, with the great man's death, the need for bigger ships than the line could afford was now very apparent. In this year George Thompson & Co was

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<sup>45</sup> <http://www.suezcanal.gov.eg/>

<sup>46</sup> Mayson, S, et al, 2005, *Mayson, French & Ryan on Company Law*, Oxford University Press, Oxford.

<sup>47</sup> Haws, D, 1989, *The Aberdeen and Aberdeen and Commonwealth Lines of George Thompson*, Starling Press, Risca.

incorporated into a public company with 67 per cent of the management-controlling shares held by Ismay's Oceanic Steam Navigation Company (better known as the White Star Line) and Shaw, Savill & Albion, both of which had similar trading footprints running to Australia and New Zealand<sup>48</sup>. In this way, the old business was carried forward into the modern age of investment risk, with the assets owned by shareholders who could trade their shares on the open market, and whose decisions could be made according to all the correct information<sup>49</sup>.

## **Ethics and the Modern Law**

The normative ethics which underpinned the relationship between the company and its shareholders were driven by the Golden Rule, whose definition today was surely inspired by the New Testament:

So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets<sup>50</sup>.

As the business operation now was truly global, the globalisation of normative ethics must logically follow. But the principle remained the same as it would to the original partners in Thompson's business, establishing a single principle against which we judge all actions; it was just on a much larger scale<sup>51</sup>. Given the globalisation of the risk, then, what would be different in the approach to the rights of cargo owners whose risk had to be addressed in the carriage of goods by sea? It is merely that this had never been regulated on a global basis: not before the Hague Rules<sup>52</sup>, anyway. It was this which imposed the regulation of the Golden Rule by taking an

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<sup>48</sup> Ibid.

<sup>49</sup> In theory; the Aberdeen Line became one of those companies held within the grasp of Lord Kylsant, who controlled about 140 companies, owning probably in excess of £60 million. But when his Royal Mail Group crashed, it became apparent that what was stated in the investors' prospectus had to be dishonestly misleading, and Lord Kylsant went to prison for the dishonesty practiced on the shareholders. Whatever the merits of the prosecution and conviction under Section 84 Larceny Act 1861, it is undeniable that he had broken the Golden Rule of normative ethics: we should do to others what we would want others to do to us. See: *R v Kylsant* (Lord) [1932] 1KB 442.

<sup>50</sup> Matthew: 7.12 (New International Version 1984).

<sup>51</sup> Burton, B and M Goldsby, 2005, The Golden Rule and Business Ethics: An Examination, *Journal of Business Ethics* 56 p372.

<sup>52</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), and Protocol of Signature. (Brussels, 25 August 1924).

impartial perspective instead of the carrier's perspective, while not abandoning sympathy for either<sup>53</sup>. Through the Rules' application to the bill of lading, the Master becomes intimately involved in the management of the risk, once again.

Article III of the Hague-Visby Rules<sup>54</sup>, which superseded the Hague Rules, imposes responsibility on the carrier properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods carried. It is thus an essential provision in contracts for the carriage of goods by sea which are loaded in ports in states which have ratified the rules and implemented them in their domestic law. The bill of lading has four functions to perform, one of which is evidence of that contract between the shipper and the carrier and, in general, the Master will have express or implied actual authority to sign bills on behalf of the Owner as carrier in the capacity of their agent; and in this way makes the Owner liable as the disclosed principal<sup>55</sup>. By the logical extension of this principle, the Master must be entitled, as their agent, to enter remarks on the bill of lading as to the apparent order and condition of the goods.

This is where the case of the *David Agmashenebeli*<sup>56</sup> comes in, described by Benjamin Parker as a decision of "indisputable importance" for English maritime law, since it is the first judicial attempt to deal with the problems created by incorrectly claused bills of lading<sup>57</sup>.

In April 1995, 35,000 metric tonnes of urea was sold by Transmarine Limited to Agrosin Pte Limited. The goods specification was "white colour, free flowing, free from contamination, prilled form, treated against caking, free from harmful substances..." On the 10th April, Agrosin sold the urea to Grand Prestige Enterprises of Hong Kong and arranged to sub-charter the dry bulk carrier *David Agmashenebeli* from Baff Shipping. Baff had entered into a voyage charter with Meezan Shipping and Trading Inc who, in turn, had time-chartered the vessel from her owners, Georgian Shipping Company. Clause 8 of the charterparty provided that the charterers were "to load, stow and trim and discharge the cargo at their expense under the supervision and responsibility of the Captain, who is to sign, if required to

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<sup>53</sup> Burton, B and M Goldsby, *Op Cit* p374.

<sup>54</sup> The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968.

<sup>55</sup> For the general principle, see Wilson, J, 2008, *Carriage of Goods by Sea*, Pearson Education Ltd, Harlow p237.

<sup>56</sup> *The David Agmashenebeli (cargo owners) v The David Agmashenebeli (owners)* [2002] EWHC 104 (Comm), [2002] 2 All ER (Comm) 806, [2003] 1 Lloyd's Rep 92.

<sup>57</sup> *Lloyd's Maritime and Commercial Law Quarterly* [2003] L.M.C.L.Q. 201.

do so by charterers, bills of lading for cargo as presented, in conformity with Mates' or Tally Clarks' receipts.”

Three hours after loading began, the Master notified all parties that the cargo contained contaminants and was of a dirty colour. Despite protests by Agrosin's surveyor, the Mate's receipt was signed with the following wording: “Cargo discoloured also foreign materials e.g. plastic, rust, rubber, stone, black particles found in cargo.” The Master refused to sign Bills of Lading without the same wording.

The Master's refusal to sign clean Bills of Lading resulted in deadlock: Agrosin declined to pay the freight due under the sub-voyage charter with Baff; Baff withheld voyage charter freight from Meezan; Meezan withheld time charter hire due to the shipowners; the shipowners threatened to lien the cargo to secure their hire; and Agrosin could not obtain payment under the documentary credit opened by the ultimate buyers.

David Martin-Clark offers some guidance which assists in drawing a conclusion from the authorities, that the Master will exercise his own discretion in order to make a reasonable judgment – that of a reasonably competent and observant Master, not an expert cargo surveyor – as to whether the cargo appears to satisfy the description of its apparent order and condition in the bill of lading tendered for his signature. Of course, if he makes his decision without the expert opinion of a cargo surveyor, he runs the risk of making a negligent misstatement but if he honestly takes the view that the goods are not in apparent good order and condition, and that is a view that could properly be held by a reasonably observant Master, he is entitled to clause the bill of lading - even if not all Masters would necessarily agree with him. It is a matter for the Master's professional judgment<sup>58</sup>. But, whatever he does, it will be as agent for his disclosed principal, and the consequence of such events was the subject of comment in the 2012 case of *Breffka & Hehnke v Navire Shipping*, in which Simon, J determined the main issue on the nature of the representation made in the bills of lading concerning the order and condition of the cargo, holding that what occurred was not an “honest and reasonable non-expert view of the cargo as it appeared” but a deceitful calculation made on behalf of the owners by their authorised agent at the request of the shippers and to the prejudice of those who would rely on the contents of the bills of lading<sup>59</sup>. No stronger example

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<sup>58</sup> DLA Piper, 2002, Bulletin, developed by David Martin-Clark, see <http://archive.onlinedmc.co.uk/the 'david a'.htm>

<sup>59</sup> *Breffka & Hehnke GmbH & Co KG and Others v Navire Shipping Co Ltd and Others (The Saga Explorer)* [2012] EWHC 3124 (Comm).

could be wished for to demonstrate the application of the Golden Rule in normative ethics.

There are, though, limits to the extent of liability for which the Master can hold the Owner liable, in the course of taking those decisions which impact upon the management of the success of the marine adventure. We have seen that the Master retains absolute discretion in the navigation of the ship, for which the Merchant Shipping (Safety of Navigation) (Amendment) Regulations 2011<sup>60</sup> reflects the body of international law that upholds this globally, but that potentially carries with it accountability for the Master's actions and, if such actions are outside the Owner's control, then the relationship between them may become strained. In real terms, the Owner's vicarious liability would prima facie make them liable for the Master's negligence in this situation, against which shipowners have held the nautical fault defence in the Hague-Visby Rules in very high esteem indeed. The part which it plays in the context of maritime commerce can be difficult to reconcile, though for, while the Master and the Owner are both engaged in the maritime adventure to make a profit, their interests may diverge, with consequences on liability, and yet their relationship in law preserves their obligations. This can be illustrated very well in the case of the *Tasman Pioneer*<sup>61</sup>.

On the evening of the 1st May 2001, the *Tasman Pioneer*, a multi-purpose break bulk cargo carrier built in 1979, left Yokohama bound for Pusan in South Korea with a passage plan that allowed for a safe voyage but, by the following day, the Master was concerned that she was running late and therefore took the commercial decision to shorten the voyage time by some 40 minutes by taking the channel between the island of Biro Shima and the promontory of Kashiwa Shima. The purpose was very clear: it was in the interests of the Owner - his principal and his employer - to restore the time schedule to that envisaged at the time when they had calculated the profitability of the voyage. To this extent, the Master was adopting the very approach taken by the clipper ship Masters 140 years earlier but, to paraphrase the words of Basil Lubbock above, he lacked the skills which marked them out, for his daring was not tempered by good judgment. Having altered course he entered the channel at 02.50 on the 3<sup>rd</sup> May – but then, disastrously, the ship lost all images on her starboard radar. He apparently realised that he was now in a precarious position and made a command response to abort the passage through the channel. This

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<sup>60</sup> SI 2011 No 2978.

<sup>61</sup> *Tasman Orient Line CV v New Zealand China Clays Ltd and Others* [2010] 2 Ll R 13.

manoeuvre was not successful, though and the ship struck bottom off Biro Shima with such force that her speed was immediately slowed from 15 knots to some 6 or 7 knots.

Shortly afterwards the ship took a list to port with water discovered in the forward ballast tanks and cargo holds. The Master ordered the pumps activated but he did not alert the Japanese Coastguard, as he should have done, or seek other assistance. The ship then sailed at close to full speed for a further two hours, some 22 nautical miles, before anchoring in a sheltered bay. It was only then that the Master contacted the ship managers in Greece, without, however, specifying the cause of damage or its full extent.

The Court's evaluation of the evidence about the Master's good faith was damning. His initial explanation of the casualty had been that the ship had hit an unidentified floating object and the Court heard that he then schooled the crew to adopt this explanation in the inquiry conducted by the Japanese Coastguard, in the course of which the truth eventually emerged. Mr Justice Williams took the view that his (the Master's) initial decision to use the passage east of Biro Shima and his subsequent attempt to abort the transit, were navigational decisions which he had, indeed, taken in good faith on behalf of his principals - he was endeavouring to save time and keep to schedule in accordance with his contractual obligations to meet the ship managers' legitimate demands. At this point, he was held to be acting within his duties as agent, to pursue the best interests of his principal. Where he abandoned his good intentions lay in his actions after the grounding, held the Judge; in particular his failure to notify promptly the Coastguard and his managers of the casualty and the ship's position and condition; more seriously still, for its implications of dishonesty, in his fabrication of the story that the ship had hit an unidentified submerged object, which could not have been motivated by his paramount duty to the safety of the ship, crew and cargo. It is difficult to imagine how more boldly a Master could have trespassed upon the principle of the Golden Rule in normative ethics, abandoning, by his conduct, any mature, rational reflection of the treatment of the interests of the cargo owners – and of course of the shipowners, whose vessel was subsequently salvaged but was sold for scrap. The whole sum of his conduct, the judge held,

was intended to allow him to misrepresent and lie about the true circumstances of the casualty so as to absolve himself from blame and in particular to hide his reckless decision to transit the inside channel of Biro Shima Island in order to take a short cut route<sup>62</sup>...

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<sup>62</sup> Ibid, p19.

On this interpretation, the Master must have been acting on his own account. As regards the liability for damages to the cargo owner, Article IV (2) of the Hague-Visby Rules gave the shipowners the crucial nautical fault defence which they needed:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from... act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

Had the damage occurred when he was acting in the best interests of the Owner, he would have been performing as their agent and, thus, they would have been liable. It was apparent, however, that the damage had occurred after then, when he endeavoured to escape from Japanese waters to save himself from their Port State laws. As a result, the damage did not take place in the course of his agency on behalf of the Owner.

Intriguingly, the Hague-Visby Rules have been challenged in the form of the new Rotterdam Rules. Currently only two of the 24 signatories have ratified this Treaty<sup>63</sup> and so another 18 States must ratify, but it has been the subject of much discussion, nevertheless<sup>64</sup>. The principle of fault-based liability for loss of or damage to goods has been maintained but elimination of the nautical fault defence exposes the Owner to the full force of the principle of vicarious liability. This particularly mischievous device, invented to secure payment of the quantum of damages by a defendant who is more likely to be able to pay than an impecunious individual, has been described by Lord Millet in *Lister v Hesley Hall*<sup>65</sup> as a species of strict liability for evidence is unnecessary to establish culpability:

an employer who is not personally at fault is made legally answerable for the fault of his employee.

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<sup>63</sup> Spain and Togo (UNCITRAL last consulted 11 March 2013).

<sup>64</sup> The challenge confronting the global maritime community in the ratification of yet another body of statutory limitation rules is a recurrent theme which divides opinion on the new Rules. See Lloyd's List, 11 October 2011, Legal Experts urge Brussels to redraft Rotterdam Rules, Lloyd's List, Informa plc.

<sup>65</sup> *Lister v Hesley Hall Ltd* [2002] 1 AC 215, para 65.

In very real terms, this is the effect of Article 18 of the Rotterdam Rules, which provides that the Carrier is liable for any breach of its obligations caused, *inter alia*, by the Master or crew of the ship<sup>66</sup>.

If this had been the prevailing law, what recourse then would the Owners have had against the Master in this context? For all its blatancy in terms of negligence, and the potential for a claim under that head, both in terms of his duty in tort and in his contract of employment, the uncomfortable theme clearly establishes the priority given by the Master to himself rather than his obligation towards the commercial success of the voyage, and it was at this stage that the dreaded conflict of interests arose. Maybe, though, this might yet be the salvation for the innocent employer.

An agent, although not technically a trustee, owes several duties of a fiduciary nature towards his principal. These may not be addressed specifically in the contract, but the Courts will apply them in equity and, of these, the key duty in this context is that the agent must not put himself in a position where his duty to his principal conflicts (or might be seen to conflict) with his personal interests. The cases contain many obvious examples of such conflicts. In the foundation case of *Bentley v Craven*<sup>67</sup> the Claimant was in a partnership with the defendant and two others, in a business as sugar refiners in Southampton. Craven was the firm's buyer, which gave him the power to buy the commodity at a cheap price and he then passed it on to the firm at the full market price, making a substantial personal profit at the firm's expense. The Court held for the Claimant principal, on the basis which is broadly followed today, that an agent owes a duty in equity that he should not obtain a personal advantage in circumstances which create a risk that professional judgment or actions regarding a primary interest – that of the partnership – will be unduly influenced by a secondary interest – that of his personal gain<sup>68</sup>. Given the facts in this case, is there merit in considering the argument that the Owner should not be confronted with vicarious liability in the circumstance that it was incurred by reason of their agent who had acted in a conflict of interests? Equity, after all, will not suffer a wrong to be without a remedy<sup>69</sup>. It is well-established that an employer may recover an indemnity from a

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<sup>66</sup> Rotterdam Rules 2009 Art 18(c).

<sup>67</sup> *Bentley v Craven* (1853) 18 Beav 75; 52 ER 29.

<sup>68</sup> Lo, B and M Field, 2009, *Conflict of Interest in Medical Research, Education, and Practice*, National Academies Press, Washington DC.

<sup>69</sup> *ubi jus ibi remedium*.

negligent employee whose conduct, which had led to Judgment in favour of a third party, amounted to a breach of his contract of employment; in this context, if a claim under the Master's service contract with the Owner fails to recover the damages ordered, then a Judgment in equity under a breach of his equitable duties in agency might<sup>70</sup>.

## **Conclusion**

A contract is nothing more than an agreement made by the exchange of commercial promises, which is managed by terms that the parties have agreed, or have been imposed by the current law of that jurisdiction and, as a whole, the agreement is recognised by both parties as a legal obligation. The essence of the contract is that it is a bargain - the parties are free to make their own bargain and the terms of the contract must be decided by the parties to the contract.

Whether or not the parties have endorsed a written contract, they will be bound by the terms from the moment when the offer is accepted. From that point, it is all down to how the parties meet the standard of duty which those terms have imposed upon them – terms which have been moulded by the application of the Golden Rule in normative ethics. If a party fails to perform an obligation agreed in the contract, that must necessarily amount to a breach – the key factor, however, is whether the party failed to perform because they had failed to meet the standard of duty promised: that is, the question to be satisfied is, was it their fault? In the non-marine case of *Target Holdings v Redferns*<sup>71</sup>, Lord Browne-Wilkinson held that liability must be based on fault – and it was this which established whether the defendant should be liable for the consequences of that legal wrong in failing to perform the promise that had been made.

The objective of this in the context of the Master-Owner relationship is to give the parties to a contract of employment the confidence that they can rely on the terms to regulate the way in which it is performed – both by the employer and employee – specifically, to manage the risks which have evolved, with surprising clarity, from nineteenth-century maritime trade, in terms of civil accountability for the way in which the Master has discharged his management function on behalf of the Owner who appointed him to command of the vessel, not only for the safe navigation of the vessel and

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<sup>70</sup> For the general principle to be applied, see *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904.

<sup>71</sup> *Target Holdings Ltd v Redferns* [1996] AC 421.

the maintenance of order and discipline, but also in relation to the Owner's commercial risk with third parties.

If the reader is persuaded to accept the arguments underpinned by the evidence in this paper that the acceleration and growth of globalisation found their feet in the heady days of the nineteenth-century industrial revolution, then it is apparent that the Master's relationship with the Owner clearly has been moulded by the regulation of this globalisation. Logically, therefore, the normative ethics underpinning this should form the justification for the approach to be taken in constructing a new approach to the contractual relationship between the Master and the Owner, in order to meet the objective defined in the paragraph above and regulate their relationship in a way in which they can manage the risk of a claim by an aggrieved cargo owner.

This is the mere foundation, of course, upon which the contractual terms must be drafted, giving, not only, certainty of rights and obligations but, also, giving both parties the confidence to acknowledge that the agreement as a bargain with terms that they can live with.

In fairness, this is the easy part. The hard part will be to conceive the next stage in the contract – the management of the risk of the Master's accountability for criminal negligence and, quite possibly, for the downstream consequences on the Owner.

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### Editor's Note

The UK Government ratified the Maritime Labour Convention in August 2013.