apparently no previous decision of the Court as to the meaning of the word "flood" in this context. Therefore, the only way in which one can interpret it is by asking oneself what is the meaning that an ordinary Englishman reading this word in the context in which it appears would give to it. I think in such circumstances one's first impression may be the best guide to the real meaning. Giving oneself for the moment the credit of assuming that one is an ordinary Englishman, when I first looked at this case my reaction to it was: "No; you really could not call this a flood." But when one began to analyse it, and to listen to the argument of Mr. Jacobs, I, like Lord Justice Shaw, was almost persuaded that this could be called a flood. That it could be called a flooded floor, that an ordinary man or an ordinary housewife would say, "The water is flooding my floor", I have no doubt. But we come back to the question: Is it a flood? Is it a flood in a clause which refers also to "storm and tempest"?—which I think contributes to giving a colour to the meaning of it.

I think it is very largely a question of degree. Mr. Day made it the main part of his concise argument before us that a flood involved a large quantity of water. That seems to me to be right. I do not think that water 3 in. deep in a room 6 ft. by 4 ft. would be regarded by any normal person as a flood. Therefore, I agree with my brethren that the appeal fails.

[Appeal dismissed, with costs.]

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Feb. 23, 24 and 25, 1976

STEELWOOD CARRIERS INC. OF MONROVIA, LIBERIA
v.
EVIMERIA COMPANIA NAVIERA S.A. OF PANAMA

(THE "AGIOS GIORGIS")

Before Mr. Justice MOCATTA

Charter-party (Time)—Payment of hire—Speed warranty — Whether charterers entitled to make a deduction from payment of hire for alleged breach—Whether owners entitled to withdraw vessel or effect temporary withdrawal — Whether master in breach of obligation for refusing to permit discharge —Whether charterers mitigated their loss.

By a time charter dated July 6, 1972, in the New York Produce Exchange form, the charterers chartered the *Agios Giorgis* from the owners, for carriage of cargo from Korea to Charleston and Norfolk. The charter provided (inter alia):

> 5. . . . Payment of said hire to be made in New York in cash in United States currency monthly in advance . . . otherwise failing the punctual and regular payment of the hire . . . the owners shall be at liberty to withdraw the vessel from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers.
>
> 8. . . . the Captain shall prosecute his voyages with the utmost despatch; and shall render all customary assistance with ship's crew.

By cl. 18, the owners were to have a lien upon all cargoes and all sub-freights for any amounts due under the charter including general average contributions and the charterers were to have a lien on the ship for all monies paid in advance and not earned.

A monthly payment was due on Sept. 17, 1972 and the charterers, in making payment deducted U.S. $19,860 in respect of a claim for an alleged speed deficiency, the vessel having been described as "capable of steaming under good weather conditions about 13½/14 knots".

The owners took the view that the charterers were not entitled to deduct this amount and instructed the master not to allow discharge at the vessel's next port, i.e. Norfolk. The cargo was detained from

Sept. 24 until Sept. 26, and on the charterers' agreeing to pay the balance of hire the cargo was discharged.

In arbitration proceedings, the umpire, Mr. Clifford Clark, held that the charterers were entitled to succeed on the breach of speed warranty issue to the extent of $7775.16 only and that the charterers' claim for loss of time and consequential loss succeeded, but stated his award in the form of a special case, the questions of law for decision of the Court being:

(1) Whether on the facts found and on the true construction of the charter-party, charterers were entitled to make a deduction from the payment of hire due on Sept. 17, in respect of an alleged speed claim.

(2) If the answer to (1) above is: no, whether on the facts found and on the true construction of clause 5, (a) owners, through the master, were entitled to withdraw the vessel from the service of the charterers, and (b) whether their actions constituted such withdrawal.

(3) Whether on the facts found the master in his refusal to permit discharge at Norfolk was in breach of the obligation undertaken by clause 8.

(4) Whether on the facts found charterers by keeping stevedores and cranes standing by on Sunday 24th and Monday 25th September failed to mitigate their losses.

———*Held*, by Q.B. (Com. Ct.) (MOCATTA, J.), that (1) the answer to question 1 would be " No " since the finding that the charterers deducted too much in respect of the breach of speed warranty made it impossible for them to seek an affirmative answer (*see* p. 201, col. 1).

———*The Brede*, [1973] 2 Lloyd's Rep. 333 and *Seven Seas Transportation Ltd. v. Atlantic Shipping Co. S.A.*, [1975] 2 Lloyd's Rep. 188, applied.

(2) the answer to question (2) was that the owners were entitled, by reason of the withdrawal provisions in cl. 5 of the charter, to withdraw the vessel (*see* p. 201, col. 1); but were not entitled to effect a partial or temporary suspension or withdrawal (*see* p. 202, col. 2); and apart from cl. 18, the owners were not entitled to refuse to allow discharge to begin at Norfolk as and when they did (*see* p. 203, col. 1);

(3) the owners could not rely on cl. 18 since the cargo was not that of the charterers and the refusal by the owners to allow discharge only deprived the bill of lading holders of possession of their cargo pro tanto (*see* p. 204, col. 1);

(4) question (3) would be answered in the affirmative in that there was a breach by the master of the obligations undertaken by cl. 8 of the charter (*see* p. 204, col. 2);

(5) question (4) would be answered in the negative (*see* p. 201, col. 1).

Umpire's award upheld.

The following cases were referred to in the judgment:

Boardman v. Sill, (1808) 1 Camp. 410n;

Brede, The, (C.A.) [1973] 2 Lloyd's Rep. 333;

Brimnes, The, [1972] 2 Lloyd's Rep. 465; (C.A.) [1974] 2 Lloyd's Rep. 241;

Dennis & Sons Ltd. v. Cork Steamship Co. Ltd., (C.A.) [1913] 2 K.B. 393;

Italian State Railways v. Mavrogordatos, (C.A.) [1919] 2 K.B. 305;

Leslie Shipping Co. v. Welstead, (1921) 7 Ll.L.Rep. 251; [1921] 3 K.B. 420;

Nippon Yusen Kaisha v. Acme Shipping Corporation, [1971] 2 Lloyd's Rep. 42;

Paynter v. James (1867) L.R. 2 C.P. 348;

Roberts v. Havelock, (1832) 3 B. & Ad. 145;

Seven Seas Transportation Ltd. v. Atlantic Shipping Co. S.A., [1975] 2 Lloyd's Rep. 188;

Sinason-Teicher Inter-American Grain Corporation v. Oilcakes and Oilseeds Trading Co. Ltd., [1954] 1 Lloyd's Rep. 376, [1954] 1 W.L.R. 935;

Tankexpress A/S. v. Compagnie Financiere Belge des Petroles, S.A., (H.L.) (1948) 82 Ll.L.Rep. 43; [1949] A.C. 76;

Weeks v. Henry Goode, (1859) 6 C.B. N.S. 367;

Wulfsberg & Co. v. " Weardale " Steamship (Owners), (1916) 85 L.J. K.B. 1717.

This was a special case stated by an umpire, Mr. Clifford Clark, in a dispute between the charterers, Steelwood Carriers Inc. of Monrovia, Liberia, and Evimeria Compania Naviera S.A. of Panama, the owners of the vessel *Agios Giorgis*. The charterers had deducted $19,860 from the payment of hire alleging that the owners were in breach of a speed warranty con-

tained in the charter and the owners had temporarily suspended the vessel by instructing the master to refuse discharge until the charterers had paid the balance of the hire.

The arbitration award provided:

"A. By a New York Produce Exchange Time charterparty dated LONDON, the 6th July 1972, the Claimants (hereinafter called 'the Charterers') chartered the motorship 'AGIOS GIORGIS' (hereinafter called 'the vessel') from the respondents (hereinafter called the Owners') for a timecharter trip, upon the terms and conditions therein set out.

B. Dispute arose between the parties in respect of matters hereinafter particularised. The said Charterparty provided that any dispute should be referred to arbitration to three persons in London, one to be appointed by each of the parties and the third by the two so chosen. By reason of Section 9(2) of the Arbitration Act 1950 the said provision is to be construed as if it provided for the appointment of an Umpire and not for the appointment of a third arbitrator. The Charterers appointed Mr. Cedric Barclay of 1 Cromwell Road in the County of London and the Owners appointed Mr. Donald Davies of Albert Buildings, 49 Queen Victoria Street in the City of London to be their arbitrators respectively.

C. By a notice in writing dated the 10th May 1974 the said arbitrators appointed me, CLIFFORD ALBERT LAWRENCE CLARK of 21 College Hill in the City of London to be the Umpire in the reference. I was subsequently informed by the said two arbitrators by written notice dated the 6th June 1974 that they were unable to agree, whereupon I entered into the reference in their stead accordingly.

D. The matters referred to me were seven claims by the Charterers against the Owners and two counterclaims by the Owners against the Charterers, as follows:—

Charterers' claims

1.	Damages for loss of time during voyage from Inchon to Balboa	U.S. $10,291.52
2.	Damages for loss of time during voyage from Cristobal to Charleston	2,436.07
3.	Damages for loss of time during voyage from Charleston to Norfolk	802.38
4.	Damages for loss of time during voyage from Norfolk to Escoumains	1,166.56
5.	Damages for loss of time Norfolk	6,410.76
6.	Longshore detentions at Charleston	1,850.00
7.	Damages resulting from Owners' refusal to discharge at Norfolk	6,179.81
		$29,155.10

Owners' counterclaims

8.	Balance of account, which agreed by the Charterers	7,686.42
9.	Disbursements incurred during delay at Norfolk, including dockage and overtime charges	1,692.80
		$9,379.22

E. I was requested by the parties, and I have agreed, to give a Final Award on items as recited in D 1, 2, 3, 4, 6 and 8 above, and to state items as recited in D 5, 7 and 9 above in the form of a Special Case.

NOW I the said CLIFFORD ALBERT LAWRENCE CLARK having taken upon myself the burden of this Umpirage and having listened carefully to the contentions of the parties through the medium of their arbitrators, read the correspondence, considered and weighed the facts and the evidence

DO HEREBY MAKE ISSUE AND PUBLISH THIS MY AWARD

as follows:—

1. I FIND AND HOLD that the Charterers' claims for damages for loss of time (as set out in recitals D 1, 2, 3 and 4 above) succeed to the extent of US $7,775.16 (Seven Thousand Seven Hundred and Seventy-Five U.S. Dollars and Sixteen Cents) and no more.

2. I FIND AND HOLD that the Charterers' claim for longshore detentions

at Charleston fails and that the same be and it is hereby dismissed.

3. I FIND AND HOLD that the Owners' counterclaim for balance of account succeeds in the sum claimed of U.S. $7,686.42 (Seven Thousand Six Hundred and Eighty-Six U.S. Dollars and Forty-Two Cents).

4. I AWARD AND ADJUDGE on the above items that the Owners shall forthwith pay to the Charterers the sum of U.S. $88.74 (Eighty-Eight U.S. Dollars and Seventy-Four Cents) together with interest at the rate of 8% (eight per cent) per annum from the 1st November 1972 to the date hereof.

5. a. As a considerable amount of time was devoted by the Arbitrators and by me to the matters on which I am asked to make a Final Award and to those on which I am asked to state a Special Case, I deal separately with the costs relating to each part of my Award.

b. With regard to the costs of that part of my Award on which I have made a Final Award in paras. 1-4 hereof, I FURTHER AWARD AND ADJUDGE that the Owners shall bear and pay their own and the Charterers' costs of the reference and shall further bear and pay the fees and expenses of the arbitrators and myself, . . . and if in the first instance such costs have been paid by the Charterers the Owners shall forthwith reimburse them.

SPECIAL CASE

stated pursuant to Section 21 (1) of the Arbitration Act 1950

6. . . . The relevant clauses, or parts thereof, of the . . . charterparty provide as follows:—

Clause 5

> Payment of the said hire to be made in New York in cash in United States Currency . . . semi-monthly in advance, Charterers' privilege deduct from last payment of hire cost of estimated bunkers remaining on board on redelivery and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers.

Clause 8

> That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim and discharge the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. See Clause No. 40.

Clause 11

> That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing, and the Captain shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents, and furnish the Charterers, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel.

Clause 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 of 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; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra

expenses shall be deducted from the hire.

Clause 18

That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel.

Clause 23

Vessel to work night and day, if required by Charterers, and all cranes to be at Charterers' disposal during loading and discharging; steamer to provide one craneman per day to work cranes day and night, as required. Charterers agreeing to pay a lumpsum of $800.00 as per Clause No. 32. If the rules of the port, or labor unions, prevent crew from driving cranes, shore cranemen to be paid by Charterers. In the event of a disabled crane or cranes, or insufficient power to operate cranes, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned thereby, including but not limited to stevedoring standby expenses, if any, caused by breakdown of ship's facilities.

Clause 32

Charterers to pay Owners a lump sum of $800.00 per month and pro rata for any part of a month in lieu of all officers and crew overtime. ————

Clause 40

Charterers' Agents are authorized to issue and sign Bills of Lading on Charterers' usual form on Owners' and Master's behalf for cargo in conformity with Clause 8 of this Charter Party.

7. I FIND the following facts:—

a. From a payment of hire due to the Owners on the 17th September 1972 the Charterers deducted the sum of U.S. $19,860.00 in respect of a claim for alleged speed deficiency during the period of the timecharter.

b. At the time of the said deduction of $19,860.00 the Charterers had not presented the Owners with any details of their claim; further they had not presented the Owners with any documentation in support of their claim. They had simply estimated the amount based on the fact that the vessel had taken 33 days, 1 hour to perform a trans-Pacific voyage which they would have anticipated normally to take about 27 days, 16 hours, had she sailed at 13 knots.

c. The Owners' London agents on the 20th, 21st and 22nd September by telex requested the Charterers for details of their alleged speed claim and indicated that Owners would consider a documented claim when presented. The Owners acted reasonably in so doing.

d. No evidence was produced to me that at the time that the deduction of $19,860.00 was made the Charterers had required from the Owners the production of true copies of the vessel's daily Logs in accordance with Clause 11, but by telex on the 20th and 22nd September Charterers said that any adjustment of deducted hire would be made promptly on receipt of log extracts from the Master. A request for such copies was made by Charterers on the 22nd September.

e. On the 22nd September at 1535 hours London time the Owners' London Agents telexed the Charterers' London Agents informing them that the Master was instructed not to commence discharge until the Owners received payment of the whole of the deducted sum of $19,860.00.

f. The Charterers' London Agents replied to the Owners' London Agents at 1645 hours London time on the 22nd September that they had forwarded to their principals the above telex, and added on Charterers' behalf that any delay and additional expenses incurred resulting from precipitate action on the part of the Owners would be for Owners' account.

g. Following the exchange of the above telexes discussions took place between Owners' and Charterers' representatives over the course of Saturday 23rd and Sunday 24th September as a result of which Owners agreed to commence discharge of the vessel, and Charterers agreed to pay to Owners the said $19,860.00.

h. The Charterers had ordered stevedores and cranes for Sunday 24th and

Monday 25th September. It would have been unreasonable to expect Charterers immediately or at any time on Friday 22nd after receipt of notice to the Owners' London Agents telex in para. (e) above (which would have been about 11.00 local U.S. time) to cancel the cranes and stevedores, bearing in mind that negotiations were likely. It would also have been unreasonable to cancel the cranes and stevedores on Saturday 23rd since negotiations had begun and in any case stevedores required 24 hours notice so that, as their office would not have been open until Monday 25th, stevedores in either case would have been available only on Tuesday 26th.

i. In the circumstances, it was reasonable for the Charterers to maintain their order for cranes and stevedores.

j. At no time did the Owners give notice that they were withdrawing the vessel from the Charterers' service under the terms of Clause 5 of the Charterparty nor that they considered that the Charterers' deduction of hire constituted a repudiation of the Charterparty, nor that they accepted any such repudiation as bringing the contract to an end.

k. The Owners did not, and did not in any way attempt to, exercise a lien on the cargo.

8. *Questions of Law*

(1) Whether on the facts found and on the true construction of the Charterparty Charterers were entitled to make a deduction from the payment of hire due on 17th September in respect of an alleged speed claim.

(2) If the answer to (1) above is: no, whether on the facts found and on the true construction of Clause 5, (a) Owners, through the Master, were entitled to withdraw the vessel from the service of the Charterers, and (b) whether their actions constituted such withdrawal.

(3) Whether on the facts found the Master in his refusal to permit discharge at Norfolk was in breach of the obligations undertaken by Clause 8.

(4) Whether on the facts found Charterers by keeping stevedores and cranes standing by on Sunday 24th and Monday 25th September failed to mitigate their loss.

AWARD

9. Subject to the decision of the Court on the above questions of Law I HOLD

a. That the Charterers were not entitled to make a deduction from the payment of hire due on the 17th September in respect of an alleged speed claim.

b. That the Owners, through the Master, were entitled to withdraw the vessel from the service of the Charterers.

c. That the Owners actions did not constitute such withdrawal.

d. That the Master in his refusal to permit discharge at Norfolk was in breach of the obligations undertaken by Clause 8.

e. That the Charterers by keeping stevedores and cranes standing by on Sunday 24th and Monday 25th September did not fail to mitigate their loss.

10. I FIND AND HOLD that the Charterers' claim for damages for loss of time at Norfolk succeeds in the amount claimed of U.S. $6,410.76 (Six Thousand Four Hundred and Ten U.S. Dollars and Seventy-Six Cents).

11. I FIND AND HOLD that the Charterers' claim for damages resulting from Owners' failure to discharge at Norfolk succeeds in the amount claimed of U.S. $6,179.81 (Six Thousand One Hundred and Seventy-Nine U.S. Dollars and Eighty-One Cents).

12. I FIND AND HOLD that the Owners' counterclaim for disbursements incurred during delay at Norfolk fails and that the same be and it is hereby dismissed.

13. I AWARD AND ADJUDGE that the Owners shall forthpay to the Charterers the sum of U.S. $12,590.57 (Twelve Thousand Five Hundred and Ninety U.S. Dollars and Fifty-Seven Cents) together with interest at the rate of 8% (eight per cent) per annum from the 1st November 1972 to the date hereof.

14. I FURTHER AWARD AND ADJUDGE that the Owners shall bear and pay their own and the Charterers' costs of the references relating to the matters dealt with in the Special Case, and shall further bear and pay the fees and expenses of the Arbitrators and myself relating to the same . . . and if in the first instance such costs have been paid by the Charterers the Owners shall forthwith reimburse them.

15. Should the decision of the Court be other than as set out in my Award as above, I respectfully request that my Award be remitted to me with the appropriate directions.

16. In the event of neither party setting down the Special Case for hearing within six weeks from the date of the publication of this my Award (or within such further time as the Court may order), then my Award, as set out in paragraphs 9 to 14 above, shall be my Final Award."

The further findings of fact provided:

"(i) By an Award dated in London 30th July 1974 I, . . . , stated a Special Case for the Opinion of the Court pursuant to Section 21 of the Arbitration Act, 1950;

(ii) The said Case was set down for hearing and was heard before Mr. Justice Donaldson in the Commercial Court on 4th December 1974 as a result of which the learned Judge made an Order remitting the matter to me for further findings of fact in connection with the following issues:—

(1) The alleged exercise of a lien by the Respondents and all matters connected therewith or relevant thereto.

(2) Any alleged waiver by the Respondents of any alleged right to withdraw the vessel suspend their performance of the charterparty or exercise a lien and all matters connected therewith or relevant thereto;

(iii) I resumed the hearing and this was held on 5th May 1975.

NOW I, the said CLIFFORD ALBERT LAWRENCE CLARK, having listened carefully to the contentions of the parties through the medium of their respective Counsel, and having heard and received verbal and written evidence, and having considered and weighed the facts and the evidence, DO HEREBY MAKE ISSUE AND PUBLISH THESE MY FURTHER FINDINGS OF FACT as follows:

1. I confirm the facts found in paras. 6 and 7 (other than sub para. 7(g)) of my above-mentioned Award. I withdraw para. 7(g) of the said Award.

A. Fact findings made in connection with '(1) the alleged exercise of a lien by the Respondents and all matters connected therewith or relevant thereto'.

2. At all material times between 17th and 27th September 1972 a substantial amount of hire which was due to be paid by 17th September 1972, namely $19,860.00, was outstanding.

3. During the period 20th September to 22nd September 1972 various telex communications were exchanged between the representatives of the Owners and Charterers . . .

4. The vessel departed from Charleston at 1428 hours (local time) on Friday, 22nd September 1972 and arrived at Norfolk at 09.45 (local time) on Sunday, 24th September 1972.

5. At about this time the Owners' London agents instructed the Master by radio telephone not to discharge cargo at the vessel's next port, namely Norfolk, without further orders.

6. The Deck Log Book records for Sunday, 24th September 1972 as below:

'On the instructions of the Shipowners, we are not allowing the Timecharterers to discharge the cargo. The holds therefore remain closed until further instructions. After renewed telephonic communication with the Shipowners I was ordered not to allow the Timecharterers to discharge the cargo until I receive instructions from them'.

7. The Master informed the Charterers' representatives that on instructions of the Owners he would not allow the cargo to be discharged until orders were received from the Owners authorising discharge.

8. (Save as aforesaid) no communications took place between the Owners and Charterers, or their representatives, which either party regards as germane to the alleged exercise of a lien.

9. The Owners never informed the Charterers that they were exercising a lien on the cargo and they did not by implication convey or communicate such an intention to the Charterers, but they did convey to the Charterers that they were instructting Master not to commence to discharge the cargo at Norfolk until they received payment of the deducted amount.

10. The cargo in question on the vessel was carried pursuant to 16 Bills of Lading, each of which was on the Standard Form of Retla Steamship Co. (an associated company of the Charterers) and all bearing dates between 27th and 31st July 1972 . . . the Shippers were in each case Taesung Lumber Ind Co. Ltd. Seoul, Korea; the Bills of Lading were made out to order of the Shipper; the notify party was in each case a U.S. Company and freight was in each case prepaid; the Bills were issued and signed by Retla Steamship Co. It was common ground that the cargo was at no time owned by the Charterers or their associates.

11. There was no evidence to indicate that at any material time the Owners or their representatives knew that prepaid Bills of Lading as above had been issued or that they made any attempt to ascertain the facts.

12. Pursuant to the instructions which had been given to him, when the vessel arrived at Norfolk, the Master refused to allow the Charterers to discharge the cargo, and it was detained on board throughout the period from 0945 on Sunday, 24th September to 0800 on Tuesday, 26th September 1972 (both local time).

13. There was no evidence that during such period cargo interests or any other third party claimed that the conduct of the Master in detaining the vessel's cargo was wrongful.

14. Contrary to para. 7(g) of my Award, and the evidence at the first hearing herein, there were no discussions, whether by telex or otherwise, between Owners' and Charterers' representatives during 23rd and 24th September 1972.

15. However, discussions did take place at about 2200 London time on 25th September 1972 and the upshot was that the Owners agreed to start discharge in exchange for the Charterers' promise to pay forthwith the outstanding balance of hire, namely $19,860.00 as above.

16. Accordingly the Master was instructed to permit discharge. Such discharge began within a reasonable time of the agreement which had been reached above. Indeed, discharge began before the $19,860.00 reached the Owners' bank.

17. Although any rights which the Owners may have had under Clause 18 remained available to them, at no material time between 23rd and 26th September 1972 did the Owners try to take advantage of them.

18. Under the law of the United States (being the applicable local law) a contractual term such as Clause 18 of the Time Charter (which provides *inter alia* that the Owners shall have a lien upon all cargoes and all subfreights for any amounts under the Time Charter) is ineffective and creates no enforceable lien if the cargo being carried on board the vessel is not owned by the Charterers and that in such circumstances no lien whatever (contractual or otherwise) arises and none can be exercised under the local law.

19. By reason of the rules of the local law, and the fact that the Charterers never owned the cargo, the Owners had no lien which they could exercise on the cargo.

20. Under the applicable local law the rule is further that a lien on cargo (viz. an enforceable lien on cargo owned by the Charterers) can only be carried into effect or perfected by a Court Order and it is common ground that no such order was ever obtained or sought.

B. Fact findings to be made in connection with '(2) Any alleged waiver by the Respondents of any alleged right to withdraw the vessel, suspend their performance of the charterparty, or exercise a lien, and all matters connected herewith or relevant thereto'.

21. At the hearing on 5th May 1975 the Owners accepted that they had not finally withdrawn the vessel.

22. After the discharge of the cargo at Norfolk on Tuesday 26th September 1972 the vessel continued to perform service under the Time Charter until her redelivery on 13th October 1972 and the Charterers made payments under the Time Charter for such service in respect of all such service.

23. Subject to any directions which the Court may give, I DIRECT that the costs of the reference and of the resumed Hearing, which I hereby tax and settle in the sum of £275.00 (Two Hundred and Seventy-Five Pounds), be paid in accordance with para. 14 of my said Award."

Mr. A. G. Pollock and Mr. W. Siberry (instructed by Messrs. Richards Butler & Co.) for the claimant charterers; Mr. Anthony Hallgarten and Mr. D. Jones (instructed by Messrs. Ince & Co.) for the respondent owners.

The further facts and arguments are stated in the judgment of Mr. Justice Mocatta.

Judgment was reserved.

Thursday, Apr. 1, 1976

JUDGMENT

Mr. Justice MOCATTA: This is a special case stated by Mr. Clifford Clark as umpire in an arbitration in which he had to deal with seven claims under a time charter of the *Agios Giorgis* by the charterers and two items of counterclaim by

the owners. He was asked to and dealt with six out of nine claims in a final award. As regards the remaining items, he has stated a special case for the decision of the Court. In his final award his decisions were in the main though not wholly in favour of the charterers and, subject to the decision of the Court, his findings in the special case are in favour of the charterers.

The dispute in the case arose in this way. A monthly payment of hire was due on Sept. 17, 1972, and the charterers in making payment deducted U.S. $19,860 in respect of a claim for an alleged speed deficiency during the period of the charter, the vessel having been described as "capable of steaming under good weather conditions about 13½/14 knots". At the time the reduced payment was made the vessel was either at Charleston or about to arrive there. The owners took the view the charterers were not entitled to make any deduction from the monthly hire even if a breach of the speed warranty could eventually be established and instructed the master not to allow discharge at the vessel's next port, namely Norfolk, without further orders.

The vessel arrived at Norfolk at 09 45 hours on Sept. 24, but the master on instructions from the owners refused to allow the charterers to discharge the cargo and the holds remained closed. The master informed the charterers' representatives in Norfolk of his instructions. The cargo was detained on board from 09 45 hours on Sept. 24 until 08 00 hours on Sept. 26. Discussions took place in London between the parties' representatives on Sept. 25, the upshot of which was that the owners agreed to start discharge in exchange for the charterers' promise to pay forthwith the outstanding balance of hire, namely, $19,860. Accordingly, appropriate instructions were given to the master to permit discharge at Norfolk, which he did, and the charterers paid the balance of hire. The vessel continued in the charterers' service until her redelivery on Oct. 13 in the Great Lakes.

In his final award the umpire held that the charterers were entitled to succeed on the breach of the speed warranty issue to the extent of $7775.16 and no more. In his award in the form of a special case the umpire had to deal with two claims in respect of the delay at Norfolk; one was for loss of time and the other was for consequential loss. Together they amounted to $12,590.57. The owners had a counterclaim of $1692.80 in respect of disbursements incurred during the delay at Norfolk. Subject to the decisions of the Court on the questions of law stated, the umpire decided that the charterers' claim for $12,590.57 succeeded while the owners' counterclaim failed.

The questions of law stated for the decision of the Court were as follows:

(1) Whether on the facts found and on the true construction of the Charterparty Charterers were entitled to make a deduction from the payment of hire due on 17th September in respect of an alleged speed claim.

(2) If the answer to (1) above is: no, whether on the facts found and on the true construction of Clause 5, (a) Owners, through the Master, were entitled to withdraw the vessel from the service of the Charterers, and (b) whether their actions constituted such withdrawal.

(3) Whether on the facts found the Master in his refusal to permit discharge at Norfolk was in breach of the obligations undertaken by Clause 8.

(4) Whether on the facts found Charterers by keeping stevedores and cranes standing by on Sunday 24th and Monday 25th September failed to mitigate their loss.

The special case came before Mr. Justice Donaldson on Dec. 4, 1974, when he remitted the matter to the umpire for further findings of fact in connection with the following issues:

(1) The alleged exercise of a lien by the owners and all matters connected therewith or relevant thereto;

(2) Any alleged waiver by the owners of any alleged right to withdraw the vessel, suspend their performance of the charterparty or exercise a lien and all matters connected therewith or relevant thereto.

As the result, there was a further hearing before the umpire and he has made further findings of fact.

Before me it was agreed that the main issues arose under question 3 in the special case, since the owners' main submissions were that in default of payment of hire (i) they were entitled either to terminate the charter by a final withdrawal of their vessel or suspend the services of the vessel temporarily pending payment, the latter being the alternative they chose, and (ii) they were entitled to and did exercise a contractual lien during the period of delay at Norfolk. These are therefore the matters with which I have to deal in this judgment.

I should, however, very briefly indicate what the answers to the other questions of law are and why.

As regards question 1, the answer is in the negative both because of the decisions of the Court of Appeal in *The Brede*, [1973] 2 Lloyd's Rep. 333, and of Mr. Justice Donaldson in *The Seven Seas* case, [1975] 2 Lloyd's Rep. 188, at p. 191, which I think it right I should follow, as Mr. Hallgarten submitted, and also because, as Mr. Pollock conceded, the finding that the charterers deducted too much in respect of the breach of the speed warranty made it impossible for them to seek an affirmative answer.

As regards question 2, it was agreed that by reason of the withdrawal provision in cl. 5 of the charter the owners were entitled finally to withdraw the vessel, but that they did not do so. The owners sought to justify their conduct under question 3 on the grounds that they were entitled to suspend the services of the vessel under cl. 5 or exercise a lien under cl. 18.

It was common ground that the answer to question 4 was in the negative.

The time charter was dated in London on July 6, 1972. The vessel was delivered in Japan and loaded cargo in Korea for carriage to Charleston and Norfolk. For present purposes it is only necessary to make the following citations from the charter. Clause 5, so far as relevant, provided:

> Payment of said hire to be made in New York in cash in United States Currency monthly in advance . . . otherwise failing the punctual and regular payment of the hire . . . the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers.

By cl. 8 it was provided that

> . . . the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew.

Lastly cl. 18 provided that the owners should have a lien upon all cargoes and all sub-freights for any amounts due under this charter, including general average contributions and the charterers to have a lien on the ship for all monies paid in advance and not earned.

Mr. Hallgarten's first submission was that as a matter of construction the wording of cl. 5 giving the owners the liberty to withdraw allowed them to withdraw temporarily or to suspend the services of the vessel pending the payment of hire. The word "withdraw" did not necessarily involve permanent withdrawal: the greater included the less. He submitted that the only argument against his submission was that there had never been any decision justifying a temporary withdrawal or suspension of the vessel's services pending payment of hire. He supported this initial submission by arguing that the payment of hire was a condition precedent to performance by the owners and that the obligations of the charterers to pay hire in advance and of continued performance by the owners were concurrent conditions requiring mutuality.

As regards authorities Mr. Hallgarten referred to *Roberts v. Havelock*, (1832) 3 B. & Ad. 145, and *The Tergeste*, [1903] P. 26, cases concerning the right of ship repairers to require part or instalment payments for work done without having to wait until they had completed all the repairs before receiving payment, unless of course the contract on its true construction so provided. He also referred to two voyage charter cases—*Paynter v. James*, (1867) L.R. 2 C.P. 348, in which it was said

> . . . the merchant is not allowed to have the goods unless he is ready to pay the freight; nor, on the other hand, is the shipowner entitled to the freight unless he is ready to deliver the cargo

and *Dennis & Sons Ltd. v. Cork Steamship Co. Ltd.*, [1913] 2 K.B. 393, per Lord Justice Scrutton, at p. 399, where he said in relation to the delivery of goods to bill of lading holders that if

> . . . the consignee came and demanded delivery of the goods, the ship could say that it was a condition of delivery that the freight should be paid first and that the goods would not be delivered until the freight was paid.

Reference was also naturally made to such help as could be obtained from *Tankexpress A/S v. Compagnie Financiere Belge des Petroles S.A.*, (1948) 82 Ll.L.Rep. 43; [1949] A.C. 76.

Although when Lord Tenterden first wrote his famous text-book on Shipping it was not the practice to provide for hire to be paid in advance and for time charterers to grant an express right of withdrawal on non-payment of such advance payments,

these provisions have been common form in time charters in this country and the United States for generations. I think there is much weight in Mr. Pollock's argument that if the word "withdrawal" bore the construction sought to be placed upon it by Mr. Hallgarten so as to include temporary withdrawal or suspension, this would inevitably have come up for decision in the Courts before now. The Courts seem to have treated the word "withdrawal" as equivalent to "cancellation", an interpretation which, if I may say so with respect, seems to me the natural one. I take two examples from the cases. In *Italian State Railways v. Mavrogordatos*, [1919] 2 K.B. 305, cl. 6 of the charter gave the right to withdraw the vessel failing regular and punctual payment. On non-payment of a month's hire on the proper date the shipowner gave notice in writing saying "The charterparty dated January 21st, 1916, is hereby cancelled". It is interesting that Lord Justice Bankes at p. 310, immediately after having quoted this, said "It would have been more correct to say that the ship was withdrawn from the charterers' service". To the Lord Justice withdrawal and cancellation were clearly synonymous. Again in the *Tankexpress* case at pp. 53 and 56, and 94 and 95 Lord Wright speaks of the right to cancel when the clause spoke of "withdrawing the said vessel from the service of the charterers".

This view of the meaning of withdrawal is expressed in the 12th edition of Carver (1971), par. 392, where it is said "the effect of the withdrawal is to determine the contract". In support of this statement *Wulfsberg & Co. v. "Weardale" Steamship (Owners)*, (1916) 85 L.J. K.B. 1717, is cited. There notice of withdrawal was given and a few hours later a writ was issued against the charterers for the hire that had been payable five days earlier. It was argued that in those circumstances the issue of the writ amounted to a waiver, but the argument failed. Mr. Justice Lush said:

> . . . the contract having been once determined, no subsequent recognition can possibly revive it.

Apart from these authorities and the remarkable absence of any authority the other way, I thought there was force and relevance in Mr. Pollock's submission that payment of hire is not a condition precedent in the contract to immediate further performance by the shipowner. Thus in *The Brimnes* both Mr. Justice Brandon, [1972] 2 Lloyd's Rep. 465 and 483, and the Court of Appeal [1974] 2 Lloyd's Rep. 241 at pp. 252, 256 and 262, held that late payment of hire was not of itself repudiatory entitling the owners, in the absence of a withdrawal provision, to terminate the charter. In this connection his citation of *Leslie Shipping Co. v. Welstead*, (1921) 7 Ll.L.Rep. 251; [1921] 3 K.B. 420, was interesting. There Mr. Justice Greer (as he then was) said at pp. 253 and 426 that the withdrawal clause was inserted in the charter for the benefit of the shipowners giving them an express right to withdraw the vessel and making it impossible that there should be any discussion about the matter. If timely payment of hire was a condition precedent, there would have been no relevance in this comment. This renders irrelevant Mr. Hallgarten's reliance upon *Sinason-Teicher Inter American Grain Corporation v. Oilcakes and Oilseeds Trading Co. Ltd.*, [1954] 1 Lloyd's Rep. 376; [1954] 1 W.L.R. 935 at pp. 383 and 944.

As regards the *Tankexpress* case, very little assistance is in my judgment to be derived in the present case from what was said in the speeches in the House of Lords by Lords Porter and du Parcq. The passages quoted were obiter and while Lord du Parcq may be said slightly to support the owners' case, Lord Porter's remarks can be read the other way. As regards the differences of judicial opinion in the Courts below, these were fully discussed in *Nippon Yusen Kaisha v. Acme Shipping Corporation*, [1971] 2 Lloyd's Rep. 42 at pp. 46-48, and so far as I know there has been no subsequent decision on this point. If hire still remains payable should the services of the ship be withdrawn for a period without this amounting to a repudiation which is accepted, then I do not think there is that close concurrent mutuality for which Mr. Hallgarten argued.

Accordingly for these various reasons I am unable to accept Mr. Hallgarten's argument that by virtue of cl. 5 and the failure of the charterers to pay the full hire on Sept. 17 the owners were entitled on those grounds not to cancel the charter by withdrawal of the vessel as they could have done, but to effect a partial or temporary suspension or withdrawal. I do not think on the authorities that cl. 5 permits of this, and in view of what cl. 5 does allow and the absence of any authority applying the principles of the common law work and labour and payment of freight cases

to a time charter, I do not think the owners were, apart from the lien clause, entitled to refuse to allow discharge to begin at Norfolk as and when they did.

The further findings by the umpire add a number of matters to the facts I have so far stated and are intended to deal with the owners' claim to have exercised a lien under cl. 18.

Thus it is found in par. 9 that

> The Owners never informed the Charterers that they were exercising a lien on the cargo and they did not by implication convey or communicate such an intention to the Charterers, but they did convey to the Charterers that they were instructing the Master not to commence to discharge the cargo at Norfolk until they received payment of the deducted amount.

As regards the cargo that was being carried under bills of lading issued and signed by an associated company of the charterers freight was in each case prepaid; the bills of lading were made out to the order of the shipper and the party to be notified was in each case a United States company. It was common ground that the cargo was at no time owned by the charterers or their associates. There are then three paragraphs dealing with United States law on liens, which it is convenient to read. They are pars. 18, 19 and 20.

> Under the law of the United States (being the applicable local law) a contractual term such as Clause 18 of the Time Charter (which provides *inter alia* that the Owners shall have a lien upon all cargoes and all subfreights for any amounts under the Time Charter) is ineffective and creates no enforceable lien if the cargo being carried on board the vessel is not owned by the Charterers and that in such circumstances no lien whatever (contractual or otherwise) arises and none can be exercised under the local law.
>
> [Paragraph 19:] By reason of the rules of the local law, and the fact that the Charterers never owned the cargo, the Owners had no lien which they could exercise on the cargo.
>
> [Paragraph 20:] Under the applicable local law the rule is further that a lien on cargo (viz. an enforceable lien on cargo owned by the Charterers) can only be carried into effect or perfected by a Court Order and it is common ground that no such order was ever obtained or sought.

As regards the owners' claim to have exercised their right of lien under cl. 18 and on this ground to obtain a favourable answer to the third question of law raised by the special case, Mr. Pollock submitted (i) the circumstances under which a lien may be exercised are governed by the law of the place where the lien falls to be exercised; (ii) under the local law as found the owners had no valid lien they could exercise on the cargo; (iii) alternatively, if English law applied, the owners were obliged to satisfy three requirements to succeed, namely, that (a) the cargo was the property of the charterers; (b) the owners intended to exercise a lien, and (c) they communicated that intention to the charterers; (iv) none of those requirements was satisfied here.

Mr. Hallgarten argued that the owners were relying upon a contractual lien and that therefore the local law was immaterial, at any rate during the short period of delay at Norfolk. The position might be otherwise were the owners seeking to exercise a lien in a warehouse ashore or to enforce their rights by local law. No authority was cited to me in relation to the application of the lex situ in relation to the exercise or purported exercise of a lien and I think it best not to express any view on this topic unless necessary. There are only two alternatives as to the law applicable here; either United States law on which the further findings of fact are fatal to the owners' case, or English law, the law of the charter. I therefore consider the matter on the latter hypothesis to ascertain whether the owners can succeed on this alternative.

Mr. Pollock sought support for his points which I have lettered (b) and (c) above from *Weeks v. Henry Goode*, (1859) 6 C.B. N.S. 367, which followed *Boardman v. Sill*, (1808) 1 Camp. 410n. The decision there was that a lien may be waived by a party setting up a claim to retain a chattel upon a different ground and making no mention of his lien. I think those cases are very different from the present one. There was no misleading of or misstatement to the charterers by the owners here. While it is found that the owners never informed the charterers they were exercising a lien on the cargo, they did convey to the charterers that they were instructing the master not to commence discharge at Norfolk until they had received payment of the amount deducted from hire. If they were entitled to do this, in my judgment they could in law justify their

conduct on the basis that they were in fact exercising a lien, if they in truth possessed one, without mentioning their right of lien to the charterers. No authority to the contrary of this was cited to me. If there were no other difficulties in the way of the owners, I would not, as at present advised, be prepared to accept the further findings of fact in pars. 9 and 17 as depriving them of their defence of lien under cl. 18.

The difficulty as I see it in the way of the owners is that they are relying upon a contractual lien, not one given at common law, as against the cargo-owners, who were not parties to the time charter. I was reminded that in the Baltime form of time charter there is a qualification in relation to the lien to the effect that the shipowner is only vested with it over cargo belonging to the time charterer. Notwithstanding the omission of this qualification here, I am unable to see how cl. 18 can give the owners the right to detain cargo not belonging to the charterers and on which no freight was owing to the owners. There is no finding that the bills of lading contained any clause rendering the cargo shipped under them subject to this charter-party lien.

Mr. Hallgarten sought to avoid this difficulty by arguing that the moment had not arisen for the bill of lading holders to call for their cargo, since the holds of the vessel remained closed until the master received further instructions. The action being taken by the owners was against the charterers and not the cargo-owners. I found this argument unconvincing since the refusal of the owners to allow the charterers to discharge until Sept. 26 at Norfolk clearly deprived the bill of lading holders of the possession of their cargo pro tanto. I therefore accept Mr. Pollock's argument that in English law the owners could not rely upon cl. 18 because the cargo was not that of the charterers.

Mr. Hallgarten advanced a secondary argument that if the ownership of the cargo was material to the owners' right of lien under cl. 18, the charterers should not derogate from their grant and must either pay all instalments of hire on their due dates or so exercise their affairs that the owners were in a position to exercise their lien. Mr. Pollock's answer to this was that if there was anything in the point, the owners would merely have a claim for damages against the charterers.

The result is that the answer to question 3 is that there was a breach by the master of the obligations undertaken by cl. 8 of the charter.

I accordingly uphold the umpire's awards in pars. 10, 11, 12, 13 and 14 of the special case and his direction in par. 23 of his further findings of fact.