Neutral Citation Number: [2019] EWHC 1213 (Comm)

Case No: CL-2018-000726; CL-2018-000722; CL-2019-000222

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QUEEN'S BENCH DIVISION)
IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2019

Before:

SIR ROSS CRANSTON
(sitting as a High Court Judge)

- -

Between:

BOSKALIS OFFSHORE MARINE CONTRACTING BV	**Claimant**
- and -	
ATLANTIC MARINE AND AVIATION LLP (the "ATLANTIC TONJER")	**Defendant**

- -
- -

James M. Turner QC (instructed by **HFW**) for the **Claimant**
Robert-Jan Temmink QC and **Robert Scrivener** (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing date: 10 April 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.

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SIR ROSS CRANSTON

Sir Ross Cranston:

Introduction

1. These appeals raise a short point on the interpretation of clause 12 (e) of the *BIMCO SupplyTime 2017 Charter Party for Offshore Support Vessels* ("BIMCO Charterparty"), which is set out below in paragraph [7] in the context of other clauses in the form relevant to this case.

2. In general terms the defendant owners, Atlantic Marine and Aviation LLP ("Atlantic Marine" or "the Owners") contend that the clause means that payment under the charterparty has to be made or disputed within the number of days agreed from the receipt of an invoice. The claimant charterers, Boskalis Offshore Marine Contracting BV ("Boskalis") deny that the clause has this effect, since it would mean that a failure to challenge an invoice before the due date for payment would result in the loss of any substantive defence to it, with limited prospects of recovering any sums overpaid as a result.

3. The dispute between the parties was referred to arbitration, and the Tribunal agreed with the Owners' interpretation.

Background

4. The *Atlantic Tonjer* ('the vessel') is a multi-purpose support vessel. On 9 April 2018, Atlantic Marine as disponent Owners chartered the vessel to Boskalis for 21 days, plus 21 daily options in the Charterers' favour. The delivery date was to be 2 June 2019. There was an addendum to the BIMCO Charterparty dated 22 May 2018. Together they are called the Charterparty in this judgment.

5. The BIMCO Charterparty used for the charter contained in Part I a number of boxes which the parties had to complete. In this case, hire was agreed at €35,050 per day (Box 20); invoices were to be issued 14 days in arrears (Box 22); payment of hire etc was to be made 21 days after that (Box 24); and the maximum audit period chosen was 4 years (Box 26).

6. Part II of the BIMCO Charterparty contains standard clauses. In this case they were modified in various respects. Additions were made in red and excisions by clauses being crossed out in blue.

7. Clause 12 is headed "Hire and Payments". Clauses 12(b) and 12(c) had additions in red. Clauses 12(e), (f) and (g) were as in the original form. They read in their relevant parts as follows:

> "(e) Payments - Payments of hire, fuel invoices and disbursements for the Charterers' account shall be received within the number of days stated in Box 24 from the date of receipt of the invoice. Payment shall be received in the currency stated in Box 20(i) in full without discount or set-off to the account stated in Box 23… If payment is not received by the Owners within five (5) Banking Days following the due date the

> Owners are entitled to charge interest at the rate stated in Box 25 on the amount outstanding from and including the due date until payment is received.
>
> If the Charterers reasonably believe an incorrect invoice has been issued, they shall notify the Owners promptly, but in no event no later than the due date, specifying the reason for disputing the invoice. The Charterers shall pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed amount…
>
> (f) Suspension and termination –
>
> …(ii) At any time while hire or other sums due and payable to the Charterers to Owners remain outstanding the Owners shall be entitled to suspend the performance of any or all of their obligations under this Charter Party until such time as all the hire due to the Owners' under the Charter Party has been received by the Owners. ….
>
> (iii) If after five (5) days of the written notification referred to in Subclause 12(f)(i) the sums referred to have still not been received, the Owners may at any time while such sums remain outstanding terminate the Charter Party…
>
> (g) Audit – The Charterers shall have the right to appoint an independent qualified accountant to audit the Owners' books directly related to work performed under this Charter Party at any time after the conclusion of the Charter Party, up to the expiry of the period stated in Box 26, to determine the validity of the Owners' charges hereunder. …. Any discrepancies discovered in payments made shall be promptly resolved by invoice or credit as appropriate."

8. Clause 13 is the off-hire clause. It provides in part (as modified by the parties) that any hire paid in advance shall be adjusted accordingly, provided always that hire shall not cease in the event of the vessel being prevented from working as a result of specified events in the clause.

9. On 2 June 2018, at 19.45, Boskalis and the Master signed an on-hire certificate. The vessel proceeded from Rotterdam to Waalhaven. Then at 06.00 on 7 June 2018, Boskalis and the Master signed an off-hire certificate. The vessel was at Franklin Shipyard to load an Ampelmann gangway. At 23.45 that day, Boskalis and the Master signed an on-hire certificate. The vessel returned to Waalhaven and from then until termination of the Charterparty it was occupied by Boskalis.

10. Atlantic Marine rendered invoices for hire, accommodation, meals and other services between 16 June 2018 (14 days after hire commenced) and 13 July 2018. They amount in total to €1,475,029.26 and £42,683.04. Boskalis did not pay the invoices and they remain unpaid. It has raised an off-hire defence, namely, that the largest item in dispute (€1,115,276.30) is not due because the vessel was offhire throughout.

11. Under the dispute resolution clauses in the Charterparty Atlantic Marine initiated arbitration in accordance with London Maritime Arbitrators Association terms. It applied to the Tribunal for a partial final award on their invoices.

12. In their First Partial Final Award dated 3 September 2018 the Tribunal identified three issues (at para [16]):

    a) When were Atlantic Marine entitled to issue invoices to Boskalis under clause 12(d) and what is the consequence if they were issued prematurely;

    b) When was the "due date" by which Boskalis should notify Atlantic Marine that they believed an incorrect invoice had been issued under clause 12(e) and what is the consequence if they failed to do so by that date;

    c) Did Boskalis notify Atlantic Marine before the due date that they believed an incorrect invoice had been issued.

13. The Tribunal found in favour of Atlantic Marine on the first issue. Boskalis do not appeal that finding.

14. On the second issue, the Tribunal found that Boskalis had not challenged any of the invoices before their due date for payment (21 days after their receipt of each invoice) and that the proper construction of clause 12(e) meant that Boskalis had to pay the invoiced amounts. The Tribunal determined as follows:

> "(c) If Boskalis wished to avoid their obligation to pay Atlantic Marine's invoices within 21 days from receipt of an invoice . . . they had to notify Atlantic Marine within 21 days from receipt of the invoice that they believed that an incorrect invoice had been issued…; and
>
> (d) The consequence if Boskalis failed to notify Atlantic Marine within the relevant period (as in para. 1(c) above) that they believed that an incorrect invoice had been issued is that they came under an obligation to pay Atlantic Marine the amount invoiced which they had not disputed within the relevant period."

15. In its Reasons, the Tribunal said in part as to the construction of clause 12(e):

> "46. [T]he context in which clause 12(e) appears is in a time charter where 'cash flow has become a matter of considerable, sometimes crucial importance' to owners of ships…
>
> 48. In our view, the focus of Clause 12(e) is on Atlantic Marine's cash flow. This much is apparent from the provision that 'Payment shall be received in the currency stated in Box 20(i) in full without discount or set-off to the account stated in Box 23'. The intention of this provision plainly is that Atlantic Marine

> should receive payment in the first instance for sums to which they might ultimately prove not to be entitled because Boskalis has a valid counterclaim which, but for this provision, would operate as a defence or set-off.
>
> 49. A similar intention is apparent in clause 12(g) which provides that the validity of Atlantic Marine's charges can be re-opened up to 4 years after the conclusion of the Charterparty…
>
> 50. It follows from this, that clause 12(e) is not a time bar provision and Boskalis's characterisation of it as such is misconceived. The clause gives Boskalis a relatively short period of 21 days within which to dispute an invoice (although the length of that period is a matter for negotiation between the parties when they enter into the Charterparty). Once that period has expired, Boskalis is under an obligation to pay any undisputed sum to Atlantic Marine, whether they are liable for such sums or not, and disputed sums are left over to be subsequently resolved. Boskalis's obligation to pay any undisputed sum to Atlantic Marine is also subject to their right to subsequently challenge their liability for such sums either by requiring an audit under clause 12(g) and a credit (if appropriate) or by way of a counterclaim.
>
> 51. We also consider that there is considerable force in Atlantic Marine's contention that their interpretation is the only one which would give clause 12(e) any real effect. We agree that if Boskalis were correct, clause 12(e) becomes a dead letter…
>
> 52…[I]f Boskalis wished to avoid their obligation to pay Atlantic Marine's invoices within 21 days from receipt…they had to notify Atlantic Marine that they believed that an incorrect invoice has been issued…The consequence if they failed to do so within the relevant period, is that they came under an obligation to pay Atlantic Marine the amount invoiced which they had not disputed."

16. Boskalis asked the Tribunal to clarify the First Award on its interpretation of clause 12(e). On 26 October 2018 the Tribunal replied that there was no ambiguity in, or need for any clarification or explanation of the Award: para [7]. However, it added:

> "9. As the Stage 1 Award makes clear if an invoice from Atlantic Marine was not disputed, either wholly or in part, within the relevant period…Boskalis came under an obligation to pay the amount of that invoice (or, if part only was disputed, the undisputed part) within that relevant period.
>
> 10. Clause 12(e) of the Charterparty makes clear that such amount had to be paid 'in full without discount or set-off'... The effect of the clause is such as to exclude any defence or right of

> set-off in respect of invoiced sums which had not been disputed within the relevant period…
>
> 13. As the Stage 1 Award also makes clear, and as in any event the Tribunal's view, the only ground upon which Boskalis might be entitled thereafter to seek any form of reimbursement in respect of a sum which they had paid, whether voluntarily or pursuant to an award, in respect of an undisputed invoice, would be if Boskalis had a counterclaim in respect of the financial loss resulting from such payment, or if they were entitled to recover any such sum in the exercise of the audit rights – see paras 48 and 50 of the Reasons."

17. The third issue in the Third Partial Award was adjourned to a second hearing. It resulted in the Second Partial Final Award dated 1 November 2018. The Tribunal awarded Atlantic Marine all the invoices forming part of the application for an award. No appeal is made against that finding.

18. The Third Partial Final Award dealt with costs.

19. In early December 2018 Bryan J gave Boskalis permission to appeal the First and Second Awards under section 69 of the Arbitration Act 1996 on two questions of law:

    (1) Does clause 12(e) of the BIMCO Supplytime 2017 form, on its proper construction, debar Charterers from raising defences against Owners' invoices if and to the extent that they have failed to notify Owners that they believed those invoices to be incorrect because of those defences by the due date of those invoices;

    (2) If the answer to the first question is "yes", are Charterers entitled to recover sums paid to Owners which were not in fact due because Charterers had a defence to Owners' claim for those sums even if that defence (i) did not give Charterers an independent counterclaim; and (ii) was not an "accounting" defence suitable for resolution by an audit under clause 12(g).

20. All three Awards turn on the same point of principle. Consequently, permission was given to appeal the Third Award, to consolidate the appeals and to dispense with a formal response to the third appeal.

Legal framework

21. The principles of contractual interpretation are well known: see for example *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, [10]-[13], per Lord Hodge; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, [13]-[14], per Lord Neuberger. The aim is to ascertain the objective meaning of the parties' language by considering the contract as a whole in its wider context. On asks what a reasonable person with the background knowledge reasonably available to the parties at the time of the contract would understand was meant. Where there are rival meanings, the court can consider which one is consistent with business common sense. There is the possibility that one side may have agreed to something which with hindsight is not to

its advantage, and the terms may be a compromise or something where more precise agreement could not be reached.

22. The courts have long required a clarity of contractual language with provisions which restrict the rights and remedies normally available to a party. Lord Diplock's oft quoted dictum to this effect in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 was described by Moore-Bick LJ in *Seadrill Management Services Ltd & Anor v OAO Gazprom* [2010] EWCA Civ 691 as "essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so": para [29].

23. Giving up contractual rights can take various forms. One example is the exclusion or limitation clause. The courts have exhibited a traditional hostility to such clauses. Notwithstanding this Lewison LJ recently noted in *Interactive E-Solutions JLT v O3B Africa Ltd* [2018] EWCA Civ 62 (by reference to a number of authorities) that, at least in commercial contracts made between parties of equal bargaining power, exclusion and limitation clauses are an integral part of pricing and risk allocation, and must be interpreted as with any contractual term: para [14].

24. Another example is the time bar clause; claims have to be advanced within a specified period to be valid. *Pera Shipping Corp v Petroship SA (The Pera)* [1985] 2 Lloyd's Rep 103 involved the construction of a time bar clause in a demurrage clause. The Court of Appeal held that the clause was ambiguous and, since the charterparty had been prepared by the charterers, it should be construed against them so as not to bar the owners' claim. Griffiths LJ saw interpreting the ambiguity in the clause as falling within "the fundamental rule that a contractual clause intended to cut down the rights which a party to a contract would otherwise enjoy, must be expressed in clear and unambiguous language." In *Odfjell Seachem A/S v Continentale des Petroles et d'Investissements* [2004] EWHC 2929 (Comm) Teare J (as he now is) referred to the principle that time bar clauses should be construed strictly and held that, objectively construed, the clause at issue was not intended to include claims for damages: para 18.

25. A third example is the issue in *European Grain & Shipping Ltd v R&H Hall plc* [1990] 2 Lloyd's Rep 139. There a clause in GAFTA100 provided that if either party was dissatisfied with the default price set by the clause, and damages could not be mutually agreed, their assessment should be settled by arbitration. Steyn J held that while that clause contemplated arbitration, it did not place on a dissatisfied party a duty to claim arbitration if it wished to avoid the default price becoming the conclusive yardstick to be set against the contract price. Steyn J added that on the construction adopted in the arbitration the default clause took away, or diminished, the litigant's right to advance his case by all relevant evidence. To achieve such a result clear language was required: at 143.

Question 1

The charterer's case

26. Boskalis submitted that the Tribunal's interpretation of clause 12(e) was wrong. The clause needed to be interpreted against the background that there could be many reasons why an invoiced sum was not due, such as the vessel being off-hire, the wrong hire rate being applied, more meals being invoiced than eaten, or costs being invoiced for the

owners' rather than the charterers' account. There might equally be a number of reasons for a charterer failing to dispute an invoice. It might simply be that in the time available they have not formed a reasonable belief one way or the other as to whether it is properly payable. The period chosen to insert in box 24 could be a few days and apply whether hire was payable in advance or in arrears.

27. In its submission, the words of clause 12(e) are unclear, possibly ambiguous. That is because they do not state that a failure to give notice will debar the charterers from raising any defence to the sums claimed. In fact the clause is silent as to the consequence of non-compliance on the part of the charterers. It is also silent as to what is to happen if the charterers have not formed a belief as to the correctness of the invoice, or a belief which is unreasonable.

28. Since the clause has this character, the legal authorities on exclusion, time bar and conclusive evidence clauses come into play by way of analogy, as do those on notification clauses and conditions precedent. In broad terms, Boskalis submitted, the Tribunal's interpretation of clause 12(e) restricts the rights and remedies ordinarily available to charterers. The clause is insufficiently clear and unambiguous to have the effect posited by the Tribunal. In effect, Boskalis contended, the Tribunal's construction was functionally indistinguishable from the implication of a term, but none of the usual requirements were satisfied: *Marks & Spencer plc v BNP Paribas* [2016] AC 742.

29. In addition, Boskalis submitted, the Tribunal's interpretation was uncommercial. It would have to work where the period in Box 24 was far shorter than the 21 days agreed in this case, say 2 or 3 business days. There was no commercial basis for barring a failure to respond within such a short period. And it contrasted with the far longer period for a clause 12(g) audit. Moreover, if hire were payable in advance the charterers might be unable to raise an off-hire event when no hire was payable in respect of the period in question. On the Tribunal's construction the charterers would have to pay and be unable to reclaim the overpaid hire.

30. In support of its construction Boskalis referred to the BIMCO Guidance Notes relevant to this charterparty form, which in its submission do not suggest the construction found by the Tribunal, and to Rainey on *The Law of Tug and Tow and Offshore Contracts*, 4th edn., which is likewise silent on the possibility.

Discussion

31. In my view clause 12(e) is clear and unambiguous. A reasonable person with the background knowledge available to the parties at the time of the contract would understand that invoices had to be paid within 21 days of their being received. (With invoices being issued in arrears that meant a maximum of 35 days after the invoiced expenses were incurred.) The language that payment "shall be received within the number of days stated in Box 24 from the date of receipt of the invoice" is precisely equivalent, as McNair J put it in *Metalimex Foreign Trade Corp v Eugenie Maritime Co Ltd* [1962] 1 Lloyd's Rep 378, to what might be equally stated in a negative form, namely, that charterers are barred from disputing the payment of invoices unless done within the 21 days referred to in the contract.

32. Those time periods had been negotiated by two commercial parties. There was no suggestion that they were not of equal bargaining power in the shipping market. Consequently, the hypothetical case of a challenge to an invoice having to be given in 2 or 3 business days has no traction. Even if that had been the case it would have been the period freely negotiated and determined by express agreement. In any event, clause 12(e) does not preclude charterers from bringing claims (in our case the counterclaim referenced by the Tribunal) or withholding payment (that being subject, of course, to notice being given, so that if no notice if given a defence to payment cannot be raised). What clause 12(e) requires is prompt payment or prompt identification of any issue preventing payment.

33. On this reading of the clause, if charterers reasonably believe that there is an error in the invoice they can withhold payment of the disputed amount by notifying the owners under the clause within the period they have agreed in the contract. They also have the audit rights under clause 12 (g) to reclaim amounts paid through accounting-type errors (wrong hire rate, wrong number of meals and so) up to four years ahead. Further, as the Tribunal correctly concluded, the charterers can always bring a counterclaim if they have paid sums which they later believe were not properly payable. Counterclaims in this context would include a claim for breach of contract or one for unjust enrichment.

34. In other words, clause 12(e) is not analogous to a time bar clause or any other type of clause limiting or excluding liability. Nothing is being implied into the clause. It may be that the charterers are required by clause 12(e) to act in a certain way if they dispute an invoice and wish to withhold payment. But as Lewison LJ said in the *Interactive E-Solutions case* [2018] EWCA Civ 62, this type of clause is to be construed in accordance with the same principles as any other clause. Adopting that approach, the clause properly construed means that, within 21 days of receipt of an invoice, charterers have to form a view about it. If they reasonably believe it is incorrect they do not have to pay, but they must give the requisite notice.

35. This interpretation of clause 12(e) is in line with commercial common sense. In paragraph 46 of its Reasons, the Tribunal quoted the impeccable authority of Robert Goff J in *The Kostas Melas* [1981] 1 Lloyd's Rep 18, that cash flow is a matter of considerable, sometimes crucial, importance to the owners of ships. That dictum has been underlined in later cases and is undisturbed by anything said in the judgments in *Spar Shipping AS v Grand China Logistics (Group) Co Ltd* [2016] EWCA Civ 982; [2017] Bus LR 663. In my view there is nothing uncommercial in charterers being obliged to raise bona fide disputes timeously, at a time when the owners have an opportunity to exercise the rights and remedies they have under the charterparty such as under clause 12(f).

36. There is nothing in the BIMCO Guidance Notes which undermines this interpretation. The Notes on clause 12(e) explain:

> "Sub-clause 12(e) (Payments) – This subclause requires payment of hire, fuel and disbursements to be received by the owners within the specified number of days in Box 24 from the date of the receipt of the invoice. Account details should be described in Box 23. The charterers are not allowed to make deductions or set-off for claims they may have, with the exceptions for advances for disbursements made on behalf of

> and approved by the owners, and disputed parts of invoices as per the last paragraph of this subclause. The charterers should notify owners at the earliest opportunity, but not later than the due date, if they reasonably believe that an incorrect invoice has been issued."

37. If anything this to my mind supports the interpretation outlined above. There is no hint in the BIMCO Guidance Notes that charterers need not pay within the time period the parties agree in the form; need not raise a dispute within that period; or can avoid the consequences of non-compliance for unstated reasons. Likewise, there is nothing in Rainey on *The Law of Tug and Tow and Offshore Contracts* to support the Charterers' case.

Question 2

38. Boskalis contended that the Tribunal was wrong in determining that under the BIMCO Charterparty charterers cannot recover sums paid (including pursuant to an award from the Tribunal) even though they have a defence, if that defence is not a counterclaim in respect of financial loss resulting from such payment or by way of an audit under clause 12(g). The Tribunal's conclusion, Boskalis submitted, means that charterers under this standard form charterparty cannot raise off-hire defences which do not constitute a breach of contract unless they have notified the owners of it before the due date of an invoice, however short that period might be. This would be the case even if that date came before the charterer could reasonably have discovered that the vessel had in fact been off-hire, or even if the vessel had not by then gone off-hire.

39. On Boskalis's case a term for the repayment of overpaid hire should be implied: *The Trident Beauty* [1994] 1 WLR 161, at 164D; *The Riza and The Sun* [1997] 2 Lloyd's Rep. 314, 320-321. There is no inconsistency between the implication of such a term even if sums that have been invoiced and not challenged should be paid. Cashflow is ensured but defences are not debarred, nor the recoupment of overpaid sums prevented. The result would be consistent with the general law and make commercial sense.

40. To my mind the Tribunal's conclusion makes commercial sense and is consistent with the wording of clause 12(e). The BIMCO Charterparty provides that hire is payable within the period the parties agree after the invoice. In this case the parties also agreed that it was payable in arrears. Consequently, an off-hire event would have happened by the time the charterers needed to serve a notice of disputed payment under the clause. As mentioned earlier, the parties were of equal bargaining strength and able to negotiate on how payment was to occur and the period to be entered in Box 24 which sets the date by which notice of any dispute must be served. To put it another way, the parties have bargained for how disputed payments are to be raised. The upshot is that the charterers are precluded from raising a defence which is not done timeously and the subject of a valid notice. Owners are not deprived of their contractually agreed remedies in clause 12(f) (which is the result of the Charterers' submissions), and charterers are not precluded from advancing a counterclaim (as explained previously) or taking advantage of the long stop in clause 12(g).

41. As to the implication of a term, that is not a matter the Tribunal has yet considered. It would be wrong for it to be determined now when the Tribunal will have an opportunity

to address it at Stage 3 of the proceedings. Whether a counterclaim could include an action for unjust enrichment is also a matter for the future.

Conclusion

42. For the reasons given above the first question is answered in the affirmative and the second in the negative. The appeals themselves are dismissed.