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Deductions from hire: did hire remain payable, in the absence of owners' agreement, when vessel was allegedly off hire at the instalment date?

Earlier this year the English Commercial Court had an opportunity to consider the construction of a clause dealing with deductions from hire in *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2023] EWHC 105 (Comm), which was an appeal from a partial final arbitration award on a question of law. The Court found that non-payment of hire amounted to a deduction from hire if the vessel was allegedly off hire at the instalment date where a charterparty clause provided that no deductions from hire, including for off-hire or alleged off-hire, may be made without the shipowners' consent. Albeit fact specific, as charterparties more frequently contain provisions limiting charterers' rights to withhold hire payments, this is a welcome analysis of how such provisions are interpreted by the Courts.

Facts

Bulk Trident Shipping Ltd ("**Owners**") chartered their vessel ANNA DOROTHEA (the "**Vessel**") to Fastfreight Pte Ltd ("**Charterers**") for a trip time charter for the carriage of a bulk cargo from East Coast India to China pursuant to a charterparty dated 13 April 2021 on an amended NYPE 1993 form (the "**Charterparty**").

Charterers agreed to pay hire at the rate of US\$20,000 per day, every five days in advance. Clause 11 (Hire Payment) provided, *inter alia*:

"... Notwithstanding of the main terms and provisions hereof no deductions from hire may be made for any reason under Clause 17 or otherwise (whether/ or alleged off-hire underperformance,

overconsumption or any other cause whatsoever) without the express written agreement of Owners at Owners' discretion. Charterers are entitled to deduct value of estimated Bunker on redelivery. Deductions from hire are never allowed except for estimated bunker on redelivery..." ("Line 146")

Clause 17 of the Charterparty was the off-hire clause which allowed certain expenses and costs to be deducted from hire, but only after an agreement with Owners on the figures had been reached.

Clause 23 of the Charterparty granted Charterers a lien on the Vessel for all monies paid in advance and not earned and required any advance and overpayment to be returned at once.

The Vessel loaded a cargo of iron ore pellets in India for carriage to China and was ordered by Charterers to sail to Linqiao for discharge. She arrived off the discharge port on 4 May 2021, but was not able to obtain a berth. The cargo was not discharged and the Vessel not redelivered to Owners until 28 August 2021.

Other than for a period of five days, Charterers did not pay any hire for the Vessel between 4 May 2021 and 28 August 2021, arguing that the Vessel went off-hire on 4 May 2021 and remained so thereafter because several crew members had Covid and that allowed them to place the Vessel off hire under the terms of the Charterparty.

Owners disputed that the Vessel was off hire for any of the period at issue and applied for a partial final award of hire in the sum of US\$2,147,717.79, with their position being that if the off-hire was disputed by Owners then Charterers could not rely on periods of alleged off-hire to avoid paying hire, relying in particular on Line 146.

The arbitrators agreed with Owners' interpretation of the provision and made a partial final award, awarding Owners US\$2,147,717.79 by way of hire. However, the Tribunal did so without prejudice to Charterers' right to counterclaim the whole or part of that sum back.

Charterers appealed the partial final award. Charterers' main argument was that the arbitrators had focused on the commercial objective of the clause, as opposed to the actual words used. Charterers argued that looking at the words used, Line 146 was an anti-set off provision preventing them from setting off amounts against accrued hire, but it did not restrict them from not making a hire payment where their obligation to pay hire had not accrued. Charterers focused their argument on the meaning of the word "*deductions*", which they said presupposes that a sum is due and that deductions can only be made where there is something to deduct from. In support of their position Charterers, among other things, also sought to rely on the judgment handed down in *The Lutetian*, where it was found that when the vessel was off hire at the date on which a hire instalment would otherwise fall due, the obligation to pay hire was suspended.

Decision

Having considered the Charterparty terms and the facts, the Judge dismissed the appeal and agreed with the conclusion of the Tribunal that in this case, non-payment of hire amounted to a deduction where the Vessel was allegedly off hire at the instalment date and the off-hire was disputed, given the wording of Line 146. As to Charterers' reliance on *The Lutetian*, that was distinguished as in that case there was no equivalent of a Line 146 nor was there any dispute as to whether the vessel was off hire.

In giving his judgment, the Judge analysed the language used by the parties, as read in the context of the terms of the Charterparty as a whole and concluded that the restriction on "*deductions*" in Line 146 applied to any exercise of rights that would otherwise arise under or by reason of Clause 17 to reduce a hire payment based on the Vessel being off hire.

This conclusion was further supported by the use of the word "*alleged*" to indicate that the clause was designed to cater for circumstances where there was a question mark over whether hire was payable and in those circumstances to require for any hire to be paid first and then any dispute or argument to be resolved about it later.

The Judge also noted that the set-off right restriction approach advanced by Charterers would have significantly undermined the purpose of Line 146 and

would have the effect potentially quickly leading to cessation of hire payments on their due dates, making a restriction on offsets largely irrelevant.

In addition, the interpretation adopted by the Judge made sense in the commercial context so as prevent Owners from losing critical hire income, which would be needed to meet Owners' usual expenses of running and financing the Vessel, based on potentially questionable allegations that the vessel was off hire. However, the Judge recognised that Owners did not have an unfettered discretion to decide whether or not the Vessel was off-hire – they had to exercise any discretion rationally and for contractually correct purposes – and under Clause 23 Charterers did have a cross-claim in debt for any overpaid hire, which was secured by a lien over the Vessel.

Comment

Whilst each case will turn on its own specific facts, as the outcome of this case clearly illustrates to anyone chartering in vessels on a time charter basis and wanting to have a right to make deductions from hire or a right to withhold payment of hire, clear and precise language would need to be used to achieve that effect and to ensure that the clause is actually triggered in the circumstances intended and in a desired manner.

The judgment also very helpfully summarises at paragraphs 21 and 23 the ordinary principles of contract interpretation and generally accepted principles in relation to payments of hire under time charterparties and is well worth a read by anyone involved in negotiating and drafting the payment of hire terms.

Please click [here](#) for a copy of the full judgment.

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