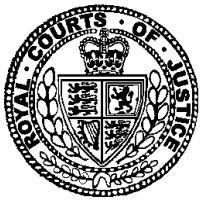

Neutral Citation Number: [2023] EWHC 1683 (Comm)

Case No: CL-2022-000595

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2023

Before:

SIR ROSS CRANSTON
(sitting as a High Court judge)

- -

Between:

SMART GAIN SHIPPING CO. LTD.

Claimant/Appellant

- and -

LANGLOIS ENTERPRISES LTD.

Defendant/Respondent

- -
- -

NIGEL JACOBS KC (instructed by **Winter & Co Solicitors LLP**) for the **Claimant/Appellant**
STEWART BUCKINGHAM KC and TOM NIXON (instructed by **Ince & Co**) for the **Defendant /Respondent**

Hearing date: 5 May 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 5th July 2023.

SIR ROSS CRANSTON:

Introduction

1. The short point which arises in this arbitration appeal is whether under a clause in a charterparty the Owners are entitled to claim the hire rate (and related expenses) for the time used for cleaning a vessel's hull after the Charterers redelivered it, or whether they are confined to a claim in damages for breach of the charterparty.

2. The context is that vessels at sea are at risk of experiencing the growth of marine life on the bottom of their hull if they remain idle in warm water for too long, which can cause issues with their speed and fuel consumption. To address that issue, the relevant clause in the charterparty in this case read as follows:

> "*Clause 86 Hull Fouling*
>
> Owners not to be responsible for any decrease in speed/increase in consumption of the Vessel whether permanent or temporary cause [sic] by Charterers staying in ports exceeding 25 days trading in tropical and 30 days if in non-tropical waters. In such a case, underwater cleaning of hull including propeller etc. to be done at first workable opportunity and always at Charterers' time and expense. After hull cleaning vessel's performance warranties to be reinstated."

3. The Charterers' case is that Clause 86 is intended to operate during the charterparty to give the Owners a claim for hire in respect of the time taken for underwater cleaning (if hire is unpaid). However, with hull cleaning after redelivery of the vessel the Owners' claim is confined to damages for loss of time - for example, by proving that the cleaning prevented the vessel being further chartered - and not the claim in debt which would be the case if the vessel remained on hire.

4. On the other hand, the Owners' case is that Clause 86 means what it says, cleaning is to be "always at Charterers' time". That must mean that Charterers must always pay for the time associated with the underwater cleaning. The premise of clause 86 is that the fouling of the vessel has been caused by the Charterers' orders to remain idle, and they are to pay for the time and cost of remedying it.

Background

5. The appeal in this case is pursuant to section 69 of the Arbitration Act 1996 against a partial final award in October 2022 arising out of a charter of a bulk carrier the M/V GLOBE DANAE, with Langlois Enterprises Ltd as the Owners and Smart Gain Shipping Co Ltd as the Charterers. The tribunal found for the Owners.

6. Permission to appeal has been given to the Charterers in respect of the following question of law:

> "If a clause in a time charterparty provides for underwater cleaning will be done at the charterers' time, does that provision give rise to a claim in debt (so that if the owners undertake cleaning after redelivery, they can claim for the cleaning time even if they have not suffered a loss of time)?"

7. During the hearing the issue arose as to whether the question was properly drafted in the abstract. In my view permission was given in relation to how that question is to be answered on the construction of the charterparty under appeal and I have proceeded on that basis: see *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] 1 Lloyd's Rep. 615, [19], per Hamblen J.

8. The charterparty between the parties was entered on an amended NYPE form dated 9 June 2021 for a time charter trip via the east coast of India to Brazil with lawful harmless metallurgical coke/coke in bulk, the duration to be about 40 to 50 days. Clause 4 provided that hire would continue until the time of the day of the vessel's redelivery in good order and condition, fair wear and tear excepted. The captain was to prosecute the voyage with utmost despatch and was under the orders and directions of the charterers as regards employment and agency: clause 8. Disputes were to be referred to arbitration in London, subject to English law in accordance with the terms of the London Maritime Arbitrators Association: clause 70.

9. Clause 86 was a rider clause. It is of note that the phrase in clause 86 "at the Charterers' time" (or the equivalent "for Charterers' time") appears in various clauses in the charterparty, clause 34 (delay caused by smuggling by Charterers "for Charterers' time"); clause 35 (bans arising out of sailing between China/Taiwan to be "on charterers' time"); and clause 41 (stevedore damage affecting seaworthiness to be repaired by Charterers "at their time").

10. The phrase "loss of time" or the like occurs at various places in the charterparty - clause 15 (ceasing hire "in the event of the loss of time" from various causes, "for the time thereby actually lost"); clause 32 (dealing with "actual time so lost" due to boycotts); clause 33 (concerning "loss of time due to blockade or detention"); clause 38 (referring to "loss of time" due to accident/grounding); and clause 78(f) (Charterers to indemnify Owners in respect of "loss of hire" resulting from ship-to-ship operations).

11. The vessel was delivered to the Charterers on 10 June 2021. After proceeding to Haldia, India, and loading metallurgical coke in bulk, the vessel proceeded to Brazil, the bill of lading listing the port of discharge as "any Brazilian port". The intended receivers rejected the cargo, and as a result the vessel remained idle in a laden state in tropical water ports in Brazil for at least 42 days so that clause 86 of the charterparty was engaged.

12. The vessel was redelivered to the Owners following completion of discharge at Acu, Brazil, at 14.00 hours on 4 September 2021 without the Charterers undertaking cleaning of the hull, despite the Owners' requests. The vessel's subsequent fixture required her to sail to Tubarao, where she arrived on 9 September 2021. The Owners therefore undertook underwater cleaning of the vessel's hull and propeller for a period of about 30 hours between 9 and 11 September before the vessel was delivered under her next employment on 16 September 2021.

13. The Owners' claim was in the sum of US $74,506.70 mainly comprised of loss of time (2.29 days) spent cleaning at the hire rate (US $55,103.13) and related costs.

The Award

14. The tribunal considered a number of issues which are not relevant to this appeal.

15. With respect to clause 86, the tribunal said that it was important to bear in mind when construing it what the purpose behind it was. It was to assign responsibility for the risks associated with marine growth forming on the hull if the vessel spent an extended period of time idle pursuant to the charterers' orders. The tribunal said that certain aspects of the clause were ambiguous but:

> "17…overall, it is quite clear from the language of clause 86 that the intention of the clause is to assign that risk to the Charterers and make them responsible for the time and cost of remedial action whilst suspending the Vessel's performance warranties in the meantime."

16. The tribunal regarded it as helpful background that the charterparty was part of a chain of charterparties, and the clause was back-to-back with the head charter which was apparently a long-term period charter: [18].

17. The Charterers argued that they were not obliged to carry out cleaning after redelivery of the vessel. Moreover, the Owners were confined to a claim in damages to put them in the position they would otherwise have been in and were not entitled to the cost of hire since there was no longer an obligation to pay it. In rejecting these submissions, the tribunal referred to *The Nicki R* [1984] 2 Lloyd's LR 186 as authority for the proposition that the Owners were not required to demonstrate loss of time regardless of whether the cleaning was performed before or after redelivery: [35]. Although that decision concerned stevedore damage rather than hold cleaning, the facts, clause, and issues were the same as in this case: [37]. As in *The Nicki R*, if a clause allocates liability for the time to the charterer, the owners do not have to prove any actual loss of time. The owners' claim was in debt: [38].

18. Applying that approach, the tribunal found that clause 86 created a debt claim in relation to the time element. The Charterers remained liable in debt since they assumed liability for the time spent in repairs "always", regardless of the actual loss of time: [39]. Clause 86 imposed an obligation upon the Charterers to arrange underwater cleaning at the first workable opportunity at their time and expense, and it was conceivable that this could be after final discharge. The reason why it needed to be at the first workable opportunity was so the Owners could present the vessel to the next employment with a "thoroughly efficient hull", for otherwise they would be exposed to a claim for underperformance: [40]. The tribunal then said that:

> "41…Clause 86 imposed an obligation on the Charterers to arrange underwater cleaning at the first workable opportunity at their time and expense at the charterparty hire rate, regardless of when the vessel was redelivered, and that this obligation gives rise to a claim in debt."

Legal framework

19. The principles of contractual construction were common ground and encapsulated by Popplewell J in *The Ocean Neptune* [2018] 1 Lloyd's Rep 654, [8] (and restated in *The Eleni P* [2019] 2 Lloyd's Rep 365, [10]) as follows:

> "8…The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

20. *The Nicki R* [1984] 2 Lloyd's LR 186 involved a charterparty on a NYPE form for one round trip from Europe to West Africa. Clause 49 provided, in relevant part:

> "Charterers to be responsible for damage to the vessel…done by stevedores …all damages…to be repaired after completion of the voyage at charterer's expense but in owner's time provided that such damage does not affect vessel's seaworthiness."

There was stevedore damage and at the conclusion of the round voyage the charterers arranged for the damage to be repaired at the point of discharge. The owners claimed hire during the period of repair. While the repairs took place, the owners also carried out work repairing the vessel's damaged engine.

21. Bingham J (as he was) held that where the damage affected the vessel's seaworthiness, at charterers' expense included time spent for repairs, at the hire rate. The arbitrator had found that since the time spent repairing stevedore damage was also spent repairing the engine, the owners would be unjustly enriched since the vessel was not capable of being operated from a trading point of view. Bingham J rejected this at p.189:

> "Accordingly, as it seems to me, where the repairs do affect the seaworthiness of the vessel, the clause does have the effect of requiring the charterers to pay for time

> spent in affecting such repairs at the charterparty hire rate, that being applicable whether the charterparty is treated as having come to an end…or whether the charterparty is to be treated as extended until such time that the repairs have been completed…[T]he arbitrator fell into error in concluding that he should take account of the engine repairs, which would be a very material consideration if the owners' claim lay for breach of contract but is not, in my opinion, a material consideration if, as I conclude it is under cl. 49, a claim lying in debt. Accordingly, as it seems to me, the owners are entitled to recover payment for five days, being the period found by the arbitrator, at the charter-party rate…"

22. Bingham J also held that if the repairs did not affect the seaworthiness of the vessel, the time spent in repair was for the owner's account. The commercial justification for that was that if the results did not affect the seaworthiness of the vessel, they did not have to be made good immediately. Rather, they could be carried out at some time convenient to the owners when there needed to be no necessary loss of time, so that it would be quite unreasonable to expect the charterers to pay for the time spent.

23. In London Arbitration 1/19, LMLN 17 January 2019, amendments to the NYPE form gave the charterers the option of returning the vessel without cleaning the holds on payment of a lump sum (clause 34) and provided for intermediate holds cleaning at the charterers' time/expense (clause 35). The owners claimed hire for the period of holds cleaning following redelivery. The charterers argued successfully that the owners were not entitled to an extended period of hire but were required to prove their loss of use.

24. In London Arbitration 29/22, LMLN 2 September 2022, the vessel was redelivered in breach of the charterers' cleaning obligation. Under clause 82, if the charterers were unable to arrange underwater cleaning on completion of the final discharge, they had to arrange it at the nearest convenient port at their time/expense/risk. The owners were entitled to claim damages - not hire - for the reasonable time taken to inspect and clean the vessel.

The charterers' case

25. The Charterers submitted that the tribunal was wrong in their construction of clause 86. It was correct in what it said about the clause at paragraph 17 of the award, but lost sight of that in their later analysis. In their submission it was important to bear in mind that the issue could arise in other charterparty contexts, such as hold cleaning, removal of fittings, and stevedore damage, which may have to be dealt with at charterers' time and expense months after redelivery.

26. The Charterers contended that the clause was intended to operate during the Charterparty to give the Owners a claim for hire in respect of the time taken for underwater cleaning if hire was unpaid. Underwater cleaning was to be carried out at the Charterers' expense with the vessel remaining on hire and performance warranties suspended until cleaning had taken place. The Owners had a claim in debt if hire was not paid, since the vessel remained on hire. Where cleaning was carried out after redelivery, however, the Owners could only claim in damages for breach of Charterparty and were not entitled to claim hire at the hire rate (and related expenses such as communication, victualling, and entertainment "(CVE")) for the time used for underwater hull cleaning. In this case since hull cleaning took place after redelivery of the vessel, the primary obligation to pay charter hire did not survive.

27. As to the words of clause 86, the Charterers submitted that the phrase "charterers' time" meant the time when the vessel was on time charter to the charterers. The clause does not say "in owners' time at charterers' expense" or cover the time when someone else was chartering the vessel. "At the first workable opportunity" could occur prior to redelivery, and the word "always" meant simply that the Charterers would always be liable for the time incurred in underwater cleaning, even if the vessel might be otherwise off-hire under another charterparty provision, or the Owners were undertaking their own work. Where the phrase "Charterers' time" was used in the charterparty in other contexts, it was directed at the time while the vessel was on charter, which reinforced the point that, in a time charterparty, the word "time" was used to refer to time when the vessel was on hire.

28. Moreover, the Charterers pointed to the location of the sentence in clause 86 containing the obligation to undertake underwater cleaning at their time and expense. It was lodged between the first and third sentences, both of which only applied during the Charterparty. In other words, sentence 1 provided for the suspension of the speed and consumption warranties, sentence 3 for their resumption, providing the context for sentence 2 – the Charterers' obligation only had purchase during the charterparty.

29. Next, the Charterers submitted, the practical context was that, after the vessel had been redelivered, they were not entitled to give orders for underwater cleaning. In their submission, the tribunal's reasoning at paragraph 41 made no sense. Clause 86 imposed an obligation on the Charterers to arrange underwater cleaning at the first workable opportunity at their time and expense, but after redelivery to Owners the Charterers would not know when a first workable opportunity arose. The claim against them in those circumstances was in damages, not for hire. The fact that clause 86 was the product of a long-term period charter contemplated that underwater cleaning would be carried out before redelivery.

30. Finally, the Charterers contended, the tribunal's construction did not make commercial sense since, if underwater cleaning did not take place during the charterparty it was unclear what rate would be applied to "charterers' time" and what other terms of the charterparty applied, for example, payment for CVE. The uncertainty demonstrated that clause 86 was only intended to operate during the period of the charterparty. It was contrary to commercial common sense for the Charterers to pay for time spent during underwater cleaning after redelivery when this was carried out at the Owners' convenience (perhaps together with their own work) and did not in itself result in any loss of time to them. The Owners' construction could result in a windfall of double hire since the vessel might be cleaned if it was in berth under a new fixture.

31. The Charterers contended that the arbitrators were wrong to regard *The Nicki R* as of assistance since clause 86 was in materially different terms from clause 49 in that case. That clause referred to repairs "after completion of the voyage" and "in Owners' time", which readily applied to repairs post-delivery. London Arbitration 1/19, LMLN 17 January 2019 and London Arbitration 29/22, LMLN 2 September 2022 were more to the point and supported the Charterers' case.

Discussion

32. Clause 86 is not as straightforward as one might like. In my view, however, the tribunal was correct in its conclusion as to what the parties intended according to the language

of the clause, its practical context, and its commercial purpose. The second sentence of the clause placed an obligation on the Charterers to pay compensation at the rate of hire – not hire itself – for the underwater cleaning of the hull in the circumstances set out in the clause. It was a specific clause to address this issue, so that there was no need to turn to other clauses in the charterparty such as clause 4, which might provide the basis of a claim.

33. First, the words of the second sentence support the tribunal's conclusion and the Owners' construction. Cleaning is to be "always at Charterers' time", which must mean that the Charterers must always pay for the time associated with underwater cleaning. To my mind the word "always" must be given effect and cannot have the limited ambit the Charterers suggested. As to the phrase "at the first workable opportunity", that covers both before and after the charterparty. Given this charterparty was for a single trip, the first workable opportunity for cleaning following a 25 or 30-day idle period would likely be once the charter had concluded and the vessel had been redelivered. The tribunal rightly recognised this at paragraph 40.

34. If what the parties intended was that the Charterers would compensate the Owners for any "loss of time" resulting from the cleaning, the language of clause 86 could have said this. Instead, they agreed that cleaning was "always at Charterers' time". As the Owners pointed out, and as indicated earlier, the charterparty contains clauses "at Charterers' time" or similar, and clauses referring to "loss of time" or similar, so that the parties must be taken to have intended that a distinction be drawn between the two phrases. Accordingly, the plain words of the clause support the tribunal's conclusion, even if the crucial words, in the second sentence of clause 86, are rather inappropriately located between its other provisions.

35. There is nothing in the Charterers' submission regarding the practical context that they could not undertake underwater cleaning after the vessel was redelivered since, it was said, they were in no position to give instructions then and would not know when a first workable opportunity arose. That is for the simple reason that the words of clause 86 do not require the Charterers to undertake the underwater cleaning themselves. In that regard the tribunal was inaccurate in what it said at paragraph 41, but that does not invalidate its findings: infelicities in a tribunal's expression must be treated with generous spirit: *The Merida* [2010] 1 Lloyd's Rep 274, [13]-[14], per Gross J (as he was), citing *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC), [2006] 4 All ER 79, [57], per Jackson J (as he was) .

36. What the clause requires is that the cleaning be at the Charterers' time and expense. This is not a charterparty expressly stating that underwater cleaning must be undertaken before the vessel is redelivered to the Owners. The hint to this effect in paragraph 17 of the Award is belied by the tribunal's later analysis at paragraphs 38-42. If the vessel is returned uncleaned, it is likely that the Owners will endeavour to clean it before its new employment, since (for the reasons the tribunal gave at paragraph 40) there would otherwise be a breach of warranty to the new charterers. That meets the Charterers' argument about the Owners receiving a windfall – because, in their submission, the vessel could be cleaned under a new fixture while at berth. More likely in practice is that the Owners will postpone a follow-on fixture until the vessel is cleaned because of the potential breach of warranty.

37. As to commercial purpose, the rationale of clause 86 is that the vessel needs underwater cleaning because of the Charterers' orders that it remain idle and must therefore pay for the time and cost of remedying the consequent fouling. The vessel can be redelivered unclean, but in that case the Charterers must compensate the Owners at the hire rate for the time when cleaning is undertaken. All this is commercially sensible. What would not be commercially sensible is to provide the Charterers with an incentive to redeliver the vessel without cleaning, and to evade having to pay hire for the time spent cleaning, unless there was a workable opportunity for that to be undertaken before redelivery. Regarding the concept of the first workable opportunity, the reality is that it turns on the operations of the vessel and neither the Charterers nor Owners will always be able to choose when it occurs. There is no appeal on CVE so that point goes nowhere. In any event there would be much greater uncertainty if the Charterers are correct and it is necessary to calculate loss of time and damages.

38. Clause 49 in *The Nicki R* was analogous, rather than identical to clause 86 in the present case, since clause 49 divided the responsibility for remedial work on the vessel between the charterers and owners depending on whether the damage affected the vessel's seaworthiness. By contrast, responsibility under clause 86 is always with the charterers. However, Bingham J held that where clause 49 required that repair be "at charterer's expense", it meant a claim for hire in debt at the charterparty hire rate, not a claim in respect of time lost or damages, even though repairs took place after completion of the contractual trip and concurrently with the owners' own work on the engine. Consequently, the tribunal was correct that *The Nicki R* lent support to its conclusion.

39. With respect to London Arbitration 1/19, LMLN 17 January 2019 and London Arbitration 29/22, LMLN 2 September 2022, it is difficult to discern their full import given the brief reports available. With arbitration 1/19 that seemed to be a quite different case, where the last cargo was dirty, and the issue concerned sufficient cleaning of the holds and the evidence about this. With arbitration 29/22 the clause stated that the charterers had to arrange cleaning, and the tribunal determined what the owners were entitled to when this was not done. The bottom line is that there is no reason not to apply *The Nicki R* and it is binding.

Conclusion

40. For the reasons given the Charterers' appeal is dismissed.