JUDGMENT : Mr Justice Simon: Commercial court. 31st July 2003.

Introduction

1. This is an appeal against the interim final Arbitration Award of Mr. Christopher Moss made on 3rd September and amended on 28 October 2002. Leave to appeal was granted by Mr. Justice Morison on 7 March 2003.

2. Under a Charterparty on an amended New York Produce Exchange form dated 26 April 1999, *The Dynamic* was chartered by the Claimants (the Owners) to the Respondents (the Charterers) for a time charter trip carrying a cargo of bulk cement and bulk clinker from Dalian in the People's Republic of China to, in the event, Myrtle Grove on the Mississippi River. She was delivered under the Charter at 23.06 hours on 28 April 1999 and proceeded from Dalian to Kosichang and then to Singapore, where she was delayed while repairs were made to the main engine. It is common ground that she was off hire during the time spent carrying out these repairs. From Singapore the vessel sailed for Myrtle Grove via the Cape of Good Hope. The vessel arrived at Myrtle Grove on the 28 July and completed discharge on 3 August at around midday. In the meantime, on 2 August, the Charterers arrested the vessel to obtain security for various performance claims. Those claims were subsequently arbitrated. Apart for a claim for US$1,250 for off-hire and deviation to Cape Town, the Charterers' counterclaims were dismissed by the Arbitrator.

3. During the course of the evening of the 3 August 1999 the vessel was ordered to shift to Nine Mile Anchorage. The vessel remained under arrest till 14.30 hours on 17 August. No claim for wrongful arrest was made in the Arbitration; but the Owners claimed that the vessel remained on hire from 3 August until the time of her release from arrest on 17 August. The Charterers maintained that re-delivery had taken place at 1220 hours on 3 August, shortly after completion of discharge.

The terms of the Charterparty

4. The terms of the charterparty so far as they are relevant are as follows:

   Clause 4:

   "That Charterers shall pay for the use and hire of the said Vessel at the rate of US$3,000/day or pro rata … commencing on and from the date of her delivery … to continue until the hour of the day of her redelivery … See Clause 88."

   Clause 34:

   "In the event of loss of time, either in port or at sea, deviation from the course of the voyage or putting back whilst on voyage, caused by sickness of or an accident to or misconduct by Master/Officers/Crew … the hire shall be suspended from the time of inefficiency in port or at sea, deviation or putting back until vessel is again in same or equivalent position for the port where vessel was originally destined and voyage resumed therefrom, and all directly related expenses incurred including bunkers consumed during the such period of suspension, shall be for Owners' account."

   Clause 60:

   "Should the vessel be arrested during the currency of this Charter party at the suit of any persons having, or purporting to have, a claim against or any interest in the vessel, hire under this Charter party shall not be payable in respect of any period whilst the vessel remaining under arrest or remains unemployed as the result of such arrest. However if the arrest is the consequence of an act or omission by Charterers and/or their agents and/or their servants hire to continue."

   Clause 88:

   "Redelivery: dropping last outbound sea pilot safe port US Gulf, if Mississippi River, redelivery when ready in Owners' option."

The issues

5. The following issues arise on this appeal:

   (1) Whether, on the proper construction of clause 60 of the charterparty, the vessel was off hire during the period when she was arrested by the Charterers?

   (2) Whether the vessel was contractually redelivered by the Charterers and, if not, whether Charterers were in breach of contract in redelivering the vessel?

   (3) Whether, if the vessel was re-delivered in breach of contract, the Charterers thereby repudiated the charterparty?

   (4) It being common ground that the Owners did not accept the repudiation, whether Owners are to be treated as bound, as a matter of law, to accept Charterers' repudiation and sue for such damages as they suffered?

   (5) Whether the Owners were entitled to recover damages for repudiatory breach equivalent to the hire for the period of the arrest?

The Award

6. At §2 of the Award the Arbitrator said: *"What was, on its face, a routine end of charter dispute involving a modest amount of money by contemporary standards, contained a number of difficult issues which led to extraordinarily lengthy and detailed submissions … This struck me as being a very good example of a case which would have benefited from a short oral hearing at which both sides would have been obliged to state their final positions on the issues and to have been prepared to confront squarely the case put by their opponents. As it was, the position of both parties seemed to me to shift during the course of the submissions and a number of 'loose ends' remained even by the close of the submissions."*

7. In my view the Arbitrator was fully justified in saying that there should have been a short oral hearing in this case: the legal issues were not straightforward, the written submissions were elaborate and the arguments changed in the course of protracted correspondence. Unfortunately, the protean nature of the dispute was reflected in some elusive passages in the Reasons.

8. It was common ground that, under the applicable LMAA rules, once the parties had agreed that the arbitration was to be conducted by way of written submissions, the arbitrator was not able to call for an oral hearing. Any inflexible approach to the way in which arbitrations are conducted is, in my view, undesirable. Many cases will be suitable for disposal on the basis of written submissions; however there may be some which appear to be suitable but which, on proper analysis, will prove not to be so. The parties should be alert to the convenience of a short oral hearing; and, if necessary, the Arbitrator should be empowered to order such a hearing. Although this case concerns a relatively small amount of money, costs were incurred which might have been avoided if the Arbitrator had been vested with powers which enabled him to call for a short oral hearing, rather than have to rely on discursive written submissions with the attendant risk that key points may be overlooked.

9. On Issue (1) the Arbitrator held that the arrest was the consequence of an act by the Charterers and that, in these circumstances, hire continued to be paid under the Charter party. On Issue (2), the Arbitrator implicitly found that the purported re-delivery was not effective and was a breach of Charter party. On Issue (3), he implicitly decided that such breach was repudiatory of the contract. On Issue (4), he found that the Owners were entitled to damages for breach of charter, if any, but not hire. Finally, on Issue (5), he decided that Owners were not entitled to recover damages for the breach of charter since they had not suffered any loss. It will be necessary to return in more detail to the Reasons when dealing with the specific issues.

The Issues

Issue (1) Whether, on the proper construction of clause 60 of the Charterparty, the vessel was off hire during the period when she was arrested by the Charterers?

10. The Arbitrator's reasons for deciding that the Charterers could not rely on clause 60 to put the vessel off-hire are set out at §11-13 of the Reasons. In summary, he said that he had never come across a case in which Charterers had arrested a vessel to obtain security prior to redelivery, and that the clause was primarily directed to arrests by third parties. The intention was that Charterers should not be liable for hire if their use of the vessel was interrupted by an arrest which was in no way connected with them; but could not rely on their own interference with the operation of the vessel to allow them to avoid liability for hire. He found that Charterers were liable for hire under Clause 60 if there was an arrest during the currency of the Charterparty and the arrest was the consequence of a deliberate act or omission by Charterers or their agents.

11. Mr Khurshid (for the Charterers) submitted that the focus of clause 60 was the cause of the arrest. If the vessel was arrested, as in this case, by someone having (or purporting to have), a claim against the vessel, then hire ceased; and it made no difference who made the claim. The identity of the Charterers as the arresting party was simply irrelevant. The second sentence only came into operation if the underlying cause of the arrest was the consequence of the act or omission of the Charterers. He also submitted that this construction made good commercial sense because, if hire was suspended when the arrest was procured by the charterer, there would be no incentive for the owner to put up security to procure the release of the vessel.

12. Ms Sabben-Clare (for the Owners) submitted that the Arbitrator's construction was correct. He had given a natural meaning to the words of Clause 60 and had considered the commercial effect of the Clause. She also relied on the warnings of Lord Mustill in ***the Gregos*** [1995] 1 Lloyd's Rep 1 at 7-8 against speculating on the practical outcome of one construction or another.

13. When considering the operation of an off-hire clause, it is necessary to have in mind the cautionary observation of Kerr J in ***the Mareva A.S.*** [1977] 1 Lloyd's Rep 368 at 381, in the context of Clause 15 of the NYPE form: *"It is settled law that prima facie hire is payable continuously and that it is for the Charterers to bring themselves clearly within the off-hire clause if they contend that hire ceases",* see also ***Royal Greek Government v. Minister of Transport*** (1948) 82 Ll.L. Rep.196, Bucknill LJ at 199.

14. In my judgment, this clause was never intended to deal with an arrest by the Charterer during the currency of the Charterparty. If the Charterers wished to avoid paying hire when they had themselves arrested the vessel during the currency of the Charterparty, then very much clearer words would have been required. The view of the Arbitrator on the proper construction of Clause 60 discloses no error of approach and was a decision he was plainly entitled to reach. Furthermore, there is nothing in the Reasons to suggest that this experienced Commercial Arbitrator was not alive to the commercial consequences of the construction he favoured. For these reasons, I reject the Charterers's appeal on this issue.

Issue (2), whether the vessel was contractually redelivered by the Charterers and, if not, whether Charterers were in breach of contract in re-delivering the vessel; and

Issue (3), whether, if the vessel was re-delivered in breach of charter party, that constituted a repudiation of the Charterparty?

15. Owners' case on this appeal was that any purported redelivery was not made in breach of the Charterparty terms; and that, if it was a breach, it was not a repudiatory breach. Owners submit that, in these circumstances, the Charterers obligation to pay hire continued.

16. Ms Sabben-Clare drew attention to the lack of any findings as to these points in the Reasons and an apparent gap in the reasoning. At §21 of the Reasons the Arbitrator said this: *"If the Charterparty was not terminated in accordance with its terms, the only alternative conclusion was that the Charterers were in repudiatory breach."*

17. It is unnecessary to go further into the details of Owners' argument, because I am satisfied that Mr Khurshid is correct in his submission that there is a short answer to these points. The reason why there were no relevant findings on these issues was because, in their submissions, both sides acted on the basis that the Charterers were in repudiatory breach of the Charterparty. This is clear from the correspondence and explains the lack of detailed findings that one might otherwise expect. These were not issues that the Arbitrator was asked to decide and, in these circumstances, it is not open to the Owners to rely on his failure to decide the points in their favour.

18. I therefore reject Owners' appeal on these two issues.

Issue (4), it being common ground that the Owners did not accept the repudiation, whether Owners were bound, as a matter of law, to accept Charterers' repudiation and sue for such damages as they suffered?

19. In ***White and Carter (Councils) Ltd v. McGregor*** [1962] AC (HL. Sc) 413 the House of Lords held by a majority that, where a party is in renunciatory breach of contract, the other party is not bound to accept the breach and sue for damages, but may perform its own obligations under the contract and claim what is due under the contract. Lord Reid expressed the general rule: *"The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and in England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."*

    He also described an exception to the general rule: *"It may well be that, if it can be shown that a person has no legitimate interest financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself."*

    On the facts of the case, Lord Reid held that the contract-breaker could not take advantage of the exception: *"Here the respondent did not set out to prove that the appellants have no legitimate interest in completing the contract and claiming the contract price rather than claiming damages; there is nothing in the findings of fact to support such a case and it seems improbable that any such case could have been proved. It is, in my judgment, impossible to say that the appellants should be deprived of their right to claim the contract price merely because the benefit to them as against claiming damages and reletting their advertising space, might be small in comparison with the loss to the respondent…."*

20. In ***Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei GmbH, (The Puerto Buitrago)*** [1976] 1 Lloyd's Rep 250, the Court of Appeal proceeded on the basis that the contract-breaker was able to prove that the other party had no legitimate interest in preserving the Charterparty and claiming charter hire rather claiming damages, see Orr LJ at p.256l.

21. The judgments in ***The Puerto Buitrago*** and an earlier case, ***Decro-Wall International SA v. Practitioners in Marketing Ltd*** [1971] 1WLR 361, were considered by Kerr J in ***Gator Shipping v. Trans-Asiatic Oil Ltd SA and Occidendal Shipping Establishment, (The Odenfeld)*** [1978] 2 Lloyd's Rep 357 at 373r:

    "All three judgments proceeded on the basis that the owner's contention must fail because it amounted to an attempt to enforce the charter by a specific performance and because, on the extreme facts of that case, it was wholly unreasonable to the owners to seek to hold the Charterers to the charter instead of claiming such damages as they could establish. I emphasise the latter part of what I regard as the ratio of the judgments, because I do not regard the case as any authority for a general proposition to the effect that whenever the Charterer repudiates a time or demise charter for whatever reason and in whatever circumstances, the owners are always bound to take the vessel back, because a refusal to do so would be equivalent to seeking an order for specific performance. The consequences of such a proposition would be extremely serious in many cases, and no trace of such a doctrine is to be found in our shipping laws. No such general proposition was laid down. One only has to read the judgment of Lord Denning MR, with which Lord Justices Orr and Browne agreed, to see that his conclusion was based on the extreme facts of the case. In saying this I am in no way belittling the importance of the case in so far as it is a presently binding authority on this court in limiting or qualifying the generality of the principal of a virtually unfettered right of election in favour of the innocent party. This had been stated in the speech of Lord Hodson, and was evidently accepted, subject to the practicalities of the situation, by all three members of the Court of Appeal in the Decro-Wall case. It must be accepted in this court that the generality of this principal is qualified by the later Atticus Sea Carriers decision, since all three judgments deal with the White and Carter case and the Decro-Wall case is also expressly referred to in the judgments of Lords Justices Orr and Browne. However, what was decided in the Atticus Sea Carrier case, to use the language of Lord Justice Orr at the end of his judgment, was that the passages in the judgments in the Decro-Wall case did not apply "in the very different circumstances of this case". It follows that any fetter on the innocent party's right of election whether or not to accept a repudiation will only be applied in extreme cases, viz. where damages would be an adequate remedy and where an election to keep the contract alive would be wholly unreasonable."

    Kerr J then considered the various factors which might be relevant. These included the inability of the owner to find comparable employment and the difficulty in establishing damages.

22. In ***Clea Shipping Corporation v. Bulk Oil International Ltd, (The Alaskan Trader) (No.2)*** [1983] 2 Lloyd's Rep 645 at 651l, Lloyd J considered whether the contract-breaker had to show that the innocent party was acting unreasonably or wholly unreasonably. *"… for reasons already mentioned, it seems to me that this Court is bound to hold that there is some fetter, if only in extreme cases; and for want of a better way of describing that fetter, it is safest for this Court to use the language of Lord Reid, which, as I have already mentioned, was adopted by a majority of the Court of Appeal in **The Puerto Buitrago."***

I agree with that conclusion. Although, the use of the qualifying word *wholly* in the expression *wholly unreasonable* in ***The Odenfeld*** properly emphasises that the rule is general and the exception only applies in extreme cases, it adds nothing to the test; see also, ***Stocznia Gdanska SA v. Latvian Shipping Co and others*** [1995] 2 Lloyd's Rep 572 (Clarke J), at 602l, and [1996] 2 Lloyd's Rep 132 (CA), at 138r-139l.

23. These cases establish the following exception to the general rule that the innocent party has an option whether or not to accept a repudiation:
   i) The burden is on the contract-breaker to show that the innocent party has no legitimate interest in performing the contract rather than claiming damages.
   ii) This burden is not discharged merely by showing that the benefit to the other party is small in comparison to the loss to the contract breaker.
   iii) The exception to the general rule applies only in extreme cases: where damages would be an adequate remedy and where an election to keep the contract alive would be unreasonable.

24. Although criticism has been made of the general rule and the limitations on the exception, see for example ***The Alaskan Trader (No.2)*** at 651r and *Treitel, The Law of Contract, 10th Ed. p.947-949*, the principles which I have attempted to summarise are well established and are binding on the Arbitrator.

25. The question then is: did the Arbitrator correctly apply these principles? At §22 of the Reasons the Arbitrator said this: *"Although it was argued on behalf of owners that electing to keep the contract alive would not be wholly unreasonable in these circumstances where they could not accept the repudiation and find alternative employment for the vessel because she was under arrest, that did not seem to me to amount to a reason for doubting my conclusion that their remedy was in damages."*

26. Ms Sabben-Clare submitted that this was a misstatement and misapplication of the law. By the end of his submissions Mr Khurshid accepted that there was a lack of clarity on this issue in the Award and that, for this reason, the Award should be remitted. The reason for the lack of clarity lies in part on the unsatisfactory way in which the arbitration proceeded; but, in the absence of indications that the Arbitrator applied the relevant legal principles (and in the light of indications to the contrary), I have concluded that the matter must be remitted so as to enable him to do so.

Issue (5) Whether the Owners were entitled to recover damages for repudiatory breach equivalent to the hire for the period of the arrest?

27. This issue only arises if the answer to Issue (4) is: "Yes". The Arbitrator held that the Owners were not entitled to claim damages because they could not show any loss. Again, confusion was caused by the way in which the Arbitration was conducted. In order to support a claim in excess of the charter rate, Owners produced a 'voyage result' calculation which showed that the vessel earned a calculated rate of US$6,311 per day under a subsequent fixture. The subsequent fixture was a voyage charter from New Orleans to Beirut. The *'voyage result'* was calculated on the basis of a voyage which notionally began on 3 August. At §25 of the Reasons, the Arbitrator held that the period of arrest (from 3 to 17 August) *"had to be taken into account as part of the subsequent fixture";* and, at §35, referred to the Owner's evidence *"that the vessel was – as a matter of law – earning a time charter equivalent in excess of charterparty hire"*.

28. Ms Sabben-Clare submitted that, in these passages, the Arbitrator clearly adopted an erroneous approach to the calculation of damages. She submits that, but for the repudiatory breach of contract, the vessel would have earned hire until 17 August; and that, while under arrest, the vessel could not be employed

29. Mr Khurshid's response was that the Arbitrator had treated the delay in the Mississippi prior to the subsequent voyage as part of the process of earning freight; and that time spent in the Mississippi prior to the laycan date on the subsequent voyage was a period when the vessel would not have been earning even if the repudiation had not occurred.

30. The broad aim of damages for breach of contract is to put the claimant into the position it would have been if the contract had been performed. If the Charterparty had been performed, the vessel would have been redelivered under Clauses 4 and 88. The Owners' damages should therefore be calculated by reference to the hire that would have been earned up to the moment of contractual redelivery. Any further losses were not caused by the repudiation, but by the effect of the arrest, which has given rise to the extra-contractual claim presently before the US Courts.

Conclusion

31. For these reasons I propose to remit the Award for further consideration of issues (4) and (5) in the light of this Judgment.

Ms Rebecca Sabben-Clare (instructed by Middleton Potts) for the Claimant Owners
Mr Jawdat Khurshid (instructed by Richards Butler) for the Defendant Charterers