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The ‘Ship’: At the Mercy of English Law

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Abstract
The current position taken by HM Revenue & Customs regarding the definition of a ‘ship’ following the taxation appeal of Torr & Others v HMRC has generated a storm in Parliament, as well as in the shipping community.

This paper examines the broader implications of this controversial issue in maritime law, focusing on the meaning of a ‘ship’, and the consistency of its application within the English Legal System. Alarmingly, it exposes a failure of good governance which Parliament shall ignore at its peril.

Introduction

On 21\textsuperscript{st} October 2008 David Anderson, Labour MP for the Constituency of Blaydon, in the traditional maritime County of Tyne and Wear, put a written Parliamentary Question to the Chancellor of the Exchequer in two parts:

(1) what estimate he has made of the average financial effect on seafarers if the seafarers’ earnings deduction is removed;
(2) if he will review the decision of HM Revenue and Customs to remove the seafarers’ earnings deduction.

Responding on behalf of the Chancellor of the Exchequer, Stephen Timms, the acting Chief Executive Officer of HM Revenue and Customs (HMRC) stated:

HMRC is not removing seafarers’ earnings deduction (SED). Rather HMRC will revise its guidance on SED to reflect a decision made by the Special Commissioners, an independent appellate body, in the case of Torr and Others v. CIR

\footnote{21 October 2008 Hansard Column 338W}
I am aware of the concerns raised by the Special Commissioners decision in this case, which centred on whether the vessel on which the appellants performed their duties was a ship or an ‘offshore installation’ within the meaning of the legislation. The Special Commissioners decided it had been operating as an offshore installation, and refused the appellants’ claims to SED.

Mr Timms may have been guessing that this presented an unsatisfactory answer to the concerns of MPs and their constituents. If so, his guess proved correct beyond his wildest dreams.

Two days later, Lindsay Hoyle, Labour MP for Chorley, put the question to the Chancellor of the Exchequer:

What the reasons were for the decision by HM Revenue and Customs to review the guidance on vessels that do not qualify under the seafarers’ earnings deduction income tax rules.

Joan Walley, Labour MP for Stoke-on-Trent North, followed with another question to the Chancellor of the Exchequer in two parts:

(1) what recent representations he has received on seafarers’ earnings deduction; and if he will make a statement;
(2) whether he plans to meet the Secretary of State for Transport to discuss the effects of the reclassification of seafarers’ earnings deduction on the recruitment and retention of British seafarers.

Poor Mr Timms was the respondent again; sadly, his response to these questions, however, proved equally unsatisfactorily, adding little to his previous reply. He did assure the House, though, that HMRC would discuss implementation with interested stakeholders before the revised guidance is issued but, in fairness, did little to assuage the fears of thousands of UK seafarers serving on board ships, that the tax regime would expose them to bills as much as £46,000, merely by re-defining the meaning of the word ‘ship’ and distinguishing it from an ‘offshore installation. In the meantime, Angus MacNeil and Katy Clark put down early day motions, calling on the Government to intervene urgently in the matter, in the interests of the UK’s maritime sector.

223 October 2008 Hansard Column 547W
It is not entirely clear whether HMRC appreciates the downstream consequences of the position which it has taken in terms of maritime law. In any event, it is essential to assess the validity of the current position of HMRC regarding the definition of ‘Ship’, because of the obvious fact that either a vessel is a ship or she is not. In terms of effective jurisprudence and good governance, she cannot occasionally be a ship and at other times an offshore installation; if she were, we would be confronted with absurd questions to address, for example, such as, at what times would the legislative provisions for ships and their certification apply?

If HMRC’s interpretation does, indeed, become embraced in the pantheon of Statute law, the question of what Parliament intends to convey by the word ‘Ship’ may be inconsistent with current Statute and Common Law. As a matter of fact, if not of law, the meaning of a ‘Ship’ in other flag state jurisdictions may also be relevant, for ships protected by other sovereign states have the singular habit of visiting UK territorial waters, so the question then arises as to the inconsistencies between findings of fact under UK Law and the Laws of other jurisdictions.

The Source of the Problem

The case of Torr and Others v HMRC¹ involved an Appeal heard by Theodore Wallace, Special Commissioner, regarding the denial of a tax concession, known as foreign earnings deduction, which had hitherto been enjoyed by the appellant seafarers.

The appellants served on the Pride South America, a self-propelled, dynamically positioned, semi-submersible vessel, possessing a certificate from Lloyd’s Register which showed that she grossed 12,314 tons. She was originally designed as an offshore drilling unit but in the periods in question operated as a workover/support vessel carrying out well workover operations in the Campos Basin off South America, meaning that she could install, refurbish and perform sub-sea completion work on wells but could not enter the pressure confines of the well due to the limitations of her equipment, which meant that she could not be used when the oil was flowing. The designation “support vessel” indicated that she had functions

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¹ Keith Wyn Torr and Capt William Mair and James Innes and Captain David Hargrave and John Paul Buchanan v The Commissioners for HM Revenue and Customs Spec00679
other than workover, i.e. diving, crane operations, including heavy lifts, construction and pipe laying.

On top of any oil well under the sea, there is a structure known as an X-mas tree, extending about 10 metres up from the sea bed. Her work involved carrying out maintenance work on this X-mas tree. Although mainly engaged in repairing non-functioning equipment, *Pride South America* was not engaged in a regular maintenance programme, being used rather when problems arose, when the well was ‘killed’, by which is meant that the flow was halted temporarily, with all valves being closed when *Pride South America* was summoned.

The case pivoted on the interpretation of Regulation 3 of the Offshore Installation and Pipeline Works (Management and Administration) Regulations 1995 which, perhaps somewhat incongruously in the context of this case, had been introduced to implement health and safety protection on offshore installations in UK territorial waters. 3 (1) defined the meaning of ‘offshore installation’ as:

a structure which is, or is to be, or has been used, while standing or stationed in relevant waters, or on the foreshore or other land intermittently covered with water -

(a) for the exploitation, or exploration with a view to exploitation, of mineral resources by means of a well;

(b) for the storage of gas in or under the shore or bed of relevant waters or the recovery of gas so stored;

(c) for the conveyance of things by means of a pipe; or

(d) mainly for the provision of accommodation for persons who work on or from a structure falling within any of the provisions of this paragraph,

(e) and which is not an excepted structure.

These Regulations, however, followed the foundation legislation, defining the key issues of fact, in Section 192 Income and Corporation Taxes Act 1988 (Foreign emoluments and earnings, pensions and certain travel facilities). Schedule 27 Finance Act 2004 amended the 1988 Act by introducing Section 837C, defining the meaning of “offshore installation”
in somewhat greater detail. Subsection 1 confines the application of this provision to the Tax Acts, and delimits the meaning of “offshore installation” to a structure which stands or is stationed in waters, whether or not they are offshore; subsection 2 defines uses encompassing exploration for and exploitation of mineral resources by means of drilling, and those other matters noted above in the 1995 Regulations. To this extent, therefore, the legislation is consistent – even to the inclusion of accommodation units, known as ‘floatels’, which will be visited below in reliable authorities.

Subsection 3 excludes a structure which is not used for any other purpose or has ceased permanently to be used for one of the purposes stated in subsection 2; we may therefore divine that a vessel which occasionally, even very frequently at all, is used for one of those purposes, must be an ‘offshore installation’. But is it a Ship? Importantly, this question is clarified by subsection 4:

(4) In this section “structure” includes a ship or other vessel.

The facts in Torr and Others hinged on the ‘use’ of the appellants’ vessel. The issue under the 1995 Regulations was whether she was a structure used while standing or stationed in relevant waters for the exploitation of mineral resources; but the really interesting bit is that, during the proceedings it was accepted by the HMRC that, apart from the exclusion of offshore installations by ICTA 1988, s.192A(3) and ITEPA 2003, s.385(a), Pride South America was a ship. Effectively, HMRC’s position embraced the point made by subsection 4, that a ship could be an offshore installation at the same time.

In drawing his Conclusions, the Special Commissioner stated, inter alia:

In my judgment in the context of regulation 3 “exploitation” clearly refers to physical rather than economic exploitation, particularly since the exploitation is “by means of a well”. It does not cover sale of mineral rights for a capital sum or royalties. It clearly involves extraction of the crude oil from under the sea bed. Furthermore it involves use of a structure.⁵

⁵ Para 43
The real question is how far the concept of use of a structure for exploitation of mineral resources by means of a well extends.

In my judgment the mineral resources do not cease to be exploited merely because a well is killed to enable corrective action to be taken. While I do not accept the submission of Mr Williams that exploitation encompasses work after the oilfield has ceased production, I hold that it does cover repair work when the field is in production notwithstanding the fact that the field has to be temporarily killed.

I see no logic in the 1995 Regulations, which are directed to health and safety, applying if the structure is only in use during normal production when there is no problem but not applying if the structure is used to remedy a problem. In my judgment the Pride South America was used for the exploitation of mineral resources, notwithstanding that the wells were killed or shut down while it was being used.

Dismissing the Appeal, the Special Commissioner added:

While the logic of applying health and safety legislation to persons employed on offshore structures in British waters or the Continental Shelf is clear, the logic of denying foreign earnings deduction to seafarers working on offshore structures in the South Atlantic is not apparent. However while I have considerable sympathy with the Appellants, my duty is to interpret the law as enacted.

The Consequences

It is, perhaps, fortunate that, in consequence of this decision, HMRC has announced a review of the relevant definitions, as HMRC’s own published guidance distinguishes between a ‘ship’ and an ‘offshore installation’ in terms which, by simple deduction, make them mutually exclusive, in the Revenue’s eyes, at least.

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6 Para 44
7 Para 48
8 Para 49
9 Para 53
It may be helpful to draw on the assistance of recent legislation in the form of section 1001(1) Income Tax Act 2007, which defines an ‘offshore installation’ for the purpose of the Income Tax Acts as:

a structure which is, is to be, or has been, put to a relevant use while in water.

Subsections 3 and 4 must be applied to this definition, which largely parrot the provisions of 837C of the 2004 Act and, as a result of this consistency, reconfirm the Will of Parliament which clearly intended to delimit the application of this law, ring-fencing the structures standing or stationed with a view to exploring or exploiting sea-bed resources by drilling operations – however incidental this may be the structure’s other uses.

Once again, we have Parliament’s clear expression in subsection 5:

In this section “structure” includes a ship or other vessel.¹⁰

Unfortunately, this is inconsistent with HMRC’s current position: in a document entitled Seafarers’ Earnings Deduction: Offshore installations and ships: examples¹¹, the statement following the title declares beyond any misunderstanding:

Offshore installations and therefore not ships¹²

The following are not accepted as ships for the purposes of the deduction: Fixed production platforms

Under this heading, the Revenue lists a range of structures which it deems to fall within 837C, including the obvious, such as floating production platforms, as well as the more challenging, grouping ‘jack-up rigs’ with ‘drillships’ into ‘mobile offshore drilling units’.

There then follows a menu of ‘Vessels’ working in the offshore oil and gas industry that the Revenue accepts, in its own words, ‘as ships’. The vessels listed are conceded as ships for the purposes of the deduction ‘if they satisfy the general conditions described at EIM33101’, and include, inter alia, anchor handling vessels, pipe laying barges, platform support vessels and well service tankers. Importantly, seismic survey

¹⁰ Author’s emphasis
¹² Author’s emphasis
vessels are included; this is interesting for the fact that seismic survey vessels have precisely the same purpose as ships which explore the seabed by drilling core samples; yet the latter is clearly a 'drillship' and therefore excluded by the Revenue as a Ship, although Legislation clearly indicates otherwise.

We therefore have an apparent problem in the inconsistency with which the law is applied, which raises the spectre of a failure of governance, in that the Revenue appears not to be accountable for its interpretation or otherwise of the Will of Parliament. This is compounded when we address EIM33101 in the Employment Income Manual, which addresses the Meaning of 'Ship' and promptly states:

There is no statutory definition of the word ship.

This is a most unfortunate assertion. It is not suggested that the following list is inclusive but it does offer alarmingly compelling evidence to the contrary:

1. The Marine Insurance Act 1906 provides:
   Sch 1 r 15 The term 'ship' includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

2. The Carriage of Goods By Sea Act 1971 Article 1 scheduled follows the Hague Rules as amended by the Brussels protocol 1968 to define a ship as:

   any vessel used for the carriage of goods by sea

3. Section 24 Supreme Court Act 1981 states:

   'ship' includes any description of vessel used in navigation and (except in the definition of "port" in section 22(2) and in subsection (2)(c) of this section) includes, subject to section 2(3) of the Hovercraft Act 1968, a hovercraft

13 HM Revenue & Customs, Employment Income Manual EIM33101, London 79
4 The Pilotage Act 1987 follows the meaning of ‘Ship’ as defined in the Harbours Act 1964:

57 ‘ship’, where used as a noun, includes every description of vessel used in navigation, seaplanes on the surface of the water [and hovercraft within the meaning of the Hovercraft Act 1968]

5 Section 313(1) Merchant Shipping Act 1995 states:

‘ship’ includes every description of vessel used in navigation

6 A ‘vessel’, as mentioned in that definition, is defined in Rule 3 (a) of The Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996 as:

every description of water craft, including non-displacement craft, WIG craft\(^{14}\) and seaplanes, used or capable of being used as a means of transportation on water.

To say that HMRC’s assertion of a lacuna in statutory definitions of a ‘Ship’ is misconceived, is an understatement.

Encouragingly, the Special Commissioners in Torr and Others gave an honourable mention to the case of Perks v Clark\(^{15}\), stating that, for the purposes of the deduction a ship must be:

- capable of navigation and
- used in navigation.

The Special Commissioners undoubtedly found highly persuasive the opinion of Carnwarth J who quoted Halsbury’s on the meaning of a Ship:

To be a ship a vessel must be used in navigable waters ... And, although she must be constructed for navigation, it is not necessary to the definition that she should be able to navigate under her own power. The presence of a rudder and the manning of the vessel with a crew are important as showing that a vessel is

\(^{14}\) a vessel capable of operating completely above the surface of the water on a dynamic air cushion created by aerodynamic lift

\(^{15}\) Perks v Clark [2001] 2 Lloyd’s Rep 431
a ship, but the absence of either does not mean that a vessel is not a ship.\(^\text{16}\)

Carnworth J found that ‘Navigation’ does not necessarily connote anything more than ‘movement across water’.\(^\text{17}\)

*Perks v Clark* is a highly relevant authority and, conveniently, enables us to broaden the horizon of this study by examining judicial authority on the meaning of a ‘ship’. Unfortunately, however, the Revenue misrepresents the case reported. This was a taxation case which required a judicial ruling on seafarers’ emoluments. It involved the definition of a ship, in the case of seafarers who were employed on jack-up rigs; the issue being whether jack-up rigs were classified as ships for the purpose of the Income and Corporation Taxes Act 1988.

On appeal from the General Commissioners, Ferris J held, that the work of a jack-up drilling rig was to be positioned at a point on the surface of the earth, there to perform the static function of drilling into the earth’s crust; its ability to float and to be moved from place to place by means of outside assistance was merely incidental to its static non-floating work; overall the rigs did not have sufficient characteristics of ships to lead to the conclusion that each of them was a ship for the purposes of para 3(2A) of Sch 12 of the 1988 Act; the jack-up rigs were not ships for that purpose.

On Appeal, the Court of Appeal held,

1. The word ‘ship’ was as ordinary an English word as one could imagine...
2. So long as ‘navigation’ was a significant part of the function of the statute in question, the mere fact that it was incidental to some more specialised function such as dredging or the provision of accommodation did not take it outside the definition.... The function of conveying persons and cargo from place to place was not an essential characteristic.\(^\text{18}\).

This case is supported by a number of previous decisions, which deserve some summary:

In *Marine Craft Constructors v Blomqvist [1953]*\(^\text{19}\) a pontoon was used for the purpose of transporting the ring of a crane to a convenient

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17 Perks v Clark, at p 439
18 Per Carnworth J at p439
19 Marine Craft Constructors Ltd v Erland Blomqvist (Engineers) Ltd [1953] I Lloyd’s Rep 514

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place where the ring could be lifted from the pontoon and placed with other dismantled portions of the crane for the purpose of being transhipped to Finland. Lynskey, J, expressed the firm view that the pontoon was being used to be towed for the carriage of goods through the water and to be navigated for that purpose, stating:

She was carrying this ring and was within what I should think was a clear definition of a vessel or a boat when one bears in mind the many other forms of articles in the water which have been held to be ships and vessels which the ordinary individual would not be likely to have so described in ordinary language.²⁰

Two ancient cases, The Mac [1882]²¹, supported by The Mudlark [1911]²², illustrated the scenario that a hopper barge, used in connection with dredging purposes, had no means of propulsion, being towed to take her to and from her destination when carrying dredged materials to sea for the purpose of discharging them, was held to be a ship.

In Addison v Denholm Ship Management [1997]²³, a ‘floatel’, that is, a platform attached by legs or columns to pontoons which enable it to float on water, and taken to the location of the installation, possibly under its own power, but usually under tow, was held to be a ship. In the light of this decision, it is, perhaps, surprising, that in the HMRC’s document EIM33104, it clearly states:

The following are not accepted as ships for the purposes of the deduction:... flotels (floating accommodation units).

In the light of this, we may legitimately observe that, given the unreliability of such significant issues in HMRC’s guidance, what areas can be relied upon? This becomes very relevant when considering the inconsistency in EIM33104 previously described which, in fact, presents itself to an expert in this sector as difficult to rationalise. The document states that certain structures are not accepted as ships for the purposes of the deduction, including mobile offshore drilling units and drillships, while then stating that seismic survey vessels may be accepted as ships for the purposes of the deduction if they satisfy the general conditions.

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²⁰ p518
²¹ The Mac [1882] 7 PD 126
²² The Mudlark [1911] PD 116
²³ Addison v Denholm Ship Management (UK) Ltd [1997] 1 CR 770

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A drillship is a maritime vessel that has been fitted with drilling apparatus. The definition includes a vessel used for exploratory drilling of new oil or gas wells in deep water – as well as a vessel used for drilling as part of the scientific survey work essential to the project. A seismic survey ship conducts scientific survey work essential to the project, but does not require a drilling derrick. As a result, two ships, with identical uses in scientific survey, apparently suffer from a distinction which suggests that the position in law can be applied very inconsistently indeed. Consider the good ship Wimpey Sealab²⁴.

In 1958, the Bowater Steamship Company Limited of London took delivery of the Elizabeth Bowater, first in a series of identical sisters, which became famous as the Bowater Lakers, with their delivery coinciding with the opening of the St Lawrence Seaway to the Great Lakes in 1959. They were built to the high specification of Lloyds 100 A1 ‘strengthened for ice class 3’, with sophisticated navigation equipment on board. They had the deadweight capacity of lifting some 5,458 tons of cargo, being designed especially to carry woodpulp for the Group’s newsprint mills; but, of course, in order to keep the ships constantly employed, they would be chartered to carry whatever general cargoes could be fixed when not needed for carrying forest products. By any definition, Elizabeth Bowater was a ‘ship’, and a very fine one too.

The latter half of the 20th century proved to be a troubled time for UK shipping and, in 1972, Elizabeth Bowater was sold to Wimpey (Marine) Limited, who had plans for her as a survey vessel. But she first had to undergo a conversion which equipped her with a drilling derrick on her foredeck to take core samples from the sea bed, a moon pool – the rather alarming feature to the uninitiated, of an opening in the hull bottom through which the drilling equipment passed on its way to the sea-bed - and retractable positioning dynamic thrusters under the hull. She had a new name, as well, Wimpey Sealab but was still very distinctly a Bowater Laker beneath the changes.

Wimpey Sealab had the benefit of a leap in technology which provided a ‘stay-still’ solution, delivering a dynamic positioning system while she surveyed coal deposits off the north coast of England. She then traded the North Sea for the comparatively calm climate of the English Channel – and the tense business of carrying out her survey work amidst one of the world’s busiest sea-lanes, sometimes in fog as supertankers, gas carriers and busy passenger ferries passed by, when the wash from their

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²⁴ See Daniels, S, 2007. Sea Changes, Southampton Solent University, Southampton UK
movement often made it difficult for the ship’s dynamic positioning equipment to meet the exacting demands of keeping exactly on-station, and even a modest movement could buckle or break the long, thin drill that stretched down to the sea-bed. In order to do her job, under conditions in which conventional mooring was impossible, she was steered with the help of an embryonic form of satellite navigation and her position was maintained by a digital computer into which was fed information such as wind speed and direction, and her heading controlled directly by computer, commanding the power of 1,000 horsepower thruster propellers.

In the wider scheme of things, of course, her ship’s company of 60 men might have considered the demands on her dynamic positioning needs to be a mere occupational hazard by comparison with the death-defying stunt of laying stationary while vessels of every sort passed by, day and night, in fog or blue skies, while she was engaged in drilling bore holes in the sea floor and taking core samples which had to be analysed in the laboratories on board, and the information sent ashore.

Incredibly, according to the HMRC definition, Wimpey Sealab was not a ship. Indeed, according to s1001 Income Tax Act 2007 she would satisfy the definition of an offshore installation in that she was used while standing or stationed in any waters.

It may be argued that reliance on one example may be unsafe as the foundation upon which to build a compelling argument. In that case, we may draw upon the evidence of Captain Francois Hugo, currently Senior Lecturer at Warsash Maritime Academy, who kindly gave the following information to the author in an interview in November 2008. Captain Hugo had held a Master’s Foreign-Going Certificate when he served on a Seismic Survey Ship, registered under a non-UK flag, for the use of diamond prospecting, off South West Africa, in 1995. She had side scan sonar sweeps to detect probable diamondiferous gravel sites. She also had the capability for test drilling in order to assess quality.

At this stage, it may be helpful to explain that a seismic survey ship is steaming while towing a seismic string. Normal watchkeeping is required for the safe navigation of the ship, in addition to monitoring position in order to follow the survey line required.

The ship may also be used to drill for core sampling, when she will be anchored or will maintain station by dynamic positioning. In addition, the ship might be used for other work, such as mining by air lift and separation of the resource from bulk material. This is performed while at anchor, using the anchors to position and move the ship for mining the area, then moving as a ship to other locations.
Whatever the use to which she is put, in addition to the normal seamanship skills an enhanced level of seamanship skills is required in order to undertake the survey or mining task.

In the interview, Captain Hugo defined with clarity his understanding, which had been gained through maritime experience and common-sense, that an offshore installation, as one permanently attached to the sea bed without mobile capability. The distinction is that the survey ship is mobile, while the offshore drilling installation is static. Seamanship skills are required for a ship which is capable of steaming between locations; while such skills are not required for a static installation. In a survey ship, there is a high responsibility for the navigational accuracy of the passage in order fully to assess the resource under survey. In addition, seafarers are exposed to risks in deploying and recovering the survey equipment, requiring additional training and the maintenance of dedicated safe working practices. None of these risks and responsibilities are shared with offshore installations; but Captain Hugo pointed out that offshore installations have their own high risk procedures requiring appropriate training and safe working practices.

Captain Hugo concluded with the assertion that service on a survey vessel requires a higher degree of professionalism than on many other vessels.

This evidence sheds important light on the practical features which characterise such vessels. By any test of common-sense, they must surely satisfy any definition of a ship. The taxation legislation, however, would seek to superimpose upon that definition, that of an offshore installation, despite the clear distinctions which Captain Hugo draws, both as to use - whether occasional use or not - and as to the skills required of the seafarers crewing the vessels. HMRC apparently goes further still in its construction of the terms in stating that ‘a ship is not an offshore installation’. In fact, HMRC is quite correct, but in a way which differs radically from that which it had in mind.

Having espoused the obvious, common-sense argument, it is appropriate to examine the application of a definition by case law, and see where common-sense has taken the Courts. The case of *R v Goodwin*\(^{25}\) involved an appeal against conviction by the accused, Mark Goodwin, who was charged following a collision between the jet ski which he was riding with another jet ski, whose rider was injured, and indicted on a single count of Conduct endangering ships, structures or individuals,

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contrary to Section 58(2)(a) Merchant Shipping Act 1995, which states that if a person, while on board his ship or in its immediate vicinity, does any act which causes or is likely to cause the death of or serious injury to any person, he shall be guilty of an offence.

In delivering Judgment, Lord Phillips CJ said that the relevant provisions, as the title 'Merchant Shipping' suggested, were primarily aimed at shipping as a trade or business, not at pleasure craft such as jet skis:

While it may be possible to extend the meaning of ship to vessels which are not employed in trade or business or which are smaller than those which would normally be so employed, if this is taken too far the reduction can become absurd.

This brings the argument to the critical question of the word 'use', which was the foundation stone of the Court's decision on the interpretation of a 'Ship'. The common sense wisdom of Sheen J was relied upon in reference to Steadman v Scofield [1992]:

A vessel is usually a hollow receptacle for carrying goods or people. In common parlance 'vessel' is a word used to refer to craft larger than rowing boats and it includes every description of watercraft used or capable of being used as a means of transportation on water.

Having addressed the authorities, Lord Phillips held,

We have concluded that those authorities which confine 'vessel used in navigation' to vessels which are used to make ordered progression over the water from one place to another are correctly decided. The words 'used in navigation' exclude from the definition of 'ship or vessel' craft that are simply used for having fun on the water without the object of going anywhere, into which category jet skis plainly fall.

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26 Para 32
28 p166
29 para 33
The rationale of the decision has been summed up succinctly by the Statute Law Review\textsuperscript{30}, which observed that the Court of Appeal wisely avoided determining whether a jet ski was a ship on the basis of its construction, but applied the test as to whether it was used to make ordered progression over the water from one place to another. In fact, the wisdom of the Court’s approach was somewhat obvious, as it was focusing on the vessel use rather than her construction, which is the clear reasoning demanded by the statutory definition under Section 313(1).

That being said, the observation of the Statute Law Review is not quite accurate because the Court did, in fact, consider the determination of a ship based on its construction: namely in the meaning of ‘sea-going’:

\ldots with the exception of certain specified sections [of which, in fact, section 58 is one], Part III applies only to “ships which are sea-going ships and masters and seamen employed in sea-going ships”\textsuperscript{31}... The suggestion that the Waverunner was a sea-going ship is worthy of A.P. Herbert. By no stretch of the imagination could that craft be so described. While jet-skis are used on the sea in proximity to land, they do not go to sea on voyages nor, we suspect would they be seaworthy in heavy weather\textsuperscript{32}.

To summarise the point, having embraced the possibility of extending the meaning of a ‘Ship’ to vessels which were not employed in trade or business, or which were smaller than those which would normally be so employed, the Court rejected the definition that a ‘ship’ could be applied to a jet ski.

Writing in Lloyd’s Maritime and Commercial Law Quarterly, G Bowtle made a keen observation on this rationale, that a ship which is used for pleasure purposes leaving from and returning to the same place where the owner is regarding as ‘messing about in boats’ [as in \textit{Curtis v Wild}\textsuperscript{33}] will apparently be outside the Act, but a similar ship whose owner is a little more adventurous going to other destinations will be subject to the requirements of the Act\textsuperscript{34}. This is a pertinent point, which may be taken to the next logical step that the same boat, one day, may loaf around inshore waters and, the next, boldly sail for another continent. In this way, the

\textsuperscript{30} Statute Law Review 27(1), iii–vi, doi:10.1093/slr/hmi020
\textsuperscript{31} para 36
\textsuperscript{32} para 39
\textsuperscript{33} Curtis v Wild [1991] 4 All ER 172, at 174

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danger becomes apparent in relying on the use of a vessel to divine its meaning in law.

A common-sense approach to this question which, of course, is that which Lord Phillips espoused so highly, demands that the definition of a 'Ship' be determined as a question of fact, which conveniently allows us to draw upon authorities from other jurisdictions. The difficulty with which this fact is determined in comparative laws, can be observed in the approaches taken in Canada and in the United States.

In the 2002 Canadian case of Attorney-General v McNally Construction\textsuperscript{35}, the issue arose as to whether the North American Free Trade Agreement (NAFTA) and the Agreement on Government Procurement (AGP) applied to the procurement by a Government department of a jet-propelled patrol boat for use in the coastal waters of the Maritime provinces. Essentially, McNally Construction Inc., an unsuccessful bidder for the building contract, filed a complaint with the Canadian International Trade Tribunal (CITT) alleging that contrary to NAFTA and the AGT the Government department concerned had failed to make an award in accordance with the criteria specified in the tender documents.

The appellant contended that the solicitation was covered by specific exclusions for 'shipbuilding and repair' in NAFTA and the AGP. Having determined that the word 'ship' has both a broad and narrower meaning, the CITT adopted the narrower definition of 'Ship' as a 'large sea-going vessel', in the sense that it is fit to cross the sea and make distant voyages as opposed to a coasting, harbour or river vessel. It concluded that the boat in question was not a ship and that the procurement was not in respect of 'shipbuilding' within NAFTA and the AGP.

The Appeal was heard in Ottawa in 2002, when the Appeal Judges upheld the decision, finding \textit{inter alia}:

(2) The CITT did not err in taking into account various definitions of 'shipbuilding' and 'ship' and the purpose for the tendering provisions of NAFTA and the AGP in construing the language of the exclusions. The language of the exclusions suggested that they were not intended to apply to any craft that might conceivably fall within a broad definition of that language but only to a large seagoing ship built or repaired on procurement of the federal government.

\textsuperscript{35} Canada (Attorney General) v. McNally Construction Inc. (C.A.), 2002 fCC 633
While the narrower definition was that which was embraced by the Court, that still embraced the criteria for a ship as a ‘large sea-going vessel’, in the sense that it is fit to cross the sea and make distant voyages as opposed to a coasting, harbour or river vessel.

Further examination of comparative laws offers deeper insight into this study when we consider the case of Stewart v Dutra Construction. The facts of this case underpin the meaning in American law of a Ship, which can be found well-defined under the United States Code:

Title 18:
(e) Definitions: In this section -
“ship” means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles or any other floating craft, but does not include a warship, a ship owned or operated by a government when being used as a naval auxiliary or for customs or police purposes, or a ship which has been withdrawn from navigation or laid up.

Title 47:
(39) Ship
(A) The term “ship” or “vessel” includes every description of watercraft or other artificial contrivance, except aircraft, used or capable of being used as a means of transportation on water, whether or not it is actually afloat.

The 2005 case of Stewart v Dutra Construction Company involved a claim under the Jones Act, originally adopted as the Merchant Marine Act in 1920, and codified on October 6, 2006 as 46 USC Sec. 30104. Section 688 (a) provides:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal

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36 Stewart v Dutra Construction Company (03-814) 543 U.S. 481 (2005) 343 F.3d 10
representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Dutra Construction had engaged Willard Stewart, a marine engineer, to maintain the mechanical systems on a dredger, the *Super Scoop*, working in Boston Harbour. The *Super Scoop* was described as a massive floating platform from which a clamshell bucket was suspended beneath the water. The bucket removed silt from the ocean floor and dumped the sediment onto one of two scows (small barges) that floated alongside the dredge. The *Super Scoop* had certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area, but had a limited means of self-propulsion, navigating short distances by manipulating its anchors and cables. Over longer distances it had to be towed.

At the time of Stewart’s accident, the *Super Scoop* lay idle because one of its scows had suffered an engine malfunction and the other was at sea. Stewart was working on board the idle scow, perched beside the hatch, when the *Super Scoop* used its bucket to move the scow. In the process, the scow collided with the *Super Scoop*, causing a jolt that plunged Stewart headfirst through the hatch to the deck below. He was seriously injured and brought proceedings against Dutra under the Jones Act.

Unfortunately the Jones Act did not define the term ‘Vessel’, but the Judges were able to rely on the definition contained in Title 18 (above). They developed their rationale clearly, explained in masterly terms by Cornell Law School:

From the very beginning, these courts understood the differences between dredges and more traditional seagoing vessels. Though smaller, the dredges at issue in the earliest cases were essentially the same as the *Super Scoop* here. For instance, the court could have been speaking equally of the *Super Scoop* as of *The Alabama* when it declared:

37 *The Alabama*, 19 F. 544, 545 (SD Ala. 1884).
“The dredge and scows have no means of propulsion of their own except that the dredge, by use of anchors, windlass, and rope, is moved for short distances, as required in carrying on the business of dredging. Both the dredge and the scows are moved from place to place where they may be employed by being towed, and some of the tows have been for long distances and upon the high seas. The dredge and scows are not made for or adapted to the carriage of freight or passengers, and the evidence does not show that, in point of fact, this dredge and scows had ever been so used and employed.”

In a unanimous opinion delivered by Justice Clarence Thomas, the Court held that a ‘vessel’ included any watercraft capable of transportation.

Thomas Emery, Proctor in Admiralty, with American law firm Garan Lucow Miller, may have been expressing a somewhat critical opinion when he commented:

In Dutra, the Supreme Court has expanded the definition of a vessel to include pretty much anything that floats and is “capable of transportation”. Jet skis, oil tankers, floating slabs of concrete: if it floats, it’s probably a boat.

Nevertheless, Dutra v Stewart conveys an important understanding of the application of a broad approach to the definition of a ‘Ship’. Happily, the rationale of the decision enjoys a close affinity with that in Perks v Clark.

The consequences of HMRC’s approach to the definition of a ‘Ship’ lead to the conclusion that those Members of Parliament who have expressed their concern over the Revenue’s position in the case have a point, even if it is not the one which they necessarily intended. The authorities which we have examined support a compelling argument for the definition of a structure, such as the Pride South America, as a ‘Ship’.

What has been exposed in this study is the appalling inconsistency of its application within the English Legal System. It is apparent that the taxation legislation describes a ‘Ship’ and an ‘Offshore Installation’ as being different things, although they can be the same; and when HMRC

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38 http://www.law.cornell.edu/supct/html/03-814.ZO.html
39 Emery, Thomas, Proctor in Admiralty, Garan Lucow Miller, PC, 2008, Great Lakes Seaway Review, Boyne City, Mi
seeks to reconcile such nonsense; it actually misrepresents maritime law as well as the tax legislation which it is meant to apply. One downstream consequence of this has proved to be extremely beneficial, however, for we are confronted with a clear failure of good governance.

The Clash with Good Governance

Any solution to the issues confronted in this study must be founded upon the fundamental properties of jurisprudence. The Courts must apply the definition of a ‘Ship’ according to the Intention of Parliament, so they are presented with an exceptional problem when the Intention of Parliament is impossible to fathom, as in the case in which a ‘Ship’ is defined inconsistently. In the event of an irreconcilable conflict, the question of which shall prevail is not within the gift of the Courts to answer. This scenario takes us firmly into the realm of Jurisprudence, which is the foundation stone of good governance. Kelsen expressed the Pure Theory of Law simply:

As a theory it is exclusively concerned with accurate definition of its subject-matter.

Lord Templeman embraces Kelsen’s theory of the legal norm as an ‘ought-proposition’ directed at the officials to apply a sanction in certain circumstances – underpinning the concept that law is essentially the idea of sanctions and officials. These laws receive their validity from higher, more general laws – the Constitution, which imparts validity to the whole legal order. Without a Constitution, the entire basis of English Statute Law is dependent upon what the Crown in Parliament enacts. But, as he states:

...it would throw into confusion the whole logic of jurisprudence in a democratic state if a Statute were to be overthrown by Common Law - in effect; Judges would be usurping the State legislative function.

In the absence of good governance, the only recourse available to judges is to apply the theory of a hard case. Dworkin characterises a hard case in a

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situation in the law which gives rise to a genuine argument about the truth of a proposition of law that cannot be resolved by recourse to a set of plain facts determinative of the issue\(^4\). Templeman embraces Dworkin's theory that law is identifiable with the clear empirically identifiable facts of legal practice:

The law is expressed in language and must rely on plain – clear – meanings.

In the problem scenario in which the underpinning meanings are equivocal or inconsistent, it necessarily follows that jurisprudence meets very real obstacles. It may be tempting to seek to reconcile the problem in the case of the taxation implications for drillships by applying the theory of a hard case, and relying on Lord Phillips's logic in *Goodwin* by reference to the ship's *use*. The unsatisfactory relationship between definition and application under the legislation which we have seen, however, demands that we draw the distinction between a vessel's occasional use as a 'Ship' and, at other times, as an 'Offshore Installation'. Determination by occasional use raises even greater problems, however. As commented in *Dutra v Stewart*, a ship and her crew do not move in and out of a particular statute depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs\(^4\).

Dwelling on the matter of governance a little longer, the decision of the Court of Appeal in *Goodwin* has two other downstream consequences which Lord Phillips may not have anticipated:

1. Mr Bowtle raises a compelling point\(^4\) over a difficulty which might now arise with the registration of a ship under the 1995 Act. Section 1 states:

   (1) A ship is a British ship if -
   (a) the ship is registered in the United Kingdom under Part II; or ....
   (d) the ship is a small ship other than a fishing vessel...

Of course, if the vessel were to be excluded from the definition of a 'Ship' according to the reasoning of Lord Phillips, her registration would be

\(^4\) http://www.law.cornell.edu/supct/html/03-814.ZO.html
invalid and, taking the point further, in circumstances in which she subsequently sailed onto the high seas or foreign territorial waters, she would not be subject to the laws of the flag state, for she would not have been allocated its flag.

Mr Bowtle further points out that one of the reasons why small pleasure ships are registered, is so that a lender can have the confidence of some security by way of a mortgage. If she were not registered, there would not be a process for registering a mortgage. It must be said, that the certainty that flows from a mortgage is one of the incentives for registering a ship under the UK flag in the first place.

2 The decision of the Court may have landed the Government, potentially, in hot water with its international partners. Bruce Grant of Newcastle Law School makes the interesting observation in his analysis of Goodwin\(^{45}\) that, while confirming the position under English law that a personal watercraft was a vessel, the Court held that it was not subject to the Collision Regulations. As he points out, this conflicts with the International Convention which forms the basis for Rule 3(a) as stated above, which defines a ship as every description of water craft, including non-displacement craft... used or capable of being used as a means of transportation on water.

The UK Government therefore appears to be in breach of its obligations to give effect to the Convention to which it has signed up.

The absurdity of the process of definition by occasional use can be illustrated best by the UK Government's own Tonnage Tax regime. Following extensive consultation with the maritime industry, this optional regime for shipping companies was introduced into the UK tax system as part of Finance Act 2000. The provisions implementing the regime form part of the Government's wider policy to bring about a reversal in the decline of the UK fleet and have been widely welcomed by the shipping industry\(^{46}\).

In order to qualify, a ship must be seagoing\(^{47}\), at least 100 gross tons, and used for:

- Carriage of passengers by sea, or

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45 Grant, B, 2006, What is a 'ship': \(R v \) Goodwin in the Court of Appeal. Web Journal of Current Legal Issues, WWW.webjcli.ncl.ac.uk/admin/welcome.html
46 HM Revenue & Customs, International – Tonnage Tax, HMRC, London
47 A ship is regarded as 'seagoing' if certificated for navigation at sea by a competent authority of any country
Carriage of cargo by sea, or
Towage, salvage or other marine assistance carried out at sea, or
Transport by sea in connection with other services of a kind necessarily provided at sea.

Crucially, however, Offshore Installations are excluded.

It would be difficult enough to reconcile these provisions to the concept of good governance. Its application in practice may present labours that would dismay a hero from the Greek myths. If, for example, a seagoing ship, grossing over 100 tons, has previously enjoyed the benefits of the Tonnage Tax regime, in the event that she is now re-defined under new criteria to be announced by HMRC, what happens to her, her owners and her seafarers is open to some speculation.

The most frightening aspect of this scenario is that the Government Department that would be responsible for addressing such a problem, would be HMRC, the very department at the centre of the storm raised by Torr and Others.

Whichever argument is examined, the solution must be to restore good governance with the accurate definition of subject-matter, which is consistent across the Legal System and, indeed, consistent with findings of fact encountered in other jurisdictions. This must surely be delivered by legislation. So, once again, we must applaud the vigour of Messrs Anderson, Hoyle, Walley, MacNeil and Clark, MPs, but urge that the Parliamentary function must be taken further, in order to establish certainty and consistency in the meaning of a ‘Ship’, by applying the common-sense approach which would be embraced by experts in their field, such as Captain Hugo.

All in all, HMRC must surely be identifying with the wise words of Mark Twain:

A man who carries a cat by the tail learns something he can learn in no other way.

Grateful thanks are due to Captain Francois Hugo for his valuable contribution to this paper

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