COURT OF APPEAL

17 July; 23 October 2013

MINERVA NAVIGATION INC
v
OCEANA SHIPPING AG
(THE "ATHENA")

[2013] EWCA Civ 1723

Before Lord Justice TOMLINSON,
Lord Justice LEWISON and
Lord Justice UNDERHILL

Charterparty (Time) — Off-hire — Whether vessel off-hire during period of drifting — Whether sufficient for charterers to establish net loss of time as regards service immediately required or whether necessary to establish that time was lost to the chartered service — New York Produce Exchange 1946 form, clause 15.

The vessel *Athena* was chartered by Minerva Navigation Inc as head owners to Oceana Shipping AG as charterers, who in turn sub-chartered her to Transatlantica Commodities SA. Both charterparties were on amended NYPE forms, and provided, at clause 15:

> "That in the event of the loss of time from deficiency *sickness, strike or default of master, officers or crew or deficiency of* ~~of men or~~ stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; *unless caused by the Charterers or Charterers agents or Charterers servants and all extra expenses directly incurred including bunkers consumed during period of suspended hire shall be for Owners' account* and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire." [The italicised words were the typed additions to the printed form.]

On 24 October 2009 the vessel completed loading a cargo of milling wheat at Novorossiysk for carriage to and delivery at Lattakia or Tartous in Syria. On her arrival at Tartous, the Syrian authorities analysed the cargo, purported to find it contaminated and forbade its import.

On 15 January 2010 the charterers instructed the master that discharge was to be in Libya.

On 16 January 2010 the vessel departed Tartous, nominally for Novorossiysk. Once she had cleared Syrian waters the owners instructed the master to proceed to international waters just outside Libya and wait for further instructions.

On 19 January 2010 the charterers instructed the vessel to anchor "at road port Benghazi" to await further instructions.

At 23.28 on 19 January 2010 the master, in accordance with the owners' instruction, stopped in international waters outside Libya. The following day the charterers sent a message to the master saying that the vessel was not complying with their instructions to proceed to the roads off Benghazi and that they would treat the vessel as off-hire until she departed from the drifting position and proceeded to Benghazi.

The vessel continued to drift in international waters, contrary to the charterers' orders, for 10.9416 days. At 22.14 on 30 January 2010 she resumed her voyage to Benghazi where she discharged.

The sub-charterers and head charterers (collectively "charterers") brought arbitration proceedings against the respective disponent owners and head owners (collectively "owners") claiming repayment of hire and other sums paid during the drifting period, on the basis that the vessel was off-hire during that period, or alternatively as damages.

The majority of the arbitrators held that the charterers' orders were valid and that the owners should have complied with them. The arbitrators were, however, unanimous in their conclusion, reached in the context of the alternative claim for damages, that had the vessel proceeded directly to Benghazi she would have berthed no earlier than in fact she did, and that the owners' breaches of contract therefore caused no loss to the charterers.

The dissenting arbitrator agreed that if the charterers' voyage orders were lawful, as the majority held them to be, then the master's failure to comply therewith was a default for the purposes of clause 15. Time was lost in relation to the service immediately required of the vessel and she was in consequence off-hire for 10.9416 days.

The owners appealed to the High Court. They submitted that the tribunal erred in law in holding that the charterers only needed to demonstrate that there was an immediate loss of time in order to succeed on their off-hire claim. The charterers had to go on to demonstrate that there was delay to the progress of the adventure, which, on the

basis of the arbitrators' findings in the context of the damages claim, there was not.

Walker J allowed the appeal, holding that it was not sufficient for the charterers to show that there was a net loss of time in performing the service immediately required of the vessel; the charterers were only permitted to deduct hire to the extent that they could show that there was a "net loss of time to the chartered service". On the arbitrators' findings, there was no net loss of time in that sense and thus the vessel was not off-hire during the period when the master refused to comply with the charterers' instructions as to the employment of the vessel.

The charterers appealed to the Court of Appeal.

———*Held* by CA (TOMLINSON, LEWISON and UNDERHILL LJJ) that the appeal would be allowed.

(1) The off-hire clause was triggered by a cause preventing the full working of the vessel. The full working of the vessel referred to her ability to do that which she was immediately required to do. The clause was concerned with the service immediately required of the vessel, and not with "the chartered service" as a whole or the entire maritime adventure or adventures which might be undertaken in the course of the chartered service. The question was what time had been lost during the period when full working of the vessel was prevented (*see* paras 21 to 26);

Tynedale Steam Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd (1936) 54 Ll L Rep 341, *Hogarth (Owners of "Westfalia") v Alexander Miller, Brother, & Co* [1891] AC 48, *Vogemann v Zanzibar Steamship Co Ltd* (1902) 7 Com Cas 254 and *The Berge Sund* [1993] 2 Lloyd's Rep 453, applied.

(2) The arbitrators had rightly focused on the service immediately required of the vessel whilst she was drifting in international waters. Whether the same amount of time would have been lost for other reasons at another stage in the chartered service was not a relevant consideration. The service immediately required of the vessel whilst drifting in international waters was to proceed to the roads at Benghazi (*see* paras 27 to 37);

The Pythia [1982] 2 Lloyd's Rep 160, considered. Reasoning of Tuckey J in *The Ira* [1995] 1 Lloyd's Rep 103, disapproved.

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The following cases were referred to in the judgment:

Forestships International Ltd v Armonia Shipping and Finance Corporation (The Ira) [1995] 1 Lloyd's Rep 103;

Hogarth (Owners of "Westfalia") v Alexander Miller, Brother, & Co (HL) [1891] AC 48;

Sig Bergeson D Y & Co v Mobil Shipping and Transportation Co (The Berge Sund) (CA) [1993] 2 Lloyd's Rep 453;

Tynedale Steam Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd (CA) (1936) 54 Ll L Rep 341;

Vogemann v Zanzibar Steamship Co Ltd (CA) (1902) 7 Com Cas 254;

Western Sealanes Corporation v Unimarine SA (The Pythia) [1982] 2 Lloyd's Rep 160.

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This was an appeal by Transatlantica Commodities SA, who had sub-chartered the vessel *Athena* from intermediate charterers Oceana Shipping AG. The appeal was from the decision of Walker J [2013] 1 Lloyd's Rep 145, allowing an appeal by the owners of the vessel, Minerva Navigation Inc, from an arbitration award upholding an off-hire claim in favour of the charterers.

Michael Nolan, instructed by W Legal Ltd, for the appellants; Richard Lord QC, instructed by Holman Fenwick Willan LLP, for the respondents.

The further facts are stated in the judgment of Tomlinson LJ.

Judgment was reserved.

Wednesday, 23 October 2013

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JUDGMENT

Lord Justice TOMLINSON:

Introduction

1. The New York Produce Exchange form of time charterparty is approaching its imminent 100th anniversary on 6 November 2013. The present appeal raises a short point concerning one of its central provisions, the off-hire clause. What is meant by the trilogy of expressions used in clause 15, "the loss of time", "the time thereby lost" and "the time so lost"? Is it the time lost in relation to the service immediately required of the vessel, during the period when full working of the vessel was prevented? In this case the service immediately required of the vessel during the period when full working of the vessel was prevented was to proceed to the roads at the port of Benghazi. Instead of complying with charterers' orders, the master stopped and drifted in international waters outside Libya for 10.9416 days. Was the time "thereby lost" rather to be computed as the net loss of time to the chartered service, which was here none, because had the vessel proceeded directly to the roads at

Benghazi, she would not have berthed and her cargo would not have been discharged at that port any earlier than in fact occurred. So was the ship off-hire for 10.9416 days or can the owners claim hire during a period when the vessel was not providing the service then required of her, in circumstances where that failure came about in consequence of a cause specified in the off-hire clause, here "default of master", typed words added to those of the printed form?

2. Three experienced arbitrators, members of the London Maritime Arbitrators Association, Mr John Schofield, Mr Edward Mocatta and Mr William Robertson, were in no doubt that time was lost in relation to the service immediately required of the vessel and that she was in consequence off-hire for 10.9416 days. As they put it at para 79 of the Reasons for their award:

> "If authority is required for that proposition, we would refer to *The Berge Sund* [1993] 2 Lloyd's Rep 453."

The Berge Sund is a decision of this court.

3. The owners were given permission to appeal. The judge, Walker J, sitting in the Commercial Court, allowed the appeal. The judge said that it was not sufficient for the charterers to show that there was a net loss of time in performing the service immediately required of the vessel; the charterers were only permitted to deduct hire to the extent that they could show that there was a "net loss of time to the chartered service". On the arbitrators' findings, there was no net loss of time in that sense and thus the vessel was not off-hire during the period when the master refused to comply with the charterers' instructions as to the employment of the vessel.

4. I have no doubt that the arbitrators were right. The judge's view is unjustified by the wording of the clause, inconsistent with the conventional approach to the clause, which approach is here underscored by typed language additional to that in the printed form, inconsistent with hallowed authority and could moreover lead to the need for "the most intricate and speculative enquiries as to the course which events would have taken" if full working of the vessel had not been prevented, enquiries of a type deprecated both by this court in *Vogemann v Zanzibar Steamship Co Ltd* (1902) 7 Com Cas 254 and, more recently, by Robert Goff J, as he then was, in *Western Sealanes Corporation v Unimarine SA (The Pythia)* [1982] 2 Lloyd's Rep 160. Such enquiries could typically not be conducted, or at any rate finalised, before the charterers come under an obligation to pay their next monthly or semi-monthly instalment of hire from which they would ordinarily expect to deduct accrued off-hire. The judge's view could also lead to the bizarre outcome that a vessel might be off-hire under a head charterparty yet on-hire under a sub-charterparty on terms materially identical save as to the period of the charter.

The facts

5. The appellants are Transatlantica Commodities SA who were in fact sub-charterers, although for reasons which will appear I shall refer to them as "the charterers". The respondents are Minerva Navigation Inc who are the owners of the vessel to whom I shall refer as such.

6. By a time charterparty on the NYPE 1946 form as amended, dated 13 January 2009, the owners chartered their vessel, MV *Athena* to Oceana Shipping AG ("Oceana") for a period initially of three to six months. That period was subsequently extended. By a charterparty on materially identical terms dated 9 October 2009 Oceana sub-chartered the vessel to the appellants, "the charterers", for one time-charter trip with re-delivery at Syria or in the Egyptian Mediterranean at charterers' option.

7. Both charters provided, at clause 15:

> "That in the event of the loss of time from deficiency *sickness, strike or default of master, officers or crew or deficiency of* ~~of men or~~ stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; *unless caused by the Charterers or Charterers agents or Charterers servants and all extra expenses directly incurred including bunkers consumed during period of suspended hire shall be for Owners' account* and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire."

I have italicised the typed words which have been added to the printed form.

8. On 24 October 2009 the vessel completed loading a cargo of milling wheat at Novorossiysk for carriage to and delivery at Lattakia or Tartous in Syria. On her arrival at Tartous, the Syrian authorities analysed the cargo, purported to find it contaminated and forbade its import. The tribunal found that it was a common ploy for receivers, often in concert with the Syrian authorities, to refuse cargoes to enable them to renegotiate contracts of sale.

9. The arbitrators record, at para 14 of their Reasons:

"On 28 December 2009 [Oceana] emailed [the charterers]:

'*Following to apply for discharge in Yemen or Libya:*

New hire USD 17,500/pdpr to start on sailing from Tartous until redelivery.'

[The charterers] paid hire at this rate from 16 January 2010. This email which has been referred to as an addendum to the sub-charter was clearly intended to remove the obligation in the original ttc [trip time charter] for redelivery on sailing from a Syrian port to permit the vessel to discharge the cargo loaded at Novorossiysk in either Yemen or Libya, following its rejection in Syria, as well as increasing the rate of hire payable under the sub-charter."

I would also add, although it is unnecessary to the analysis, that it seems to have been assumed that this "addendum" provided also for redelivery in either Yemen or Libya.

10. On 15 January 2010 the charterers instructed the master that discharge was to be in Libya, and later that the port would be Benghazi.

11. On 16 January 2010 the vessel sailed from Tartous, nominally for Novorossiysk (because Syrian law required rejected cargoes to be returned to the original port of shipment) and the charterers started paying hire at the increased rate. After the vessel had cleared Syrian waters, two messages were sent at about the same time, one from the master saying that the owners had instructed him to proceed towards Libya without stoppage and one from the owners to Oceana saying that they had instructed the master to proceed to international waters just outside Libya and wait for further instructions. As the arbitrators observe, these messages are difficult to reconcile.

12. On 19 January 2010 the charterers instructed the master:

"Please note that we forbid berthing/discharging and releasing the cargo to receivers until our next written instructions. Hereby we confirm that receivers has (sic) right to take samples only. Upon arrival please anchor at road port Benghazi and waiting our further instructions."

13. At 23.38 on 19 January 2010 the master in accordance with the owners' instruction stopped in international waters outside Libya. The following day the charterers sent a message to the master saying that the vessel was not complying with their instructions to proceed to the roads off Benghazi and that they would treat the vessel as off-hire until she departed from the drifting position and proceeded to Benghazi.

14. The vessel continued to drift in international waters, contrary to the charterers' orders, for 10.9416 days. At 22.14 on 30 January 2010 she resumed her voyage to Benghazi where she discharged.

The decision of the arbitrators

15. The question which the arbitrators had to resolve was, broadly, whether hire paid in respect of the drifting period was recoverable (it had been paid in advance) together with the cost of the associated bunker consumption and other deductible expenses. This in turn resolved into the questions: was the vessel off-hire during the relevant period or, if not, could charterers nonetheless recover the hire paid (and associated expenses) as damages for breach of clause 8 of the charterparties, on the footing that the master had both failed to prosecute the ordered voyage with the utmost despatch and/or that the master, who was under the orders of the charterers as regards employment, had failed to comply with the charterers' orders.

16. The arbitrators were divided as to the validity of the charterers' orders. Questions arose as to the return of the original bills of lading and the issue of new bills of lading and of the non-compliance with Syrian requirements. However the majority of the tribunal decided that the charterers' orders were valid or that the owners had elected to treat them as valid and that they should have been complied with. There is no challenge to that conclusion.

17. The arbitrators were however unanimous in their conclusion, reached in the context of the claim for damages, that had the vessel proceeded directly to Benghazi she would have berthed no earlier than in fact she did. Problems concerning the bills of lading would have been resolved no earlier than in fact they were. The breaches of contract by the owners therefore caused no loss to the charterers.

18. The dissenting arbitrator agreed with his colleagues that if the charterers' voyage orders were lawful, as the majority held them to be, then the master's failure to comply therewith was a default for the purposes of clause 15. Again, there is no challenge to this conclusion.

19. The arbitrators were therefore unanimous in their conclusion that the vessel was, on this footing, off-hire during the period of drifting. I have already summarised their reasoning at para 2 above. Paragraphs 78 and 79 of their Reasons read in full:

"78. As is made clear at paragraph 25.2 of *Time Charters*, the ship must render the service immediately required of her, in which event hire is payable continuously, but if she cannot or does not, hire is not payable for the time so lost. As is also made clear in that paragraph, the off-hire clause operates entirely independently of any breach of contract by the owners, and a claim under the off-hire clause may lead to a different

answer than would ensue in the case of a claim for damages for breach of contract.

79. The Tribunal are satisfied that all [the charterers] need do in respect of their claim under the off-hire clause is demonstrate that there was a default on the part of the Master (which we have already accepted there was) and that in consequence, there was an immediate loss of time. On this last, we are satisfied that the consequence of the Master's failure to proceed directly to Benghazi, was a loss of time by her delayed arrival at that port. Whether the same time would have been lost for other reasons had she proceeded directly to Benghazi, is irrelevant to a claim under the off-hire clause. The time was lost in relation to the service immediately required of her and that is sufficient. If authority is required for that proposition, we would refer to the *Berge Sund* [1993] 2 Lloyd's Rep 453."

20. There were of course two arbitrations, by consent heard together, between owners and Oceana and between Oceana and charterers. The appeals both to the judge and to this court were consolidated and argued between owners and charterers, with Oceana agreeing to be bound by the result. The judge, as I have already described, allowed the owners' appeal, hence the further appeal to this court by the charterers. I have summarised the judge's reasoning at para 3 above. The judge's judgment, [2013] 1 Lloyd's Rep 145, contains a long and detailed analysis of all the relevant authorities which however it is unnecessary further to reproduce here.

Discussion

21. The key to a proper understanding of the off-hire clause is in my view that it is triggered by a cause preventing the full working of the vessel. It is axiomatic that the full working of the vessel refers to her ability to do that which she is immediately required to do. Thus the full working of a vessel required to sail from port A to port B is not for the duration of that voyage prevented by the circumstance that her cranes are not in working order, a point made with particular clarity by Lord Roche in *Tynedale Steam Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* (1936) 54 Ll L Rep 341 at page 346. Similarly, the full working of a vessel required to lie alongside and discharge is not prevented by a breakdown to her main engine. Thus in *Hogarth (Owners of "Westfalia") v Alexander Miller, Brother, & Co* [1891] AC 48 the vessel was time-chartered for trading between UK Continent and West Africa. The off-hire clause provided:

"In the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than 48 consecutive working hours, payment of hire shall cease until she be again in an efficient state to resume her service."

On 30 September 1887 in the course of a voyage from a West African port to Harburg on the Elbe, now part of the port of Hamburg, the vessel's high-pressure engine broke down at a point not far off Las Palmas. The master put back to Las Palmas – her low-pressure engine working part of the way. As repairs could not be effected at Las Palmas the vessel had to be towed from that port to Harburg. She then discharged normally, over the course of 10 days. Coincidentally, the repair to her high-pressure engine occupied the same period of time. The charterers contended that the vessel was off-hire both during the tow from Las Palmas to Harburg and during discharge, because the expression "efficient to resume her service" must be taken to mean total and absolute efficiency. The House of Lords held by a majority of four to one that the vessel was off-hire during the voyage from Las Palmas to Harburg. But by a different majority of four to one they also held that hire was payable in respect of the period spent discharging, the vessel being in an efficient state for the employment then required of her.

22. Lord Halsbury LC was in both majorities. At page 56 he said this:

"I should read the contract as meaning this, which I think one of the noble and learned Lords suggested in the course of the argument, that she should be efficient to do what she was required to do when she was called upon to do it; and accordingly, at each period, if what was required of her was to lie at anchor, if it was to lie alongside the wharf, upon each of those occasions, if she was efficient to do it at that time she would then become, in the language of the contract, to my mind "efficient," reading with it the other words, 'for the working of the vessel'. How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the purpose. It is not only that she has the goods in the hold, but she has machinery there for the purpose of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me, therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time."

23. I would also draw attention to his more general observations upon the clause at pages 53 to 55:

> "Now, the contract is for the hire of a ship, and each of the parties must be taken to know what are, in the ordinary course, the duties to be performed by a ship, and it must be taken that each party is contemplating the possibility of the benefit which he is contracting to obtain being interrupted by various causes. That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care and with reference to the words which are found associated with it in the particular instrument which we have to construe. It is, 'That in the event of loss of time'. That is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates. 'That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours.' The language is consonant with what I have indicated to be the general intention of the parties in entering into this part of the contract. In the first place, it is 'in the event of loss of time', and then the parties proceed to shew that that contingency which is to give rise to the actual operation of the clause is, that the working powers of the vessel are interfered with, and 'the working of the vessel is stopped for more than forty-eight consecutive working hours', and upon that there is to be a cessor. What the parties to this contract contemplated was this: The hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself, namely, 'the deficiency of men or stores, breakdown of machinery, want of repairs or damage', the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying that during such period as the working of the vessel is stopped for more than forty-eight consecutive hours, payment shall cease; and now come the words upon which such reliance is placed: 'until she be again in an efficient state to resume her service'. If the contention which has been put forward at your Lordships' Bar were well founded one might have expected that the parties in contemplating what upon that view was said to be the intention of the parties if they had intended that the test should be the efficient state of the vessel as it originally was might very readily have used the words, 'until such time as the deficiency of men or stores has been removed, or the breakdown of the machinery has been set to rights, or the want of repairs has been supplied or the damage has been remedied', and so forth; or the terms might have been inserted that the resumption of the payment shall be dependent upon the vessel being restored to full efficiency in all respects, as to seaworthiness and otherwise, as she was at the time when she was originally handed over. But the parties have not used such language. On the contrary, the test by which the payment for the hire is to be resumed is the efficient state of the vessel to resume her service; so that each of those words, as it appears to me, has relation to that which both of the parties must be taken to have well understood, namely, the purpose for which the vessel was hired, the nature of the service to be performed by the vessel, and the efficiency of the vessel to perform such service as should be required of her in the course of the voyage."

24. I have set out these passages because they make good, in my view, the proposition that an off-hire clause in the terms which we have here to consider is concerned with the service immediately required of the vessel, and not with "the chartered service" as a whole or the entire maritime adventure or adventures which may be undertaken in the course of the chartered service. The clause concentrates on the period during which full working of the vessel is prevented or, in the language used in *Hogarth v Miller,* stopped. The question is then what time has been lost during that period. In *Hogarth v Miller* it does not seem to have been disputed that the entire duration of the tow was time lost for the purposes of the clause.

25. A similar approach is to be found in the decision of this court in *Vogemann v Zanzibar*. A charterparty provided that, in the event of loss of time from "detention by average accidents to ship", the payment of hire should cease for the time thereby lost. An average accident occurred to the ship on 22 November 1900 while on a voyage from Hamburg to New York. The vessel put back to Queenstown for repairs. The repairs were finished and the vessel left Queenstown to resume her voyage on 22 December 1900. She arrived back at the spot at which the accident had occurred at noon on 29 December. It was admitted by the shipowners that the vessel was off-hire between 22 November and 22 December, but the charterers contended that the vessel was additionally off-hire until she arrived back at the scene of the accident on 29 December. Phillimore J and this court decided that hire was due in respect of this latter period when the vessel was,

as Mr Hamilton KC for the owners put it, "going at full speed towards her port of destination". Sir Richard Henn Collins MR said at page 257:

> "The charterparty seems to me to be fairly clear. The object of the clause in question is to provide for a possible loss of time; and the question is how much time was provided for. In my opinion only such time was provided for as might elapse until the vessel was once more in full working order. When the accident ceased to prevent the full working of the vessel, the hire became again payable. This is the natural construction of the clause, and any other construction would involve intricate calculations as to the time which had been lost."

Stirling LJ, at page 257 said this:

> "In order to prevent the hire running there must be an accident preventing the full working of the vessel; therefore when she had been repaired, and was once more in full working order, she was no longer 'detained' within the meaning of the clause in question."

26. Moving to more modern authorities, this court in *Sig Bergeson D Y & Co v Mobil Shipping and Transportation Co (The Berge Sund)* [1993] 2 Lloyd's Rep 453 adopted the same approach. In that case the relevant off-hire clause read:

> "8(a) In the event that a loss of time, not caused by Charterer's fault, shall continue, (i) due to repairs, breakdown, accident or damage to the Vessel, collision, stranding, fire, interference by authorities or any other cause preventing the efficient working of the Vessel, for more than twenty-four (24) consecutive hours . . . then hire shall cease for all time so lost until the Vessel is again in an efficient state to resume her service and has regained a point of progress equivalent to that when hire ceased hereunder."

The vessel was delayed in starting to load because of the need to carry out tank cleaning made necessary in consequence of the charterers' choice as to the sequence of cargoes to be carried. The question arose whether the vessel was during this period off-hire. This court held that it was not. After citing Lord Halsbury's remarks in *Hogarth v Miller* Staughton LJ said this, at page 459 col 2:

> "The reasoning in that decision seems to me equally applicable in the present case, whether one is considering 'loss of time' or 'preventing the efficient working of the vessel', or 'again in an efficient state'. In each case one has to decide whether *Berge Sund* while at Ras Tanura, was in the words of Lord Halsbury 'efficient to do what she was required to do' by the charterers. Unfortunately that is by no means the end of the problem, but only the beginning of it."

At page 460 col 1 Staughton LJ continued:

> "In the ordinary way a charterer will wish a vessel to be profitably employed continuously throughout the charter period in loading, the carrying voyage, discharging, and if necessary a ballast voyage. Any time spent on other activities brings no immediate return to the charterer. Yet it is manifest that some other activities must take place in the charterer's time. When a ship has used up the fuel in her bunkers, she must pause to take more on board, and for that purpose perhaps call at a port where she would not otherwise have called. Time may be spent taking on ballast, either for a ballast voyage or to reduce the vessel's air draft so that she can go under a bridge. Lightening may be necessary, to enable her to go through a canal, as in *Actis and Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 Lloyd's Rep 7; [1982] WLR 119. Or time may need to be spent cleaning the vessel's holds or tanks. If the charterer orders the vessel to load coal on one voyage and sugar in bulk on the next, he can hardly expect the necessary cleaning to be done in the owner's time.
>
> Time spent on those activities is, in the ordinary way, to be paid for in hire. The charterer has acquired the services of the vessel, and has the right to determine what cargoes she shall carry on what voyages. If, as a result of his orders, any of those measures become necessary, hire must be paid for the time so spent. Incidentally, there may be other expense for the charterer to bear. Almost invariably the charterer pays for fuel; the cost of lightening, ballast and cleaning may be a matter of negotiation.
>
> One can justify that result in more than one way. It can be said that there is no 'loss of time' when the vessel is carrying out those activities, or that the 'efficient working of the vessel' is not prevented, or that she is still able to perform (and is performing) the service required by the charterer. By whichever route one goes, the result is that the vessel is not off hire.
>
> Those, as I have said, are the consequences which flow in the ordinary way. But what if there are unusual or extraordinary circumstances? The arbitrators reached this conclusion, in para 59:
>
> > 'Charterers justifiably declined to load the vessel after the coolant failed the test. This was an unexpected event since both owners and Charterers hoped to load the vessel immediately on presentation at Ras Tanura and the vessel was, thus, not in an efficient state to provide the service next expected of her, viz to begin loading.'
>
> The arbitrators' test was thus one of hope or expectation. But even if that was to be an objective test, I cannot believe that it was right.

It is, as Aristotle said, probable that many improbable things will happen. The question is not what the charterers hoped or expected their orders would be, but what service they actually required."

Finally, at page 461 col 2, Staughton LJ said this:

"In my opinion the critical question is, what was the service required of the vessel on Dec 20 1982? What were the charterers' orders? They were not to load cargo; as I have said, that was the very last thing that the charterers would have ordered, since the copper strip test had been failed. The orders were, in part, expressly and at all relevant times by implication, to carry out further cleaning. That was the service required, and the vessel was fully fit to carry it out.

But then it may be asked whether the same reasoning would apply if, for example, a ship suffered an engine breakdown, and the charterer ordered her to carry out repairs. Would that be performing the service required? And would it make any difference, if instead the charterer merely said that the ship was off hire, and that what the owner did about it was up to him? In either of those cases the ship would clearly not be performing the service required, and would be off hire.

In my judgment the distinction lies in the fact that cleaning is in the ordinary way an activity required by a time charterer. It is his choice what cargoes are loaded, and consequently when and what clearing is required. If in a particular case the charterer declines to load until there has been further or extraordinary cleaning, the service required is that cleaning. Of course there may be cases where the need for such extra cleaning results from a breach of contract on the part of the owner or even from 'neglect of duty on the part of the master, officers and crew'. In that event the charterer has a remedy. But here the arbitrators rejected the charters' case that there had been negligence or want of due diligence in cleaning on the ballast voyage. Once they had reached that conclusion, the argument that the vessel was off hire or that the charterers could recover the hire paid was in my opinion doomed to failure.

I appreciate that in reaching this conclusion I may be differing from what Mr Justice Donaldson at least implied in the *Bela Krajina* case. But I can see no ground for distinguishing between ordinary cleaning and extraordinary or unusual cleaning. If either is required by the charterer, it is the service which for the time being the vessel must be efficient to perform, and time spent on it is not time lost.

It follows that in my judgment the vessel was not off hire, and the charterers' claim fails."

27. It was in reliance on this last case that the arbitrators, rightly in my view, focused on the service immediately required of the vessel whilst she was drifting in international waters. The judge regarded neither *Hogarth v Miller* nor *The Berge Sund* as concerned with identifying the extent of the time lost and in consequence of no assistance. The judge was of course correct to observe that in neither case did an issue arise as to the amount of time lost, but both cases, and *Vogemann v Zanzibar*, are in my judgment authority for the principle that when one is considering whether and to what extent there has been, in this context, a loss of time, it is by reference to the service immediately required of the vessel that that enquiry is to be conducted. Whether the same amount of time would have been lost for other reasons at another stage in the chartered service is not a relevant consideration. The clause is concerned to identify an actual period of real time during which time is being lost, not an identifiable length of time by which "the chartered service" or what the judge sometimes called "the charter service overall" can be said to have been delayed. Quite apart from this being the natural construction of the language under consideration, there are sound practical reasons for this approach. It avoids intricate calculations, enabling the parties to know where they stand without having to wait on events subsequent to the period of inefficiency, a consideration of prime importance bearing in mind the remedies available to the owners in the event that payment of hire is not made punctually.

28. At a relatively early stage in his judgment the judge cited the following paragraphs from *Time Charters*, 6th Edition, 2008, a work still commonly referred to as "Wilford" out of deference to the distinguished leading founding author when the book was first published in 1978:

> "25.53 It is usually the case that a ship is off-hire only if there has been a 'loss of time'. That expression, however, can be used in two different senses.
>
> (1) On the one hand, the phrase 'loss of time' is used to refer to the period of time during which the ship is prevented from working; so, in other words, 'loss of time' means 'loss of a period of service'.
>
> (2) On the other hand, 'loss of time' or 'time lost' is also used to refer to the period of time by which the progress of the charter service has been delayed; when used in this sense, 'loss of time' or 'time lost' means 'delay to the progress of the adventure'.
>
> *'Net loss of time' clauses*
>
> 25.54 In order to claim off-hire under Clause 15 of the New York Produce form, the charterers

have to show that there has concurrently been a loss of time in both of the senses identified above. Clauses of this kind are called 'net loss of time' clauses. The Baltime form contains a net of loss of time clause. So, too, does the Shelltime 4 form."

29. The judge recorded at para 30 of his judgment owners' submission before him that what the arbitrators had said at para 79 of their Reasons was directly contrary to what is said at para 25.54 of Wilford.

30. I suspect that this passage in *Time Charters* has been misunderstood, and that the source of the misunderstanding is the authors' use of the expression "the progress of the charter service", an expression which, at para 25.55, they attribute, at any rate inferentially, to Robert Goff J in *The Pythia* at page 168. Robert Goff J did not in fact use this expression, and the other formulation in para 25.53 of Wilford, "the progress of the adventure" is likewise nowhere to be found in the authorities. However it is I think plain from the context that what the learned authors in fact meant by both expressions was the service immediately required of the vessel, which is in fact the expression used three times by Robert Goff J at page 168 col 2 of his judgment in *The Pythia.*

31. What both Robert Goff J explained in *The Pythia* and, I suspect, the learned authors of Wilford sought to explain in the passage cited, is that a clause which renders the vessel off-hire during a period when full working of the vessel is prevented may have the effect of depriving the owners of all hire during a period when the vessel is partially capable of performing, and does so perform, the service immediately required of her. The clause in *Hogarth v Miller* was such a clause, since although introduced by the expression "in the event of the loss of time", it provided nonetheless that payment of hire was to cease until the vessel should be again in an efficient state to resume her service. This "all or nothing" aspect can be mitigated by providing that the vessel is only to be off-hire for "the time lost thereby", meaning the time lost during the period of inefficiency by reason of the vessel's inability to provide the full extent of the performance immediately required of her. None of this however expands the enquiry beyond the time lost in performing the service immediately required of the vessel. The service immediately required of *The Athena* whilst drifting in international waters was to proceed to the roads at Benghazi. It is nothing to the point in computing the time lost by reason of the master's default that a similar length of time, although not obviously the same precise period of time, since the vessel had first to proceed to the roads, might have been lost had there been brought forward the moment at which the service immediately required of the vessel became not the sea passage but rather berthing and discharge.

32. This is so completely explained by Robert Goff J in *The Pythia* that I make no apology for setting out the relevant passage at pages 168 and 169 in full:

"Now it is customary to draw a distinction between what have been called 'period' off-hire clauses and 'net loss of time' off-hire clauses. Historically some time charters have contained period clauses under which in certain specified circumstances the ship goes off-hire for a certain period. The difficulty with such clauses has however been that the ship might be put off-hire during a period when by reason of a specified event her performance was impaired despite the fact that during such period she was partially capable of performing and did so perform the services required of her. See, for example, *Hogarth v Miller Brothers & Co* [1891] AC 48 and *Tynedale Steamship Co v Anglo-Soviet Shipping Co* (1936) 54 Ll L Rep 341; (1936) 41 Com Cas 206. However there are also perhaps because of possible injustices of this kind, net loss of time clauses, under which the ship is only put off-hire for the 'time lost thereby', so that the time charterers cannot escape all liability for hire in respect of time for which they have at least some use of the vessel for the services immediately required of her. Even in the case of such clauses, however, it has not followed that a precise comparison will be made between the period which would have been occupied in performing the relevant service had the off-hire event not occurred and the period in fact occupied in performing that service. No doubt the making of such a comparison, with the consequence that the difference between the two periods constitutes the period of off-hire, would lead to a logical result; but it could also lead to the most intricate and speculative enquiries as to the course which events would have taken if the vessel had not gone off-hire, and perhaps for that reason we find that, in for example the Baltime charter, although no hire is to be paid in respect of 'any time lost thereby', nevertheless on the form of words so used no deduction of hire is made in respect of any period after the ship is once again able to perform the service immediately required of her. That clause is therefore a net loss of time clause, but only in respect of time lost during a particular period.

Into which category does clause 15 of the New York Produce Exchange form fall? In my judgment, both as a matter of construction of the clause and as a matter of authority, it falls into the same category as the off-hire clause in a Baltime charter. The clause contemplates the

happening of a certain event which has the effect of preventing the full working of the vessel in the performance of the service immediately required of her. If such an event occurs, 'the payment of hire shall cease for the time thereby lost'. The clause therefore contemplates a cesser of the payment of hire during the period when 'the full working of the vessel' is so prevented but only to the extent that time is thereby lost.

This was the conclusion of the Court of Appeal in *Vogemann v Zanzibar Steamship Co Ltd* (1902) 7 Com Cas 254, on a clause which I find to be indistinguishable in any material respect from cl 15 of the charter now before me. Collins, MR, said (at p257): . . ."

And then Robert Goff J set out the passage which I have cited at para 25 above and continued:

"That case was recently applied by Mr Justice Parker in *The Marika M* [1981] 2 Lloyd's Rep 622. It is binding upon me, and I respectfully agree with it. Of course, *Vogemann v Zanzibar* was only concerned with the question of the *period* during which the vessel might be put off-hire. It was not concerned with the question how time lost during that period was to be computed. But since the clause only provides for hire to cease for 'time thereby lost' it must follow that, only in so far as time is in fact lost during that period by reason of the relevant event, will the vessel be put off hire."

33. *The Pythia* was concerned with clause 15 of the NYPE form. I draw particular attention to the fact that Robert Goff J twice emphasised that although that is a net loss of time clause, it is concerned only with time lost during the period of inefficiency. This is achieved by the words "time thereby lost" and "time so lost" as it had been in *Vogemann v Zanzibar.*

34. As I have already mentioned above, the judge used a variety of phrases to express the concept with which he considered clause 15 is concerned. Thus at para 33 he spoke of "a net loss in the performance of the chartered service", at paras 38 and 65 of "a net loss of time in performing the charter service overall" and at para 40 simply of "loss of time overall". The judge nowhere explains precisely what he means by these expressions. "The chartered service" might ordinarily be taken without more to be a description of the entirety of the service rendered by owners to charterers during the currency of a time charterparty. The use of the word "overall" begs the question what are the beginning and the end points of what is being measured. Without more, "the charter service overall" would seem to be a reference to the entirety of the service to be performed under the charter. It is immediately apparent that, quite apart from the fact that there is no justification in the wording for the adoption of this approach, it would lead to precisely those intricate and speculative enquiries which were deprecated both by this court in *Vogemann v Zanzibar* and by Robert Goff J in *The Pythia.* It would also give rise to the distinct possibility that the same triggering event could give rise to different consequences in terms of off-hire in back-to-back charterparties of differing length. Mr Richard Lord QC for the owners submitted that the judge did not envisage a process of infinite regression and that what he had in mind was that "the charter service" is the same as "the adventure", an approach apparently embraced by the learned authors of Wilford at para 25.53. The adventure here was, suggested Mr Lord, "the voyage including discharge at Benghazi". I have already indicated my view that this approach almost certainly involves a misunderstanding of what the authors of Wilford meant to convey. But in any event it is in my view both wrong and precluded by authority. It might be possible to describe the adventure contemplated by a time charter trip as involving a single voyage, but the same is not true of the more normal time charter which is measured by a period of time rather than by pre-determined employment. It is also arbitrary and counter-intuitive to include loading and discharge within the voyage. The voyage, or at any rate the carrying voyage, typically begins on leaving the load port and ends on arrival at the discharge port. These concepts are important, since the same "adventure" is likely to be the subject of many interlocking contracts, including possibly a voyage charterparty and sale contracts in which the incidence of liability for delay is determined by whether or not the vessel is an "arrived ship" at the contractual destination. Once an arrived ship, the risk of delay is likely to shift. Thus in the usual case a master's refusal to proceed to the normal waiting place at the discharge port is likely to postpone the point at which a time charterer may pass on to his sub-voyage charterer the risk of delay at the discharge port. The same is true, mutatis mutandis, as between the sub-voyage charterer who may well be a seller of the goods carried and his purchaser. The present case is complicated by the charterers' order forbidding berthing/discharging, but in the ordinary case a vessel drifting at sea without proceeding to the port during a period when the vessel would otherwise have been awaiting a berth will have the result that the charterers are unable to start time running against their sub-charterers and the same will ordinarily be true as between sellers and purchasers. Seen in this light the judge's notion of the charterers gaining a windfall in the event that the vessel is off-hire during the drifting period is wholly illusory since the master's arbitrary

action has resulted in the upsetting of the normal allocation of the risk of delay.

35. The judge found support in a decision of Tuckey J, as he then was, in *Forestships International Ltd v Armonia Shipping and Finance Corporation (The Ira)* [1995] 1 Lloyd's Rep 103. The vessel was chartered on the NYPE form; it does not appear from the report for how long. Clause 21 of the NYPE form provides that the vessel is to be docked at a convenient place whenever charterers and captain think necessary, at least once in every six months. Clause 21 makes provision for the suspension of hire "until she is again in proper state for the service", whilst clause 15 provides "in the event of loss of time from drydocking preventing the full working of the vessel the payment of hire shall cease for the time thereby lost". In late 1991 the parties agreed under the terms of clause 21 that the vessel would drydock in Greece after discharging cargo in Ravenna. Discharge at Ravenna was completed on 11 January 1992 and the vessel then proceeded to Piraeus where she was dry docked. On 24 January the owners informed the charterers that the vessel would be at their disposal when she dropped her outward pilot at Piraeus the following day at noon. On the same day the charterers voyage-chartered the vessel to load a cargo at Novorossiysk in the Black Sea. Piraeus was, with a very slight deviation, on the route from Ravenna to Novorossiysk. The question arose under clause 15 what time was lost by reason of drydocking preventing the full working of the vessel. The charterers submitted that the time lost by the drydocking was from dropping the outward pilot at Ravenna, ie for the duration of the voyage from Ravenna to Piraeus. The owners argued that the time spent sailing to Piraeus was not lost to charterers because that voyage was on route to Novorossiysk and therefore not lost. Both the arbitrator (Mr George Hardee) and the judge upheld the owners' argument. In doing so the judge said this (at page 105 col 2):

> "It seems to me that the question of whether the vessel was operating on the orders of owners or charterers is not to the point in calculating what time was actually lost to the charterers as a result of the off-hire event. Obviously during the time that the vessel is under directions to go to the port where it is to be drydocked and during the drydocking itself, an off-hire event has taken place."

With great respect to Tuckey J I disagree. The off-hire event was dry docking. The full working of the vessel was not prevented whilst the vessel proceeded from Ravenna to Piraeus, because that was the service immediately required of her by the charterers, in agreement with the owners. The judge went on to hold that the tribunal must "count the time and count the duration of the off-hire event", but that it must also then "go on to see what causative effect that has had upon the charterers in the particular circumstances of the case". The judge went on to conclude that the charterers had not lost the time that it had taken for the vessel to sail from Ravenna to Piraeus, apart from a small amount of time involved in the deviation into that port for the purpose of dry docking. The vessel was not therefore off-hire whilst proceeding from Ravenna to Piraeus. The ultimate conclusion of the judge that the vessel was not during the voyage off-hire is I think right for the reason that the full working of the vessel was not prevented whilst she proceeded from Ravenna to Piraeus, that being the service immediately required of her. The decision is not however justified by the fortuity of the orders which the charterers gave for the employment which was to be undertaken once the vessel had completed drydocking, orders which were given some 13 days after, on Tuckey J's approach, the vessel had already been affected by the relevant off-hire event. With respect, Tuckey J's reasoning, like that of the judge in the present case, failed to focus on the service immediately required of the vessel during the voyage from Ravenna to Piraeus. Walker J thought that the answer to the question "what service was immediately required by charterers of *Ira* when she left Ravenna?" might well be "none". But that is, with respect, untenable. Owners and charterers were agreed as to the required service, which was to proceed from Ravenna to Piraeus. I agree with Tuckey J that in certain circumstances it is not possible to determine what loss of time has occurred until the end of the off-hire event. The corollary is however that since the clause is concerned with the service immediately required of the vessel, it must be possible at the conclusion of the off-hire event to determine what net time has been lost in consequence of the event. It is thus impermissible to have regard to events occurring after the end of the off-hire event. If it were permissible, one would be faced with the question for how long after the end of the off-hire event could such events be relevant to the computation of loss of time consequent upon the off-hire event. As I have already pointed out, the judge's various formulations do not provide a principled answer to this question.

36. Tuckey J thought that the result in *The Ira* would have been different had the operative clause been a "period" off-hire clause rather than a net loss of time clause but this cannot be right. There would have been no loss of time had the matter been governed by an off-hire clause such as that in *Hogarth v Miller*, because the vessel was always capable during the voyage from Ravenna to Piraeus of performing the required service, as in fact she did.

37. For all these reasons I consider that the decision of the judge should be set aside and that of the arbitrators restored.

38. In conclusion I gratefully acknowledge the assistance I have derived from a paper dated 17 May 2013 prepared for the London Maritime Arbitrators Association by three of the current authors of *Time Charters*, Terence Coghlin, Andrew Baker QC and Julian Kenny, "Off-Hire under the New York Produce Form: 'Loss of Time' & 'Time Thereby Lost', *The Athena* [2012] EWHC 3608 (Comm)". I must however ask their forgiveness for declining to embark upon a "thorough review of the operation of the off-hire clause". In my judgment authority binding this court compels the conclusion which I have reached, although I have for my part in any event no doubt as to its correctness.

39. Accordingly, I would allow the appeal.

Lord Justice LEWISON:

40. I agree.

Lord Justice UNDERHILL:

41. I also agree.