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

Quiana Navigation SA
v
Pacific Gulf Shipping (Singapore) PTE LTD

"*The Caravos Liberty*"

[2019] EWHC 3171 (Comm)

BEFORE: MRS JUSTICE COCKERILL DBE

CASE SUMMARY

In this appeal on an arbitral award under s. 69 of the Arbitration Act 1996, Cockerill J upheld the decision of the tribunal that it is not possible to withdraw a vessel under the BIMCO Non-Payment of Hire Clause for Time Charter Parties for non-payment of historic arrears. The clause is only engaged where the non-payment is of hire due for the first time.

Facts

The claimant owners (the "Owners") of the "*Caravos Liberty*" (the "Vessel") had time-chartered the Vessel to the defendant charterers (the "Charterers") pursuant to a charterparty (the "Charterparty") comprising an amended New York Produce Exchange form, rider clauses and fixture recap. Under the Charterparty, fifteen days of advance hire fell due and payable on payment dates every fifteen days.

Charterers underpaid hire on a particular payment date. They then paid the full sum which fell due for the first time on the two subsequent payment dates but did not pay the shortfall still owing. Owners then served an anti-technicality notice ("ATN") purportedly in accordance with sub-clause (b) of the BIMCO Non-payment of Hire Clause (see below). Following Charterers' failure to comply with the demand in the ATN, Owners withdrew the Vessel from the Charterparty.

The BIMCO Non-Payment of Hire Clause for Time Charter Parties

The Charterparty included the BIMCO Non-Payment of Hire Clause which provides as follows (the four paragraphs, as the clause indicates, may be referred to as sub-clauses (a) to (d)):

> "*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".

The award and appeal

The tribunal held Owners had not been entitled to withdraw the Vessel because the BIMCO clause was not engaged. It concerns non-payment of hire due for the first time on the relevant payment date, rather than the total hire due on that date (including historic shortfalls).

The question raised by the Owners' appeal was: "*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).*"

In addition, Charterers, by way of Respondent's Notice, sought to uphold the tribunal's decision on alternative grounds – namely that the Owners' right of withdrawal had been waived.

Construction of the BIMCO Non-Payment of Hire Clause

Cockerill J upheld the tribunal's decision. The starting point was the natural meaning of the clause. It was emphasised that construction is an iterative process so that although none of the indications set out below were alone dispositive, taken together and set against the relevant commercial background they provided a clear answer.

As to sub-clause (a), the coupling of "***the*** *hire*" with "***the*** *due date*" (**emphasis** added) in the first sentence of sub-clause (a), supported Charterers' case that the clause was concerned with a particular instalment of hire. Owners' construction would artificially require an instalment of hire be subject to multiple "*due date*[s]" on each successive payment date.

As to sub-clause (b), Cockerill J found unpersuasive an argument of Owners that since the words "*the payment*" were used with "*due*" (instead of "*due date*"), the clause should be read as contemplating "*payment*" as including historic arrears. This argument required sub-clause (a) be

read against its natural meaning, in circumstances where the word "*due*" in sub-clause (b) related to a specific time and was thus inapt to cover historic arrears. Moreover, it ought to be read in the context of "*due date*" in sub-clause (a).

Finally, sub-clauses (c) and (d) provided some support for Charterers' construction. Owners' case entailed that the right of indemnity in (c) continued on a rolling basis which was unattractive. Further, the wording in (d) indicated the remedies for failure to pay related to single instalments.

As for commercial context and common sense, it was explained these were unlikely to warrant reconsideration of a conclusion founded on natural meaning. Nonetheless the authorities on ATN clauses such as (b) corroborated Charterers' construction. The standard position demonstrated in those cases is that the default period for withdrawal is normally shortened in order to achieve "*speedy certainty*".

An argument of Owners based on *The Libyaville* [1975] 1 Lloyd's Rep 573 was misplaced. It was not authority for the proposition Owners contended (that there is a shortfall in hire where by midnight on a due date the Charterers have not paid sufficient hire to fund contractually anticipated earning activity up to highlight on the following due date) since the correctness of that proposition had not been in issue. In any event, it could be distinguished because it concerned withdrawal of a Vessel for a shortfall in respect of the most recent payment due rather than for a historic shortfall.

Warranty

Cockerill J did not need to decide this issue given her decision on the construction of the BIMCO clause. Nonetheless she recorded that she would have held in favour of Owners on this issue. This was because Charterers' waiver arguments ultimately were founded on the incorrect proposition that acceptance of payment constitutes a waiver.