



## ATTEMPT TO BROADEN TIME CHARTERER'S TORT DUTIES TO THIRD PARTIES FOUND “UNMOORED FROM REALITY”<sup>1</sup>

***In Grand Famous Shipping Limited, et al. v China Navigation Co., the United States Court of Appeals for the Fifth Circuit reviewed the traditional duties owed by a time charter to third parties in tort. Though asked by Plaintiffs to broaden these duties, the Fifth Circuit found their “arguments are unmoored from reality.”<sup>2</sup>***

<sup>1</sup> *Grand Famous Shipping Limited v. China Navigation Company, et. al*, 45 F. 4th 799, 804 (5th Cir. 2022).

<sup>2</sup> *Id*

The Court started its opinion with a scholarly review of the three basic types of charter parties (time charter, voyage charter, bareboat charter). The case arose out of a serious allision in the Houston Ship Channel involving a vessel, a barge, and a dock. The Pilot onboard the *M/V Yochow* ordered the helmsman to go hard starboard to commence a swing to the right through a bend in the channel. The helmsman erroneously went hard port which brought the vessel into a basin where the articulated tug and barge unit *Independence/Barge OSG 243* (the barge) was docked. The Pilot immediately realized the helmsman's error and countermanded the helmsman's orders. The vessel continued to port.

The Pilot had the option of increasing engine speed to put more water over the vessel's rudder but declined. He feared that if the vessel did not swing quickly enough to starboard, there was a risk that it would collide with the tugboat instead of the barge. The tugboat was the manned unit where the off-watch crew lay sleeping. Instead, the Pilot ordered full astern and drop anchors. Unfortunately, the *Yochow* made contact with the barge. There was \$20 million dollars of damage to the dock, and \$1 million of damage to the barge. There were no personal injuries.

The *Yochow* was owned by Grand Famous Shipping Ltd. ("Grand Famous"). Its technical manager was Beikum Shipping Tianjin Co., which had a ship management agreement with Grand Famous. Grand Famous had time chartered the ship to China Navigation Co. using the common New York Produce Exchange form.

The barge owner and the dock lessee sued both the vessel's owner and the time charterer for their allision damages. The Court found their attempt to drop anchor in China Navigation's "pocketbook" to be based upon two theories.

First, the claimants argued that China Navigation was independently negligent as a time charterer by failing to exercise reasonable care

in selecting and employing a competent contractor (i.e., Grand Famous and, by extension, Beikum). They argued this was so because China Navigation failed to ensure that Grand Famous was financially stable and that operationally, the *Yochow* had appropriate safety procedures in place. Had China Navigation been more careful in vetting Grand Famous, the argument went, it would have discovered inadequacies in the *Yochow's* safety management procedures, in particular, its fatigue management practices. Second, they argued that China Navigation was the *de facto* owner of the *Yochow* and therefore responsible for the *Yochow's* safety and the negligence of her crew. Claimants went so far as to argue that China Navigation used Grand Famous as a shell company to shield itself from liability. The Fifth Circuit soundly rejected both of these arguments finding "these arguments are unmoored from reality."<sup>3</sup>

The Court first evaluated if the Grand Navigation exercised sufficient operational control over the *Yochow* such that it would be considered a *de facto* owner. In defining a time charterer, the Court noted:

In a time charter, the ship's carrying capacity is taken by the charterer for a fixed time for the carriage of goods on as many voyages as can fit into the charter period. **Again, the owner retains all control for management and navigation.**<sup>4</sup>

The Fifth Circuit commented "one of the very reasons why an entity would choose a time charter is precisely to avoid undertaking the responsibilities of ship navigation and management or the long-term financial commitments of vessel ownership."<sup>5</sup> The Court highlighted the language found in the New York Produce Exchange form used by Grand Famous and China Navigation:

Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The Owners shall remain responsible for the navigation of the vessel, acts of pilots and tug boats, insurance, crew, and

all other similar matters, same as when trading for their own account.<sup>6</sup>

The Court commented that the parties could have structured their agreement differently and shifted responsibility for the *Yochow's* management and navigation to China Navigation - they didn't.

Even so, the Plaintiffs argued that China Navigation had "held itself out" as if it were the *Yochow's* owner. For support, they pointed out that China Navigation was listed as the vessel's "Manager" in the Lloyd's Register of Ships and that China Navigation listed the *Yochow* in a 2016 Sustainability Report as a vessel it "operated." Further, China Navigation exercised its rights under the time charter, as do many times charterers, to paint the ship in its own house colors and put its corporate logo on its stack. Plaintiffs further argued that the captain of the *Yochow* loaded China Navigation's reporting software, Swirelink, on his computer which allowed him to report data about the vessel's operation to China Navigation.

The Court found the painting of house colors and logo by the time charterer "had nothing to do with China Navigation's exercising operation control over the *Yochow* and everything to do with its exercising its rights under the time charter." Listing the *Yochow* as "operated" in its 2016 Sustainability Report should be viewed in the proper context. The evidence indicated the designation of "operated" was to distinguish the *Yochow* from vessels from that China Navigation listed as "owned" and/or "managed."

The fact was that China Navigation treated vessels that it owned or managed differently from vessels that it listed as "operated." For the owned/managed vessels, China Navigation would maintain its own SMS system. But in the case of *Yochow*, the SMS system was maintained by Beikum pursuant to its Ship Management Agreement with Grand Famous. The fact that China Navigation was listed as manager of the vessel in the Lloyd's Register was also found to "fall flat" by the Court. Plaintiffs cited no authority for the proposition that the way a

<sup>3</sup> *Grand Famous Shipping* at p. 804.

<sup>4</sup> *Id.* at 802.

<sup>5</sup> *Id.* at 803

<sup>6</sup> *Id.*

# “He feared that if the vessel did not swing quickly enough to starboard, there was a risk that it would collide with the tugboat instead of the barge.”

time charterer describes a vessel to third parties is of any legal import. The Court found it had no import and that it is “the terms of the charter party [that] control,” and those terms clearly described China Navigation as the time charterer and Grand Famous as the owner. The Court found the totality of the evidence to show that China Navigation was acting purely as a time charter and that “the touchstone of de facto ownership is *control*, and China Navigation had virtually none.”<sup>7</sup>

The Court then turned to the second course set by the Plaintiffs in their attempt to drop anchor in China Navigation’s pocketbook: China Navigation acted negligently as a time charterer. The Court found this question hinged on whether Grand China owed a duty to vet Grand Famous’s finances and safety management protocols prior to entering into the charter party. Plaintiffs argued that had China Navigation done so and ensured that Grand Famous had diligently investigated the ship manager, Beikum, it would have discovered that neither had the ability to support the safe operation of the *Yochow*. Charterer China Navigation argued that as a matter of law, as time charterer it had no duty to vet the *Yochow*’s owners or managers, nor was it obligated to vet their financial

stability. The Court agreed stating “[W]e’re on board with China Navigation.” It explained: “the general rule under traditional principles of admiralty law is that “a time charterer who has no control over the vessel [] assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the chartering intended otherwise.”<sup>8</sup>

The Court commented that a time charterer may still be liable for negligently “conducting its activities as time charterer.” A time charterer does owe a duty to third parties for activities falling within a time charterers traditional “sphere of activity.” It pointed to its 1987 decision in the *Graham v. Milky Way Barge, Inc.* case as an example. In that case, a time chartered vessel capsized throwing four men overboard, three of whom survived. Three of the men sued the time charterer and the vessel’s owner claiming that the time charterer negligently dispatched the vessel into unsheltered waters despite inclement weather. The district court held the time charterer independently negligent as a time charterer in contributing to the vessel’s capsizing.

The Court explained that in routing the vessel or instructing it to call at a certain port, the time charterer is acting within its traditional sphere and would owe a duty of care. The Court stated:

In this circuit, time charterers owe “a hybrid duty arising from contract and tort, to persons with whom they have no contractual relationship, including vessel passengers, to avoid negligent actions **within the sphere of activity over** which they exercise at least partial control. The traditional spheres of activity in which a time charterer exercises control and thus owes a duty include choosing the vessel’s cargo, route, and general mission, as well as the specific time in which the vessel will perform its assignment. Most importantly for our purposes, a time charterer **owes no duty** beyond these spheres unless the parties vary the traditional assignment of control by contract or custom.<sup>9</sup>

The Court summed up a time charterer’s duty as:<sup>10</sup>

Time charterers *do* owe duties to third parties. Namely, to avoid negligent acts within the traditional spheres of activity over which they exercise control. But those spheres are well defined, and time charterers are not – as a matter of law – liable for acts taken outside those spheres unless the parties agree otherwise by contract or custom.

<sup>7</sup> *Grand Famous* at p. 804.

<sup>8</sup> *Grand Famous Shipping* at p. 805 (citing *In re P&E Boat Rentals, Inc.*, 872 F.2d 642, 647 (5th Cir. 1989).

<sup>9</sup> *Id.* at p.806 (citing *Hodgen v. Forest Oil Corp.*, 87 F.3d 15,12 1520 (5th Cir. 1996)).

<sup>10</sup> *Id.*

## Grand Famous

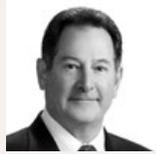
The Court concluded that ensuring the competence of a contractual counterparty plainly does not fall within a traditional sphere of activity over which time charterers exercise control. Further, there was no indication that China Navigation and Grand Famous had intended to vary the traditional assignment of control by contract or custom. Therefore, “China Navigation did not owe a duty to vet Grand Famous’s finances or the *Yochow*’s safety management protocols prior to executing the time charter.”

The trial court found that the helmsman likely failed to properly carry out the pilot’s rudder command due to over work and fatigue. The Plaintiff’s claim was that had China Navigation as time charterer properly vetted the *Yochow*’s safety management protocols, it would have discovered inadequacies in those protocols, primarily the work/rest standards. The Court found the fatal flaw in this argument was that China Navigation simply did not, as a matter of law, owe any duty to vet either the owner, or the ship’s safety procedures. Citing *Moby Dick*, the Court concluded the “*Yochow* crew’s alleged failure to abide by Stubb’s twelfth commandment does not provide a lifeboat for [Plaintiffs] theory of liability.”<sup>11</sup>

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<sup>11</sup> Stubb was a second mate aboard the *Pequod* in Melville’s classic *Moby Dick*. It was he that commented: “*Think not, is my eleventh commandment; and sleep when you can, is my twelfth.*” Herman Melville, *Moby Dick* (Dodd, Mead Co. 1922)

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