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Is non-payment because of off-hire a "deduction" from hire?

Where a charterparty clause states that no deductions from hire can be made without the consent of Owners, can Charterers nevertheless withhold payment of hire if the Vessel may be off-hire at the instalment date, on the grounds that the non-payment of hire that is not due does not constitute a deduction? ***David Owens****, Director, and* ***Caroline Stewart****, Senior Associate, summarise an important High Court decision in Fastfreight Pte Ltd v Bulk Trident Shipping Ltd*

The High Court has handed down its decision in an important judgment in *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd (Re Arbitration Act 1996)* [2023] EWHC 105 (Comm) (24 January 2023). Where a charterparty clause states that no deductions from hire can be made without the consent of Owners, can Charterers nevertheless withhold payment of hire if the Vessel may be off-hire at the instalment date, on the grounds that the non-payment of hire that is not due does not constitute a deduction?

Facts of the case

Bulk Trident Shipping (the 'Owners') chartered the vessel *Anna Dorothea* (the 'Vessel') to Fastfreight Pte Ltd (the 'Charterers') for a time trip charter from the east coast of India to China. The charter rate was agreed at US$20,000 per day with instalments of hire to be paid every five days in advance.

The Vessel loaded cargo in Visakhapatnam, India, and sailed to Lanqiao, China, for discharge. She arrived off port on 4 May 2021 but was unable to obtain a berth. Cargo was not discharged and the Vessel was not redelivered to Owners until 28 August 2021.

Charterers stated that the Vessel was off-hire from the 4 May until redelivery due to positive lateral flow tests received by three crew members on 1 May 2021, and did not pay hire for the period of 4 May to 28 August (barring for a period of five days between 22 and 26 May 2021).

Owners disputed that the vessel was off-hire for various reasons. However, Owners further relied upon a provision inserted at line 146 of the relevant charterparty, which provided in part (NB: clause 17 is the off-hire clause):

"*Notwithstanding of the 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. Deduction from the hire are never allowed except for estimated bunker on redelivery...*".

Owners accordingly argued that Charterers had no right to make any deductions from hire as Owners' consent had not been given. Charterers' obligation was to pay hire (even if it may be disputed), and then sue for its return. Owners applied for a partial final award of hire under section 47 of the Arbitration Act 1996 in the sum of US$2,147,717.79. Charterers argued that this was incorrect. Where the vessel is off-hire, hire does not accrue. A deduction cannot be made from hire that does not exist. Therefore, clause

11 did not prohibit Charterers from refusing to pay hire if the vessel was off-hire, but only from exercising a set-off against hire that had in fact accrued. Had it been intended otherwise, there would have been a prohibition against 'withholding' hire, rather than making 'deductions' from hire without Owners' consent.

Abitration

The arbitrators disagreed with Charterers' argument. They considered that Charterers' approach, was, simply, too restructive. Construing the provisions of the charterparty together, the arbitators considered it was clear that the intention of the parties was that Charterers could not withhold payment of hire without the Owners agreement. Commercial people would understand a prohibition against 'deduction' from hire as refusing to pay because the vessel was off-hire; without the input of lawyers, commercial people would not be likely to use words such as 'withhold' payments of hire. Owners accordingly succeeded in their application for an interim award of all hire not paid.

The Appeal

Charterers appealed under s.69 of the Arbitration Act 1996.

The Court found that arbitrators were correct in their decisions at first instance and the appeal was dismissed. In particular, the Judge noted that the wording of line 146 specifically singled out the off-hire clause as being qualified. Line 146 applied to any exercise of rights under clause 17. Therefore, no deduction of hire could be made under the off-hire clause without Owners' written consent. Owners had not given such consent, and Charterers were entitled to succeed in full.

Comment

This will be a judgment that is likely to be welcomed by Owners. It shows that the inclusion of clear wording in the relevant off hire clause can protect hire payments. With such a clause, if there is a dispute over hire payments the charterers must pay the hire in the first instance and then dispute it later. Owners' cash flow will be protected in the meantime.

However, the judgment also turned on the precise wording of the clause used. Had the wording of the insertion at line 146 been more ambiguous, it is possible that a different result could have been reached. Should any Owners be unsure whether their standard terms would have a similar effect, we would recommedn taking legal advice.

In the meantime, charterers should be alive to the implications the inclusion of such clauses would have in charterparties. Where such a clause is present, charterers must carefully consider their legal postion before withholding hire payments or making deductions. Charterers will be well aware of the severe consequences that can result from a failure to pay hire when due – including the potential withdrawal of owners from the charter.

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