CL-2019-000228

Neutral Citation Number: [2019] EWHC 3171 (Comm)

Case No: CL-2019-000228

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2019

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

QUIANA NAVIGATION SA	**Claimant**
- and -	
PACIFIC GULF SHIPPING (SINGAPORE) PTE LTD	**Defendant**
“CARAVOS LIBERTY”	

- -
- -

Mr Robert Bright QC and Mr Henry Moore (instructed by **Norton Rose Fulbright LLP**) for the **Claimant**
Ms Karen Maxwell (instructed by **MFB Solicitors**) for the **Defendant**

Hearing dates: 18 November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MRS JUSTICE COCKERILL DBE

Cockerill J :

1. This appeal under s. 69 of the Arbitration Act 1996 arises out of a Partial Final Award dated 7 March 2019 of Mr Mark Hamsher, Mr Alistair Schaff QC and Mr David Owen QC ("the Award").

2. The issue concerns the BIMCO Non-Payment of Hire Clause for Time Charter Parties, and in particular the question of whether it is possible to withdraw a vessel under this clause when the breach in question relates to non-payment for an earlier period of hire. The appeal is brought by permission of Teare J on the basis that, this being a standard form clause, it is a question of law of general public importance and the decision of the Tribunal is open to serious doubt.

The Facts

3. The time charter in question ("the Charterparty") was concluded on 26 May 2017 between the Claimant/Appellant ("Owners") and the Respondent ("Charterers") in respect of MV "Caravos Liberty" ("the Vessel"). The Charterparty was drafted on an amended New York Produce Exchange form with rider clauses and a fixture recap.

4. The Vessel was delivered into Charterers' service on 27 May 2017.

5. Relevant provisions of the Charterparty were:

   i) Clause 4: *"the Charterers shall pay for the use and hire of the said vessel at the rate of USD9,000 daily including overtime, payable every 15 days in advance.... BIMCO non-payment of hire clause for time charterparties to apply ...*".

   ii) Clause 5: "*Payment of said hire to be made in cash in United States Currency (as per clause 34) every 15 days in advance…*". The "*said hire*" in clause 5 was the US$9,000 daily hire set out in clause 4.

   iii) Clause 34: "*Hire and all monies due to the Owner under this Charter Party will be paid to Owner's bank account...First hire 15 and value of bunkers on delivery to be paid within 3 banking days after vessels delivery and charterer's receipt of scanned/signed/stamped relevant hire statement, thereafter every 15 days hire in advance Bimco Non Payment of hire clause for time Charter Parties to apply*".

6. The key provision is the BIMCO Non-Payment of Hire Clause, incorporated as clause 37 of the Charterparty. It governs the right to suspend service, the right to withdraw the Vessel and the anti-technicality procedure to be followed prior to withdrawal. It should in the context of this appeal be reproduced in full:

   "Clause 37

BIMCO Non-Payment of Hire Clause for Time Charter Parties

If the hire is not received by the Owners by midnight on the due date, the Owners may immediately following such non-payment suspend the performance of any or all of their obligations under this Charter Party (and if they so suspend, inform the Charterers accordingly) until such time as the payment due is received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel is to be and shall remain on hire. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

The Owners shall notify the Charterers in writing within 24 running hours that the payment is overdue and must be received within 72 running hours from the time hire was due. If the payment is not received by the Owners within the number of running hours stated, the Owners may by giving written notice within 12 running hours withdraw the Vessel. The right to withdraw the Vessel shall not be dependent upon the Owners first exercising the right to suspend performance of their obligations under this Charter Party pursuant to sub-clause (a). Further, such right of withdrawal shall be without prejudice to any other rights that the Owners may have under this Charter Party.

The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under the Bill of Lading or any other contract of carriage as a consequence of the Owners' suspension of and/or withdrawal from any or all of their obligations under this Charter Party.

If, notwithstanding anything to the contrary in this Clause, the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of hire or a series of late payments of hire, this shall not be construed as a waiver of their right either to suspend performance under sub-clause (a) or to withdraw the Vessel under sub-clause (b) in respect of any subsequent late payment under this Charter Party".

7. The clause naturally falls into four sub-clauses, which have been referred to as sub-clauses (a) to (d). So:

    i) Sub-clause (a) deals with the gateway to the clause and suspension of performance.

    ii) Sub-clause (b) provides for the service of an anti-technicality notice (ATN) and withdrawal.

    iii) Sub-clause (c) deals with indemnities for liabilities as a result of suspension/withdrawal.

    iv) Subclause (d) is an anti-waiver provision, which appears to be primarily directed to *Scaptrade* type arguments (that acceptance of late payments in the past precludes future prompt withdrawal).

8. The dates for advance payment could be calculated from delivery and initial payment of 15 days' advance hire on 27 May 2017. The next payment date was 15 days later on 11 June 2017, followed by 26 June 2017, followed by 11 July 2017, followed by 26 July 2017, followed by 10 August 2017. If the Charterparty had not been terminated, this 15-day pattern would have continued until the end of the charter period.

9. The sum payable by Charterers to fund the 15 days of earning between due dates was US$130,652 (being 15 days of hire at US$9,000 per day, less commission). This would be subject to any deductions for off-hire.

10. Each payment date was preceded by the parties producing Hire Statements. In this instance these hire statements were "rolled-up" documents, setting out previous hire instalments as well as the current one and setting out a running account of sums due. It was not contended before me that this fact was of any legal relevance, though an argument was made before the Tribunal that this practice informed the construction of the relevant clause. The highest it was put before me was that as a result both parties knew what the argument in this case was about, because they could see the difference between them on their rival statements.

11. On 11 July 2017 (the 4th date), following an exchange of statements showing different amounts, Charterers underpaid by US$8,015.40. They tendered US$122,637 instead of the full US$130,652 payable because they claimed (wrongly) that there had been overconsumption of fuel. There were protests from Owners but no ATN was served.

12. On 26 July 2017 (the 5th date) and on 10 August 2017 (the 6th date), Charterers paid 15 days' worth of hire (US$130,652). The statements from Owners leading up to the 5th and 6th dates made clear that Charterers were asked to pay the shortfall from the fourth instalment,

but Charterers never made up the shortfall of US$8,015.40. No ATN was served after the 5th date in July.

13. However, after the 6th date, on 11 August 2017, Owners served anti-technicality notices calling for payment of the full balance of hire due. The second such notice complied with the requirements of the BIMCO Clause, and would have justified Owners’ withdrawal of the Vessel (which occurred on 14 August 2017, following Charterers’ failure to comply with the demand in the notice) had the BIMCO Clause been held by the Tribunal to apply.

14. The Tribunal held, however, that the BIMCO Clause was not engaged.

15. The Tribunal accepted that Charterers’ deduction on 11 July 2017 was wrongful and resulted in a short payment, and that the shortfall persisted and remained due thereafter, including on 10 August 2017. This means that the total sum due, owing and payable in respect of hire as at 10 August 2017 was US$130,652 + US$8,015.40 = US$138,667.40.

16. However, in the Tribunal’s view, Owners were not entitled to invoke the withdrawal procedure in respect of the payment made on the 10 August 2017 due date, because that payment date equated to the 15 days’ worth of hire which fell due on that date.

17. The Tribunal’s view was that the BIMCO Clause was not concerned with whether Charterers paid all the hire due on 10 August 2017; only whether they paid the hire that fell due for the first time on that day, i.e. 15 days’ worth (US$130,652).

18. The Tribunal therefore ruled that Owners acted in “*renunciatory/repudiatory breach*” by withdrawing the Vessel without contractual justification.

19. The essence of this appeal is therefore whether the BIMCO Clause is engaged in circumstances where:

    i) There was a short payment on the 4th payment date;

    ii) Owners objected, but did not serve an anti-technicality notice within the 24-hour period allowed under the BIMCO Clause;

    iii) The payments made on each of the 5th and 6th payment dates equated to 15 days’ worth of hire, but did not make up the shortfall; and

    iv) Owners served an anti-technicality notice, and then withdrew, on the basis of that shortfall, in the context of the payment due on the 6th date, i.e. 10 August 2017.

20. Owners say it was; Charters and the Tribunal said that it was not.

21. The specific question raised is:

> "In the first sentence of the BIMCO Non-Payment of Hire Clause, do the phrases "the hire" and "the payment due" refer to:
>
> i. the full amount of hire that is due and payable and should be received on the relevant due date, or
>
> ii. only to the amount of hire that falls due for the first time on such due date (i.e., excluding any amount of hire that first fell due on some earlier date, but has not been paid, and thus remains due and payable on the instant due date)."

22. There is no cross-appeal by Charterers against the finding on points (i) and (ii). However, Charterers have served a Respondent's Notice seeking if necessary to uphold the Award on other grounds, namely that "*failure to notify Charterers within the time stipulated by the second paragraph constituted a waiver of any right to withdraw arising from failure to pay a particular hire statement.*".

The first question: Construction

23. Owners' case on this appeal is that the Tribunal's conclusion is inconsistent with fundamental characteristics of the time charter bargain and cannot be reconciled with the natural meaning of the words of the BIMCO Clause (as interpreted in the light of longstanding authority).

The Legal Backdrop

24. The exercise which the Tribunal had to undertake was of course an exercise of contractual interpretation. As such, the well-known principles of contractual construction apply.

25. Both parties agree however that that exercise is informed by previous decisions of the Courts upon the same or similar wording as *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep 516 (CA), 520, per Hobhouse LJ. That is the background against which the parties are to be taken to have contracted.

26. So far as that legal background is concerned, the parties are almost entirely *ad idem*. It is agreed that:

    i) Hire is earned continuously by the shipowners and therefore payable continuously by the charterers (unless the vessel is off hire): *Mareva Navigation Co Ltd v Canaria Armadora S.A. (The "Mareva A.S.")* [1977] 1 Lloyd's Rep 368, 381, per Kerr J.

ii) The obligation to pay hire in advance requires the charterers to pay hire in advance of midnight on a certain date (called the due date): *Astro Amo Compania Naviera SA v Elf Union SA (The Zographia M)* [1976] 2 Lloyd's Rep 382, 393, per Ackner J.

iii) The obligation to pay in advance has no regard to the number of days' hire likely or estimated to be earned in fact. Rigby LJ and Lord Esher MR in: *Tonnelier v Smith* [1897] 2 Com. Cas. 258 (CA), 266.

iv) The charterers bear the burden of calculating the correct amount of hire to discharge their obligation to pay hire to the shipowners: *The Lutetian* [1982] 2 Lloyd's Rep 140, 154.

v) *"[H]ire is payable in advance in order to provide a fund from which the shipowner can meet those expenses of rendering the promised services to the charterer*": *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694, 702D, per Lord Diplock.

vi) Any underpayment of hire of any size is the same as non-payment, i.e. it is a failure to make punctual and regular payment and thus a default which, subject to any contrary withdrawal or anti-technicality provision, entitles the shipowners to withdraw the vessel from the charter: The *Lutetian,* p. 154 lhc, per Bingham J.

27. Where the parties part company is the proposition which the Owners seek to derive from the case of *Oceanic Freighters Corp v M.V. Libyaville Reederei und Schiffahrts GmbH (The Libyaville)* [1975] 1 Lloyd's Rep 537.

28. The proposition is this: there will be an underpayment of hire payable in advance if by midnight on a due date the charterers have not paid sufficient hire to fund the contractually anticipated earning activity of the vessel up to midnight on the following due date.

29. Owners not unnaturally place heavy stress on the fact that that proposition was common ground between two eminent teams composed of Mr Robert Goff QC and Mr Bernard Rix, on the one hand, and Mr John Hobhouse QC, and Mr Ian Kinnell, on the other.

The arguments as to construction

30. Owners' argument rests not just on this, but on three other arguments, namely:

i) The natural and ordinary meaning of the words favours their construction; in particular that:

a) the words "*if the hire is not received by the Owners by midnight on the due date*" naturally invokes the full amount of hire outstanding, not the specific 15 days hire.

b) that approach best makes sense of the words "*until such time as the payment due is received by the Owners*" in the third and fourth lines of the BIMCO Clause (and, indeed, other references in the Clause to payment being due); "payment due" again invokes the full hire payable – as Bingham J indicated in *The Lutetian.*

c) similarly, this gives the most realistic approach to "the payment" in the second paragraph of the BIMCO Clause, where Owners' anti-technicality notice is required "*within 24 running hours that the payment is overdue…*"

d) the other approach wrongly suggests that the introduction of a grace period mechanism changes the meaning of the words "the hire";

ii) The Tribunal's approach undermines the essential nature of the bargain struck between the parties to a time charter (and, in particular, undermines the substance of the consideration to be received by the shipowner in return for the promise to provide a service to the charterers); in essence it deprives the owners of the opportunity of taking action on an underpayment which may not be apparent within 24 hours of the due date or of taking a commercial approach rather than invoking the nuclear option of withdrawal.

iii) Commercial common sense in a number of respects favours the Owners' approach.

31. Despite the thoroughness and intellectual rigour with which the case has been analysed and argued, I remain unpersuaded that the Tribunal erred in their approach to construction.

The Award

32. I should mention first the Award which is the subject of this appeal. This is not a case of an Award which bears signs of being rushed or underthought. It is the Award of two eminent QCs and one of the foremost London maritime arbitrators following a two day hearing at which the parties were represented by the same experienced legal teams as appeared before me.

33. The salient part of the Award runs to 17 pages and 38 paragraphs of reasoning. It commences with 9 paragraphs dealing with the wording of the clause. There are 6 lengthy paragraphs devoted to commercial context and business common sense. The *Libyaville* is analysed over twenty paragraphs.

34. This court is always adjured to treat the Awards of arbitrators with respect; this is perhaps a paradigm case for so doing. However, at the same time I have borne well in mind that this is a question of contractual construction on which Teare J has concluded for the purposes of giving permission that the decision of the Tribunal is open to serious doubt.

The starting point: natural meaning

35. When it comes to this issue the approach of the Tribunal is, despite the arguments aimed at it, clear and logical. It echoes almost word for word the points which presented themselves to me on reading the clause, before reading the Award itself. Where I differ from the Tribunal is perhaps in giving less weight to any individual indication; thus, while the various issues are considered separately below, it is in the bringing of them together, and then considering them against the relevant arguments on commercial context, that the answer emerges clearly.

36. Starting at the beginning with sub-clause (a), which the Tribunal described as "the gateway" the wording is this: "*If the hire is not received by owners by midnight on the due date*".

37. To a reader the use of the phrase "the hire", particularly taken with the identification of a single "due date" provides an initial indicator in favour of the right to withdraw being tied to a particular hire instalment. This is the more so where, as Charterers pointed out, each claim for an instalment of hire under a time charterparty is a separate cause of action: *The "C" and "J"* [1984] 2 Lloyd's Rep. 601. It is therefore not a natural use of language to say that, in relation to the sum not paid in respect of the fourth hire payment, its "due date" was the date for payment of the sixth hire instalment.

38. Of course, I entirely accept the point which Mr Bright QC made, that the clause does not use the word instalment, and perfectly well could have done. However, that does not stop the wording being an indicator; it just stops the indication being clear. And were the wording simply "the hire" in conjunction with "due", his point would be more attractive. However where one has both "the hire" and "due date" those two would naturally be read together. In deprecating the Tribunal's reliance on the wording "the hire", Owners themselves shied away from this conjunction, preferring to focus on hire "owing and payable" or outstanding at that date – which of course is not the formulation used by the clause. And as Mr Bright QC accepted, the fourth instalment fell due on 11 July and remained due at all times thereafter.

39. This point was put particularly well in the Award, at [54] thus:

> "That ["any outstanding hire"] is simply not what the clause says. Moreover, it would involve decoupling the non-receipt of the relevant hire from its due date for payment, contrary to the linkage which the clause expressly provides for. Indeed, the Owners' construction appeared to require "*the due date*" to be read as meaning that an instalment of hire which fell due on a specified date in the past, which must have been "*the due date*" for that instalment, is in fact subject to another due date described as "the" due date, on each successive date on which further, different instalments fell due. That is indeed a strained and unnatural construction."

40. This composite point in my judgment meets the first submission which Owners deployed – the supposed lack of textual basis for restricting the hire to be received. These points are obviously not determinative of the exercise of construction but they plainly do provide a real indication which asks "*what is the hire?*" and points to the due date for that specific hire; and that question can only sensibly be answered and one single date produced if the Charterers' approach is preferred.

41. In attempting to avoid this problem Owners argued (in a shadow of the accounting argument advanced before the Tribunal) that to some extent because of the accounting, whatever hire fell due or was owing and payable became so on that date, hence transforming the due date into a date applicable to the historic hire. However, this was an artificial approach, because as regards the historic hire no due date could be created by this – it would not, for example, have prevented Owners from commencing proceedings to recover the hire before the date for the sixth instalment. The only reason the date would become a due date, would be if (as Owners contended) a window for withdrawal were opened by this process; but this is to rely on one side's answer to the very question which is to be determined and hence a "bootstraps" argument.

42. The other obvious point which presents itself and was duly and clearly noted by the Tribunal is that if what was intended was to say that all arrears of hire were covered, there are other, and better, ways of saying this. This is a point which naturally occurs when one is looking at a contract which is not an "*off the cuff*" document but a standard form into whose drafting considerable expert legal thought will have gone.

43. This argument shades into the argument adopted by Charterers at paragraph 3(b) of the Respondent's Notice: that had BIMCO or the parties intended to provide a right of withdrawal on the basis of historic unpaid arrears they would have used the language adopted

in other BIMCO clauses. In the event no argument was directed to this point orally by either party, each having appreciated that it was a double-edged sword. On the one hand if BIMCO intended this result one would expect wording more apt, and more like those other clauses. On the other there is, as Owners submitted, a tension in some clauses pointing one way, and some the other.

44. As such this argument is in my judgment too insubstantial to shift the scales much in either direction. While my approach if I had to favour one view over another would, in the context of the kind of drafting processes likely in this context, be to see a deliberate distinction, I am perfectly well aware (for example by comparison with statutory infelicities) that even the most comprehensive drafting exercises can fall down and that the oddity of inconsistent drafting is not impossible.

45. As Charterers submitted, Owners' approach involves an element of what they characterised as "mental gymnastics" but might more moderately be termed impressionistic thinking, smoothing the period between the date when the fourth instalment (including the disputed sum) originally fell due (11 July) and the date in question here (10 August).

46. Owners rested also on the words "the payment" in sub-clause (b), in particular given that this was not separately dealt with by the Tribunal, and drew to my attention the fact that the words used are "the payment" (again not "the instalment") in conjunction with "due" (without the refinement of "due date"). As such, they said whatever might be said about sub clause (a), sub-clause (b) must be taken as looking to the payment including the historic arrears as set out in the statements.

47. Owners' suggestion here (and in their fourth argument) that their interpretation was supported by Bingham J's analysis of a similar clause in *The Lutetian* [1982] 2 Lloyd's Rep 140, did not seem to be borne out by the relevant passage at p. 158 and the facts of the case. That case was (i) dealing with a different clause (the NYPE clause, which the parties here deleted) and (ii) concerned a failure to pay a single hire instalment. In that context the dictum: "*The three days' grace provided by the cl. 31 notice was a period within which the charterers could cure, by payment their default in making payment on the due date. This cure could be affected only by paying "the hire", which can only mean the hire payable on the due date"* adds nothing to the debate which is happening in this case. In that context therefore, the idea of this dictum as part of the relevant factual matrix which ought to inform this case is not attractive.

48. Turning back therefore to the argument on its pure merits as a construction argument based on the words: Owners' approach would require dealing with the difficulty of the reading of sub-clause (a) in conjunction with this. It is plainly unlikely that (without making it very

clear) the parties and BIMCO intended sub-clause (a) to shoot at one target and sub-clause (b) another. Therefore, in order for this argument to succeed, it would need to be sufficiently compelling to effectively "flip" the natural reading of the other words already considered. In my judgment there is nothing which comes close to compelling such a conclusion, particularly when it is perfectly possible (and natural) to read them in a way which is consistent with the indications given by the opening words. This is the more so when the word "due" (in the context of starting a clock running and therefore temporally linked) is in any event inapt for the historic outstandings.

49. Attractively as the point was of course put by Mr Bright QC, it is artificial to ignore the temporal dimension inherent in the reference to a "due date" in (a); and equally artificial to say that the sum outstanding from the fourth instalment was due "on" 10 August. Or, as the Tribunal put it: "*it would be a strained and unnatural construction of the words, not to say a rewriting of the clause, to treat the clause as applying to an outstanding payment which had been overdue for more than 24 hours and 72 hours respectively*."

50. The wording here much more naturally reflects and reinforces the necessary connection between the relevant hire instalment and the (single) due date; and it also prescribes conditions for withdrawal that, as the Tribunal recognised, simply cannot be satisfied in respect of historic arrears. The reality is that the $8,000 had been due since 11 July, it remained outstanding on 10 August, but it was no more due on 10 August than it had been on 9 August. It would be illogical in those circumstances to say that a withdrawal notice in which time is key (with the time for compliance fixed not just in hours but "running hours" for clarity) should run from a date which meant nothing in the context of that particular sum.

51. Owners characterised the Tribunal's approach on this as betraying a significant misunderstanding because "*The payment in question [the composite amount]…. had not been overdue for more than 24 hours or 72 hours, because it did not become due until the last moment for payment, i.e. midnight on 10 August 2017. While there was a historic shortfall, which had been overdue since 11 July 2017, the BIMCO Clause does not give Owners the right to serve an anti-technicality at any time, at will, on the basis of such a shortfall.*"

52. This was a return to the point with which I have dealt at paragraph 41 above, and as I have indicated there seemed to me to be pure bootstraps analysis. I do not accept that the language would have been different if an instalment only had not been met or that the wording of the "running hours" provisions or the absence of a definite article on the word "hire" provide Owners with any assistance. One has to look at the overall scheme of the clause so that the initial wording of "the hire" feeds into the analysis of the later provisions.

So, the time hire was due must refer back to hire not being received by midnight on "the due date".

53. Owners' argument also, either (as Charterers would put it) impermissibly elides the very real distinction between the continuing entitlement to recover hire as a debt and on the other the independent contractual entitlement to withdraw or at least attempts to draw focus from the existence of other remedies. The distinction and the existence of the other rights is a significant factor; a right to the hire as a debt arises automatically and is not particularly easily lost. But the right to withdraw is a nuclear option, it is hedged about by careful contractual requirements – and as the cases make clear, it can be easily lost.

54. I would also add that while not much assistance is to be gained from the latter parts of the clause, they do offer three indications, which at least tend to support the approach which the Tribunal took:

    i) The four parts are plainly designed to operate as a coherent whole (for example indemnities cover both suspension and withdrawal) – which counteracts any suggestion that (b) could have a different focus to (a);

    ii) Sub-clause (c) which gives an indemnity presents unattractively as a right which could continue in existence on the rolling basis which would be necessary as an adjunct to Owners' interpretation;

    iii) Sub-clause (d) contains wording ("*any particular late payment of hire*") which treats failures to pay as discrete. Although this arises in a different context (aimed at a "course of dealing" type waiver, prospectively) it does suggest that the remedies for failure to pay relate to individual payments, not to a rolling account.

55. For the avoidance of doubt in relation to the fourth argument on the wording (though this was not urged in oral argument), there seemed no force at all in the submission that the deletion of the NYPE clause should somehow drive a conclusion that the BIMCO clause was intended to use the words "the hire" in the same way; even if (contrary to my conclusion above) the authorities indicated that the NYPE wording did have a different meaning to that which appears suggested by the wording of the BIMCO clause.

Commercial Context part 1: The clash with the nature of a Charterparty

56. In the event, the commercial context arguments were sensibly taken relatively lightly on behalf of the Owners; as they rightly acknowledged, while there are cases where commercial context will require a reconsideration of the conclusion at which one provisionally

arrives by consideration of the wording, the issues raised here were always unlikely to do so.

57. However, I have given careful consideration to these points, both as argued orally and as more fully developed in writing, because of the possibility of such considerations casting a different light on the provisional conclusions.

58. Owners' second major point was, in essence, a variant of a commercial context argument, as the heart of it is that it would force the Owners to perform services on credit. Again however this comes back to Owners' attempt, if not to elide two sets of remedies into one, to marginalise the options outside withdrawal; just because the right of withdrawal is not available does not mean that the Owners are obliged to perform on credit. In addition, it ignores the fact that there was an earlier right of withdrawal. As the Tribunal noted, it is not persuasive to say:

> "that the same commercial or business-like imperatives justify conferring on the Owners a right to withdraw for the continuing non-payment of historic arrears of hire, in respect of which the right of withdrawal was not exercised at the time when the relevant hire first fell due…. They consciously chose not to exercise their contractual rights; Having taken that course, it is far from clear to us why they should be afforded successive rights to withdraw, at 15 day intervals, as and when future instalments of hire fell due, exercisable in the event that commercial or market considerations had changed and now rendered cancellation for the previous non-payment an attractive course".

Commercial Context part 2: Commercial Common Sense

59. This naturally leads into Owners' arguments on commercial common sense, which were, in effect that:

    i) This gives inadequate protection if Owners are unable within 24 hours to work out whether they have a right to serve such a notice (for example in a *Nanfri* like deduction based on acting reasonably and in good faith);

    ii) This gives inadequate leverage to Owners to obtain payment of everything payable without forcing them into the nuclear option of withdrawal and that approach should be considered unlikely in the context of a time charter with the need for ongoing co-operation;

60. In some ways these points are effectively facets of the previous argument – as is often the case, arguments on commercial common sense are multifaceted but elide.

61. At the end of the day I am not persuaded by these arguments. There is often a tension in the operation of commercial contracts, and construction of the contract cannot resolve that in every case.

62. Here the situation is one where commercial parties have wittingly signed up to a particular regime which is predicated on a 24 hour period for the service of the notice. Owners presumably would not agree to this if they thought it was likely that this period would be inadequate. In this connection I was referred to the dictum of Goff LJ (as he then was) in *The Scaptrade* [1983] QB 529 at 540:

> "….the English courts have time and again asserted the need for certainty in commercial transactions - for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly. In particular, when a shipowner becomes entitled, under the terms of his contract, to withdraw a ship from the service of a time charterer, he may well wish to act swiftly and irrevocably."

63. This also acts as a natural bridge for the commercial arguments which face the Owners. Although the ATN regime supersedes the normal "reasonable notice" rule for withdrawal, that regime does provide a backdrop for construing the contractual scheme. In reality, as the quotation above indicates, an ATN clause is likely to abridge the period which would be allowed by the common law because it is all about speedy certainty. While it is possible (as noted by Sir John Donaldson MR, in *The Antaios* [1983] 2 Lloyd's Rep. 473 at 480l) that an ATN scheme could provide for a longer period than would usually be considered reasonable, the expectation would be that this would be an unusual course. Yet the effect of the Owners' construction, if correct, would be that they would in effect retain the right to withdraw the vessel at any time up until the debt became time barred, six years after the failure to make payment. Of course, that right would only be "triggered" every fifteen days, and of course it would be activated only when a notice was served; but the net effect would be to keep the weapon hanging in a Damoclean manner. That is a solution which in commercial terms sits very ill with the authorities on withdrawal.

64. Charterers also suggested that commercially speaking, an arrangement whereby a continuing right to sue for the debt was repeatedly periodically augmented by a right to withdraw the vessel was bizarre. Owners suggested that, far from being bizarre, this was a carefully limited right of withdrawal while giving limited and controlled certainty. While I accept that such a balance could be

arrived at by rational parties, I do consider that there is a real commercial oddity about such a scheme, and that that oddity is one which would seem to require better explanation and clearer words than is forthcoming.

65. As for the argument posed by Owners of the unattractiveness of the *"withdraw or nothing"* dichotomy, the first problem is that it is a false dichotomy, and again illustrates the Owners' focus on the withdrawal right alone and not on the package of rights. Owners retain the right to sue for unpaid hire, and indeed have a sub-nuclear option of suspension under sub-clause (a), even if in some cases that latter option may not be feasible. The second problem is that this ignores the underlying ethos of certainty which an ATN is there to produce. I would also add that a suggestion which hinges on the nature of the charter produces the potentially unattractive result that such words could mean one thing in a time charter and another in a voyage charter.

66. In my judgment therefore although there is obviously a range of commercial indications, the more commercially uncomfortable results come if one pursued Owners' argument, and produce a result where, far from offering a scheme involving speedy certainty, late hire can be a basis for withdrawal possibly for a period of years – but only at the time of some later, completely distinct payment. That is a solution which is lacking in logic or commercial coherence.

The Libyaville

67. This therefore leaves only the authority of *The Libyaville*. This is a case which has gained in significance in the Owners' submissions over time. As the Charterers note *The Libyaville* was not cited by Owners in their skeleton argument at the hearing. In fact, as the Tribunal explains, it was cited by Charterers in support of another proposition and developed from there.

68. Now it is, on the Owners' case, authority for the proposition that there will be an underpayment of hire payable in advance if by midnight on a due date the charterers have not paid sufficient hire to fund the contractually anticipated earning activity of the vessel up to midnight on the following due date.

69. Although the case is not cited in any textbook or subsequent case as authority for the proposition Owners now advance, they say it emerges thus:

   i) This proposition was common ground between the distinguished counsel on both sides of the argument in *The Libyaville* (Mr Robert Goff QC and Mr Bernard Rix, on the one hand, and Mr John Hobhouse QC, and Mr Ian Kinnell, on the other). Mocatta J did not object to their approach when he

undertook his task of construing and applying the charterparty in question.

ii) Mocatta J reached a conclusion of law that, on the facts before him, there was a total underpayment of D.M. 11,413.71 on 6 July 1971 (p. 552r). This took into account both historic wrongful deductions for cash disbursements (D.M. 9,338.49 in respect of the historic period from 12 February 1971 to 28 June 1971) and a fresh underpayment on 6 July 1971 itself (D.M. 2,075.22).

iii) On this basis, Mocatta J concluded that (having dismissed charterers' case that they had been entitled to deduct various items by way of set-off): "*There was an underpayment of hire by the charterers on July 6 which, apart from the other questions of law arising, would have entitled the owners to withdraw the vessel*" (p. 553 r).

70. This, they say, is directly contrary to the Tribunal's finding that "the hire" with which the BIMCO Clause is concerned is only an instalment of 15 days' worth of hire in advance of midnight on the due date.

71. The Owners say that the Tribunal made "heavy weather" of this authority. It would be more fair to say that the Tribunal was plainly keen to ensure that its reasoning was clear – and I am duly grateful for the fullness with which the reasoning is expressed.

72. *The Libyaville* was concerned with the NYPE withdrawal provision (deleted from the current charter) coupled with a bespoke ATN clause (clause 44) which applied only where the failure to pay was due to oversight, negligence, error or omissions. The provisions governing hire were bespoke arising against a particular factual background: the vessel was a newbuilding and alterations during construction had potentially reduced the vessel's trailer capacity. Accordingly, the parties agreed a provision for hire to be reduced by 1.25% if the trailer capacity was 16 rather than 17. The first three payments were made at the full rate. The fourth and fifth instalments following a survey by charterers, were paid at the 16 rate, and it became clear that the parties took different views about how many trailers could in fact be loaded which resulted in a reference to arbitration. They therefore (after a lot of dispute) agreed to perform a practical test and, if the test found the vessel could load at the 17 trailer rate, "*Charterers would recognise the Owners' right to the further 1.25% hire*". Following the results of this test – the outcome of which was contentious perhaps more so than the Award suggested- a further payment at the reduced rate was made, and owners withdrew the vessel.

73. Three questions were raised on the case stated, set out at pp 547-8 of the report:

i) Whether there was an underpayment of hire,

ii) Whether a valid ATN had been served, and

iii) Whether the Owners had waived any right to withdraw.

74. In the end the withdrawal was found to have been invalid because the ATN was not compliant with the clause - at 555I, but in getting to that point the judge first decided the points as regards underpayment and waiver at pp 553 and 554 of the report.

75. Owners rely on the way that the first answer was arrived at. However, I am certainly not persuaded that the judgment offers support for the argument that Mocatta J's judgment gives rise to the proposition for which they contend.

76. Critically the point was not in issue. While it is certainly true that a galaxy of legal luminaries agreed effectively to treat the earlier non-payments as sitting with the later:

i) There are in context reasons for this – to which I shall come.

ii) The point was not actually decided – nor indeed was it argued, as the Tribunal says, it was dealt with on an "all or nothing" basis. While it was suggested that I should take it as having been decided, given that Mocatta J could have declined to accept the parties' consensus, that was not a realistic submission – particularly given the counsel in question.

77. The result is that there was no finding which could be of binding effect on the Tribunal. And there is no question from my perspective of "applying" *The Libyaville* on this point. I of course entirely accept that it is a moderately well-known authority on a different point - that of the interpretation of the iteration of ATN in issue in that case. It has not ever apparently been understood as an authority on the question of withdrawal for historic defaults.

78. Secondly as the Tribunal (to my mind correctly) noted: "*the proposition for which the decision is now relied on by the Owners only emerges on a microscopic review of the actual facts of the case, is not part of the ratio and may be thought unsupported by a later part of the judgment.*"

79. As to the first point – the reasons for the concession – the issue which was being considered was not that which occupies me here – but (as the Tribunal correctly noted at [74]) an entirely distinct question about whether a claim for disbursements could prevent there being short payment – in other words it was agreed that but for the disbursements argument, there would be short payment. There was also a very live issue about waiver – on which charterers succeeded; and if they were right on waiver the issue as to construction did not

matter. The concession can therefore be seen as a classic example of not running unnecessary points.

80. There are also key differences between that case and this. One obvious point is that it concerned a different clause, ("*failure to make punctual and regular payment*"). Although in *The Laconia* [1977] AC 580 the court explained that the word "punctual" adds nothing to the requirement for payment in advance, the wording is different from the current clause and as regards the issue in focus here, I agree with Charterers that that wording more easily encompassed historic arrears.

81. There was also a different ATN - unlike clause 37, the ATN clause in *The Libyaville* did not impose any time limit within which the ATN notice was to be served.

82. But, and perhaps most significantly here, it was also a case where the withdrawal was based not solely on a past shortfall but on a shortfall for the relevant payment – the ATN therefore related (at least in part) to the most recent payment. In those circumstances the position as to the earlier payment was not relevant.

83. Accordingly, I reach the conclusion that *The Libyaville* can make no difference to the conclusion indicated by the earlier considerations of the wording and the commercial context. The Tribunal's conclusion at [75] is faultless:

> "On this basis, the actual amount of unpaid hire in relation to which the ship owner had been entitled to withdraw the vessel on 6th July, and in particular whether it extended to outstanding arrears of hire was moot. On any view, there had been an underpayment of the sixth and final instalment of advance hire due on 11 June or 11 July. There was no (reported) argument on the issue which arises for our determination in the present case."

84. Having provisionally reached a conclusion in favour of Charterers based on the earlier issues, that is enough to determine the appeal.

Waiver

85. Accordingly, the issue of waiver need not arise. This is common ground, Owners accepted that: "*The Tribunal was correct to say at paragraph 88 that waiver does not add to the contractual analysis*".

86. However, since this formed a considerable part of the submissions, I will just briefly record my reasons for forming the view that, had the point arisen, I would have found this point in favour of the Owners.

87. On this Owners' submission that *The Libyaville* was an unsafe guide was well founded. Despite Ms Maxwell's heroic attempts to persuade me that only the latter part of the waiver analysis was infected with the (subsequently determined in *The Mihalios Xilas* [1979] 2 Lloyd's Rep 303) error of reliance upon inapposite landlord and tenant authority, a pursuit of the judgment into the authorities cited seemed to justify the claim that both waiver arguments rested on the acceptance of payment, and were thus now bad law. I note that this is certainly how Kerr J read them in *The Mihalios Xilas* [1976] 2 Lloyd's Rep 697.

88. Further the submission that the right to be waived had not arisen, because it was dependent upon the serving of an ATN, appeared logically completely sound. In this respect even if it had been good law, *The Libyaville* would have been an unsafe guide, since in that case the right arose under the unamended NYPE form, and the ATN (in an embryonic form) did not stop the right arising, However, here the contractual regime makes clear that the right to withdraw will only accrue if and when Charterers still fail to pay within 72 hours after midnight on the due date, having received a notice of ultimatum. It is at this point, and at this point only, that Owners gain "*the right to withdraw the vessel*".

Conclusion

89. For the reasons given the appeal is dismissed.