

## THE NYPE OFF-HIRE CLAUSE AND THIRD PARTY INTERVENTION: CAN AN EFFICIENT VESSEL BE PLACED OFF-HIRE?

by JOHN WEALE\*

*“The test, therefore, is whether the vessel is fully efficient in herself, that is to say, whether she is fully capable of performing the service immediately required of her.”*

Actis Co. Ltd. v. The Sanko Steamship Co. Ltd. (*The “AQUACHARM”*)  
[1980] 2 Lloyd’s Rep. 237 (per Lloyd J, at p. 240)

*“In my judgment, therefore, the qualifying phrase ‘preventing the full working of the vessel’ does not require the vessel to be inefficient in herself.”*

André & Cie S.A. v. Orient Shipping (Rotterdam) B.V. (*The “LACONIAN CONFIDENCE”*)  
[1997] 1 Lloyd’s Rep. 139 (per Rix J, at p.150)

### I INTRODUCTION

In the last twenty five years or so, five cases have come before the English Commercial Court which deal with the inception of off-hire under the New York Produce Exchange (“NYPE”) form of time charter party,<sup>1</sup> each arising as the result of the intervention of some third party.<sup>2</sup> With the growing involvement of port state authorities in the regulation of shipping, coupled with the likelihood of increased “vetting” requirements from sub-charterers in the dry market (as already happens in the tanker trades), it seems very likely that such intervention will become more common; and the purpose of this article is to examine the approach which the English Courts have adopted in this area, in an attempt to reconcile some apparent inconsistencies in the reported judgments.<sup>3</sup>

In *The “APOLLO”*,<sup>4</sup> the port health authorities at Lower Buchanan had delayed the granting of free pratique because they had good reason to believe that there was typhus on board the vessel. The Panama Canal authorities had insisted that the *“AQUACHARM”*<sup>5</sup> must be lightened for transit. In *The “MASTRO GIORGIS”*,<sup>6</sup> the intervening authority was an Italian court which had arrested the vessel as security for the receiver’s claim in respect of cargo damaged during the voyage. In *The “ROACHBANK”*,<sup>7</sup> the Kaohsiung port authorities had refused to allow the ship to berth with a large number of Vietnamese “boat people” on board, who had been rescued in the South China Sea. And the local authorities had refused permission for the *“LACONIAN CONFIDENCE”*<sup>8</sup> to ballast away from Chittagong with cargo residues still on board.<sup>9</sup>

The *“APOLLO”* and the *“MASTRO GIORGIS”* were both held to be off-hire: in each of those charter parties, the clause was modified by the addition of *“whatsoever”*. The *“ROACHBANK”* charter was similarly amended, but she remained on hire. The charter parties for the *“AQUACHARM”* and the *“LACONIAN CONFIDENCE”* were unamended, and they, too, remained on hire.<sup>10</sup>

All of these cases came to the Court either as a special case or by way of appeal from arbitration, so that (except in one of them<sup>11</sup>) the decision of the Court was based on the factual findings of the tribunal. Inevitably, such findings frequently colour (and sometimes steer) the decision of the Court hearing the appeal, especially in cases which concern causation.<sup>12</sup> Of the five, only *The “AQUACHARM”* reached the Court of Appeal for a determinative judgment; but *The “ROACHBANK”* was also discussed there in the context of an application for leave to appeal.

## II THE OFF-HIRE CLAUSE IN CONTEXT

Given the “scissors-and-paste” approach commonly adopted to their negotiation and drafting, most time charter parties will include other provisions dealing with or touching on loss of time. In reading the cases, therefore, it is important to understand, not only the factual back-ground, but also (as always) the overall context of the charter.<sup>13</sup>

Loss of time under a time charter may arise in many different ways. It may fall within the off-hire clause, but arise without any breach on the part of the Owner;<sup>14</sup> it may fall within the off-hire clause, and also arise from the Owner’s breach;<sup>15</sup> it may be attributable to the Owner’s breach, but fall outside the off-hire clause;<sup>16</sup> or it may fall outside the off-hire clause and arise without breach, but be covered by indemnity.<sup>17</sup> Loss of time may also fall within the ambit of the off-hire clause, and yet arise from Charterer’s breach,<sup>18</sup> or from the Charterer’s unintended act.<sup>19</sup> It may also ostensibly fall within the off-hire clause, but actually flow from the Charterer’s legitimate order or use of the vessel.<sup>20</sup>

### A. *Some General Principles Pertaining to Off-Hire*

There are a number of general principles for the interpretation of the NYPE off-hire clause (and most others too) which are by now fairly well established under English law. Those which may be found relevant for present purposes will include the following:

- (i) it is the Charterer’s basic obligation, absent express exception, to pay hire continuously and without interruption from the time of the vessel’s delivery until the time of redelivery;<sup>21</sup>
- (ii) the burden is upon the Charterer to bring himself within the scope of any provision alleged to curtail this obligation;<sup>22</sup>
- (iii) the off-hire clause, being in the nature of an exception, is to be construed narrowly against the Charterer, since it is included for his sole benefit;<sup>23</sup>
- (iv) the off-hire clause is a provision which operates independently of fault or breach (at least on the part of the Owner);<sup>24</sup>
- (v) the off-hire clause is not subject to the general exceptions provisions of the charter party;<sup>25</sup>
- (vi) the off-hire régime being quite distinct from that for damages, the Charterer has no duty to act reasonably in order to mitigate its loss or to credit any savings in cost;<sup>26</sup>
- (vii) the expression “*preventing the full working of the vessel*” is to be construed as qualifying, not only “*any other cause*”, but also each of the specifically enumerated events which come before;<sup>27</sup>
- (viii) absent amendment, the words “*or by any other cause*” are to be read restrictively (loosely, the so-called “*eiusdem generis* rule”);<sup>28</sup>
- (ix) where the words “*or by any other cause*” are amended by the addition of “*whatsoever*”, the *eiusdem generis* rule does not apply;<sup>29</sup>
- (x) an underlying cause may serve to trigger the off-hire clause, provided it has a direct or necessary linkage to the immediate cause;<sup>30</sup>

(xi) where the cause of delay flows naturally from compliance with the Charterer's orders, it will fall outside the scope of the off-hire clause;<sup>31</sup>

(xii) where the cause of delay arises from Charterer's responsibility or non-actionable fault, it will fall outside the scope of the off-hire clause;<sup>32</sup>

(xiii) where the cause of delay arises from the Charterer's breach, it will (probably) fall outside the scope of the off-hire clause;<sup>33</sup> and

(xiv) unless the clause states otherwise in very clear terms, the off-hire period will end no later than the moment when the vessel is again fully efficient.

#### B. *The Test for the Resumption of Hire*

The authority for this paradoxical proposition is the 1902 decision of the Court of Appeal in *The "ZANZIBAR"*,<sup>34</sup> as applied by Parker J in *The "MARIKA M"*.<sup>35</sup> Its importance in the present context has generally been understated in the literature, and possibly overlooked in some of the judgments. It is important because, where the test for the ending of the off-hire period is met from the outset, it must follow that the off-hire period can never commence.<sup>36</sup>

What had happened in the earlier case was this: the *'ZANZIBAR'* had sustained damage from an average accident on passage from Germany to the U.S.A., and put back to Cork for repairs. The off-hire clause was in all material respects that of the NYPE form;<sup>37</sup> and it was clear that the time lost in putting back and while under repair in Ireland was properly "*loss of time from ... detention by average accidents*". But was the vessel still off-hire after she had resumed the voyage?

At first instance, the case was decided simply in these terms, Phillimore J finding that the vessel could not properly be said to be detained once the repairs had been completed and she was again steaming westwards at full speed.

In upholding this judgment, the Court of Appeal evidently considered the issue in a wider context:

*"The object of the clause in question 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. I think Phillimore J was right as to the cesser of the hire, and also as to the liability to pay for the coal during the time in dispute..."*<sup>38</sup>

From time to time, doubts were occasionally expressed about the general application of this broader restriction to the scope of "*for the time thereby lost*";<sup>39</sup> but in *The "MARIKA M"* (1981), Parker J was quite clear on the point:

*"That is a perfectly general statement, in the light of facts which would have enabled the point here taken to be fully canvassed. The facts were before the Court of Appeal and the Master of the Rolls says, as plainly as it is possible to say, that the [off-hire] time ceases when the vessel is again in full working order."*<sup>40</sup>

Before that decision, the uncertainty concerning the authority of *The "ZANZIBAR"* for the so-called "wider proposition" was quite understandable. When read on its own, the wording of the clause is fairly unambiguous, and does not naturally imply any restriction beyond the usual questions of remoteness. Added to this, there is the obvious contrast between the NYPE charter's silence on this point and the express, and scarcely supererogatory, wording of the 1939 BALTIME form: this latter

appeared soon after the judgment of the Court of Appeal in *The "HORDEN"*,<sup>41</sup> and was evidently intended to correct the cruel injustice - as shipowners no doubt regarded it - of that latest decision.<sup>42</sup>

Under this new BALTIME clause, the hire is reduced only in respect of such lost time as falls within the period between the inception of the delay and the moment when the vessel is again ready and available to perform the service immediately required - that is, the moment when she meets the test for efficiency advanced by Lord Halsbury in *The "WESTFALIA"*: was the ship "efficient to do what she was required to do when she was called upon to do it"?<sup>43</sup> On its plain wording, it is by no means obvious that the NYPE clause should be treated in the same way.<sup>44</sup> Unlike the 1939 BALTIME, it says nothing on its face of a "cut-off" once the vessel is again able to perform the service immediately required.

However that may be, it is now clear, following *The "MARIKA M"* and *The "PYTHIA"*, that, at least under English law, the NYPE form is to be read in exactly the same way as BALTIME 1939. And this was recognised by Goff J in the latter case when he said:

*"Into which category does clause 15 of the New York Produce Exchange 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."<sup>45</sup>*  
(Emphasis added.)

### C. Interruption of Hire under the NYPE Clause

In order to trigger the NYPE off-hire clause, three necessary conditions<sup>46</sup> must first be met:

- (1) there must be a loss of time to the Charterer<sup>47</sup>, which
- (2) is caused by an event which falls within the named causes,<sup>48</sup> and which
- (3) has the effect of preventing the full working of the vessel.<sup>49</sup>

Through the application of the general propositions (viii) to (xiii) above, it is usually a fairly simple exercise to establish whether a given event falls within the named causes of a particular clause. Difficulties frequently arise, however, in deciding (a) whether that event has the effect of preventing the full working of the vessel; and (b) whether, if so, it is a cause of such a kind as will properly permit the clause to be triggered.

## III THIRD PARTY INTERVENTION

Typically, such an event is the one which falls awkwardly in the no-man's land between the Charterer's field of responsibility and the risks which must lie with the Owner: a loss of time resulting from the intervention of some independent third party. On which side of the contractual fence should this lie?

Where the off-hire clause is not amended by the addition of "whatsoever", this difficulty will seldom arise: it is sufficiently clear that each of the disparate events enumerated - "deficiency of men or stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking ..." - has this in common with the others: that it is a cause of delay which might reasonably be expected to fall to the Owner's account.<sup>50</sup> But with the

addition of “*whatsoever*”, virtually any event will fall within the named causes;<sup>51</sup> and the only limitation, apart from “*preventing the full working of the vessel*”, is then what Mocatta J characterised in *The “APOLLO”* as the “*general context of the charter*”:

*“In my view, although there is considerable tautology about the printed clause, ... the use of the word ‘whatsoever’ coming after the words ‘or by any other cause’ excludes the application of the ejusdem generis rule ... This does not, however, necessarily mean that there is no limitation on the application of the amended clause since one has the general context of the charter and the words ‘preventing the full working of the vessel’. It is for the owners to provide the ship and the crew to work her and provide the service then required by the charterers.”*<sup>52</sup>

Here, the judge evidently had in mind a passage from the recent decision in *The “MAREVA A.S.”*, which he had just quoted (and which, although arguably *obiter*, has since been highly influential):

*“This clause undoubtedly presents difficulties of construction and may well contain some tautology, e.g. in the reference to damage to hull, machinery or equipment followed by ‘average accidents to ship’. But I think that the object is clear. The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost... But if, for instance, the cargo is damaged as the result of an accident, but the vessel’s ability to work fully is not thereby prevented or impaired, because the vessel in herself remains fully efficient in all respects, then I do not think that the charterers bring themselves within the clause.”*<sup>53</sup>

Mocatta J did not enlarge further on this “*general context of the charter*”. Simply put, it probably says no more than that there must be some sort of restriction to the scope of the expanded universe of admissible causes, which can best be explored by carefully construing the off-hire clause in the wider context of the charter party as a whole.<sup>54</sup>

The judge’s second limitation, however, has received a great deal of attention, as attempts have been made to find a judicial test which will consistently filter out those types of cause which, by their nature, cannot properly be said to interfere with “*the full working of the vessel*”, - that is, to formulate the determinative question(s) to be asked by the trier of fact. And, as in relation to the cessation of off-hire, so also with regard to its inception, the English courts have readily adopted an approach to the construction of the NYPE form which reflects the express wording of BALTIME.

#### IV THE SERVICE IMMEDIATELY REQUIRED

The correct approach to the NYPE clause, therefore, is to ask: Was the vessel fully capable of performing the service immediately required of her? But, as so often happens with such a diagnostic question, it is usually easier to pose than to answer; and the discussion sometimes degenerates into an apparently self-defeating debate on a par with Zeno’s paradoxes.<sup>55</sup>

In *The “BERGE SUND”*, where the delay arose out of the failure of the vessel’s cargo spaces to pass a pre-loading inspection, Staughton LJ considered the matter in these terms:

*“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 the cargo; as I have said, that was the very last thing that the charterers would have ordered ... 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 which cargoes are loaded, and consequently when and what cleaning is required.”<sup>56</sup>*

But such a common-sense distinction will not always work in practice. In *The “BERGE SUND”* itself, the three “very experienced” arbitrators had adopted the broader view; and in confirming this part of their award, Steyn J commented:

*“[Counsel] said that the arbitrators erred in concentrating on the charterers’ subjective wishes instead of concentrating on what was objectively needed to be done in furtherance of the voyage. I disagree. In my view the arbitrators posed exactly the right question.*

*It was then submitted that the service required of the vessel was not loading but cleaning. Again, I disagree. Objectively what was required in furtherance of the voyage was that loading should have commenced on Dec. 20, 1982.”<sup>57</sup>*

In many situations, the answer will, of course, be intuitively self-evident<sup>58</sup> – even if it is not all that easy to explain precisely why; but sometimes, and especially where the intervention of some third party is involved, there may be no obviously correct answer.

Whatever its practical limitations, however, this test of “*the service immediately required*” has invariably been upheld. It was first clearly articulated in the context of the NYPE form by Lloyd J in *The “AQUACHARM”*; and if the judge had left it at that, things might have turned out differently. But that is not what he did. Possibly influenced by the facts of the case before him, he went on to equate that question with an alternative question, concerning the vessel’s efficiency; and it is really this awkward relationship which lies at the root of the problem of construction where third party intervention is involved:

*“The test, therefore, is whether the vessel is fully efficient in herself, that is to say, whether she is fully capable of performing the service immediately required of her.”<sup>59</sup>*

## V EXTRANEOUS CAUSES

Three years later, in *The “MASTRO GIORGIS”*, Lloyd J had to deal with the case of a ship arrested by the receivers to obtain security for cargo claims; and in this context, he articulated a subsidiary test:

*“In deciding whether a cause prevents the full working of a vessel, distinction is drawn between causes which are totally extraneous, such as the boom in *Court Line Ltd. v. Dant & Russell Inc.*, and causes which are attributable to the condition of the ship itself, such as engine breakdown.”<sup>60</sup>*

*Court Line*<sup>61</sup> is the earliest case which is commonly cited in this connection. In 1937, the “*ERRINGTON COURT*” was trapped in the Yangtse River by a defensive boom erected to prevent enemy forces from advancing up-stream. The main question was whether the charter had been frustrated by the resulting delay; but, having found that it was, Branson J went on to consider the possible application of the off-hire clause in case his main decision was wrong:

*"If there was no frustration the contract stands and hire is payable unless there is anything in the contract to prevent it becoming payable. The charterers rely on [the off-hire clause] for this. The argument depends upon the delay caused by the boom coming within the words 'any other cause preventing the full working of the vessel.' In my opinion it does not.... The words are not apt to cover a case where the ship is in every way sound and well found, but is prevented from continuing her voyage by such a cause as this."*<sup>62</sup>

Although this conclusion is evidently based on the simple finding that the delay caused to the vessel was something which fell wholly outside the ambit of the off-hire clause in question, the Charterer's claim has generally been taken to fail, not only the causal test (the clause being unamended), but also the test of the effect on the full working of the ship. That is certainly how the case has usually been read,<sup>63</sup> so that the Yangtse boom has come to be treated as the paradigm of an extraneous cause which, while it may prevent the use, cannot properly be said to affect the full working of the vessel.<sup>64</sup>

The reasoning of *The "MASTRO GIORGIS"* decision has since been questioned;<sup>65</sup> and Lloyd J readily conceded that *"on any view the case is near the line"*. In the end, however, he was not prepared to over-rule the arbitrators. Their reasons he summarised as follows:

*"Where a vessel is fully efficient, and capable in herself of performing the service immediately required by charterers, she is on-hire, even if she is prevented from performing that service by an extraneous cause, such as the boom which prevented the ("**ERRINGTON COURT**") from sailing down the Yangtse ... But here the arrest was not an extraneous cause in that sense since it affected the legal status of the vessel. She was just as much incapable in herself of performing the service immediately required, that is to say, leaving port, by reason of the arrest as she would have been if she had suffered a breakdown in her engines. There is no distinction to be drawn between legal incapacity and physical incapacity."*<sup>66</sup>

In giving his reasons for upholding this award, Lloyd J added:

*"In deciding whether the cause of prevention is totally extraneous, one must have regard not only to the physical condition of the vessel, but also, in the words of the arbitrators, to her qualities and characteristics, to which I would also add, her history and ownership. I can see no valid distinction between a vessel being arrested because of a claim by cargo against her owners, and a vessel being prevented from leaving port because, for example, her classification certificates are not in order. I agree with the arbitrators that it can make no difference whether she is arrested because of alleged damage to cargo carried on the particular voyage, or on some previous voyage, or indeed by reason of alleged damage to cargo carried on a sister ship."*<sup>67</sup>

The decision in the *The "MASTRO GIORGIS"* was published in time to be relied on by the majority of the arbitral tribunal in *The "ROACHBANK"*,<sup>68</sup> where the off-hire clause was again amended by the addition of *"whatsoever"*. Having found that the presence of the refugees was not a material impediment to the working of the cargo<sup>69</sup>, they effectively decided that the chain of causation leading to the delay contained not one, but two extraneous links: behind the action of the authorities lay the presence of the refugees on board the ship:

*"The majority concluded that the finding of the refugees was 'extraneous' and we did not see how it can be argued that by coming aboard "**ROACHBANK**" or by the effluxion of time ... or by the subsequent attitude of the Taiwanese authorities, an 'extraneous' event can therefore change its character or history and become an 'internal' one."*<sup>70</sup>

Perhaps recognising that the facts were closer to those of *The "MASTRO GIORGIS"* than the tribunal had found,<sup>71</sup> Owner's counsel questioned the reasoning in that case, submitting on appeal that it was not supported by the earlier decisions and that, while the principles derived from those earlier decisions were simple and easily applied, the distinction between those causes which were extraneous and those which were not was unclear and difficult. In his submission, the proposition

that an external cause may be said to prevent the full working of the vessel provided it is attributable to its history or ownership must run counter to authority because it would “circumvent the established test of whether the vessel is fully efficient in herself, fully capable of performing the service immediately required of her.”<sup>72</sup>

## VI THE “JUDICIAL GLOSS”

Having reviewed the previous decisions, Webster J said:

*“[The] approach [of the earlier authorities], as it seems to me, is first to consider whether the full working of the vessel has been prevented. Although, as I said earlier, that would appear prima facie to be a pure question of fact, the Courts have unquestionably put a judicial gloss on the way in which that question of fact is to be put, so that the question which has to be asked, according to the authorities, is whether the vessel is fully efficient and capable in herself of performing the service immediately required by the charterers.”*<sup>73</sup>

On this basis, he concluded, the decision of the arbitrators was a finding of fact, or mixed fact and law, which any reasonable tribunal could have reached, and so he upheld the award. At the same time, however, as he applied the test first unambiguously articulated by Lloyd J in *The “AQUACHARM”*, Webster J was careful to distance himself from the distinction between extraneous and intrinsic causes advanced in *The “MASTRO GIORGIS”*:<sup>74</sup>

*“I now return to [Owner’s counsel’s] submission that I should not follow the decision of Mr. Justice Lloyd [in *The “MASTRO GIORGIS”*]. I do not think that it is necessary or proper to decide not to follow that decision. But, assuming that my analysis of the approach to the clause, consistent with authority, is correct, I would not, with diffidence and respect, apply Mr. Justice Lloyd’s approach in the terms in which he applied it for two reasons; first, because it seems to me to give undue emphasis to the cause of the prevention of the full working, as distinct from the fact that full working is prevented; and, secondly because ... in the case of an amended clause in my view it is probably unnecessary to consider the nature of the cause at all, something which Mr. Justice Lloyd himself acknowledged in the way in which he stated his second reason: ‘any cause may suffice’. Moreover, for my own part, I do not think it either necessary or helpful to attempt to categorise causes with a view to distinguishing between totally extraneous and other causes.”*<sup>75</sup>

This approach to Lloyd J’s reasons was echoed in the Court of Appeal:

*“The opinion expressed by Mr Justice Lloyd in the ‘MASTRO GIORGIS’ was that it was necessary to consider whether the cause was extraneous or not. If it were an extraneous cause, then it would not result in the off-hire clause attaching. If, on the other hand, the cause was not extraneous, then the charterer would be able to claim that the off-hire clause applied. Mr. Justice Webster, in his judgment in this case, did not take the same view. He thought that because the word ‘whatsoever’ was used, any cause would suffice, and that the only limitation to be placed on the words ‘any other cause whatsoever’ was that the cause had to be one which ‘prevented the full working of the ship’ ... It follows, therefore, that the approaches of Mr. Justice Lloyd and Mr. Justice Webster to the proper construction of clause 15 can be said to be different.”*<sup>76</sup>

This paraphrase of the difference between the two judgments, while correct so far as it goes, is not altogether helpful, and has led to a certain amount of confusion.<sup>77</sup> In fact, as pointed out by Webster J, Mr Justice Lloyd was very clear that, where the clause is amended by the addition of “whatsoever”, any cause of itself will serve as a valid trigger.<sup>78</sup> And so it is at the least an over-simplification to suggest that the difference arises because Lloyd J was considering the cause while Webster J was considering its effect: both judgments are, in their different ways, concerned with the effect. For the reasons explained above, Lloyd J’s concern was not to discuss the nature of the cause *per se*, but to

explore more fully the “*general context of the charter*” as identified by Mocatta J in *The “APOLLO”* - and subsequently dismissed by Webster J as being of limited practical significance:

*“I quite accept that in principle the words [‘any other cause whatsoever’] can be limited by the general context of the charter..., but in practice I would have thought that the only real limitation is that the cause must have been one which prevented the full working of the ship.”*<sup>79</sup>

Discussing the issue a few years later, in *The “LACONIAN CONFIDENCE”*, Rix J concluded that the true difference between the two lines of approach might indeed lie elsewhere:

*“I feel bound to say, however, with equal diffidence, that in my judgment the real point of difference between Mr. Justice Lloyd and Mr. Justice Webster (and perhaps both of them, reading this, would disagree with me) was that Mr. Justice Lloyd was willing to say that a vessel wholly efficient in herself might nevertheless, under certain circumstances, come within the words ‘preventing the full working of the vessel’, whereas Mr. Justice Webster was of the view, based upon his reading of the authorities, that such a reading was not possible where the vessel was fully efficient and capable in herself.”*<sup>80</sup>

## VII TWO DIVERGENT VIEWS

Taken at face value, this statement reads rather oddly, as it seems to imply that Lloyd J had changed his mind between *The “AQUACHARM”* and *The “MASTRO GIORGIS”*, but had omitted to mention it. The natural reaction to this apparent inconsistency is, of course, to assume that Rix J wished to imply “a vessel wholly efficient in herself, at least in physical terms”; and that may, indeed, be what he actually meant. But there is evidently more to it than that, because, earlier in his judgment, Rix J had also said:<sup>81</sup>

*“In such a situation [as *The “MASTRO GIORGIS”*] a vessel is fully efficient in herself, but is susceptible to arrest. It follows that ... Mr. Justice Lloyd was not giving to the words ‘preventing the full working of the vessel’ a meaning that required the vessel to be inefficient in herself. Her full working was only prevented inasmuch as she was under arrest.”*

So there is clearly an issue here which is more than merely semantic. And we must, therefore, ask: are the comments of Rix J in *The “LACONIAN CONFIDENCE”* on all fours with the judgment of Lloyd J in *The “MASTRO GIORGIS”*?

It is readily apparent that Rix J did not agree with the approach adopted in the “*ROACHBANK*”, and was unimpressed by the “judicial gloss”. Having reviewed the authorities considered by Webster J, he concluded:

*“In these circumstances I would for my part respectfully differ from Mr. Justice Webster’s conclusion that he was bound by authority to impose the judicial gloss he adopted upon the phrase ‘preventing the full working of the vessel’. I would prefer myself to accept that it could be legitimate to find the full working of a vessel had been prevented by the action of authorities in preventing her working.”*<sup>82</sup>

This conclusion was not affected by a careful consideration of the Court of Appeal’s dismissal of the “*ROACHBANK*” Charterers’ application for leave to appeal, nor by the two Shelltime cases which had not been mentioned by Webster J:<sup>83</sup>

*“In my judgment, therefore, the qualifying phrase ‘preventing the full working of the vessel’ does not require the vessel to be inefficient in herself. A vessel’s working may be prevented by legal as well as physical means, and by outside as well as internal causes. An otherwise totally efficient ship may be prevented from working. That is the natural meaning of those words, and I do not think that there is any authority binding on me that prevents me from saying so.”*<sup>84</sup>

As for the issue of causation, Rix J's conclusion is expressed in terms with which, at least on the face of it, Lloyd J would hardly disagree:<sup>85</sup>

*"Prima facie it does not seem to me that it can be intended by a standard [i.e. unamended] off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word 'whatsoever', I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word 'whatsoever', then he should be cautious to do so."*<sup>86</sup>

But beneath this seeming unison there lies a jarring discord. In Rix J's analysis, this is the area of the clause where lies the distinction between those causes which are extraneous and those which are not:

*"It follows in my judgment that, although I would for my part accept [the charterers'] submission that the full working of a vessel may be prevented for legal as well as physical reasons, this appeal must nevertheless fail. In the absence of the word 'whatsoever', the unexpected and unforeseeable interference by the authorities at Chittagong at the conclusion of what was found to be a normal discharge was a totally extraneous cause, (save in a 'but for' sense) unconnected with, because too remote from, the merely background circumstance of the cargo residues ...*

*I would suggest that if the clause had been amended to contain the word 'whatsoever', then the position would probably have been otherwise. The vessel would have been prevented from working, albeit in unexpected circumstances. The cause would not have been ejusdem generis, but with the addition of the word 'whatsoever' would not have to be. It would not seem to me to matter that the authorities' actions may have been capricious."*<sup>87</sup>

In *The "MASTRO GIORGIS"*, however, the logical structure is quite different, as Lloyd J's second and third reasons demonstrate:

*"(2). Where, as here, the word 'whatsoever' is added, any cause may suffice to put the vessel off-hire, whether physical or legal; the question in each is whether it prevents the full working of the vessel for the service immediately required.*

*(3). In deciding whether a cause prevents the full working of a vessel, distinction is drawn between causes which are totally extraneous, such as the boom in [The "ERRINGTON COURT"], and causes which are attributable to the condition of the ship itself, such as engine breakdown."*<sup>88</sup>

Quite apart from their obvious semantic differences, therefore, there is a clear division between the two judgments in relation to the amended clause.<sup>89</sup> Both would exclude the boom in the Yangtse River, because that would clearly affect the use of the vessel as distinct from its working.<sup>90</sup> But, whereas the reasoning of *The "MASTRO GIORGIS"* would also exclude the arbitrary or capricious intervention of an independent third party provided the vessel itself remained - albeit in the widest sense<sup>91</sup> - efficient, *The "LACONIAN CONFIDENCE"* would apparently permit such an event to place the ship off-hire, subject only to the natural exclusions of the Charterer's order or responsibility (or, presumably, fault or breach).<sup>92</sup>

Logically, Lloyd J would ask the same questions as to effect regardless of whether or not the words "or by any other cause" were amended by the addition of "whatsoever", and would in either case exclude any event which, while it might succeed in preventing the full working of the vessel, was nevertheless extraneous.<sup>93</sup> The approach of Rix J, on the other hand, would sift out the extraneous

event only where the clause was unamended. The line drawn by *The "LACONIAN CONFIDENCE"* would, therefore, allow the amended clause to catch a class of external causes which *The "MASTRO GIORGIS"* would always exclude as being wholly extraneous.

## VIII A NEW HIGH-WATER MARK?

If this analysis is correct, then *The "LACONIAN CONFIDENCE"* - which, taken at face value, seems to offer a comprehensive validation of *The "MASTRO GIORGIS"* - actually represents a substantial shift in interpretation, and must leave a higher tide-line. And while this part of Rix J's judgment should admittedly be regarded as *obiter*, so perhaps should two other judicial pronouncements which have been held to be good authority in this general area.<sup>94</sup> So, just how good is the authority of *The "LACONIAN CONFIDENCE"* for the proposition that a vessel which is fully efficient in itself (in the wider, "*MASTRO GIORGIS*", sense) may yet be placed off-hire?

The judgment of the Court of Appeal in *The "ROACHBANK"* is, unfortunately, of little assistance here. The hearing was not an appeal proper, but dealt only with an application for leave to appeal under the Arbitration Act.

For the Charterer, it was argued that there were conflicting decisions at first instance (*The "MASTRO GIORGIS"* and *The "ROACHBANK"*), and also that neither of those cases had applied the right tests. But the Court came to the conclusion that the decisions themselves were not inconsistent. The tribunal in the later case had applied the test stated in the earlier one, and had found that the ship remained on hire; and the judge, applying the alternative test, had concluded that they were right. Therefore, while the two judges had evidently adopted different approaches,<sup>95</sup> the Charterer's claim was bound to fail in any case.

In order to succeed, the Charterer must show that Webster J's conclusion on the law was either plainly wrong or, at the least, that there was a strong *prima facie* case for saying that it was. Since no *prima facie* case had been made at all, the application must be denied.

As mentioned above, the two Shelltime cases<sup>96</sup> are of little assistance in this context, because their specific wording refers, not to the *'full'* working of the vessel being prevented, but its *'efficient'* working. As a result, they can hardly be enlisted either to reinforce or to deny the judicial gloss allegedly applied to the NYPE clause, that "*the question which has to be asked is whether the vessel is fully efficient*".

There is, however, one of the older cases which is directly relevant to this discussion;<sup>97</sup> and that, as mentioned earlier, is *The "ZANZIBAR"*. There, the off-hire clause was materially identical with that of the NYPE form;<sup>98</sup> and the decision of the Court of Appeal was that "*only such time was provided for as might elapse until the vessel was once more in full working order*".<sup>99</sup>

Exactly as with "*efficient*" in *The "AQUACHARM"*, so here "*full working*" is obviously used in a purely physical sense, for that in each case is the context. But since the only basis for importing the concept of efficiency (however defined) into the construction of such an off-hire clause is the use of the expression "*full working of the vessel*", it must follow that "*efficient*" can carry no wider sense.<sup>100</sup> *The "ZANZIBAR"* does, therefore, appear to be good authority for the proposition that the off-hire period cannot extend beyond the moment when the vessel is again fully efficient, because by then it must necessarily be in full working order.<sup>101</sup> But if a sufficient criterion for the resumption of hire is met at the outset (because the vessel is in fact never less than fully efficient), it must follow that the payment of hire cannot be interrupted in the first place.<sup>102</sup>

The other decision which must cast serious doubt on the wider implications of *The "LACONIAN CONFIDENCE"* is the judgment of the Court of Appeal in *The "AQUACHARM"* itself. As pointed out by Rix J, the leading judgment of Lord Denning MR, with which Shaw LJ expressed his complete

agreement, says nothing about efficiency as such. The question is addressed in simple, factual terms: did the lightening of the vessel's cargo prevent its full working? Answer: No.<sup>103</sup> Accordingly, as this argument goes, the reasoning of the majority offers nothing in support of the judicial gloss of full efficiency.<sup>104</sup>

But can this view be right? The Court of Appeal was, after all, unanimously confirming, without qualification, the judgment of Lloyd J, which stated the proposition in question in the clearest of terms; and while it is true that Shaw LJ does not refer to the immediately preceding judgment of Griffiths LJ, his express endorsement is not limited to the judgment of Lord Denning; *"I entirely agree with the judgment of my Lord Denning, M.R., and with that of Mr. Justice Lloyd."*<sup>105</sup> The characterisation of Griffiths LJ's judgment as being influential, but not on all fours with the majority of the Court will hardly stand up.

Both of these judgments of the Court of Appeal, therefore, would appear to contradict Rix J's proposition that *"the qualifying phrase 'preventing the full working of the vessel' does not require the vessel to be inefficient in herself"*.<sup>106</sup>

## IX THE SUSPECTED CAUSE

But this still leaves *The "APOLLO"*. There was a clear case of a ship which was fully efficient but which was nevertheless held to be off-hire. The ship was fully efficient in fact because the health authorities eventually gave her a clean bill of health: all of the medical tests were negative, and the disinfection of the galley and sanitary system was nothing but a sensible precaution in light of the vessel's history, two men having been landed at the previous port with suspected typhus.<sup>107</sup>

Whether or not this case was correctly decided on its facts,<sup>108</sup> it has sometimes been cited in support of the notion that the mere suspicion of a named event may be enough to satisfy the causal test. Such a reading seems to be inconsistent with the principle that the off-hire clause should be construed strictly against the Charterer;<sup>109</sup> and so it requires careful analysis.

Where the word "*whatsoever*" is added, as it was in *The "APOLLO"*, it is clear that any cause will serve of itself to trigger the clause - always provided that it prevents the full working of the vessel and is not purely extraneous: the only reason to go behind it in the search for an underlying cause would be to see if it is extraneous or not.<sup>110</sup> But in *The "LACONIAN CONFIDENCE"*, Rix J suggests that, even without this amendment, the reasonable intervention of authorities acting on the suspicion of a named event may be sufficient:

*"The authorities suggest, moreover, that where the authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel, any time lost may well be off hire even in the absence of the word 'whatsoever'. Thus in *The "APOLLO"* (albeit the presence of 'whatsoever' may have facilitated the decision) Mr. Justice Mocatta stressed that there was good cause for the careful testing and disinfection that was carried out before free pratique was granted ...; and Lord Justice Griffiths pointed out (in *The "AQUACHARM"*...) that no responsible person would use a ship suspected of carrying typhus. Moreover in *The "BRIDGESTONE MARU No. 3"* Mr. Justice Hirst held that the vessel was off hire even in the absence of the word 'whatsoever' on the basis that the regulations had been properly applied and that the failure of the pump to comply with the regulations was a potential (sc and reasonable) challenge to the efficiency of the ship herself."<sup>111</sup> (Emphasis added.)*

The *"BRIDGESTONE MARU No. 3"* was a gas carrier, chartered on the Shelltime 3 form.<sup>112</sup> To cut short a convoluted narrative,<sup>113</sup> it was refused permission to discharge a parcel of propane at Leghorn because the booster pump was a temporary, and not a fixed installation. All of the Charterer's submissions alleging breach by the Owner were rejected; and the only remaining question related to the off-hire clause.

Here, having reviewed the authorities, Hirst J divided those which seemed relevant into two categories:

*"In [The **'ERRINGTON COURT'**] ... the cause (the boom) was entirely extraneous to the ship and had nothing whatsoever to do with the efficiency of the vessel. In The **'AQUACHARM'** the cause was the overloading, and although this was in a sense intrinsic to the ship, it had, as Lord Denning, M.R., clearly pointed out, nothing to do with its actual efficiency as a working vessel. In The **'GOOD HELMSMAN'**, where the case was on any view extremely weak on the facts, the absence of one single crew member could not possibly affect the overall efficiency of the crew.*

*On the other hand, in The **'APOLLO'** the cause was the alleged health risk which, if made good, would undoubtedly affect the efficiency of the crew. In The **'MASTRO GIORGIS'** the cause was the alleged defects revealed by the cargo claim, which again, if made good, would affect the efficiency of the vessel."<sup>114</sup>*

Having distinguished the authorities in this way, Hirst J concluded that the case before him fell with The **'APOLLO'** and The **'MASTRO GIORGIS'**:

*"In my judgment, this case falls within the latter of the above two categories. The cause of refusal to allow the vessel to discharge was the failure of the pump to comply with the RINA regulations in that it was unfixed. This allegation was a potential challenge to the efficiency of part of the ship's equipment, namely, the portable pump. To adapt the words of Lord Justice Griffiths in The **'AQUACHARM'**, the incapacity of the ship to discharge was attributable to the suspected condition of the ship itself, and as a result the crew could not use the relevant part of the machinery, namely, the pump. Consequently I hold that the charterers have clearly established as a matter of principle the occurrence of an off-hire event at Livorno."<sup>115</sup>*

In fact, there was nothing suspected about the vessel's condition: everyone knew that the pump was a temporary installation. The Harbour Master asked RINA: is this the proper and safe way to do it? RINA answered: No. And the Harbour Master took his decision on the basis of that advice. What prevented the working of the ship was a prohibition properly imposed by the port authority, but for which the crew could, no doubt, have used the pump perfectly well, as they had in the past.

The report of the case is unusual, in that the relevant clause is not quoted *in extenso* and nowhere in the judgment is it stated what precisely was the named cause which was found to trigger the interruption of hire. The RINA regulations were certainly found to mandate the fixed installation of the booster pump; but those were its (private) classification rules, and could only be compulsorily applied to a foreign ship, classed elsewhere, through the port state régime.<sup>116</sup> It is not at all obvious why non-compliance with port regulations should be *eiusdem generis* with the sort of causes enumerated in the unamended Shelltime clause.<sup>117</sup>

Clearly, in this case, the immediate cause was the order of the Harbour Master. If that had fallen *per se* within the named causes, the judgment would surely have said so, for the temporary installation of the booster pump would then self-evidently have constituted an intrinsic underlying cause. But that is not what was found.

Be that as it may, there was certainly nothing suspected, reasonably or not, about the relevant condition of this ship. The non-compliance with the RINA rules was a fact and was accepted as such by the proper authority of the port. Thus, this judgment, despite the eccentric wording of its conclusion, with its statement about *"the incapacity of the ship to discharge ... attributable to the suspected condition of the ship itself"*, really does nothing to validate the concept of the suspected cause.

What, then, of The **'APOLLO'** – a decision which, like The **'ERRINGTON COURT'**, appears to have received a unanimously favourable press? One would like to be able to say that a finding of fact was

imposed on the Court by the arbitrators; but that would not be correct.<sup>118</sup> Mocatta J could have made all of the sound legal points for which his decision is approved, and still found that the facts did not fit; but that is not what he did.

So here was a vessel which was, as a matter of contingent fact, fully efficient in itself, being well-found and adequately manned with a crew which was healthy. Solely because of the decision, proper and reasonable, of the port health authority, she was delayed for about 30 hours awaiting pratique. But the obtaining of pratique, just like hold-cleaning or bunkering, is undoubtedly a function of the Charterer's use of the ship, as the judge himself recognised:

*"Where the obtaining of health clearance is a mere formality ... the very minor delays, if any, involved in obtaining it would not bring the off-hire clause into play, since the ship would be able to render the service then required of her. But in the present case the obtaining of free pratique was no mere formality and there was good cause for the careful testing and disinfection that was carried out before free pratique was given involving a delay of 29 1/2 hours. In my judgment the action taken by the port health authorities did prevent the full working of the vessel and did bring the off-hire clause into play."*<sup>119</sup>

Thus, the judgment certainly does not require, nor indeed does it mention, any suspicions about the ship as it lay at Lower Buchanan: the word "suspected" is used by Mocatta J only to describe the potential diagnosis of the two sick crew members who were previously landed at Naples.<sup>120</sup> The health authorities delayed the granting of pratique, not because they had a suspicion of the presence of typhus, but because they had very good reason to believe that it was there, and should properly be guarded against: "[T]here was good cause for the careful testing and disinfection that was carried out ..."<sup>121</sup>

Whether or not *The "APOLLO"* would be decided in quite the same way today, the case offers no validation for the concept of suspected cause as such in relation to the NYPE provision, with or without "whatsoever". And without its support, the later references to suspected cause lose their rationale.

With the unamended clause, the first question to be asked is undoubtedly that presented by Rix J: were the authorities acting reasonably and properly?<sup>122</sup> But if the answer is: Yes, or if the clause contains "whatsoever", there must still be the second one to ask: And does the (underlying) reason for their action properly fall within the clause?<sup>123</sup> If the clause is amended, any act prompted by the suspicion of a named cause, so long as it is not extraneous, should be enough to trigger the off-hire; but where the provision does not include "whatsoever", it is by no means obvious why the erroneous suspicion of the existence of something which, as a matter of fact, does not exist should be treated as *eiusdem generis* with that something's actual existence.

## X CONCLUSION

In one of the earlier off-hire cases,<sup>124</sup> Lord Justice Scrutton remarked:

*"Judges have used very wide language in cases relating to particular facts, but the language used must be construed in reference to the facts of the particular cases in which they were using them."*

This is good advice. The off-hire jurisprudence is plagued by an unfortunate tendency to present the facts in an oblique light which distorts their relevant features; and eventually, the facts themselves are allowed to drift out of focus, and the argument centres on the way in which they have been characterised in the adversarial context of some later case.<sup>125</sup>

But it is also important to remember that most of the recent cases have come to the Court either by way of appeal from an arbitration award or (before the 1979 Arbitration Act) as a special case stated

on facts found. Usually, the issue to be decided has not been whether the arbitrators got it right on the facts, but whether, as a matter of law, they asked themselves the proper questions. The judge who upholds an award would not necessarily come to the same decision as the arbitrator if he were standing in his shoes; and a legal precedent should not be treated, as too often happens, as a factual precedent.<sup>126</sup> Lloyd J evidently paused before he followed the tribunal in *The "MASTRO GIORGIS"*; and it is quite conceivable that Webster J would still have upheld a contrary award in *The "ROACHBANK"* if it had happened that one of the majority had changed his mind before it was issued.

Another common trait is the tendency of the more recent judgments to avoid defining their terms, which results in needless ambiguity. Most obviously, the word "*efficient*" is used in a number of different ways. Sometimes it relates only to physical and mechanical capacity;<sup>127</sup> sometimes it also includes conjunct qualities, such as the health of the crew or the state of the ship's certificates;<sup>128</sup> sometimes it is expanded to embrace other inherent characteristics, such as the vessel's ownership and history;<sup>129</sup> and sometimes it is extended to capture virtually anything, imaginary or real, which is not exclusively extrinsic, in the sense that it would apply equally to any and every other vessel of similar contractual description in that particular situation.<sup>130</sup> Usually, it is only clear from the context (and not always then) exactly what the expression is being used to cover.<sup>131</sup>

The use of "*external*" is similarly ambiguous, since it is applied both in a purely descriptive sense (as the opposite of "*internal*") and also to convey a concept close to or overlapping with "*extraneous*".<sup>132</sup> Nor is it at all clear that "*extraneous*" itself is always used in the same sense.<sup>133</sup>

And, as demonstrated above, the usage of "*suspected*" and "*suspicion*" is scattered fairly liberally across a wide scale of uncertainty and risk, ranging from the wholly appropriate precautions taken by the Lower Buchanan health authorities in *The "APOLLO"* to the fastidious apprehension of the Chittagong customs that the sweepings of rice, rust and straw left on the tank-tops of the "*LACONIAN CONFIDENCE*" might, just conceivably, be radioactive.

Such uncertainties have led to repeated and somewhat rebarbative reviews of the jurisprudence.<sup>134</sup> Unfortunately,<sup>135</sup> they have not led to any clear and comprehensive theory of causation, which is disappointing in an area where breach or fault is usually irrelevant.<sup>136</sup>

It is, however, now clear that three further propositions can be added to the general principles outlined above, at least in relation to the NYPE form of clause:<sup>137</sup>

(xiv) the full working of the vessel is to be tested against its ability to perform the service immediately required;<sup>138</sup>

(xv) the service immediately required is to be identified, not by the Charterer's orders, expectations or hopes, but as the next step logically entailed in the employment of the vessel in the contingent factual situation;<sup>139</sup> and

(xvi) the full working of the vessel cannot properly be said to be prevented by an effective cause which is extraneous.<sup>140</sup>

More tentatively, an additional proposition may be added:

(xvii) in the case of an unamended clause, the full working of the vessel may be prevented by a suspected underlying cause, provided: (a) the suspicion is well-founded as a matter of fact; and (b) the person who acts on the suspicion acts not unreasonably.<sup>141</sup>

So, what of the question posed in the title of this article? Can it properly be said that an efficient vessel may yet be placed off-hire? Given its protean usage, this adjective is dangerously ambiguous. Where it actually appears in the charter party itself, the word must be interpreted like any other, according to the usual canons of construction;<sup>142</sup> but when it is used, without definition, as a measure

of the vessel's capacity to perform the service required, the expression becomes effectively otiose, because of its wide range of possible meanings.

The notion of efficiency is imported into the jurisprudence of the NYPE clause by two distinct routes: first, as a linguistic or semantic gloss on "[not] *preventing the full working of the vessel*"; and secondly, as a legal or judicial gloss deriving from the influential speech of Lord Halsbury in *The "WESTFALIA"*, where the expression "*efficient state*" did appear in the charter.<sup>143</sup> Where the wording of the clause appears to permit the interruption of hire in respect of an efficient vessel, that judicial gloss sounds as a warning to interpret the clause restrictively; but it is, after all, a matter of construing the specific off-hire clause within the framework of the particular charter read in one piece – as Lord Halsbury himself was careful to acknowledge.<sup>144</sup>

Inevitably, therefore, the immediate answer to the question posed above must be the trite rejoinder that it all depends what you mean by "*efficient*". If it is being used in a restricted or qualified sense (as, "physically" or "classification-wise"), the answer must be: Yes, an efficient vessel can certainly be said to have its "full working" prevented. If, however, the word is used in the wider and unqualified sense implied by the dictionaries, and entailed by the established criterion of "*capable of performing the service immediately required*", it must follow that the vessel's full working cannot properly be said to be prevented so long as it meets that test; for that test is, simply and precisely, the relevant definition of "*efficient*" in that wider sense.<sup>145</sup>

If, as this article seeks to show, the problems surrounding the concept of efficiency are essentially semantic in nature, this area of enquiry must ultimately prove to be something of an analytical *cul-de-sac*. The real, and interesting, difficulty will be found to lie in the second branch of Lloyd J's "*AQUACHARM*" test, - that is, whether the ship is fully capable of performing the service immediately required of it.<sup>146</sup> Because this is usually an issue to be addressed by the trier of fact, it may well turn out that the most significant and far-reaching decision of the past twenty-five years or so will be none of the NYPE judgments, but the tanker case of *The "BERGE SUND"*, with its restrictive approach to this question. Not surprisingly, the Court of Appeal there took as its natural starting point the determinative speech of Lord Halsbury in *The "WESTFALIA"*, which remains the only pure off-hire case yet to reach the House of Lords.<sup>147</sup>

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\* The author is Vice President, Risk Management, of Fednav Limited, and President of the Association of Maritime Arbitrators of Canada.

<sup>1</sup> The wording of the relevant sentence of the NYPE 1946 form is as follows:

"15. *That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking 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.*"

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Two later versions are also in use: the 1981 ASBATIME (amendments to 1946 shown below in bold lettering), and the NYPE 1993 (amendments to 1981 shown with underlining):

~~15~~ **17** ~~That~~ *in the event of the loss of time from deficiency **and/or default and/or strike of men officers or crew** or **deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the vessel (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), or detention by** average accidents to ~~ship~~ **the Vessel** or cargo **unless resulting from inherent vice, quality or defect of the cargo**, drydocking for the purpose of examination or painting bottom, or by any other **similar** cause preventing the full working of the vessel, the payment of hire **and overtime, if any**, shall cease for the time thereby lost."*

<sup>2</sup> During the same period, two cases have also dealt with third party intervention in relation to the off-hire clause of the Shelltime 3 form: *The Sanko Steamship Co. Ltd. v. Fearnley & Eger A/S (The "MANHATTAN PRINCE")* [1985] 1 Lloyd's Rep.140 (ITF boycott); and *Navigas International Ltd. v. Trans-offshore Inc. (The "BRIDGESTONE MARU No.3")* [1985] 2 Lloyd's Rep. 62 (non-compliance of booster pump with port state requirements and resulting refusal of permission to discharge). The Shelltime 3 clause refers (twice), not to "*the full working*" of the vessel, but to its "*efficient working*":

*"In the event of loss of time (whether arising from interruption in the performance of the vessel's service or from a reduction in the speed of the performance thereof, or in any other manner)*

*(i) due to deficiency of personnel or stores, repairs, breakdown (whether partial or otherwise) of machinery or boilers, collision or stranding or accident or damage to the vessel or any other cause preventing the efficient working of the vessel; or*

*(ii) due to strikes, refusal to sail, breach of orders or neglect of duty on the part of the master, officers or crew; or*

*(iii) for the purpose of obtaining medical advice or treatment for or landing any sick or injured person (other than a passenger carried [at Charterers' request] or for the purpose of landing the body of any person (other than such a passenger);*

*hire shall cease to be due or payable from the commencement of such loss of time until the vessel is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced."*

<sup>3</sup> Two other recent NYPE cases have also involved loss of time in relation to detention or arrest, but in each there was an additional clause specifically dealing with such delays: *Nippon Yusen Kaisha Ltd. v. Scindia Steam Navigation Co. Ltd. (The "JALAGOURI")* [1999] 1 Lloyd's Rep.903 (Commercial Court); [2000] 1 Lloyd's Rep.522 (Court of Appeal); and *Islamic Investment Co. 1 S.A. v. Transorient Shipping Ltd & Alfred C. Toepfer International G.m.b.H. (The "NOUR")* [1999] 1 Lloyd's Rep.119).

A third case – as unique as it is confusing – is *The "GOOD HELMSMAN"* (Harmony Shipping Co. S.A. v. Saudi-Europe Line Ltd. [1981] 1 Lloyd's Rep.377). The relevant allegation (very much a subsidiary issue) was that the vessel was detained at Jeddah awaiting the return of a crew member who had gone on a pilgrimage to Mecca; but there was no charter party as such, the facts of the incident were based on "*second or third hand hearsay*", and the published report of Ackner LJ's judgment is textually corrupt. As Webster J charitably remarked in *The "ROACHBANK"*: "*... although that case was referred to in argument, I have come to the conclusion that it cannot assist me in the present case one way or the other ...*" (In *The "BRIDGESTONE MARU No.3"*, the printed version was cited, while in *The "MASTRO GIORGIS"* and *The "LACONIAN CONFIDENCE"*, the corrected version was preferred. Neither seems to have affected the outcome.) See also fn.93, *inf.*)

<sup>4</sup> *Sidermar S.p.A. v. Apollo Corporation (The "APOLLO")* [1978] 1 Lloyd's Rep.200

<sup>5</sup> *Actis Co. Ltd. v. The Sanko Steamship Co. Ltd. (The "AQUACHARM")* [1980] 2 Lloyd's Rep.237 (Commercial Court); [1982] 1 Lloyd's Rep.7 (Court of Appeal)

<sup>6</sup> *Belcore Maritime Corporation v. Fratelli Moretti Cereali S.p.A. (The "MASTRO GIORGIS")* [1983] 2 Lloyd's Rep.66

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<sup>7</sup> C.A.Venezolana de Navegacion v. Bank Line (*The "ROACHBANK"*) [1987] 2 Lloyd's Rep.498 (Commercial Court): [1988] 2 Lloyd's Rep.337 (Court of Appeal)

<sup>8</sup> André & Cie S.A. v. Orient Shipping (Rotterdam) B.V. (*The "LACONIAN CONFIDENCE"*) [1997] 1 Lloyd's Rep.139

<sup>9</sup> The cargo discharged at Chittagong was the last one prior to redelivery - it was in fact a trip charter - and the Charterer had apparently exercised an option to redeliver the vessel with dirty holds against a lump-sum payment in lieu of cleaning. The tribunal found that the cause of the delay was *"a lengthy and remarkable bureaucratic procedure"* which involved the *'performance of an extraordinary and exceedingly slow exercise involving multiple certificates as to the small quantity of cargo (one being for non radio-activity).'*"

<sup>10</sup> But in the latter, Rix J suggested *obiter* that *"if the clause had been amended to contain the word 'whatsoever', then the position would probably have been otherwise."* (*Sup.*, fn.8, at p.151)

<sup>11</sup> *The "APOLLO"*: see fn.118, *inf.*

<sup>12</sup> *"So the matter comes down to this, that the arbitrator has selected one cause in preference to another as the proximate or direct cause. I cannot see that any question of law is involved in this selection. . . . [Counsel] says that the decision is for the Court, applying the standard of the reasonable man. I cannot accept that. All conclusions of fact - that is, fact and inference from fact . . . - are for the arbitrator. What is reasonable is always a question of fact. The arbitrator is the person whom the parties have chosen, as they are entitled to do, to apply finally the standard of common sense; and common sense is, I believe, the only test that can be applied to the choice between several causes, all of which are sufficient in law. In my judgment, an arbitrator's finding on causation, unless he can be shown to have misdirected himself on some principle of law or on some point of construction, or to have acted on insufficient evidence, is conclusive."*

Royal Greek Government v. Minister of Transport (*The "ANN STATHATOS"*)  
[1950] 83 L.L.Rep.228 (per Devlin J, at p.238)

*"If I had been the judge of fact in this case it may be that, after hearing the evidence, I would have reached a different conclusion. But the parties to this contract did not want their disputes determined in a court of law. They wished them to be decided by arbitration in London. It followed that the decision of their chosen tribunal was to be final, except to the extent that the English Courts exercise control over arbitrators as a matter of public policy."*

Transworld Oil Ltd. v. North Bay Shipping Corporation (*The "RIO CLARO"*)  
[1987] 2 Lloyd's Rep. 173 (per Staughton J at p.177)

*"Findings of fact by arbitrators should be most jealously safeguarded by the Court, which must take great care not to be led into substituting its own inferences, especially where there may be evidence or technical knowledge available to the arbitrators but not to the Court."*

Santa Martha Baay Scheepvaart & Handelsmaatschappij N.V. v. Scanbulk A/S (*The "RIJN"*)  
[1981] 2 Lloyd's Rep.267 (per Mustill J, at p.271)

See also fn.135, *inf.*

<sup>13</sup> *"We were urged by [Counsel] to arrive at a solution which would provide a clear and workable rule for future cases, but I fear that we are unable to do that. A charter-party might provide that the vessel would remain on hire except during delay caused by a breach of contract on the part of the owner; or it might provide that the vessel should be off hire in the event of delay, unless caused by breach of contract on the part of the charterers. Either solution would provide a rule that was tolerably clear and workable. But those who make charter-parties prefer something more complicated. They provide for a vessel to be off hire in some events which are not a breach of contract by either party - for example, interference by authorities in the present case. As is fashionable nowadays, the clause is said to deal with allocation of risk. The only general rule that can be laid down is that one must consider the wording of the off-hire clause in every case."*

Sig Bergesen D.Y. A/S et al. v. Mobil Shipping & Transportation Co. (*The "BERGE SUND"*)  
[1993] 2 Lloyd's Rep.453 (per Staughton LJ, at p.459)

Such supplementary clauses may provide that other specified events are to be treated as falling within the off-hire clause proper, or they may set up a parallel régime. As an example, the 1981 and 1993 NYPE forms have two other provisions dealing with off-hire situations: Clause 20, which deals with scheduled drydocking; and Clause 21, which deals with disabled cargo-handling gear. And others are commonly added in the rider clauses, often with fairly liberal disregard for consistency. (It should be noted that there is an anomaly in this Clause 20,

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which provides that hire is to “be suspended upon deviation from Charterers’ service until vessel is again placed at Charterers’ disposal at a point not less favorable to Charterers than when the hire was suspended”: contrast this with the off-hire clause proper (15): “Should the vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason other than accident to the cargo, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom.” A 1996 New York tribunal stumbled over this inconsistency: see *Allied Ocean Carriers Inc. v. Navios Corporation* (*The “AMAZON”*) SMA 3246.)

<sup>14</sup> *E.g.*, scheduled dry-docking.

<sup>15</sup> *E.g.*, the breaking of a crane wire at less than its warranted safe load.

<sup>16</sup> *E.g.*, failure to carry on board specified certificates.

<sup>17</sup> *E.g.*, an indemnity against any action taken against the vessel as a result of its flag or the terms of engagement of the crew.

<sup>18</sup> *E.g.*, collapse of stow, or engine breakdown caused by sub-standard fuel.

<sup>19</sup> *E.g.*, drugs hidden on board by Charterer’s stevedores.

<sup>20</sup> *E.g.*, reduction in speed caused by bottom-fouling incurred by lying in tropical waters during the charter period, or prolonged cleaning for loading of sulphur immediately after carrying petroleum coke for the same time charterer.

<sup>21</sup> “...[The] obligation to pay hire during the period of this time charter-party is unabated unless, first, there is a clause in the charter-party giving [the Charterers] a right to stop payment during any particular period ... or secondly they are entitled to set up their claim for damages on the ground that during this particular period the shipowners were not carrying out their part of the contract.”

*Sea & Land Securities, Ltd. v. William Dickinson & Co., Ltd.* (*The “ALRESFORD”*)  
[1942] 72 Ll.L.Rep.159 (per Mackinnon LJ, at p.165)

“It is trite law that hire is continuously payable under a time charter unless the charterer can bring himself within the words of the off-hire clause.”

*Court Line, Ltd. v. Finelvet, A.G.* (*The “JEVINGTON COURT”*)  
[1966] 1 Lloyd’s Rep.683 (per Roskill J, at p.698)

“It is settled law that prima facie hire is payable continuously and that it is for the charterers to bring themselves clearly within an off-hire clause if they contend that hire ceases.”

*Mareva Navigation Co. Ltd. V. Canaria Armadora S.A.* (*The “MAREVA A.S.”*)  
[1977] 1 Lloyd’s Rep.368 (per Kerr J, at p.381)

<sup>22</sup> “I start with this general proposition, that, prima facie, the charterer’s obligation to pay hire is continuous. If a charterer withholds hire, purporting to do so under the off-hire clause, it is for him to establish facts which entitle him to do so.”

*Leolga Compania de Navigacion, S.A. v. John Glynn & Son, Ltd.* (*The “DODECANESE”*)  
[1953] 2 Lloyd’s Rep.47 (per Pilcher J, at p.54)

“The off-hire clause sets out the events which lead to a cessation of hire. If the charterers fail to prove a loss of time due to a cause specifically mentioned in the clause hire will not cease. Here the charterers relied on the words ‘or any other cause preventing efficient working of the vessel’. The burden rested squarely on the charterers to show that the case falls within these words.”

*Sig Bergesen D.Y. A/S & al. v. Mobil Shipping & Transportation Co.* (*The “BERGE SUND”*)  
[1992] 1 Lloyd’s Rep.460 (per Steyn J, at p.463)

“The rule is clearly established that when once hire has begun it runs continuously in favour of the shipowner unless there be some special provision to the contrary in the Charter-party. ... If a Charterer desires to escape this liability he must take care to make the requisite provision clear and unmistakable.”

*J.&J.Denholm Ltd. v. Shipping Controller* (*The “CARRONPARK”*)  
[1920] 4 Ll.L.Rep.426 (per McCardie J, at p.429)

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<sup>23</sup> “The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made.”  
Burton & Co. v. English [1877] 6 Ch.D.265 (per Brett MR)

“I think that the safest way of construing [the off-hire] clause is to regard it as one of exception or defeasance. By the clause certain days are deducted from those for which hire is to be paid, and it was, I think, the duty of the charterer to insert in the clause everything which he wished to have deducted.”  
Vogemann v. Zanzibar Steamship Company Limited (*The “ZANZIBAR”*)  
[1901] 6 Com. Cas. 253 (per Phillimore J)

“...[T]he cardinal rule, if I may call it such, in interpreting such a charter-party as this, is that the charterer will pay hire for the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owner’s right to hire.”  
Royal Greek Government v. Minister of Transport (*The “ILISSOS”*)  
[1949] 82 Ll.L.Rep.196 (per Bucknill LJ, at p.199)

<sup>24</sup> “In seeing whether clause 15 applies, we are not to inquire by whose fault it was that the vessel was delayed.”  
The “**AQUACHARM**” (*sup.*, fn.5, per Lord Denning MR at p.9)

“It is a truism that the objective of the off-hire clause is to relieve the charterers of the obligation to pay hire continuously during certain periods when the charterers do not have the use of the vessel. The clause does not require that ‘off hire events’ should be attributable to the fault of the owners. Instead the emphasis is on a pragmatic allocation of risk.”  
The “**BERGE SUND**” (*sup.*, fn.22, per Steyn J at p.463)

In *Hogarth v. Miller*, the dissenting speech of Lord Morris treats the off-hire clause as a liquidated damages provision: “The owner contracted ... to keep her in that efficient ... state to perform that service ... But as the owner would be liable ... in an action for damages, the parties very wisely chose to measure their damages, and accordingly the measure is that the hire is to cease ...” (Hugh Hogarth & others (owners of “**WESTFALIA**”) v. Alexander Miller, Brother, & Co. [1891] A.C. 48, at p.67). The majority, however, preferred to follow Lord Halsbury LC in reading the clause as a simple “on/off” switch to protect the Charterer in the event of delay caused by certain specified contingencies.

In *The “DERBY”* (Alfred C. Toepfer Schiffahrtsgesellschaft G.m.b.H v. Tossa Marine Co. Ltd. [1984] 1 Lloyd’s Rep.635), the vessel was delayed as a result of the actions of the I.T.F. One of the Charterer’s submissions – rejected by the Court of Appeal – was that any foreseeable delay in the course of the charter service due to any reason related to ship or crew must effectively render the vessel unseaworthy, and therefore in breach of the warranty “in every way fitted for the service”. But it was common ground (and accepted as such) that the Charterer was nevertheless relieved of the obligation to pay hire by virtue of an additional clause which provided that the Owner should bear any loss of time resulting from “labour stoppages or any other difficulties only due to ... payment of crew”.

For loss of time due to Charterer’s breach, see fn.33, *inf.*

<sup>25</sup> Well illustrated by *The “AQUACHARM”*: there, the Charterer had claimed both under the off-hire clause and also in damages arising from the Master’s failure to exercise reasonable skill and care in carrying out its orders. The exceptions of the Hague Rules (error in the navigation and management of the vessel) were a defence to the claim for damages arising out of breach (the vessel being found seaworthy), but irrelevant to the off-hire issue.

Cf: “If the causes enumerated in article 15 for which payment of hire is suspended were wholly different from the exceptions of article 17 [i.e. the general exceptions clause], it might fairly be contended that those exceptions applied to them, but they include many categories exactly alike. ... This leads us to the conclusion that article 15 must be understood to state absolute categories in which the parties intended the hire to be suspended whether the owner was at fault or not, and therefore that article 17 does not apply to them at all.” (Clyde Commercial S.S. Co. v. West India S.S. Co. (*The “SANTONA”*) [1909] 169 F.275 [2d Cir.] Ward C.J.)

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<sup>26</sup> “But the charterers point out that they are not obliged to claim damages; they can instead bring a claim under ... the off-hire clause, if they can bring themselves within it. In that event the common law rules as to damages do not apply and one must go by what the clause says. It may say something different from the common law rules. After all, if it did not, there would not be much point in it being there. Off-hire events are not necessarily a breach of contract at all. So one should not be too surprised if one finds that [the off-hire clause] leads to a different answer than would ensue in the case of a claim for damages for breach of contract.”

Ocean Glory Compania Naviera S.A. v A/S P.V. Christensen (*The “IOANNA”*)  
[1985] 2 Lloyd’s Rep.164 (per Staughton J, at p.167)

If a slow-steaming claim is framed as damages for Owner’s breach, the Charterer will be obliged to credit any related bunker savings; but if the claim falls under the off-hire clause, no such off-set will be required. (In the case of the *“IOANNA”*, the off-hire clause allowed the Charterer to recover “the time so lost and the cost of any extra fuel consumed”. The vessel had over-consumed diesel oil, and under-consumed fuel oil; and the Court effectively held that the expression “fuel” must cover both grades, so that “extra” must mean net over-consumption; but it is clear that the fuel oil saving was to be off-set only against the diesel oil excess, not against the time lost.)

<sup>27</sup> “The word ‘other’ in the phrase ‘or by any other cause preventing the full working of the vessel’ in my view shows that the various events referred to in the foregoing provisions were also only intended to take effect if the full working of the vessel in the sense just described was thereby prevented and time was lost in consequence.” (*The “MAREVA A.S.”*: sup., fn.21, at p.382: described as *obiter* by Lloyd J in *The “MASTRO GIORGIS”* [sup., fn.6, at p.67], but always cited with approval, for example, by Mocatta J in *the “APOLLO”* and, most recently, by Rix J in *The “LACONIAN CONFIDENCE”* [sup., fn.8, at p.141]: ‘It is established that the phrase ‘preventing the full working of the vessel’ qualifies not only the phrase ‘any other cause’ but also all the named causes.’)

As a matter of construction, the words of the clause could be read equally well as meaning ‘or any other cause provided it prevents the full working of the vessel’; but it does seem that Kerr J’s reading (which is any case to be preferred as the one more favourable to the Owner) is already implicit in the decision of the Court of Appeal in *The “ZANZIBAR”*, where the relevant event was detention by average accident – i.e. a specified cause: “I was at first impressed by the argument upon behalf of the [charterer] as to the time during which the hire of the ship should cease, and at first sight the meaning of the clause might well appear to be that which was contended for upon his behalf. But upon a closer examination of the clause it becomes clear that hire is only to cease on the happening of certain specified events. 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.” (*Inf.*, fn.34, per Stirling J, concurring, at p.257: emphasis added.) Although the connection does not appear to be mentioned elsewhere, Kerr J undoubtedly recognised it in *The “MAREVA A.S.”*: “[Collins MR] therefore appears to have founded his decision on the reference to ‘other causes preventing the full working of the vessel’ ... Mr Justice Stirling clearly took this view ...” (*Sup.*, fn.21, at p.383.)

<sup>28</sup> “In my judgment, it is well established that those words [i.e. ‘any other cause’], in the absence of ‘whatsoever’, should be construed either *eiusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause.” (*The “LACONIAN CONFIDENCE”*: sup., fn.8, per Rix J at p.150, rejecting the Charterer’s submission that the “heterogeneous nature of the named causes made any application of the *eiusdem generis* rule inappropriate, and the question was simply whether the ‘other cause’ bore a sufficiently close relationship to any named cause”.)

Fifteen years earlier, Mustill J had been rather less specific on the point:

“I now turn to the ... loss of time due to fouling by marine growth, which the charterers assert should be counted as off-hire. Both parts of clause 15 must be taken into account.

As regards the first part, I do not consider that the charterers’ argument can be disposed of simply by applying the *eiusdem generis* rule to the words ‘or any other cause’; for in the absence of any decisive authority on the point, I would not be disposed to find that the rule provides a helpful guide to the construction of the clause, where the general words follow such a heterogeneous collection of terms ... On the other hand, the words cannot be applied in their full width without qualification by reference to the general purpose of the clause. The draftsman cannot possibly have intended that hire should cease in every circumstance where the full working of the vessel is prevented. This reading would be commercial nonsense, and would make the second half of the clause redundant.” (*The “RIJN”*: sup., fn.12, at p.271.)

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In *The "ROACHBANK"*, however, Webster J felt that the rule probably should come into play, although it was not a point which he had to decide: *"Where the off-hire clause is unamended and does not contain the word 'whatsoever', then the ejusdem generis rule could, and probably should, be applied."* (*Sup.*, fn.7, at p.507.)

The authors of *"TIME CHARTERS"* (4<sup>th</sup> Edn., 1995, p.374) suggest that the true view should reflect the opinion of Lloyd J in *The "AQUACHARM"* (an approach which is, after all, very close to that of *The "RIJN"*):

*"There was some preliminary skirmishing as to whether the ejusdem generis rule applies to those words. But in the end I do not think it matters. For [Counsel], on behalf of the charterers, accepted that there must be some limitation on the full width of the words, if only because the words must be construed in their context or 'matrix'. But that is only another way of saying the same thing. The ejusdem generis rule is, as it seems to me, only an illustration of the more general rule that all contractual provisions are to be construed in the context, whether linguistic or circumstantial, in which they are found."* (*Sup.*, fn.5, at p.239.)

(But the discussion in *"TIME CHARTERS"* should be read with caution: the comments at page 373 about the remarks of Devlin J in *The "EVGENIA CHANDRIS"* would appear to miss the point that he was not discussing an exception clause.)

<sup>29</sup> *"In my view, ... the use of the word 'whatsoever' coming after the words 'or by any other cause' excludes the application of the ejusdem generis rule so as to limit the 'other causes' to those of the same genus as previously enumerated, if such a genus can be found."* (*The "APOLLO"*, *sup.*, fn.4, per Mocatta J at p.205.)

*"Where, as here, the word 'whatsoever' is added, any cause may suffice to put the vessel off-hire, whether physical or legal; the question ... is whether it prevents the full working of the vessel ..."* (*The "MASTRO GIORGIS"*, *sup.*, fn.6, per Lloyd J at p.68.)

Where, as in the 1981 and 1993 versions of the charter (see fn.1), the clause reads *"or by any similar cause"*, the effect of adding *"whatsoever"* is, of course, substantially negated. (In the late 'seventies, following the decision in *The "APOLLO"*, there was a common commercial belief that simply adding *"whatsoever"* would solve all of the Charterer's problems. When they met with ASBA in New York for discussions about their draft revision of the NYPE form, the representatives of BIMCO/GCBS argued that, if the intention under the 1946 version had indeed been to exclude dissimilar causes, it would be irresponsible for the draftsmen not to make this explicit. Somewhat disingenuously, perhaps, they saw no need to point out that this would effectively emasculate the unthinking addition by Charterers of *"whatsoever"*.)

<sup>30</sup> This proposition is central to the discussion of extraneous causes: see text at fn.60, *inf.* The point was argued, but unsuccessfully, in *The "MANHATTAN PRINCE"* (*sup.*, fn.2).

*"Sometimes, however, there is a combination of causes. The immediate cause may be extraneous, such as a refusal to grant free pratique, or a refusal to allow the vessel to leave the port. But it may be necessary to go behind the immediate cause to find the underlying cause. If the port authorities refuse to allow a vessel to leave because her classification certificates are not in order, or because she has an insufficient number of certificated officers, then she would plainly be off-hire, even though the immediate cause of the detention was the 'extraneous' action of the authorities. The action of the authorities in such a case would appear extraneous, but in reality it is not."* (*The "MASTRO GIORGIS"*, *sup.*, fn.6, per Lloyd J at p.69.)

*"Prima facie it does not seem to me that it can be intended by a standard (sc unamended) off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause."* (*The "LACONIAN CONFIDENCE"*, *sup.*, fn.8, per Rix J at p.151: emphasis added.)

But cf: *"[Counsel] argued that it is a natural result of the fact that this cargo was damaged that the vessel was arrested... But I am not sure that it was the natural result ... It is certainly, I think, a natural conclusion that the vessel would not have been arrested if the damage had not been done, but I cannot say that it was the natural consequence that because the cargo was damaged, therefore the vessel should be erroneously arrested. If it had been the proper step in law to arrest this vessel then I should see a chain of consequences."* (*The "ROBERTA"* [1937] 58 Ll.L.Rep.231, per Langton J at p.236)

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"[Counsel] for the charterers was prepared to accept that the trouble as *Ras Tanura* would not have occurred but for what was loaded at Chiba. But he observes, correctly, that a cause 'without which would not' is rarely if ever sufficient to establish causation in law." (The "**BERGE SUND**": *sup.*, fn.13, per Staughton LJ at p.459.)

<sup>31</sup> "In my judgment, only those causes qualify for consideration which are fortuitous, and are not the natural result of the ship complying with the charterers' orders. ...[I]n the great majority of cases, the accretion of growth is simply a natural consequence of the ship remaining in service, with nothing fortuitous about it. In the present case, furthermore, it is a fair inference from the findings in the award that the excessive growth stemmed from the abnormally long period which the vessel spent at Lourenço Marques awaiting cargo. It was the charterers' own choice to keep her at rest in tropical waters for nearly three months, and it would be unjust if they could seek financial relief for the natural consequences of the delay."

The "**RUN**" : *sup.*, fn.12, per Mustill J at p.272

"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 [sc. bunkering, ballasting, lightening, hold cleaning] become necessary, hire must be paid for the time so spent. ... 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."

The "**BERGE SUND**": *sup.*, fn.13, per Staughton LJ at p.460

The Owner will, of course, still be required by Clause 1 of the NYPE form to take reasonable steps without undue delay to put things right; and if he fails to do so, he will be in breach.

<sup>32</sup> "It is to be observed that under this charter-party it is for the charterers to find the bunkers; and this cesser clause is in my judgment drawn so as to make hire cease when there is a failure of that which has to be supplied by the shipowner, but it does not extend the cesser of hire when anything for which the charterer is responsible has caused the loss of time. ... It would be an absurd result if it were held that hire was to cease when something for which the owner is not responsible causes the loss of time. I think there is nothing in the words of the clause which forces me to such an absurd conclusion."

(James Nourse Ltd. v. Elder Dempster & Co. Ltd. (The "**MEGNA**")

[1922] 13 Ll.L.Rep. 197, per Greer J at p.198.)

Cf. also The "**LACONIAN CONFIDENCE**", where, in a wide-ranging discussion at the end of his judgment (*sup.*, fn.8, at p.151: expressly identified as *obiter*), Rix J considers the hypothetical situation where time is lost through detention of the vessel as a result of contraband discovered on board:

"In such a case the position may well depend on who was responsible for the presence of the contraband. If the owners (or their crew) were responsible, the vessel might well be off-hire, particularly under an amended clause [sc. with the addition of 'whatsoever'], but even perhaps in the absence of amendment. If, however, the charterers were responsible, it would seem to be absurd to hold the vessel off-hire: how would that square under an amended clause with my construction, seeing that the detention by the authorities under my construction would be 'any other cause whatsoever preventing the full working of the vessel'? It seems to me that there would be an implicit exclusion of causes for which the charterers were responsible."

<sup>33</sup> Curiously, there seems to be no specific authority on this point; but if the clause did have the effect, on a literal reading, of permitting the Charterer to withhold hire in respect of any loss of time caused by its own breach, it should surely be defeasible on the natural principle that 'a man cannot take advantage of his own wrong' (as was argued in The "**TROWBRIDGE**": see fn.124, *inf.*) The lack of precedent is not altogether surprising: in each case either the Charterer was found not to be in breach or else it did not really matter whether the hire was properly withheld or not: having already been deducted, it was on any analysis recoverable either by way of damages or else by way of a wrongful withholding returned.

In The "**TERNEUZEN**" (Lensen Shipping Ltd. v. Anglo-Soviet Shipping Co., Ltd. [1935] 52 Ll.L.Rep.341), Greer LJ seems to have preferred the view that the off-hire clause should not operate where the Charterer is in breach:

"... and just as a shipowner is deprived of his right to rely on the exceptions in his charter-party if he takes his ship outside the agreed limits of the voyage, so I think a time charterer who has used the chartered ship outside the agreed limits is disentitled to rely upon the clauses in the charter-party which are inserted to protect him ... Further, Clause 8 calls upon the charterers to indemnify the owners against all consequences or liabilities arising

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from the captain complying with [their] orders .. and ... the charterers cannot rely on the cesser of hire clause in relation to a period in respect of which they have agreed to indemnify the owners.”

He did, admittedly, go on to say: “The same result flows from the words in the second part of Clause 12 ... [‘Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default by owners’ servants’], as I think if technically the vessel was off-hire the owners would be entitled to recover the same amount from the charterers under this clause as damage caused to the owners by goods being loaded contrary to the terms of the charter-party.” In its context, however, this surely offers slender support for the operation of the off-hire clause, being more of an after-thought of the “but even if ..., so what?” kind.

The authors of “**TIME CHARTERS**” (*sup.*, fn.28, at p.376) conclude: “Nevertheless, the combined effect of the cases cited above may be that the off-hire clause does not operate where the event which would otherwise cause it to operate flows from a breach by the charterers.” Scrutton on “**CHARTER PARTIES**” is a little more definite (19<sup>th</sup> edn., at p. 369): “The charterer, however, will probably not be entitled to put the ship off hire where the event giving rise to the loss of time was due to his breach of contract.”

Because of the Owner’s clear right of recourse in damages, this situation is strictly not on all fours with loss of time arising from the Charterer’s legitimate order, for a vessel can hardly be off-hire, but wrongly so. But, that being said, the distinction which is sometimes drawn between the Charterer’s breach and what the Charterer is responsible for is a fine one, and perhaps overly so: see the comments of Greer J (as he then was) at fn.32, *sup.* It would be logically odd if the operation of the off-hire clause were to be precluded where the cause of the loss of time flows from the Charterer’s legitimate order, but not where it flows from the Charterer’s breach. (Arguably, the Charterer in Rix J’s contraband example – *sup.*, fn.32 - would in any case be in breach of a covenant, express or implied, to ship only lawful goods, and in *The “MEGNA”* to supply fit bunkers.)

Where the issue affects a future right of the Charterer (e.g. to add off-hire time to the charter period, or to terminate the charter if the vessel is off-hire for more than a specified period), a court or tribunal would in any case presumably be ready to find an implied term to prevent the exercise of that right as a consequence of the Charterer’s breach: otherwise, if the vessel is indeed “technically” off-hire, the Owner could well be faced with difficult and inequitable issues of causation and/or remoteness. Similarly, if there is an express provision elsewhere in the charter which excuses the Charterer’s breach, an implied term would presumably be read into it, limiting its application.

<sup>34</sup> Vogemann v. Zanzibar Steamship Company Limited [1902] 7 Com. Cas. 254.

<sup>35</sup> Eastern Mediterranean Maritime (Liechtenstein) Ltd. v. Unimarine S.A. (*The “MARIKA M”*) [1981] 2 Lloyd’s Rep.622. Arriving at the Bahrain anchorage on 17 July, the vessel would have berthed the following day if it had not run aground. By the time it was refloated on the 27<sup>th</sup>, it had lost its turn to berth, and had to wait until 6 August to go alongside. The arbitrator had found that the vessel was fully efficient upon refloating, and the true cause of the ensuing delay was either the strict berthing system operated by the port or the intervening arrival of other ships.

<sup>36</sup> See text at fn.97, *inf.* In his concurring judgment in the case of the “**HORDEN**” (Tynedale Steam Shipping Co. Ltd. v. Anglo-Soviet Shipping Co. Ltd. [1936] 54 Ll.L.Rep.341), Scott LJ commented (at p.349):

*“I feel strongly that from a commercial point of view a distinction between what causes the charter to go off and what causes it to come on again is confusing to the commercial mind; and I am very loath to construe an ordinary commercial clause in a way that is not simple to the commercial mind, if the clause can properly be interpreted in a simple way ...”*

Surprisingly, *The “ZANZIBAR”* is never mentioned in the lists of authorities appearing at the head of the judgments in any of *The “APOLLO”*, *The “AQUACHARM”*, *The “MASTRO GIORGIS”*, *The “ROACHBANK”* or *The “LACONIAN CONFIDENCE”*: in their different ways, each was dealing with the effect of third party intervention on a physically efficient ship.

<sup>37</sup> See fn.98, *inf.*

<sup>38</sup> *Sup.*, fn.34, per Collins MR at p.257. See also fn.27,*sup.* (Curiously, the second issue in the “**ZANZIBAR”** also spawned a common amendment. This concerned the coal consumed during the off-hire period. The charter party said only that “the charterers shall provide and pay for the coals ...”; and so the Owner

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was found to have no liability to reimburse the Charterer for fuel consumed during the off-hire period. After this, it quickly became standard practice to qualify the Charterer's obligation by adding the words: "*Whilst on hire*".)

<sup>39</sup> See, for example, the first (1978) edition of "**TIME CHARTERS**", at p.165. See also the remarks of Bailhache J in *Thomas Smailes & Son v. Evans & Reid Limited (The "CARISBROOK")* [1917] 2 K.B. 54, at p.56.

<sup>40</sup> *Sup.*, fn.35, at p.625. Endorsed shortly after by Goff J: "*That case [i.e. The "ZANZIBAR"] was recently applied by Mr Justice Parker in The "MARIKA M" ... It is binding upon me, and I respectfully agree with it.*" (*Western Sealanes Corporation v. Unimarine S.A. (The "PYTHIA")* [1982] 2 Lloyd's Rep.160, at p.169).

<sup>41</sup> *Sup.*, fn.36. The "**HORDEN**" charter was on the old Baltimore form (Uniform Time Charter, 1912), and the off-hire clause was a period clause which provided that payment of hire would cease "*until the steamer is again in efficient state to resume service*". The vessel shot part of a deck cargo of timber on passage from Archangel to Liverpool, and the forward derricks were damaged, rendering the vessel less than fully efficient.

<sup>42</sup> It is instructive to compare the new version with the old, as it demonstrates how easily a fundamental shift in meaning can be introduced through very minor alterations to the wording (additions shown in bold italics):

" ~~40 11 (A) In the event of loss of time caused by drydocking or by other necessary measures to maintain the efficiency of steamer the Vessel or by deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the steamer Vessel and lasting continuing for more than 24 consecutive hours, no hire to cease be paid from the commencement of such loss of in respect of any time lost thereby until during the period in which the steamer Vessel is again in efficient state to resume unable to perform the service immediately required. Any hire paid in advance to be adjusted accordingly.~~"

Usually categorised as a "net loss of time" clause, this is surely better described as a period clause where only the net loss of time falling within that period may be deducted.

<sup>43</sup> *Sup.*, fn.24, per Lord Halsbury LC at p.56. There, the ship was held to be off-hire while under tow with a defective main engine, but on-hire as soon as she reached the discharge berth, when "*the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time*". The brief factual summaries in the text-books might lead one to conclude that this was most inequitable for the Owner. Frequently overlooked is the fact that the cost of the tow was, by a separate agreement, treated as a general average, with the Charterer, who also happened to own the cargo, carrying most of the expense: that towage agreement said nothing at all about the hire.

<sup>44</sup> A commercial man might, indeed, think that it should pretty obviously be treated differently: see "**TIME CHARTERS**" (*sup.*, fn.28) at pp.380ff for the position in the U.S.A. See also fn.39, *sup.*

<sup>45</sup> *Sup.*, fn.40, at p.168. Cf. the remarks of Tuckey J in *The "IRA"*: "*Stated in this way, it is obvious that the question is essentially one of causation, although I should add that in relation to such clauses [as NYPE] it has been held that one cannot deduct hire after the ship has become fully efficient, so it is not, so to speak, a full-blown issue of causation but one which has a terminal cut-off time at the moment when the ship becomes fully efficient.*" (*Forestships International Ltd. v. Armonia Shipping & Finance Corporation* [1995] 1 Lloyd's Rep.103, at p.104) Cf. also the remarks of Hirst J about the Shelltime 3 form of clause in *The "BRIDGESTONE MARU No.3"* (*Sup.*, fn.2, at p.84): "*In my judgment, this is essentially a period and not a loss of time clause. However, even if this were in truth a net loss of time clause, I should be quite unable to accept Counsel's argument that the resumption of efficiency is irrelevant, since in my judgment the authorities show that this limitation has over the years become firmly engrained in clauses of this type, and understandably so, seeing that the exception provided for in an off-hire clause arises irrespective of fault.*"

<sup>46</sup> But not necessarily sufficient – see fnn.31,32,33, *sup.*, also fn.140, *inf.*

<sup>47</sup> Like so many other off-hire issues, this was effectively established by *The "WESTFALIA"* (*sup.*, fn.24), where the vessel was able to discharge at Harburg while carrying out engine repairs. Knowing that these repairs would take longer than the normal discharge time, the Charterers' stevedores adopted a fairly relaxed approach, taking 10 days instead of the customary 4. The Inner House of the Court of Session had held that the ship should be on hire only for the 4 days, being "*such period as would ordinarily be occupied*"; but the majority of the House of Lords ruled that the vessel should be on hire throughout the time actually occupied in discharging.

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*"A net time clause, such as this clause is, requires the charterer to prove the happening and the duration of the off-hire event, and that time has been lost to him thereby. So it is a two-stage operation and it does not follow merely by proof of the off-hire event and its duration that he is able to establish a loss of time to him. That must depend upon the circumstances of the particular case."*

*The "IRA":* *sup.*, fn.47 (per Tuckey J, at p.104)

*"As regards off-hire, the argument proceeds upon the premise that the ship was unseaworthy on the ballast voyage, and that she was therefore necessarily off-hire. This is not the law, nor is it what is said by either of the off-hire clauses. The first ... requires the charterer to demonstrate that one of the stipulated causes, or any other cause preventing the working of the vessel, has caused loss of time. Even if [the Charterers] can show that a cause of the relevant type was operating, they cannot establish that it brought about any loss of time. Until the collision the ship was proceeding on the ballast voyage in a perfectly ordinary way, the condition of the hatches having no effect on her progress at all. Once detected, the condition of the hatch covers would of course have necessitated repairs which, when commenced, would put the ship off-hire; but [the Charterers'] cancellation prevented this moment from ever arriving."*

Nitrate Corporation of Chile Ltd. v. Pansuiza Compania de Navegacion S.A. etc (*The "HERMOSA"*)  
[1980] 1 Lloyd's Rep.638 (per Mustill J, at p.651)

*"Taking [the off-hire] clause by itself, it would mean that, if one crane broke down, there would have to be an inquiry as to the time lost thereby ... For instance, if one broke down and the other two cranes were able to do, and did do, all the work that was required, there would be no "time lost thereby"; and there would be no cessation of hire. But if there was work for three cranes, and there was some loss of time owing to the one crane breaking down, there would have to be an assessment of the amount of time lost. In that event, as the Judge pointed out, the question would have to be asked: 'How much earlier would the vessel have been away from her port of loading or discharge if three ... cranes instead of two, had been available throughout?' The Judge called that a 'net loss of time' clause."*

Canadian Pacific (Bermuda) Ltd., v. Canadian Transport Co. Ltd. (*The "H. R. MACMILLAN"*)  
[1974] 1 Lloyd's Rep.311 (per Lord Denning MR at p.314).

<sup>48</sup> *"The second off-hire provision ... is of no greater help to [Charterers]. I do not regard the references to 'inefficiency' and 'efficiency' in the latter part of the clause as entailing that a ship which is inefficient is ipso facto off-hire: only an inefficiency due to one of the causes enumerated earlier in the clause will suffice."*

*The "HERMOSA":* *sup.*, fn.49, at p.651.

<sup>49</sup> See text at fn.27, *sup.* In practice, the order of the second and third criteria is usually reversed, although there seems to be no logical necessity for this:

*"We are to inquire first whether the 'full working of the vessel' has been prevented. Only if it has, do we consider the 'cause'."*

*The "AQUACHARM":* *sup.*, fn.5, per Lord Denning MR at p.9.

Cf. also the remarks of Webster J in *The "ROACHBANK"* (*sup.*, fn.7, at p.507): *"[F]or the purposes of an unamended clause [sc by the addition of 'whatsoever'], my approach, if I were an arbitrator, would be first to find whether the full working had been prevented, then to determine the cause of the fact, and, finally, to decide whether that cause was a cause within the meaning of the words 'any other cause' in the clause."*

<sup>50</sup> *"A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo." (The "LACONIAN CONFIDENCE":* *sup.*, fn.8, per Rix J at p.150.) But see text at fn.141, *inf.*

<sup>51</sup> See fn.29, *sup.*

<sup>52</sup> *Sup.*, fn.4, at p.205.

<sup>53</sup> *The "MAREVA A.S.":* *sup.*, fn.21, per Kerr J at p.381. *"There is, moreover, the general context, emphasized for instance by Mr. Justice Kerr in The "MAREVA A.S." ... that it is for the owners to provide an efficient ship and crew." (The "LACONIAN CONFIDENCE":* *sup.*, fn.8, per Rix J at p.150.) The issue in *The "MAREVA A.S."* concerned slow discharge of damaged cargo.

<sup>54</sup> Cf: *"My Lords, the whole of this case, as it appears to me, turns upon the true construction of the contract which regulates the relations between the parties, and there are two very diverse views which have*

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been presented to your Lordships upon the true construction of that instrument. I think that each part of the contract must be looked at with care, and that it must be remembered that in the construction of the contract we are not bound simply by the exact words. We must remember that it is a mercantile contract, and we must remember the nature of the subject-matter with respect to which each of the parties was contracting." (*The "WESTFALIA"*: *sup.*, fn.24, per Lord Halsbury L.C. at p.53.)

<sup>55</sup> It is not known where the precise form of words first originated: perhaps it came from one of the BALTIME draftsmen. But it clearly echoes the words of Lord Halsbury in *The "WESTFALIA"*: "... that she should be efficient to do what she was required to do when she was called upon to do it." (*Sup.*, fn.24, at p.56.) To Steyn J in 1991, it was "trite law that the right question to ask is whether the vessel was fully fit to perform the service immediately required of her". (*The "BERGE SUND"*: *sup.*, fn.24, at p.464); and by the time of *The "JALAGOURI"*, it was "a basic tenet of time charter interpretation that delay has to be measured by reference to the service immediately required." (*Sup.*, fn.3, per Rix J at p.906.)

"The reasoning in (*The "WESTFALIA"*) seems to me to be 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 this is by no means the end of the problem, but only the beginning of it."

(*The "BERGE SUND"*: *sup.*, fn.13, per Staughton LJ at p.459.)

<sup>56</sup> *Sup.*, fn.13, at p.461. See also fn.31, *sup.* The then C. S. Staughton Q.C. was the umpire who had found that the refusal of the Panama Canal authorities to allow the transit of the "*AQUACHARM*" without lightening did not prevent its full working, the vessel remaining at all times "*fit in herself*" to perform the service immediately required. It will be recalled that the over-loading resulted from the failure of the Master to exercise reasonable skill and care in the loading of the cargo: see fn.25, *sup.*

<sup>57</sup> *Sup.*, fn.22, at p.464.

<sup>58</sup> "The owners denied that the full working of the vessel was prevented at any time. The argument appeared to be that, since it was the consensus amongst all concerned that the vessel should remain alongside the berth in order to fight the fire, it was thus capable of performing the service then required of her. This proposition is wholly unreal. The vessel had a substantial fire in one of her holds. This had to be extinguished. She could not safely sail. The crew had to act as stevedores, wearing breathing apparatus. Outside assistance was required from the fire brigade, the P&I Club surveyor and a fire expert. The vessel had to remain alongside. She was thus unable to perform the service then required of her, which was to sail for Itajai."

(*Maceio Shipping Limited v. Clipper Shipping lines Limited (The "CLIPPER SAO LUIS")* [2000] 1 Lloyd's Rep.645, per Steel J at p.651.)

In *The "JALAGOURI"* (*sup.*, fn.3), which involved an additional clause, the port authorities had ordered the vessel off the berth until security was provided for the costs of storing water-damaged cargo. Rix J held that the service immediately required was to discharge the cargo.

Doubts may arise in relation to a case such as *The "APOLLO"* (see fn.120, *inf.*) Heretical as this may seem - the factual element of that decision apparently never having been questioned in any reported judgment - the obtaining of pratique is surely a contingent requirement of the vessel's trading and employment, particularly where the vessel is, as a matter of fact, free of contamination or infection and the crew is healthy. (Surprisingly, this case is not referred to in the Court of Appeal judgment in *The "BERGE SUND"*.)

<sup>59</sup> *The "AQUACHARM"*: *sup.*, fn.5, at p.240. Described by Webster J in *The "ROACHBANK"* as "an amalgamation of the tests of Mr. Justice Kerr in *The "MAREVA"* and Mr. Justice Mocatta in *The "APOLLO"* (*sup.*, fn.7, at p.505). See fn.53, *sup.*, and related text. (The word "therefore" in Lloyd J's *dictum* refers to *The "ERRINGTON COURT"*: see fn.61, *inf.*)

<sup>60</sup> *Sup.*, fn.6, at p.69.

<sup>61</sup> *Court Line, Ltd. v. Dant & Russell, Inc. (The "ERRINGTON COURT")* [1939] 64 Ll.L.Rep.212. Later off-hire judgments have been rather less laconic.

<sup>62</sup> *Sup.*, fn.61, at p.219.

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<sup>63</sup> “I do not think the lightening of cargo does ‘prevent the full working of the vessel’. Often enough cargo has to be unloaded into a lighter – for one reason or another – to get her off a sandbank – or into a basin. The vessel is still working fully, but she is delayed by the need to unload part of the cargo. It is rather like [the “**ERRINGTON COURT**”]. The vessel was still working fully, but she was delayed by the boom across the Yangtse River. The vessel was, therefore, still on hire for nearly nine days.”  
The “**AQUACHARM**”: *sup.*, fn.5, per Lord Denning MR, at p.9

<sup>64</sup> See, e.g., “**TIME CHARTERS**” (1<sup>st</sup> edn., 1978, at p.167): “Thus in *Court Line v. Dant & Russell* ... Branson J expressed the view that the “**ERRINGTON COURT**” was not off-hire under the words ‘any other cause preventing the full working of the vessel’ while prevented by a military boom across the Yangtse from sailing down river, the ship being in every way efficient.”

But, *contra*, see also the comment of Rix J in the “**LACONIAN CONFIDENCE**” (*sup.*, fn.8, at p.147):

“*Court Line* differed perhaps from all other cases in that the boom there was a totally extraneous matter - I know of no other way in which to point up that idiosyncrasy. Although it was man-made, it was akin to a geographical impediment. A vessel is not off hire just because she cannot proceed upon her voyage because of some physical impediment, like a sand bar, or insufficiency of water, blocking her path. While remarking that the vessel was ‘in every way sound and well found’. Mr. Justice Branson ultimately founded his reasoning, it seems to me, on the fact that ‘such a cause as this’ was not within the clause.”

<sup>65</sup> Notably in *The “ROACHBANK”* (*sup.*, fn.7). See also “**TIME CHARTERS**” (*sup.*, fn.28, p.372): “But this decision ... may represent the high-water mark in the construction of the clause.” M. Davies (“**THE OFF-HIRE CLAUSE IN THE NEW YORK PRODUCE EXCHANGE TIME CHARTERPARTY**”: LMCLQ February 1990 p.107) appears to suggest that *The “ROACHBANK”* actually establishes a wider test than *The “MASTRO GIORGIS”*, following the remarks of Neill LJ in the Court of Appeal: see text at fn.76, *inf.* But this is misleading: see citation at fn.80, *inf.*

<sup>66</sup> *Sup.*, fn.6, at p.67. Although the word “efficient” does not appear in Lloyd J’s own reasons, this summary only makes sense if he intended it to carry a wider meaning than mere physical or mechanical soundness. (Cf. **CHAMBERS TWENTIETH CENTURY DICTIONARY** [1972]: “**efficient**: ... capable of doing what may be required; effective.” **OXFORD ENGLISH DICTIONARY** [1971]: “**efficiency**: ... 2. Fitness or power to accomplish, or success in accomplishing, the purpose intended; adequate power, effectiveness, efficacy.” “**efficient**: ... 2. Productive of effects; effective; adequately operative. Of persons, adequately skilled.”) The legally or administratively incapacitated vessel is properly characterised as inefficient.

<sup>67</sup> *Sup.*, fn.6, at p.69. In *The “APOLLO”*, Mocatta J had been reluctant to venture into the area of extraneous causes: “[Owners’ counsel] submitted that the use of the word ‘whatsoever’ did not ipso facto exclude the application of the ejusdem generis rule and that the off-hire clause applied to matters internal to the ship and her crew and not to external interference or delays. I find it very difficult to lay down criteria of this kind. For example if a surveyor from a classification society required tests to be made to the machinery, would the delay consequent upon this bring the off-hire clause into play?” (*sup.*, fn.4, at p.205.)

<sup>68</sup> *Sup.*, fn.7.

<sup>69</sup> “[The majority] felt that whilst the cargo work might be somewhat hampered and modestly delayed initially whilst the refugees were herded to non-working areas, they did not envisage inability to perform cargo work.” (*sup.*, fn.7, at p.500). (On the face of it, perhaps a slightly surprising conclusion: the “**ROACHBANK**” was a general cargo vessel and did not have unlimited free deck space. Presumably, not all of the hatches were workable.)

<sup>70</sup> *Sup.*, fn.7, at p.501. The majority tried to define what it meant for a cause be intrinsic, as opposed to extraneous: “[A]lthough the refugees were present on the vessel, they did not form part of the essential entity of it which embraces the physical structure, the crew and its health, the history of the vessel, its own qualities and characteristics, its certificates and its freedom from arrest. We do not suppose our list to be exhaustive, but it is the best we can devise to delineate what one might term as the personal characteristics of the vessel (being the antithesis of the extraneous matters) which are apt, in our view, to bring about an off-hire situation.”

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<sup>71</sup> The arbitral majority could not accept that the presence of the refugees formed any part of the “*personal characteristics*” of the ship; but it is not immediately obvious why that was materially different from the (alleged) damage to the cargo on and/or just discharged from the “**MASTRO GIORGIS**”

<sup>72</sup> *Sup.*, fn.7, at p.507. Owner’s counsel did accept, however, that “*the state of a vessel’s documentation and her crew are matters which may be relevant to her efficiency*”, with which Webster J agreed.

<sup>73</sup> *Sup.*, fn.7, at p.507. The contentious element is, of course, the concept of “*full efficiency*”: see fn.103, *inf.*

<sup>74</sup> *Sup.*, fn.7, at p.507 . See also citation at fn.59, *sup.*

<sup>75</sup> See fn.67, *sup.*

<sup>76</sup> *Sup.*, fn.7, per Neill LJ at p.342. As mentioned above, the case came to the Court of Appeal only by way of an application for leave to appeal, and not for determination of the substantive issue: see text at fn.95, *inf.*

<sup>77</sup> Nor is this the only occasion when Lloyd J’s judgment has been mis-read: see fn.65, *sup.*, also text at fn.114, *inf.*

<sup>78</sup> “*Where, as here, the word “whatsoever” is added, any cause may suffice ...*” (See citation at fn.88, *inf.*)

<sup>79</sup> *Sup.*, fn.7, at p.507.

<sup>80</sup> *Sup.*, fn.8, at p.147.

<sup>81</sup> *Sup.*, fn.8, at p.146.

<sup>82</sup> *Sup.*, fn.8, at p.149. Although the last sentence may look circular as cited, its logic is clear in the context: it says that the action of the authorities in preventing the working of the vessel may properly be said to “*prevent its full working*” as this expression is used in the clause.

<sup>83</sup> The “**MANHATTAN PRINCE**” and The “**BRIDGESTONE MARU No.3**”: see fn.2, *sup.*

<sup>84</sup> The “**LACONIAN CONFIDENCE**”: *sup.*, fn.8, at p.150. (Emphasis original.)

<sup>85</sup> See fn.29, *sup.* (“... any cause may suffice.”)

<sup>86</sup> *Sup.*, fn.8, at p.151. See also fn.106, *inf.*

<sup>87</sup> *Sup.*, fn.8, at p.151. Cf. *ibid.*, at p.145: “*I would, however, observe at the outset of my discussion of [the] authorities that there appear to be two interrelated concepts which run here and there through them. One is that the typical off-hire clause does not cover an ‘extraneous’ cause, by which is, I think, meant a cause extraneous to the vessel itself. This concept I suppose relates to the meaning or possible width of meanings of ‘cause’ in the expression ‘any other cause’ or ‘any other cause whatsoever.’*” (Emphasis added.) In this, Rix J was simply following the lead of Webster J in The “**ROACHBANK**”: *vid.* citation at fn.74, *sup.*

<sup>88</sup> *Sup.*, fn.6, at p.68.

<sup>89</sup> Logically, it might seem to be irrelevant whether the “extraneous” exclusion is related to cause or to effect; but it is crucial to a proper interpretation of the authorities to identify the approach adopted by each.

<sup>90</sup> As it would any other vessel in its place: perhaps “extraneous” should be defined in terms which would also catch a notional sister-ship of identical contractual description but materially distinct contingent characteristics.

<sup>91</sup> See fnn.30,70, *sup.*

<sup>92</sup> See text at fn.31 ff., *sup.*

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<sup>93</sup> As Rix J recognised: “I would comment that, if Mr Justice Lloyd was wrong in his conclusion that an efficient vessel [sc. in a physical or cognate sense] may be prevented from working by the action of the authorities, then it would be odd if the addition of the word ‘whatsoever’ could make any difference. If a vessel efficient in herself cannot be within the words ‘preventing the full working of the vessel’, then it does not seem to me that the nature of the cause which operates on such a vessel can alter the fact that the vessel is efficient in herself. In such a case, widening the ambit of ‘cause’ by adding the word ‘whatsoever’ ought not in logic to affect the position.” (The “**LACONIAN CONFIDENCE**”: *sup.*, fn.8, at p.146.)

In *The “GOOD HELMSMAN”* (*sup.*, fn.3), the authorities would not allow the ship to sail from Jeddah until the missing crew member returned. If there was indeed an implied off-hire clause (in the absence of a charter party), the Owner argued, the cause of the delay was the action of the authorities, not the deficiency of men. Assuming an unamended NYPE off-hire clause, Lloyd J stated: “As for the point on causation, it is, I think, clear that the proximate cause of the detention of the vessel was the absence of the member of the crew, which I hold to be ‘deficiency of men – or any other cause preventing full working of the vessel.’” Not surprisingly, this was overturned on appeal: all else apart, the concern of the authorities was not the manning of the vessel but the risk of an unwanted immigrant. In itself, this is a very odd conclusion for Lloyd J to have reached, even if it is assumed that ‘proximate’ is a slip for “effective”; but it does illustrate a consistency of approach. (On appeal, Owner’s counsel argued that there was in any case no admissible evidence that the ship was detained through the absence of a crew member. Ackner LJ commented: “Although the learned Judge recorded this technical objection in his judgment, he did not in terms deal with it. Heaven knows, he had every reason to be weary of this bitter dispute by the time he wrote the final page of his judgment upon which this matter is dealt with.” (*Sup.*, fn.3, at p.421.) That Lloyd J did indeed mean to say “proximate” is suggested by his reference to the case in *The “MASTRO GIORGIS”* (*sup.*, fn.6 at p.68): “I held that she was off-hire, since the proximate cause of the detention was, in my view, ‘deficiency of men.’”)

<sup>94</sup> The “**ERRINGTON COURT**” and *The “MAREVA A.S.”* Also, prior to the decision in *The “MARIKA M”*, it was at least arguable that the binding authority of *The “ZANZIBAR”* was limited to the detention point: see fn.39, *sup.*

<sup>95</sup> See fn.73, *sup.*

<sup>96</sup> See fn.83, *sup.* The “**BRIDGESTONE MARU No. 3**” is discussed below: see text at fn.112, *inf.* In *The “MANHATTAN PRINCE”*, Leggatt J found that, in the context of the Shelltime 3 clause, the word “efficient” must be read restrictively: “It is plain that what the charterers have to show is that the efficient working of the vessel was indeed prevented by the I.T.F. One starts then by asking: What is the natural meaning of those words in that context? ... It seems to me that the true interpretation of the phrase in its context demands that it should apply, and apply only, to the physical condition of the vessel, with the result that ... the phrase ‘efficient working’ must enjoy the connotation of efficient physical working. In my judgment the vessel worked, even though she was prevented from working in the way the charterers would have wished by the action of I.T.F. She was indeed fully operational and as such was not within the scope of the off hire clause.” (*Sup.*, fn.2, at p.146.)

<sup>97</sup> But, oddly, generally ignored in this context: see fn.36, *sup.*

<sup>98</sup> “That in the event of loss of time from deficiency of men or stores, breakdown, or damage of machinery or damage to rudder or propeller, grounding, but not in river, detention by average accidents to ship or cargo, or by other cause preventing the full working of the vessel (loading and/or discharging cargo), the payment of hire shall cease for the time exceeding twenty-four hours thereby lost.” (*Sup.*, fn.34.)

<sup>99</sup> See fn.37, *sup.*

<sup>100</sup> Both expressions should, of course, be taken as qualified by reference to the service immediately required.

<sup>101</sup> Cf. citation of *The “BRIDGESTONE MARU No.3”* at fn.45, *sup.* (In that case, however, the clause did refer to efficient, not full, working.)

<sup>102</sup> Cf. “As “**AQUACHARM**” remained at all times an efficient ship, she was capable of ‘full working’ within the meaning of the off-hire clause ...” (The “**AQUACHARM**”: *sup.*, fn.5, per Griffiths LJ at p.11.) It should be noted that the judicial test for the inception of off-hire – i.e. whether the vessel is able to perform the service

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immediately required – is actually applied by the BALTIME clause as the test for the end of the period within which the loss of time is to be measured: see fn.42, *sup.*

A similar thought evidently presented itself to Lord Halsbury in the **“WESTFALIA”** when considering the resumption of hire: *“That appears to me to shed great light on the other question: What was the breakdown of the machinery which was contemplated by both of the parties? It appears to me that the resumption of hire is correlative with that and inasmuch as when the vessel got to Harburg the vessel became ‘efficient’ for the purpose for which alone she was wanted at that time, it appears to me that the right of payment arose.”* (Sup., fn.24, at p.58) (Emphasis added.)

<sup>103</sup> *Sup.*, fn.5, at p.9. Cf: *“If no gloss had been put upon the clause, other than that the reference to ‘the full working of the vessel’ was to be construed as a reference to ‘the full working of the vessel for the service immediately required’ (as to which there is no argument), I would have thought that the application of the clause prima facie involved only one matter of fact, namely whether the full working of the vessel, understood in that way, had been prevented.”* (The **“ROACHBANK”**: *sup.*, fn.7, per Webster J at p.502)

<sup>104</sup> *“The judgment of Lord Justice Griffiths and his explanation of The **“APOLLO”** have been influential; but the reasoning of the majority in the Court of Appeal is that contained in the judgment of Lord Denning, and that in my view does not support, and a fortiori does not require, the judicial gloss found by Mr. Justice Webster.”* (The **“LACONIAN CONFIDENCE”**: *sup.*, fn.8, at p.148.)

<sup>105</sup> *Sup.*, fn.5, at p.12. Nb also: *“In The **“AQUACHARM”** the cause was the overloading, and although this was in a sense intrinsic to the ship, it had, as Lord Denning, M.R., clearly pointed out, nothing to do with its actual efficiency as a working vessel.”* (The **“BRIDGESTONE MARU No. 3”**: *sup.*, fn.2, per Hirst J at p.83)

<sup>106</sup> It is, perhaps, not altogether surprising that Rix J should speak in this context of *“the interference of the authorities which prevents the vessel performing its intended service”*, because, if his analysis does not equate *“full working”* with *“use”*, it certainly comes perilously close. Cf. the remarks of Staughton LJ in *The **“BERGE SUND”*** (*sup.*, fn.13, at p.460): *“But what if there are unusual or extraordinary circumstances? The arbitrators reached this conclusion...: 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.”* (The off-hire clause in that case referred to *“efficient working”*, not *“full working”*. The then B. Rix Q.C. had appeared as counsel for the Owner.) Cf. also the remarks of Leggatt J in *The **“MANHATTAN PRINCE”*** (*sup.*, fn.2, at p.146): *‘It seems to me that ... the phrase ‘efficient working’ must enjoy the connotation of efficient physical working. In my judgment the vessel worked, even though she was prevented from working in the way the charterers would have wished by the action of the I.T.F.’*)

The idea of *“full working”*, as distinct from *“full use”*, was clearly identified by Kerr J in *The **“MAREVA A.S.”***, where the vessel’s discharge was delayed because of damaged cargo: *“[I]f, for instance, the cargo is damaged as the result of an accident, but the vessel’s ability to work fully is not thereby prevented or impaired, because the vessel in herself remains fully efficient in all respects, then I do not think that the charterers bring themselves within the clause.”* (Sup., fn.21, at p.382.) The service immediately required may be altered - or even dictated - by the very circumstance which has caused delay to the Charterer.

In *The **“TRADE NOMAD”*** (Poseidon Schiffahrt G.m.b.H. v. Nomadic Navigation Co. Ltd. [1998] 1 Lloyd’s Rep. 57), the off-hire clause (Shelltime 4) provided that *“the vessel shall be off-hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced: provided however, that any service given or distance made good by the vessel whilst off-hire shall be taken into account in assessing the amount to be deducted from hire.”* Owing to a mechanical breakdown, the vessel was ordered off its discharging berth in Singapore. By the time the repair was completed, that berth was occupied by another ship, and so the Charterer ordered the Master to shift to a second discharging berth. When she finished there, the original berth was again unavailable, and she had to wait for a further four days. The arbitrator took the view that the off-hire ceased when the vessel commenced discharge at the second berth: *“What [the Charterers] did with her thereafter was their business, but no further time was lost to them as a result of the off-hire incident.”* Colman J upheld this conclusion as being *“a perfectly tenable result of the application of the words of the off-hire clause”*. (*ibid.*, at p.64.)

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<sup>107</sup> Apparently unknown to the tribunal, it was disclosed to the Court that they had indeed contracted the disease (*sup.*, fn.4, at p.203). There is no evidence that this information affected Mocatta J's decision; but it has undoubtedly coloured the subsequent reading of the case.

<sup>108</sup> If so, it is arguable that it goes further than *The "MASTRO GIORGIS"*: the latter could do nothing but lie in the port until the arrest was lifted, whereas the restriction on the "*APOLLO*" was limited to that specific loading port and would, quite possibly, dissipate with time. See also fn.120, *inf.* Whereas the "*APOLLO*" was delayed by a normal port procedure, the "*MASTRO GIORGIS*" was blocked by judicial intervention of a wholly contingent kind.

<sup>109</sup> See fn.23, *sup.* It should be noted that such a situation must involve an underlying cause, because the suspicion can only reside in the mind of the actor whose decision or action constitutes the immediate cause of the delay.

<sup>110</sup> "*The action of the authorities in such a case would appear extraneous, but in reality it is not*" (*The "MASTRO GIORGIS"*, *sup.*, fn.6, at p.69.) See citation at fn.86, *sup.*

<sup>111</sup> *Sup.*, fn.8, at p.151. (This passage, which follows directly after that cited at fn.86, *sup.*, evidently refers to an argument advanced by the Owner's counsel, to the effect that a valid off-hire cause must always "*bear on the vessel's physical condition as a vessel, albeit for these purposes her suspected condition was also relevant*", and seeking to explain such cases as *The "APOLLO*" and *The "BRIDGESTONE MARU No.3"* on this basis. *The "MASTRO GIORGIS"*, in this submission, was either distinguishable because of the addition of "*whatsoever*", or else it was simply wrong.)

<sup>112</sup> *Sup.*, fn.2. The vessel was a fully refrigerated LPG carrier.

<sup>113</sup> There was considerable confusion about the role and standing of RINA, the Italian classification society. In the argument, it (potentially) appears in four different guises: as a classification society in its own right, as the Italian representative of the vessel's own classification society, as an Italian "proper authority", and as a technical adviser to the Harbour Master. In the end, the decision to refuse permission to discharge was evidently made and implemented by the Harbour Master: "*...I find as a fact that the essential ground on which the port authority refused to allow discharge was non-compliance with the RINA regulations requiring a fixed installation, and the challenge to the vessel's safety was based on such non-compliance*" (*Sup.*, fn.2, per Hirst J at p.78.) In "*TIME CHARTERS*" (*Sup.*, fn.28, at p.593), RINA is misleadingly described as "*the official body charged with the enforcement of safety regulations*" – i.e. the proper authority.

<sup>114</sup> *Sup.*, fn.2, at p.83. This analysis is badly skewed in its approach to the facts of the two cases in Hirst J's second category: in *The "APOLLO"*, the actual cause of the delay was the action of the port health authorities in, quite properly, refusing pratique, and in *The "MASTRO GIORGIS"*, it was the arrest of the ship. Each fell within the named causes of the relevant charter simply because it contained the word "*whatsoever*", not because of some underlying potential prejudice to efficiency or seaworthiness.

<sup>115</sup> *Sup.*, fn.2, at p.83.

<sup>116</sup> What the RINA rules stated was no doubt safe and sensible; but there could be no obligation for the vessel, which was classed with NKK, to comply with them unless (a) that was a local requirement and (b) the charter required the Owner to comply with such a requirement. Non-compliance would then be a breach, sounding in damages, which would include loss of time; but no such breach was proved. (The charter happened to contain a clause to the effect that the vessel had neither a USCG letter of compliance nor a RINA certificate, and did not comply with either authority's requirements. One suspects that most commercial men would naively conclude that this was intended to place the risk of Italian trading squarely on the Charterer's side of the contractual fence.)

<sup>117</sup> See fn.2, *sup.*

<sup>118</sup> The arbitrators had simply stated the basic facts and left it to the Court to decide.

<sup>119</sup> *Sup.*, fn.4, at p.205. It is probably no accident that the wording here is reminiscent of the wording in voyage charter cases dealing with notice of readiness presented prior to the granting of pratique; for those cases

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had been fully canvassed in argument by Charterer's counsel (B. Rix, as he then was), this being the first case to address the NYPE clause with the amendment "*whatsoever*".

In *The "AQUACHARM"* (*sup.*, fn.5, at p.11), Griffiths LJ characterised the situation in this way: "*(The) ship was held up by the port health authorities because two of the crew had been taken to hospital with suspected typhus, and the health authority insisted that the ship be disinfected before they would issue a free pratique. ... A ship suspected of carrying typhus is prevented from working fully until it is cleared, for no responsible person would use it in such a condition. The incapacity of the ship to work in such a case is directly attributable to the suspected condition of the ship itself ...*" But what had happened in fact (as presented in the special case) was that the ship arrived and was boarded by the health officials shortly before midnight on 27<sup>th</sup> March. On the following morning, various specimens from the crew and the vessel's potable water were taken ashore for testing. The tests were completed on the morning of the 29<sup>th</sup>, and were in all respects negative. It was after this that the fumigation was carried out, starting at 9.45 a.m. and lasting until 10.30, when pratique was granted.

<sup>120</sup> Since the charter party apparently contained a clause to the effect that fumigations ordered because of illness of the crew were to be for the Owner's account (*sup.*, fn.4, at p.204), it was probably inevitable that this operation would be found to prevent the full working of the vessel; but that only took forty-five minutes. The decision of the Court of Appeal in *The "BERGE SUND"*, and especially the remarks of Staughton LJ and Sir Roger Parker may suggest an alternative approach to the rest of the delay (*sup.*, fn.13, at pp.461 – cited at fn.56,*sup.* - and 463); and a similar perspective appears in an earlier case, as cited by Atkinson J in *The "ALRESFORD"* (*Sea & Land Securities Ltd. v. Wm. Dickinson & Co. Ltd* [1941] 71 Ll.L.Rep.166, at p.175):

*"The next case to which I want to refer is a Scottish case, where the point argued was whether a ship was or was not off hire during a period when she was in quarantine in some port. That is the case of Aktieselskabet "Lina" v. Turnbull & Co., [1907] Sess. Cas. 507... Now, this is what Lord Stormonth-Darling said in that case:*

*'The second question depends on the terms of the charter-party and on the ordinary rules of maritime law. Both Sheriffs lay stress on this being a time charter, and in my opinion that affords a sufficient ground of judgment. [Why?] The owners had no voice in the question as to what ports (within the defined limits) their ship was to be sent to, and the correlative of that was that hire should go on at a certain rate so long as they continued to furnish a seaworthy ship capable of performing its stipulated service. Quarantine may or may not be a 'restraint of princes and rulers', but even if it is, and as such is 'mutually excepted', it does not follow that payment of hire calculated by time should be suspended during the whole course of its continuance.'*"

It is difficult to see how the service immediately required by the Charterer of the "*APOLLO*" could be other than the obtaining of free pratique. (The statement of Griffiths LJ - see fn.119, *sup.* - that "*a ship suspected of carrying typhus is prevented from working fully until it is cleared, for no responsible person would use it in such a condition*" neatly underlines the ambiguity about Mocatta J's decision on the facts, because the word "*use*" must lie closer to the concept of employment than to intrinsic efficiency: see also Davies, *sup.*, fn.65.)

<sup>121</sup> Cf: "**suspicion**: ... the imagining of something without evidence or on slender evidence ..." (CHAMBERS TWENTIETH CENTURY DICTIONARY [1972])

**"suspicion**: 1. ... imagination or conjecture of the existence of something evil or wrong without proof; apprehension of guilt or fault on slight grounds or without clear evidence ...

3. gen., Imagination of something (not necessarily evil) as possible or likely; slight belief or idea of something, or that something is the case; a surmise; a faint notion, an inkling ..." (OXFORD ENGLISH DICTIONARY [1971])

But cf: "*In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a word of warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts.*" (*Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and others (The "STAR SEA")* [2001] 1 Lloyd's Rep.389, per Lord Scott at p.414.)

(A parallel type of problem is suggested by *The "NOUR"* (*sup.*, fn.3), although the off-hire point was there seen as something of an after-thought: "*I would hold that this period was time lost by reason of the arrest of the vessel 'by creditors related to the Owners and/or the vessel'. The arrest was by cargo receivers who asserted bill of lading claims. It therefore was within the off-hire provisions of Clause 70. This achieves what would appear to be, in any event, a commonsense outcome, depriving the shipowners of hire during a period when the ship was*

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*detained by their representatives' failure to act with reasonable despatch to obtain the vessel's release."* (per Evans LJ, at p.20.) Had this particular Charterer actually inserted in the clause everything which he needed to bring himself within it? Can a claimant properly be described as a creditor?)

<sup>122</sup> *Sup.*, fn.86. If not, the necessary causal linkage is missing: see fn.30, *sup.*

<sup>123</sup> In a reported award (LMLN No. 197 [21 May 1987], London Arbitration 6/87), the vessel was delayed because the authorities believed that it was black-listed by the Arab Boycott Office. As it turned out, this belief was mistaken: the vessel on the list was a different ship. The tribunal found that the Owner was not in breach of a warranty as to the absence of black-listing, and also that the cause of the delay was the (extraneous) mistake of the authorities, so that the ship remained on hire.

In another case (LMLN No.406 [27 May 1995], London Arbitration 6/95), the vessel was detained by customs authorities on suspicion of smuggling. In addition to the customary off-hire clause (unamended), the charter contained a provision forbidding smuggling by those on board, and stating that any loss of time due to the presence of illegal merchandise or actual or attempted smuggling should be treated as off hire. Finding that the authorities' suspicions were groundless, in that there was no evidence of smuggling by the crew, the tribunal held that there was no interruption of hire.

In a third award (LMLN No.433 [8 June 1996], London Arbitration 6/96), the vessel was arrested by the Charterer shortly before redelivery in order to obtain security for various claims against the Owner. The off-hire clause was amended to read: " ... *or by any other cause whatsoever caused by the vessel and/or owners*", which the tribunal held did not materially alter the basic legal position as established by *The "MASTRO GIORGIS"*. Despite this, they found that the vessel remained on hire. While the physical condition of the vessel might be the basis for the claims, the decision of the Charterer to arrest was separate and distinct: it was not something which it had to do. The tribunal also accepted that, as a matter of common sense and necessary implication, the Charterer could not put the vessel off-hire where it had itself procured the arrest – otherwise, Charterers could use almost any excuse to evade payment when it suited them, and Owners would have to prove bad faith to recover in damages for wrongful arrest.

<sup>124</sup> *Board of Trade v. Temperley Steam Shipping Company Ltd. (The "TROWBRIDGE")* [1927] 27 Ll.L.Rep.230, at p.232. The vessel suffered damage in an accident in 1917 while under time charter to the Crown. At that time, repair materials were classified as munitions of war; and the local Board of Trade surveyor, acting under the Munitions Act, restricted the work. Soon after her departure, the ship broke down again and was properly brought back for complete repairs; and the Charterer placed the vessel off-hire for the time so lost. The Owner's claim was that the action of the Charterer's servant could not properly trigger the clause. Upholding the umpire and the judgment of Roche J at first instance, the Court of Appeal agreed with the Charterer: per Scrutton LJ: "*Now, that stopping of him making his ship efficient was the action of an officer of the State fulfilling his statutory duty of a semi-judicial character, and making an error of judgment in it. I am quite unable to find any case or any principle which will bring an action of that sort within the principle, which is sometimes expressed, that a man cannot take advantage of his own wrong.*"

<sup>125</sup> See, for example, fn.77, *sup.*, and the related text. The problem is further compounded when such remarks are repeated and relied on uncritically: the creeping but unremitting progression from *obiter dictum* to "*trite law*" is perhaps nowhere so endemic as it is in the interpretation of the off-hire clause.

An example of this danger is suggested by *The "MASTRO GIORGIS"*, where the ultimate responsibility for the damage to the cargo (as between Owner and Charterer) is never discussed. The judgment says only that "*the receivers alleged that some of the grain had been damaged in the course of the voyage*"; and it has always been assumed (no doubt correctly) that the liability was 100% with the Owner. But what of damage caused by bad stowage where the charter lays that responsibility on the Charterer? Would the arrest then class as extraneous? (And, if so, what should be said of the common situation where the ultimate responsibility for bad stowage is divided equally between the parties?)

In a recent case (*Jolley v. London Borough of Sutton* [2000] 2 Lloyd's Rep.65, at p.70), Lord Steyn remarked:

*"[I]n this corner of the law the results of decided cases are inevitably very fact-sensitive. Both counsel nevertheless at times invited your Lordships to compare the facts of the present case with the facts of other decided cases. That is a sterile exercise. Precedent is a valuable stabilizing influence in our legal system. But, comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, viz to identify the relevant rule to apply to the facts as found."*

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The issue before him was of a non-contractual nature; but his comment could apply equally well in the present context.

<sup>126</sup> See fn.135, *inf.*

<sup>127</sup> As in *The "MAREVA A.S."* and *The "AQUACHARM"*. (Cf. also *The "MANHATTAN PRINCE"*.)

<sup>128</sup> See fn.72, *sup.* The usage of *The "LACONIAN CONFIDENCE"* does not seem to extend beyond this.

<sup>129</sup> As implied in *The "MASTRO GIORGIS"*.

<sup>130</sup> As implied by the majority of the tribunal in *The "ROACHBANK"*, stepping gingerly back from the "no go" area of *The "ERRINGTON COURT"*.

<sup>131</sup> In the paragraph cited at fn.111, *sup.*, for example, "efficiency" is used in two distinct senses: to describe the incapacity of the "APOLLO", and to characterise the condition of the "BRIDGESTONE MARU", where "efficiency" was limited to the physical dimension: this is presumably why Hirst J was constrained to find as he did – see citation at fn.114, *sup.* - although, oddly, his judgment does not refer at all to the recent decision in *The "MANHATTAN PRINCE"*, which had found that Shelltime's use of "efficient" must mean "physically efficient": see fn.106, *sup.*

<sup>132</sup> See fn.67, *sup.*

<sup>133</sup> See Lloyd J's remarks in *The "MASTRO GIORGIS"*, cited at fn. 67, *sup.* Cf. the finding of the majority in *The "ROACHBANK"* that, behind the (extraneous) attitude of the authorities, there *'lay a second extraneous cause, namely the presence of the refugees on board the ship.'* (*Sup.*, fn.7, at p.501.) In *The "LACONIAN CONFIDENCE"*, Rix J speaks of the attitude of the Taiwanese authorities as being extraneous, but of the presence of the refugees as *"too temporary to have become a characteristic of the vessel or part of its history"*. This may be no more than a point of style; but it does occur twice, and may indicate an intuitive reluctance to follow the arbitrators' line of thought.

<sup>134</sup> The judgments in *The "BRIDGESTONE MARU No. 3"*, *The "ROACHBANK"* and *The "LACONIAN CONFIDENCE"* all traverse this well-trodden ground. By this stage, the gentle reader might well sympathise with Steyn J's sardonic aside in *The "BERGE SUND"*: *"I was then taken on a tour of some of the leading cases in this area of the law."*

<sup>135</sup> But perhaps not altogether surprisingly: *"My Lords, questions of causation are mixed questions of fact and law and opinions may and often do differ upon them."* (Shell International Petroleum Co. Ltd. v. Caryl Antony Vaughan Gibbs (*The "SALEM"*) [1983] 1 Lloyd's Rep. 342, per Lord Roskill at p.350). *"It may well be that the primary arguments addressed to the umpire proceeded upon a different basis ... I have no knowledge of this. I have to express my opinion on the facts found and any irresistible inferences from those facts."* (Sposna Plovba of Piran v. Agrelak Steamship Corporation (*The "BELA KRAJINA"*): [1975] 1 Lloyd's Rep. 139, per Donaldson J at p. 145.) *"... [W]here the parties submit to an arbitrator or an umpire the determination of the question as to whether certain damage is attributable to one or another cause, unless it can be shown ... that the determination was clearly wrong in law, his finding is unassailable. The parties having chosen their arbitrator or umpire for better or worse must abide by his determination."* (*The "DODECANESE"*: *sup.*, fn.22, per Pilcher J at p.57). See also fn.12, *sup.*

Sometimes, of course, the tribunal has misdirected itself in law, and the award must then be varied: cf. *The "DERBY"* (*sup.*, fn.24, per Hobhouse J at p.642): *"It follows, in my judgment, that the arbitrator is mistaken in his conclusion on liability and that the criticisms in ... the owners' notice of motion are well founded."* Dismissing the Charterer's further appeal, Kerr LJ said: *"In the present case, however, I am left in no doubt that the arbitrator misdirected himself in law for the reasons discussed above, and it is unnecessary to go further. I would only add that in my view this case provides a clear illustration of the importance of maintaining a measure of control over decisions on issues of law made by commercial (and other) arbitrators in appropriate cases ..."* (2 Lloyd's Rep. [1985] 325, at p.333). Cf also: *"Accordingly, in my opinion, Mr Justice Hobhouse and the Court of Appeal were fully entitled in these circumstances to substitute their view of the case on this point for that of the arbitrators. There was no question of their reversing the arbitrators on an issue of fact; they were deciding, and in my opinion rightly deciding, that the arbitrators had failed to draw an inference of law which on their findings of fact they were*

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bound to draw.” (Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (*The “KANCHENJUNGA”*) [1990] 1 Lloyd’s Rep. 391, per Lord Goff at p. 400).

The safest advice is probably that of Lord Wright, albeit in a slightly different context: “*The choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view.*” (Yorkshire Dale Steamship Company Ltd. v. Minister of War Transport (*The “COXWOLD”*) [1942] 73 Ll.L.Rep. 1, at p.10). Cf. fn.12, *sup.*

<sup>136</sup> This void is reflected in “**TIME CHARTERS**”, which barely mentions the concept of underlying cause. One must, of course, be cautious to avoid the unthinking application of principles derived from adjacent, but distinct, areas of contract law, such as insurance.

<sup>137</sup> In an extraordinary break with tradition, BIMCO’s new (1999) “GENTIME” form introduces a novel form of off-hire clause, to which the existing jurisprudence may have only limited application: as the introductory Special Circular (No.5, 15 September 1999) points out, it is worded “substantially differently from the corresponding provisions of BALTIME 1939 and the NYPE forms”. The section which corresponds to the first sentence of the NYPE clause reads as follows:

“After delivery in accordance with Clause 1 hereof the Vessel shall remain on hire until redelivered in accordance with Clause 4, except for the following periods:

(a) Inability to Perform Services

If the Vessel is unable to comply with the instructions of the Charterers on account of:

- (i) any damage, defect, breakdown, deficiency of, or accident to the Vessel’s hull, machinery, equipment or repairs or maintenance thereto, including drydocking, excepting those occasions where Clauses 7(b) [breakdown of gear] and 16(b) [stevedore damage] apply;
- (ii) any deficiency of the Master, officers and/or Crew, including the failure or refusal or inability of the Master, Officers and/or Crew to perform services when required;
- (iii) Arrest of the Vessel at the suit of a claimant except where the arrest is caused by, or arises from any act or omission of the Charterers, their servants, agents or sub-contractors;
- (iv) the terms of employment of the Master, Officers and/or Crew;

then the Vessel will be off-hire for the time thereby lost.”

By opting expressly for the Charterer’s “instructions”, the clause would appear to have discarded the restrictive test of the service immediately required: at the very least, this expression must move the criterion much closer to employment and use. In abandoning the qualification of “preventing the vessel’s [full] working”, GENTIME has reinforced this shift, and has simultaneously jettisoned the period element of both the NYPE and the 1939 BALTIME clauses, so that it now reads as a pure loss of time clause (see citation at fn.42, *sup.*). If this reading is correct, BIMCO’s new clause will have accomplished for the Charterer what no reported version of the NYPE has yet achieved under English law: an off-hire right coextensive in time with damages for breach, but with no concomitant duty to mitigate. So, for example, under this clause, the “*MARIKA M*” might well remain off-hire for the time lost between 27 July and 6 August: see fn.35, *sup.* (One may also wonder whether the explicit, but ambiguous, carving out of loss of time from repairs due to stevedore damage may not have reinforced the argument that this clause is intended otherwise to operate even in the event of Charterer’s breach: see fn.33, *sup.*)

This daring draftsmanship is clearly derived from BIMCO’s earlier “BOXTIME” form, which is, if anything, even worse for the Owner: in place of GENTIME’s “then the Vessel will be off-hire for the time thereby lost”, it has “if any of the above incidents affect the full use of the Vessel, it shall be off-hire. If they partially affect the use of the Vessel, it shall be off hire to the extent such incidents affect the Charterer’s use of the Vessel.”

(The new “BPTIME3” form, produced in 2001 by BP Shipping Limited in association with BIMCO, also departs from tradition, but in a slightly different way. The relevant part of the clause reads:

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“19.1 The Vessel shall be off-hire on each and every occasion that there is a loss of time arising out of or in connection with the Vessel being unable to comply with Charterers’ instructions (whether by way of interruption or reduction in the Vessel’s services, or in any other manner) on account of:-

19.1.1 any damage, defect, breakdown, deficiency of or accident to the Vessel’s hull, machinery, equipment or cargo handling facilities, or maintenance thereto; or

19.1.2 any default and/or deficiency of the Master, officers or crew, including the failure or refusal or inability of the Master, officers and/or crew to perform the services required; or

19.1.3 any breach of sub -clause 9.6.5 (trading certificates); or

19.1.4 any other cause preventing the full working of the vessel.”

With this lay-out, does the expression “preventing the full working of the vessel” still qualify all of the enumerated causes? And how is the duration of the off-hire period to be assessed?)

<sup>138</sup> See fnn.55,59,73,88, *sup.*

<sup>139</sup> See fnn.56,106, *sup.*

<sup>140</sup> See fnn.30,64,87, *sup.* Cf. also: “It does not seem to me that this citation of authorities assists greatly in relation to the present case, except to the extent that it underlines the importance of distinguishing between events which are extraneous to the vessel and events which relate to the condition of the vessel.” (The “**BERGE SUND**”: *sup.* fn.22, per Steyn J at p.465: the cases there cited had included *The “ERRINGTON COURT*, *The “APOLLO*, *The “AQUACHARM*”, and *The “MASTRO GIORGIS*.”) In practice, this proposition is often more of a crutch than a sign-post: see fn.132, *sup.* (Cf. H.G. Williams: “**CHARTERING DOCUMENTS**” (4<sup>th</sup> Edn., 1999, at p.89): “There are numerous decisions, sometimes on unusual or quirky facts, which support the general proposition that a charterer has difficulty in proving a vessel off-hire unless there is something wrong internal to the vessel which actually prevents her working.”

In *The “TRADE NOMAD*” (*sup.*, fn.109) the vessel went off-hire in the Mississippi River. By the time she was again efficient, the movement of shipping was restricted on account of a sunken barge, and her departure was further delayed. The charter party was on the Shelltime 4 form (materially identical with that of Shelltime 3: see fn.2, *sup.*), and the Charterer argued that the position where the vessel lay at anchor following repair could not properly be characterised as “no less favourable” until the moment when she was able to sail. The arbitrator stated: “The fact that she could not actually resume [her] service had nothing to do with her condition, and everything to do with an entirely extraneous cause.” In upholding the award, Colman J commented: “It is, in my judgment, quite impossible to say that this conclusion could not have been arrived at by an arbitrator applying the proper construction of the off-hire clause. On the contrary, it is very difficult to see that on the facts which he found the arbitrator could have arrived at any different conclusion. The position of the vessel was, having regard to charterers’ requirement that she should proceed downstream, no less favourable in respect of that requirement than her position at the time of the accident. What was less favourable was not her position, but the navigational conditions in that part of the river.” (*ibid.*, at p.65.)

<sup>141</sup> See citation at fn.111, *sup.* Cf. fn.123, *sup.* It may be objected that either (a) or (b) alone should be sufficient to trigger the off-hire clause; and, from a cursory reading of some of the judicial *dicta*, especially taken in isolation, this may seem plausible. For the reasons discussed above, however, it is submitted that each is a necessary condition. If the actor is behaving capriciously, the causal chain is broken; and if the suspicion of a named cause is mistaken, this can only entail that such named cause does not exist. (In the case of an amended clause, of course, the most that could be required is that the actor has behaved reasonably, and sometimes not even that: see citation at fn.86, *sup.* The question of the underlying cause would there only be relevant if the immediate cause were *prima facie* extraneous.)

<sup>142</sup> See, for example, K. Lewison: “**THE INTERPRETATION OF CONTRACTS**” (2<sup>nd</sup> Edn., 1997). This is, of course, always subject to any binding precedent as to the interpretation of particular expressions as they appear in a standard form: “Once a court has put a construction on commercial documents in a standard form, commercial men act upon it. It should be followed in all subsequent cases. If the business community is not satisfied with the decision, they should alter the form.” (The “**ANNEFIELD**” [1971] 1 Lloyd’s Rep. 1, per Lord Denning MR at p.3.)

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<sup>143</sup> *Sup.*, fn.24. The off-hire clause in The “**WESTFALIA**” read as follows: “*That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers’ risk and expense. Quarantine (if any) at charterers’ expense.*”

<sup>144</sup> *Sup.*, fn.54.

<sup>145</sup> See citation at fn.59, *sup.*, also fn.66, *sup.*

<sup>146</sup> As clearly recognised by Lord Halsbury in *The “WESTFALIA*”. In *The “YAYE MARU”* ([1921] 274 F. 195 [4<sup>th</sup> Circ.] Knapp CJ), the ship, which was apparently chartered on the NYPE form, was lying at anchor awaiting a berth to load coal when it was damaged and rendered unseaworthy by another vessel which had dragged its anchor. At the time, there was a government embargo on coal exports; and this continued after the repairs were completed. The Fourth Circuit Court of Appeals (in an action brought by the damaged vessel) held that she was properly off-hire, on the grounds that the Charterer could not be required to pay hire when the power to use the vessel was taken away. Could an English Court correctly reach the same conclusion? What was the service immediately required of the ship: to await its turn at berth, or to carry out the essential repairs? (Cf citation at fn.58, *sup.*) Should the Charterer have to pay continuously for a ship which is completely broken down and incapable of carrying out any valid instruction other than to lie idle?

In *Stolt Tankers Inc. v. Landmark Chemicals S.A. (The “STOLT SPUR”)* [2002] 1 Lloyd’s Rep. 786), it was held that demurrage was not payable where the vessel had left the waiting anchorage to carry out other contractual commitments. If, as seems natural, the same logic should apply to the ship which immobilises the main engine under similar circumstances, this case may turn out to have implications in the context of off-hire. Under English law, demurrage is treated as liquidated damages for detention, which effectively excludes any duty to mitigate; and, as with hire, the general rule is that demurrage is payable without interruption absent express exception. If, then, demurrage is to be interrupted when the owners elect to take advantage of the hiatus in the charterer’s cargo operations, why should hire be treated any differently?

<sup>147</sup> See fn.54, *sup.* Ironically enough, characterised by the dissenting Lord Bramwell (at p.62) as being “*a case of no great consequence in point of amount, nor I should think in point of precedent.*”