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CASES JUDICIALLY CONSIDERED

Aello, The [1960] 1 Lloyd's Rep. 623; **applied:** [1991] 1 Lloyd's Rep. 277
Aktieselskabet Reidar v. Arcos Ltd. (1926) 25 Ll.L.Rep. 513; **considered:** [1991] 1 Lloyd's Rep. 137
Angel Bell, The [1980] 1 Lloyd's Rep. 632; **considered:** [1991] 1 Lloyd's Rep. 563
Antares, The [1987] 1 Lloyd's Rep. 424; **considered:** [1991] 1 Lloyd's Rep. 538
Aramis, The [1989] 1 Lloyd's Rep. 213 **applied:** [1991] 1 Lloyd's Rep. 456
August Leonhardt, The [1985] 2 Lloyd's Rep. 28; **applied:** [1991] 1 Lloyd's Rep. 493
Bernard v. Rodocanachi, (1882) 7 App. Cas. 332; **considered:** [1991] 1 Lloyd's Rep. 169
Captain Gregos (No. 2), The [1990] 2 Lloyd's Rep. 395; **applied:** [1991] 1 Lloyd's Rep. 456
Commonwealth, The v. Verwayen, (1990) 64 A.L.J.R. 540; **applied:** [1991] 1 Lloyd's Rep. 493
Congimex Companhia Geral de Commercio Importadora e Exportadora S.A.R.L. v. Tradax Export S.A., [1983] 1 Lloyd's Rep. 250, **considered:** [1991] 1 Lloyd's Rep 378
Cowan v. Spence (1824) 3 S. 42; **considered:** [1991] 1 Lloyd's Rep. 95
Cundy v. Lindsay, (1877–1878) 3 App.Cas. 459; **considered:** [1991] 1 Lloyd's Rep. 576
Deichland, The [1989] 2 Lloyd's Rep. 113; **applied:** [1991] 1 Lloyd's Rep. 240
Democritos, The [1976] 2 Lloyd's Rep. 149; **considered:** [1991] 1 Lloyd's Rep. 100
Dione, The [1975] 1 Lloyd's Rep. 115; **considered:** [1991] 1 Lloyd's Rep. 100
Dione, The [1975] 1 Lloyd's Rep. 115; **applied:** [1991] 1 Lloyd's Rep. 77; [1991] 1 Lloyd's Rep. 100
Duke of Westminster v. Swinton [1948] 1 K.B. 524; **considered:** [1991] 1 Lloyd's Rep. 120
El Amria, The [1981] 2 Lloyd's Rep. 119; **applied:** [1991] 1 Lloyd's Rep. 69
Elli 2, The [1985] 1 Lloyd's Rep. 107; **applied:** [1991] 1 Lloyd's Rep. 456
Empress Assurance Co. v. Bowring, (1906) 11 Com. Cas. 107; **applied:** [1991] 1 Lloyd's Rep. 602
Empressa Cubana de Fletes v. Aviation and Shipping Co. Ltd. [1969] 2 Lloyd's Rep. 257; **applied:** [1991] 1 Lloyd's Rep. 77
Evans Construction Co. Ltd. v. Charrington & Co. Ltd., [1983] 1 Q.B. 810; **considered and applied:** [1991] 1 Lloyd's Rep. 201
Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. and Others, [1978] 2 Lloyd's Rep. 132; **applied:** [1991] 1 Lloyd's Rep. 573
Glasgow Assurance Co. v. Symondson, (1911) 16 Com.Cas. 109; **applied:** [1991] 1 Lloyd's Rep. 603
Howard v. Pickford Tool Co. Ltd. [1951] 1 K.B. 417; **considered:** [1991] 1 Lloyd's Rep. 172
Kalliope A, The [1988] 2 Lloyd's Rep. 101; **applied:** [1991] 1 Lloyd's Rep. 81
Leonidas D, The [1985] 2 Lloyd's Rep. 18; **applied:** [1991] 1 Lloyd's Rep. 538
Letang v. Cooper, [1964] 2 Lloyd's Rep. 339; **considered:** [1991] 1 Lloyd's Rep. 181
London Explorer, The [1971] 1 Lloyd's Rep. 523; **applied:** [1991] 1 Lloyd's Rep. 100
London Explorer, The [1971] 1 Lloyd's Rep. 523; **considered:** [1991] 1 Lloyd's Rep. 100
Mareva A.S., The [1977] 1 Lloyd's Rep. 368; **considered:** [1991] 1 Lloyd's Rep. 100
Marques de Bolarque, The [1984] 1 Lloyd's Rep. 652, **applied:** [1991] 1 Lloyd's Rep. 392
Matija Gubec, The [1983] 1 Lloyd's Rep. 24; **considered:** [1991] 1 Lloyd's Rep. 100
Midland Bank Ltd. v. Eastcheap Dried Fruits Co. [1962] 1 Lloyd's Rep. 359; **considered:** [1991] 1 Lloyd's Rep. 154
Nai Matteini, The [1988] 1 Lloyd's Rep. 452; **not followed:** [1991] 1 Lloyd's Rep. 126
Nema, The [1981] 2 Lloyd's Rep. 239; **not followed**: [1991] 1 Lloyd's Rep. 349
Nema, The [1981] 2 Lloyd's Rep. 239; **considered**: [1991] 1 Lloyd's Rep. 349
Reg. v. Ministry of Agriculture Fisheries and Food, ex parte Agegate Ltd. (Case C.3/87) [1990] 3 W.L.R. 226; **considered:** [1991] 1 Lloyd's Rep. 10
Reg. v. Ministry of Agriculture Fisheries and Food, ex parte Jaderow Ltd. (Case C.216/87) [1990] 3 W.L.R. 265; **considered:** [1991] 1 Lloyd's Rep. 10
Rena K, The [1978] 1 Lloyd's Rep. 545; **applied:** [1991] 1 Lloyd's Rep. 126
Rodriguez v. R. J. Parker [1967] 1 Q.B. 116; **considered and applied**. [1991] 1 Lloyd's Rep. 201
Sanders v. McLean, (1883) 11 Q.B.D. 327; **considered:** [1991] 1 Lloyd's Rep. 475
Sharpe v. Nosawa, [1917] 2 K.B. 814; **considered:** [1991] 1 Lloyd's Rep. 475
Solholt, The [1983] 1 Lloyd's Rep. 605; **considered:** [1991] 1 Lloyd's Rep. 120
Thistle Hotels Ltd. v. Sir Robert McAlpine & Sons Ltd., Apr. 6, 1989; **considered and applied:** [1991] 1 Lloyd's Rep. 201
Tradax Export S.A. v. Italgrani di Francesco Ambrosia [1986] 1 Lloyd's Rep. 112; **considered:** [1991] 1 Lloyd's Rep. 136
Vervaeke v. Smith, [1983] A.C. 145; **applied:** [1991] 1 Lloyd's Rep. 161; [1991] 1 Lloyd's Rep. 429
Young v. Schuler (1883) 11 Q.B.D. 651; **applied:** [1991] 1 Lloyd's Rep. 521
Zeus, The (1888) 13 P.D. 189; **applied:** [1991] 1 Lloyd's Rep. 269

STATUTES CONSIDERED

CONTENTS

NOTE: These Reports should be cited as "[1991] 1 Lloyd's Rep."

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

LLOYD'S LAW REPORTS

Editor: Miss M. M. D'SOUZA, LL.B., Barrister

HOUSE OF LORDS

July 17 and 19, 1990

PRESIDENT OF INDIA
v.
JEBSENS (UK) LTD. AND OTHERS

(THE "GENERAL CAPINPIN", "PROTEUS" AND "FREE WAVE")

Before Lord KEITH OF KINKEL, Lord BRIGHTMAN, Lord TEMPLEMAN, Lord GRIFFITHS and Lord GOFF OF CHIEVELEY

Charter-party (Voyage) — Laytime — Contractual rate of discharge — Cargo to be discharged on available workable hatch basis — Whether hatch over empty cargo hold workable —Whether hatch workable if no ship's gear to work it — Whether clause provided for overall rate of discharge.

By four charter-parties the four owners let their vessels *General Capinpin*, *Proteus*, *Free Wave* and *Dinara* to the charterers for the carriage of cargo to India.

The cargo discharging clause in the four charters, though not identical provided inter alia:

> Cargo to be discharged by consignee's stevedores free of risk and expense to vessel at the average rate of 1000 metric tonnes basis 5 or more available workable hatches, pro rata if less number of hatches per weather working day.

Disputes as to the calculation of laytime arose between the parties and were referred to arbitration.

In all four cases the charterers contended that the effect of that clause was that the contractual rate of discharge would diminish from time to time as holds became empty and that in consequence the time permitted for discharge was governed by the quantity of cargo in the hold into which the greatest quantity of cargo had been loaded, dividing that cargo by 200 tonnes per day for a vessel with five hatches.

Proteus and *Dinara* were ordered to be discharged at small ports in India where discharging had to take place in the stream so that no shore cranes could be used. It was necessary for the vessel's own gear to be used. Although each of the vessels had five hatches, each of them carried only four cranes and the charterers argued that the contractual rate of discharge was 800 tonnes on the basis of four available workable hatches.

Both contentions were rejected and the charterers appealed.

———*Held*, by Q.B. (Com. Ct.) (WEBSTER, J.), that (1) while 200 tonnes per hatch per day, given five hatches, might well be the same as 1000 tonnes per day, 1000 tonnes per day was not necessarily the same as 200 tonnes per hatch per day given five hatches, because discharging might have to take place at a rate of more than 200 tonnes per day through one or more hatches if the vessel was to be discharged at the rate of 1000 tonnes per day;

(2) although under the present clause it might be necessary to discharge through some hatches at a higher rate than 200 tonnes per day so as to achieve 1000 tonnes for the vessel, the rate which the vessel had to achieve was governed by the numbers of available workable hatches; and the words "basis 5 or more available workable hatches, pro rata if less number of hatches" meant no more than that the average rate of discharge was to be 1000 tonnes if there were five hatches, 800 tonnes if there were four, 600 tonnes if there were three and so on;

(3) there was no reason why a hatch with no cargo in the hold beneath it should be treated as an available workable hatch for the purpose of determining the rate of discharge for the vessel but not for the purpose of determining the rate of discharge per hatch; a hatch over an empty hold was not a workable hatch and the charterers' contention would be accepted;

(4) a hatch was not to be regarded as unavailable or unworkable because there was no gear available to load or discharge the cargo through it; and the awards on this issue would be upheld.

The owners of the vessels *General Capinpin*, *Free Wave*, and *Proteus* appealed; the owners of *Dinara* cross-appealed; and the charterers

appealed against the decision in respect of *Dinara* and cross-appealed in respect of the decision in *Proteus*.

The questions for decision of the Court were: (1) How was laytime to be calculated under a provision in the charter in the following terms: "Cargo to be discharged . . . at the average rate of 1000 tonnes per day basis 5 or more available workable hatches . . . " where different quantities of cargo were loaded beneath each hatch. Did the stipulated average rate apply throughout the whole period of discharge or did it reduce depending on the quantities loaded beneath each hatch? (2) Where the vessel had fewer cranes than hatches was that fact to be taken into account in determining the number of available workable hatches for the purposes of calculating laytime when the vessel was ordered to a port where she had to discharge in stream without the aid of shore or floating cranes, and if so, in what way?

———*Held*, by C.A. (Sir STEPHEN BROWN, P., NEILL and TAYLOR, L.JJ.), that (A.) as to the appeals in all four cases: (1) the submission that a daily rate which was expressed to be based on available hatches was only apt to describe a daily rate which reduced as the holds emptied and the available workable hatches became fewer in number failed to give proper weight to the fact that the obligation to discharge was expressed to be at the average rate of 1000 tonnes per weather working day; the obligation to discharge was qualified but the obligation was imposed by reference to a rate for the vessel and not to a rate per hatch and that was a fundamental distinction;

(2) the specified rate was an average rate for the vessel and was only to be reduced pro rata if at the time when unloading began the number of workable hatches was less than five; the owners were right in their contention that the contractual rate of discharge was expressed as a daily average for the vessel and this remained constant despite any reduction in the number of workable hatches; question 1 would be answered in favour of the owners;

(B) As to the appeals in *Dinara* and *Proteus*: (1) the actual method of working adopted by a charterer could not affect the calculation of laytime; the laytime provisions could not be affected by the fact that the charterers ordered the vessel to be discharged at small ports in India where shore cranes could not be used so that only the four cranes on board each vessel could be employed to unload the five hatches; the charterers chose the port in each case and elected to use the vessels' cranes; the fact that only four cranes were available for the five loaded hatches did not affect the calculation of laytime and the second question would be answered in favour of the owners; the owners' appeals would be allowed and the charterers' appeal dismissed.

The charterers appealed in the cases of *General Capinpin*, *Proteus* and *Free Wave*. The appeal in the case of *Dinara* was not pursued.

———*Held*, by H.L. (Lord KEITH OF KINKEL, Lord BRIGHTMAN, Lord GRIFFITHS and Lord GOFF OF CHIEVELEY; Lord TEMPLEMAN dissenting), that the clause provided for an overall rate of discharge and did not expressly provide for a rate per hatch; the arbitrators were not prepared to ignore the express provision for the overall rate; they preferred to treat the reference to "available working hatches" not as substituting a rate per hatch but rather as imposing a qualification on it; there was no good reason for departing from the decision of the arbitrator and the appeal would be dismissed (*see* p. 3, col. 1; p. 5, col. 1; p. 9, cols. 1 and 2; p. 10, col. 1).

The following cases were referred to in the judgments of Lord Templeman and Lord Goff:

Cargill Inc. v. Marpro Ltd., (The *Aegis Progress*), [1983] 2 Lloyd's Rep. 570;

Cargill Inc. v. Rionda de Pass Ltd., (The *Giannis Xilas*), [1982] 2 Lloyd's Rep. 511;

Compania de Navigacion Zita S.A. v. Louis Dreyfus Compagnie (The *Corfu Island*), [1953] 2 Lloyd's Rep. 472;

Sandgate, The (C.A.) (1929) 35 Ll.L.Rep. 151; [1930] P. 30; (1929) 35 Ll.L.Rep. 9;

Tropwave, The [1981] 2 Lloyd's Rep. 159.

These were appeals by the charterers, the President of India from the decision of the Court of Appeal ([1989] 1 Lloyd's Rep. 232) allowing the appeal of the owners, Jebsens (U.K.) Ltd., the owners of *General Capinpin*, Pearl Freighters Corporation, the owners of *Proteus*, and Kastelli Shipping Corporation the owners of *Free Wave* from the decision of Mr. Justice Webster ([1987] 2 Lloyd's Rep. 354) given in favour of the charterers in the dispute concerning the calculation of laytime.

Mr. Angus Glennie (instructed by Messrs. Constant & Constant) for the charterers; Mr. Timothy Young (instructed by Messrs. Sinclair Roche & Temperley) for the owners, Jebsens; (instructed by Messrs. Holman Fenwick & Willin) for the owners Pearl Freighters; (and instructed by Messrs. Middleton Potts) for the owners Kastelli.

The further facts are stated in the judgment of Lord Templeman and Lord Goff of Chieveley.

Judgment was reserved.

Thursday Oct. 25, 1990

JUDGMENT

Lord KEITH OF KINKEL: My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I agree with it, and for the reasons he gives would dismiss these appeals.

Lord BRIGHTMAN: My Lords, I also have considered the speech to be delivered by my noble friend Lord Goff of Chieveley, and for the reasons given by him would dismiss these appeals.

Lord TEMPLEMAN: My Lords, when a shipowner agrees to carry in his ship a cargo of a charterer, the responsibility for loading and unloading the cargo may be imposed on the charterer subject to his compliance with safety and other requirements of the owner. On a single voyage charter the shipowner wishes the adventure to be completed as soon as possible so as to free his ship for another voyage. The speedy unloading of the vessel by the charterer is encouraged by a stipulation in the charter-party that if the charterer does not discharge the cargo within a certain time, known as "laytime"after the vessel is ready to be unloaded the charterer will pay a daily fine, known as "demurrage", but if on the other hand the charterer discharges the cargo before the expiry of the laytime, the owner will pay the charterer a reward known as "despatch money" for every day saved.

The appellant, the President of India representing the Government of India, is the charterer in this appeal and the respondents are shipowners. *General Capinpin* and *Free Wave* were chartered to deliver wheat in bulk to a port in India and *Proteus* was chartered to deliver ammonium sulphate in bulk to India. The Government of India is a frequent charterer and negotiates charters on the basis of its own standard form of charter-party. The standard form employed by the Government of India originally contained a laytime clause in these terms:

> Cargo to be discharged . . . at the average of 1,000 metric tons per weather working day . . .

This formula is liable to produce eccentric results when bulk cargo is carried on a vessel with holds of different capacities. The number of days required to complete discharge of the vessel must depend not on the total tonnage of the cargo but on the largest tonnage of cargo stowed in any one hold. The heaviest hold dictates the time required to unload. Thus if the cargo is 12,000 tons, laytime at the rate of 1000 tons per day will be 12 days. If there are five holds each with one hatch the daily average rate of discharge from each hatch will be 200 tons, thus providing the stipulated 1000 tons per day for the whole cargo. If hold A contains 3000 tons, however, it will take 15 days at 200 tons a day to complete the discharge of that hold. To achieve completion of the unloading of the vessel within the laytime of 12 days, hold A must be discharged at the rate of 250 tons a day. If hold B holds 1200 tons, that hold will be discharged in six days at the rate of 200 tons per day but the early discharge of hold B will not benefit the charterer struggling to discharge hold A during the 12 days of laytime. A formula which defines laytime by reference to the total cargo produces results which are unfair to the charterer. The time taken to discharge the vessel will be 15 days but laytime will be 12 days. A formula which defines laytime by reference to each hatch simpliciter is also unsatisfactory because the heaviest hold still dictates the time required for unloading. Thus if the charter-party provides for the cargo to be discharged at the rate of 250 tons per day per hatch and there are five hatches, the time required to discharge the cargo of 12,000 tons will be 15 days if hold A contains 3000 tons but laytime will be 12 days.

The unfairness is, however, eliminated if the formula for calculating laytime takes account of hatches which are not "workable" and if a hatch which has been emptied ceases to be "workable".

In *The Sandgate — "Sandgate" (Owners) v. W. S. Partridge & Co.*, (1929) 35 Ll.L.Rep. 9, the Divisional Court construed a charter-party which required the charterers to discharge a bulk load of coal "at the average rate of 125 tons per working hatch per day" so that the charterer was not obliged to unload the cargo "at a higher rate than 500 tons per day". There were four holds of different capacities. The owner argued that the laytime must be calculated by dividing the total cargo by the figure of 500 tons per day. That argument was rejected. Mr. Justice Hill accepted the argument of the charterers that the term —

> . . . working hatch denotes a hatch which can be worked because there is cargo underneath it waiting to be discharged.

If you "took the quantity in the hold which contains the largest quantity and divided that by 125 then that would give the period in which the discharge had to be carried out". The Court of Appeal affirmed the Divisional Court at (1929) 35 Ll.L.Rep. 151; [1930] P. 30 and the headnote correctly reports the decision:

That a working hatch meant a hatch in which there was still cargo to be discharged, and not a hatch that had contained, or could contain, cargo; that accordingly the obligation of the consignees was only to take delivery at the rate of 500 tons per day when all four holds contained cargo to be discharged, and that when one or more of the holds was emptied the obligation then was to work the remaining hatches at the average rate of 125 tons per hatch per day.

In *Compania de Navigacion Zita S.A. v. Louis Dreyfus & Compagnie (The Corfu Island)*, [1953] 2 Lloyd's Rep. 472, the laytime clause required cargo to be loaded —

> . . . at an average rate of not less than 150 metric tons per available working hatch per weather working day . . .

The vessel had five holds, each hold serviced by one hatch. Mr. Justice Devlin said, at p. 475:

> The shipowners' desire is to achieve a quick turn-round; time is money for him. The object of fixing lay days and providing for demurrage and dispatch money is to penalise dilatoriness in loading and to reward promptitude. When a number of lay days is specified, it is no doubt calculated upon some estimate of the period within which the charterers, working diligently, should be able to load a known quantity of cargo. But it is common enough to find that, although a full and complete cargo is required, the quantity to be loaded cannot be known until it is seen how the stowage is working out; in the present case the weight of cargo may vary by at least as much as 10 per cent. according to stowage factors which are in the discretion of the master. A fairer and more accurate method of fixing the laytime is, therefore, to fix a daily rate of loading. The clause in this case introduces a further refinement. Instead of providing simply for a rate per day, it provides for a rate per hatch per day. If all the holds were of equal capacity this refinement would be unnecessary. If they were loaded at the same working rate they would then all be finished simultaneously, and with five holds you might just as well say that 750 tons per day is 150 tons per day per hold. But if they are not of the same capacity one hold will be finished before the others. If when, say, half the holds are filled, the charterer had to carry on at the same daily rate, he would have to double the rate on each of the unfilled holds, and that would be unreasonable, if not impossible; thus the necessity for the rate per "workable hatch". It is common ground that the word "workable" is intended to describe the state of a hatch that can still be worked because its hold is not yet full.

In *Cargill Inc. v. Rionda de Pass Ltd. (The Giannis Xilas)*, [1982] 2 Lloyd's Rep. 511, Mr. Justice Bingham said, at p. 513, that the effect of the expressions "working hatch" or "available workable hatch":

> . . . is not to distinguish a cargo hatch from any other kind of hatch but to denote a hatch which can be worked either because under it there is a hold into which cargo can be loaded or a hold out of which cargo can be discharged, in either event being a hatch which the party responsible for loading or discharging is not for any reason disabled from working. The use of this expression acknowledges that, holds being of different sizes and containing different quantities of cargo, points will be reached during loading or discharge at which successive hatches will cease to be workable because they are, as the case may be, full or empty, and accordingly the loading or discharging obligation is modified when these points occur. On the proper application of the clause in this form the time permitted for loading is governed by the quantity of cargo loaded into the hold into which the greatest quantity of cargo is loaded.

Thus the meaning of the expression "available working hatch" is well established and for my part I would not be prepared to attribute to that expression whenever and wherever used in a laytime clause of a charter-party any meaning except the classic meaning which has been established in the interests of fairness.

In the circumstances it is not surprising that the Government of India, perhaps learning from bitter experience as charterers, amended the laytime provisions of their standard form of charter-party. The clause thus amended applied to the three charter-parties now in question. Each clause, with insignificant differences, provided as follows:

> Cargo to be discharged . . . at the average rate of 1,000 metric tons basis five or more available workable hatches pro rata, if less number of hatches, per weather working day . . .

When a vessel with five holds and five hatches begins to unload, the rate per day is 1000 tons or 200 per hatch. But when one hold has been emptied, one hatch will cease to be workable and the basis will be four holds at the pro rata daily rate of 800 tons or again, 200 per hatch. The laytime will be the number of days required to discharge the heaviest hold at the rate of 200 per day.

On behalf of the owners it was submitted that because the draftsman of the amendment did not delete the word "average" or did not delete all reference to a daily rate, the amendment was ineffective and the expression "available working hatch" does not include a hatch over a hold which has been emptied. This would render the amendment quite useless and introduce into charter-parties two different meanings of the words "working hatch" Mr. Justice Webster in *The General Capinpin*, [1987] 2 Lloyd's Rep. 354 at pp. 354–356 rejected, rightly in my view, the submission on behalf of the owners and the suggestion that the expression "available hatch" means a hatch which becomes unavailable or unworkable for some reason other than mere emptiness. Counsel for the owners could only suggest that the expression would assist the charterers if some hypothetical customs official declined to allow one hold to be emptied or if the vessel left the loading port with one hold already empty. I cannot accept that the Government of India amended its standard form to no purpose or for the purpose of avoiding a risk which only exists in the imagination of the skilful advocate. In my opinion the object and the effect of the amendment were to make sure that laytime is calculated by reference to the heaviest hold.

This conclusion is fortified by the bizarre and gambling results which follow if the owners' submissions are accepted. The charter-party for *General Capinpin* discloses that the vessel was required to transport a bulk cargo of wheat and that it had five holds and five hatches. The capacity of each hold was not mentioned. In the event 20,299.68 tons were loaded and the heaviest hold contained 5115.56 tons. If the owners are correct, laytime at a 1000 tons per day amounted to 20 days seven hours and 11 minutes. In order to unload within the laytime, the charterers would be bound to unload the heaviest load at the rate of 252 tons per day, a rate which could not be calculated until the vessel had been loaded, after the charter-party had been entered into. If the charterers are right then at a 1000 tons per day on the basis of five workable hatches each hold must be discharged at the rate of 200 tons per day and lay days calculated by reference to the heaviest load would be 25 days 13 hours and 52 minutes. The heaviest hold, like every other hold, must be unloaded at the rate of 200 plus tons per day and this rate was known when the charter-party was signed because on the basis of a 1000 tons for five available hatches the rate for each workable hatch is 200 tons.

The charter-party for the *Free Wave* also provided for the carriage of a cargo of bulk wheat to India and disclosed that the vessel had four holds and five hatches without giving the capacities of the holds. In the event, 14,060 tons were loaded and the heaviest hold, which had one hatch, held 6071 tons. If the owners are right, laytime calculated at a 1000 tons per day is no more than 14 days one hour and 26 minutes. In order to discharge the heaviest load in the laytime it will be necessary for that hold to be unloaded at the rate of 431.79 tons per day. Thus the rate of discharge applicable to the *General Capinpin* worked out at 252 tons per day while the rate of discharge of the *Free Wave* amounted to 431.79 tons per day. In either case the charterer was liable to pay demurrage if he failed to discharge the heaviest load at the calculated rate and was entitled to despatch money if he discharged the heaviest load at a faster rate. Thus both the charterer and the owners were gambling on the unknown factor of the heaviest load. I cannot believe that if the Government of India had thought or known that 252 tons a day were required in connection with *General Capinpin* they would have blindly accepted the requirement of *Free Wave* which worked out at 431.79 tons per day. So far as *Proteus* is concerned the daily rate required from the heaviest load amounted to 278.72 tons per day. All these calculations could only be made with hindsight.

I decline to reach a conclusion which contradicts the established meaning of the expression "workable hatch" and produces results which are demonstrably eccentric. I would allow the appeals.

Lord GRIFFITHS: My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I agree with it, and for the reasons he gives would dismiss these appeals.

Lord GOFF OF CHIEVELEY: My Lords, these appeals are concerned with the construction of a laytime clause which (with immaterial variations) was used in three charter-parties sharing the common feature that in each case the charterer was the President of India who, as is well known, is the world's largest charterer of dry cargo vessels. The first appeal is concerned with a charter-party dated May 25, 1983, under which *General Capinpin* was chartered for the carriage of a cargo of wheat from the U.S. Gulf to the east coast of India. The second is concerned with a charter-party dated Dec. 16, 1983, under which *Free Wave* was chartered for

the carriage of a cargo of wheat from Argentina to the west or east coast of India. The third is concerned with a charter-party dated June 25, 1984 under which *Proteus* was chartered for the carriage of a cargo of fertiliser from the U.S. Gulf to the west coast of India. The Courts below were also concerned with a fourth charter of a vessel called the *Dinara*. However the point now in question has ceased to be material in that case, and so the appeal in that case was not pursued before your Lordships' House.

In the *General Capinpin* charter, the laytime clause in question is cl. 14. The relevant part is cl. 14(*a*), which reads as follows:

> Cargo to be discharged by consignees' stevedores, free of risk and expense to vessel at the average rate of 1,000 metric tons basis five or more available workable hatches pro rata, if less number of hatches, per weather working day of 24 consecutive hours Saturday afternoon, Sundays and holidays excepted, even if used, always provided the vessel can deliver at this rate.

It is to be observed that cl. 14(*a*) did not, in its original form, contain the words —

> . . . basis five or more available workable hatches pro rata, if less number of hatches.

Those words were added in a marginal note to cl. 14(*a*) in this particular charter. By the date of the *Free Wave* charter, the words had been incorporated in the body of the clause (in that charter numbered 19(*a*)); and similar words were likewise incorporated in cl. 19(*b*), concerned with deep tanks and wing tanks (a point which seems to have been overlooked in cl. 14(*b*) of the *General Capinpin* charter). Almost identical words are to be found in the laytime clause (cl. 28) of the *Proteus* charter.

It is the effect of those words which lies at the heart of the dispute between the parties in these three appeals. The owners contend that the laytime clause expressly provides for an overall rate for the ship, i.e., 1000 tonnes per weather working day. The effect of the added words is not to substitute a rate per hatch for the overall rate, but is to qualify the provision for an overall rate in two respects. First if, when the vessel commences discharging, less than five workable hatches are available, the overall rate will be reduced pro rata. Second if, in the course of discharging, any of the vessel's hatches should cease temporarily to be available, the relevant period (to the extent that it has an impact upon the laytime) shall not count towards the laytime used. However the mere fact that the discharging of any particular hatch is completed does not itself effect the computation of laytime, because the rate of discharging is not a rate per hatch, but an overall rate for the vessel.

The charterer adopts a different approach. He contends that the expression "available workable hatch" has acquired, in law, a well established meaning. In *Cargill Inc. v. Rionda de Pass Ltd. (The Giannis Xilas)*, [1982] 2 Lloyd's Rep. 511 at p. 513, Mr. Justice Bingham said that the effect of the expression:

> Is not to distinguish a cargo hatch from any other kind of hatch but to denote a hatch which can be worked either because under it there is a hold into which cargo can be loaded or a hold out of which cargo can be discharged, in either event being a hatch which the party responsible for loading or discharging is not for any reason disabled from working.

On this approach, if a hatch is not in this sense available workable, whether at the commencement of loading or discharge (as the case may be), or by reason of any temporary impediment during the operation of loading or discharge, or by reason of the loading or discharge of the hatch having been completed, time shall not count in respect of that hatch. This leads to the practical result that, if this approach is adopted in respect of the form of clause under consideration in the present appeals, it will have the same effect as if the clause had provided for a discharging rate per available workable hatch — a well established formula for the computation of laytime, which the charterer says must have been intended by choosing a clause in this form which adopts the available workable hatch as its basis. The owners riposte that the form of clause now under consideration does not provide for a rate per hatch but for an overall rate for the whole vessel, and that if it had been intended to provide for a rate per hatch that could easily have been done, in accordance with well established precedent. Indeed Mr. Young for the owners was able to point out that, on the charterer's approach, the laytime for discharging would never be calculated with reference to an average rate for the vessel of 1000 tonnes per day, unless there was an equal quantity of cargo under each hatch, which was in practical terms an inconceivable eventuality. It was the owners' approach which was accepted by the arbitral tribunal in all three cases. On appeal, the Judge (Mr. Justice Webster) preferred the approach of the charterer; but the Court of Appeal reversed his decision, and restored the decision of the arbitral tribunal in each case. It is against the decision of the Court of Appeal that the charterer now appeals to your Lordships'

House, with the leave of your Lordships (though on special terms as to costs).

The rival contentions in these appeals are, in my opinion, best approached by first examining the form of clause considered in previous authorities, which provides for an average rate of loading or discharge per working or workable or available workable hatch per day. Here, of course, the rate of loading or discharge is expressly related to each hatch. The effect of such a clause was first considered in *The Sandgate — "Sandgate" (Owners) v. W. S. Partridge & Co.*, (1929) 35 Ll.L.Rep. 9. The clause in that case provided for cargo to be taken from alongside "at the average rate of 125 tons per working hatch per day", with a proviso that "consignees shall not be obliged to take cargo from alongside . . . at a higher rate than 500 tons per day". The owners submitted that the expression "working hatch" was intended only to distinguish cargo hatches from other hatches, such as bunker hatches; and that as soon as the number of cargo hatches was ascertained, the rate of discharge was fixed — two hatches, 250 tons per day, three hatches, 375 tons per day, and four or more hatches, 500 tons per day (the proviso limiting the discharging rate to a maximum of 500 tons per day). The Divisional Court rejected this contention. They held that the expression "working hatch" meant more than "cargo hatch"; it denoted a hatch which can be worked because there is cargo underneath it waiting to be discharged. It followed that if, during discharge of a ship with four working hatches, discharge of one hatch was completed before the others, that hatch would cease to be a working hatch; the obligation in relation to the remaining three hatches would still be to discharge at a rate of 125 tons per day per hatch — a total rate of 375 tons per day instead of 500 tons per day when all four hatches were working hatches.

At the end of his judgment, Mr. Justice Hill adverted to the manner of calculation of the laytime under a clause of this kind. He said (at pp. 12–13):

> As to the suggested difficulty of the shipowner in knowing what the lay days are going to be, there is nothing in it at all, because it appears from the charterparty that a bill of lading was to be issued and presumably was issued specifying the quantity of tons in each of the respective holds. I suppose worked out most accurately you would take these several quantities and start with 500 and go on reducing to 375, reducing to 250 and finally to 125; but you get exactly the same result, and the shipowner would have no difficulty in doing the arithmetic if he took the quantity in the hold which contains the largest quantity and divided that by 125, then that would give you the period in which the discharge had to be carried out, and you would then take into account Sundays and holidays.

The decision of the Divisional Court in that case was affirmed by the Court of Appeal (see (1929) 35 Ll.L.Rep 151; [1930] P. 30). The leading judgment was delivered by Lord Justice Scrutton. He first pointed out that the function of the word "average" in the clause was to ensure that there was no obligation to discharge any particular amount on any particular day. He then, like the Divisional Court, rejected the owners' contention that a working hatch meant simply a cargo hatch; it meant a hatch which can be worked because there is cargo underneath it.

The analysis of the clause was carried further by Mr. Justice Devlin in *Compania de Navigacion Zita S.A. v. Louis Dreyfus & Compagnie (The Corfu Island)*, [1953] 2 Lloyd's Rep. 472; [1953] 1 W.L.R. 1399. The clause there provided for loading —

> . . . at an average rate of not less than 150 metric tons per available workable hatch per weather working day (Sundays and holidays excepted) . . .

The charterers contended that, in accordance with the approach of Mr. Justice Hill in *The Sandgate*, the laytime for loading should be calculated by dividing by 150 the largest quantity of cargo loaded into any one of the hatches. The owners' contention was that it should be calculated by looking at the actual time occupied in loading, reducing the rate of loading as and when the loading of each hatch was completed. Mr. Justice Devlin preferred the approach of the charterers, because on the owners' construction the number of laydays would depend on the way in which the charterers chose to load the vessel. The laytime clause was not prescribing a method of loading, but was setting a standard; it was drawing a notional line above which there would be a bonus and below a penalty. However, Mr. Justice Devlin pointed out that the effect of interruptions in loading must of course be considered with reference to the actual events on the ship. Unavailability was outside the formula and a matter for separate calculation. An interruption in the loading which renders a hatch temporarily unavailable may or may not have the effect of extending the laytime, depending on the circumstances. Prima facie, the longest hatch is the critical hatch. Any interruption which prolongs the loading of that