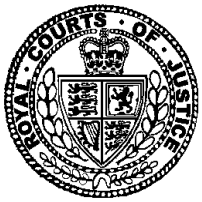

Neutral Citation Number: [2023] EWHC 105 (Comm)

Case No: CL-2022-000017

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

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 24/01/2023

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

FASTFREIGHT PTE LTD	**Claimants/ Charterers**
- and -	
BULK TRIDENT SHIPPING LTD	**Defendants/ Owners**

- -
- -

Patrick Dunn-Walsh (instructed by **MFB Solicitors LLP**) for the **Claimants**
Henry Byam-Cook KC (instructed by **Holman Fenwick Willan LLP**) for the **Defendants**

Hearing dates: 29 and 30 November 2022
Draft Judgment circulated to the parties: 3 January 2023

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.

.....

Mr Justice Henshaw:

(A) INTRODUCTION

1. This is an appeal on a question of law under section 69 of the Arbitration Act 1996, relating to a Partial Final Award dated 20 December 2021 ("***the Award***") under which two maritime arbitrators awarded the Owners US$2,147,717.79 (together with interest and costs) in respect of unpaid hire under a time charter.

2. The question of law on which permission to appeal was granted by Andrew Baker J is:

> "Where a charterparty clause provides that no deductions from hire (including for off-hire or alleged off-hire) may be made without the shipowner's consent: Is non-payment of hire a 'deduction' if the Vessel is off hire at the instalment date?

3. Having considered the Award and counsel's written and oral submissions, I have concluded that, at least on the charterparty terms and facts in the present case, the answer is 'yes'; that the arbitrators were correct to make their award in favour of the Owners; and that the appeal must be dismissed.

(B) BASIC FACTS AND KEY CHARTERPARTY TERMS

4. The Owners chartered their vessel, the "*Anna Dorothea*", to the Charterers by a trip time charter for the carriage of a bulk cargo from East Coast, India to China. The contractual documents comprised a fixture recap email dated 13 April 2021, which set out the main terms of the contract and incorporated a heavily amended New York Produce Exchange (NYPE) 1993 form wording, with certain additional clauses attached.

5. The Charterers agreed to pay hire for the use of the vessel at the rate of US$20,000 per day, with instalments of hire to be paid every five days in advance (§ 11 of the recap). Further details concerning hire were set out in clauses 10 and 11 of the incorporated NYPE form.

6. Clause 10 was headed "*Rate of Hire/Redelivery Areas and Notices*". So far as relevant, it provided that:

> "The Charterers shall pay for the use and hire of the said Vessel at the rate of [US$20,000] per day pro rata… Charterers to pay first 20 days hire without value of bunker within 3 banking days of vessel's delivery and thereafter every 5 days in advance or up to redelivery which ever is earlier. U.S. currency, commencing on and from the day of her delivery…until the hour of the day of her redelivery…".

7. Clause 11 was headed "*Hire Payment*" and provided:

> "(a) Payment
>
> Payment of Hire shall be made so as to be received by the Owners or their designated payee in cash in to Owners' bank account in Germany…
>
> 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…
>
> in United States Currency, in funds available to the Owners on the due date [5 days in advance] … Failing the punctual and regular payment of hire…the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims they (the Owners) may otherwise have on the Charterers.
>
> At any time while the hire or any amount is outstanding … the Owners shall, without prejudice to the liberty to withdraw, be entitled to withhold the performance of any and all of their obligations hereunder … and hire shall continue to accrue …
>
> …
>
> (b) Grace Period
>
> Where there is failure to make punctual and regular payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Charterers shall be given by the Owners 3 banking days written notice to rectify the failure, and when so rectified within those 3 banking days following the Owners' notice, the payment shall stand as regular and punctual. …"
>
> (my emphasis)

The paragraph underlined above was printed at line 146 of the amended NYPE terms and is referred to as "***line 146***" in the Award and the parties' submissions.

8. Clause 17, headed "*Off Hire*" stated:

> "In the event of loss of time from deficiency and/or default … of officers or crew … or by any other similar cause preventing the full working of the Vessel, the payment of hire and overtime, if any, shall cease for the time thereby lost. Should the Vessel deviate .. during a voyage, contrary to the orders or directions of the Charterers, … the hire is to be suspended from the time of her deviating .. until she is again in the same or equidistant position from the destination and the voyage resumed therefrom. …
>
> If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra provide directly related and actually paid expenses (always limited to one shift maximum) expenses [sic] … may be deducted from the hire only after having reached an agreement with the Owners on the figures (costs, times, bunkers)."

9. Clause 23 was headed "*Liens*" and dealt, among other things, with overpaid hire:

> "The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire and/or all demurrage and/or all dead freight and/or all damages detention and/or all other amounts due to Charterers for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once. …"

10. The charterparty also incorporated a set of Additional Clauses, including this one:

> "**Clause 67. <u>BIMCO terms</u>**
>
> Notwithstanding anything within this charter party, the riders, the recap, and/or the "BIMCO infections or contagious disease clause for time charter parties" and/or its equivalent, in the event any member of the crew or persons (except those on charterers' behalf) on board the vessel is found to be infected with a highly infectious or contagious disease and the vessel has to (i) deviate, (ii) be quarantined, or (iii) barred from entering any port, all time lost, delays and expenses whatsoever shall be on owners' account and the vessel shall be off-hire.
>
> …

> Owners are fully aware that vessel is fixed for one trip via East Coast India to China."

11. The vessel loaded a cargo of iron ore pellets at Visakhapatnam, India for carriage to China, and was ordered by the Charterers to sail to Lanqiao for discharge. It arrived off that port on 4 May 2021 but was not able to obtain a berth. In the event, the cargo was not discharged, and the vessel was not redelivered by the Charterers to the Owners until 28 August 2021.

12. Except for a period of five days between 22 and 26 May 2021, the Charterers did not pay any hire for the vessel between 4 May and 28 August 2021. They contended that the vessel went off-hire on 4 May 2021 and remained off-hire thereafter on the basis that three crew members had positive rapid lateral flow tests for Covid on 1 May 2021. The Charterers relied in this regard on clause 67 quoted above.

13. The Owners disputed that the vessel was off-hire for any of the period at issue, relying in particular on line 146, and 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.

(C) THE AWARD

14. The Owners and the Charterers respectively appointed two very experienced maritime arbitrators, Michael Baker-Harber (now, sadly, deceased) and Bruce Harris.

15. The arbitrators noted that there was a dispute about the underlying facts:

> "9. There is a dispute as to the precise situation on board the vessel concerning infection, and the facts in that regard will have to be investigated later in the arbitration if it proceeds. The owners contend that 3 crew members tested positive with rapid lateral flow tests on 1 May, 3 days before the vessel arrived off Lanquiao [*sic*], but 2 weeks after she had arrived at Visakhapatnam, which the owners said indicated that the crew in question were not infected when the vessel had arrived at that port.
>
> 10. It was impossible to arrange for PCR testing of those crewmembers, but on the owners' case if they had Covid-19 (lateral low tests not being wholly reliable) they had recovered by no later than 13 May, as their temperature records for that day and subsequent days showed. Meanwhile, the charterers asserted that the vessel went off hire on 4 May and remained off hire thereafter. They relied on clause 67, quoted above. This situation continued – subject to a brief excepted period referred to below – until 28 August when, the owners said, the agreed trip was completed, and the vessel redelivered. …"

The arbitrators noted that the Owners' position was that the Charterers could not rely on periods of alleged off hire to avoid paying hire if that had not been agreed by the Owners in writing: in other words, if it was disputed by the Owners.

16. The core of the arbitrators' reasoning was this:

> "15. Fundamental to the charterers' case was their contention that "deduction" in the line 146 insertion must mean "deduction from hire that is due". Were that limited, literal, meaning to be given to the word it seems to us that it would largely, if not entirely, emasculate the insertion, for it would be sufficient for a charterer simply to assert off-hire in order to justify non-payment. That, in our view, cannot be right. The clear intention, to our minds, is that charterers cannot withhold payment of hire without the owners' agreement. Commercial parties such as the owners and charterers here would understand "deduction" in this sense, and without the input of lawyers would be most unlikely to use a word such as "withhold" in their contract.
>
> 16. We have no doubt that the owners are right when they argue that, reading all the relevant terms of the charter together, as must plainly be done, line 146 only allows charterers to withhold payment of hire not simply if the vessel is actually off hire as at the date when the relevant instalment falls due, but also only where the owners agree in writing that the vessel is off hire. The terms of the insertion at line 146 in our view make the position entirely clear.
>
> 17. First there are the opening words "Notwithstanding of the terms and provisions hereof …". Then there is the express prohibition against deductions "for any reason under Clause 17 or otherwise". If that were not sufficiently clear, the parties agreed that it should apply whether there was actual or only alleged off hire: "(whether/or alleged off hire"). And they capped all that with "or any other cause whatsoever)"; all "without the express written agreement of Owners at Owners' discretion". Finally, the position was put beyond doubt by the words quoted at the end of paragraph 4 above [viz. "Deduction from the hire are never allowed except for estimated bunker on redelivery."]
>
> 18. The intention of this provision could hardly be clearer: if anything, it might be said to suffer from overkill. What is clear is that it considerably limits the effect of clause 17 and any other off-hire provisions in the charterparty so as to affect the question of actual payment of hire in accordance with the other provisions of clause 11, without of course preventing the charterers from ultimately claiming that the vessel was off hire at any particular time, and seeking a refund of any hire that they might have been obliged to pay because the owners had failed to give written consent to a deduction.
>
> 19. The charterers suggested that this consequence would be surprising, as it would mean that charterers have to pay hire, essentially by way of security, for a period when no hire might

> be due. However, whether or not it is surprising, that is what the parties agreed. And, contrary to the charterers' submissions, it is not hard to see why rational commercial actors would reach such a result. Indeed, such provisions are in our experience becoming increasingly common, no doubt because of the very frequent tendency of time charterers to withhold hire whenever they can on grounds which not infrequently turn out to be spurious. That is why, over the last forty years or so, we have seen numerous applications based on The Kostas Melas, most of which in our experience have succeeded.
>
> 20. This conclusion is also consistent with what follows in the charter, namely the owners' right to withdraw "failing the punctual and regular payment of the hire". The provision eliminates the uncertainty that would otherwise prevail in the event of a non-payment and the owners having to consider whether they were entitled to withdraw or not.
>
> 21. The charterers also argued that line 146 only covers cross-claims and set-offs. We agree with the owners that this cannot be right given the references to clause 17 and to alleged off-hire, for off-hire does not operate by way of a set-off or cross-claim.
>
> 22. The charterers said that whatever the position in relation to line 146, there had to be a genuine dispute in the light of the decision in The C Challenger [2020] EWHC 3448 (Comm). Assuming, without deciding, that this is correct, in our view there is nothing in this argument because there was in any event a genuine dispute, so the owners were entitled to withhold their written consent. Indeed, as things stand it is somewhat difficult to see on what basis it can be said that there was an off-hire situation for at least most of the period relied on by the charterers: disputing that position is certainly reasonable."
>
> (my interpolation in quoted § 17 above)

17. The arbitrators proceeded to explain why it was reasonable for the Owners to dispute the Charterers' position on the facts. They noted that whilst the Charterers claimed that the vessel was off-hire for almost four months, from 4 May to 28 August 2021, the evidence so far indicated that the problem was over by at least 13 May. They concluded that the Owners had reasonable grounds for disputing the claim that the vessel was off hire, and thus for refusing written permission to withhold hire.

18. The arbitrators distinguished Bingham J's decision in *Tradax Export v Dorada Compania Naviera (The "Lutetian")* [1982] 2 Lloyd's Rep. 140, on which the Charterers relied, as a case raising a different issue and where the contract contained nothing equivalent to line 146.

19. The arbitrators accordingly awarded the Owners the sum claimed by way of hire, without prejudice to the Charterers' right thereafter to counterclaim the whole or any

part of that sum, and reserved jurisdiction accordingly as well as jurisdiction to decide all other undetermined matters that had been referred to them.

(D) GENERAL PRINCIPLES TO BE APPLIED

20. Arbitration awards are to be interpreted in a reasonable and commercial way, rather than with a meticulous legal eye endeavouring to find inconsistencies and faults (*MRI Trading v Erdenet Mining Corp* [2013] EWCA Civ 156 § 23).

21. The charterparty itself is to be interpreted applying ordinary principles of contract interpretation. In brief summary:

    i) The court has to decide what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean. The court does this by focussing on the meaning of the relevant words in their documentary, factual and commercial context. The meaning has to be assessed in the light of (a) the natural and ordinary meaning of the clause, (b) any other relevant provisions of the contract, (c) the overall purpose of the clause and the contract, (d) the facts and circumstances known or assumed by the parties at the time that the contract was made, and (e) commercial common sense. (*Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 § 15).

    ii) The court has to ascertain the objective meaning of the language used, within the context of the contract as a whole and, depending on the nature, formality, and quality of the contract, give more or less weight to the wider context in reaching a view on objective meaning (*Wood v Capita Insurance Services* [2017] UKSC 24, [2017] AC 1173 § 10).

    iii) The unitary exercise of construction is an iterative process by which rival constructions are checked against the provisions of the contract, business common sense, and their commercial consequences. The extent to which each factor will assist the court in its task will vary according to the circumstances of the particular agreement. Sophisticated and complex agreements or those negotiated and prepared with the assistance of skilled professionals should be interpreted principally by textual analysis (*Wood v Capita* §§ 11-13).

    See also the summary by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] 1 Lloyd's Rep. 654 § 8.

22. The Charterers also highlight the statement in *Arnold* § 17 that:

> "… the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."

and the statement of Patten LJ in *Warborough Investments v Lunar Office SARL* [2018] EWCA Civ 427 that:

> "…it is normally safe to assume that the parties intended to give the words they chose their natural meaning. In particular, there is a danger in approaching the construction of the document with pre-conceived ideas about what the parties, acting commercially, are likely to have intended and to allow those ideas to subvert the clear language of the document". (§ 19)

23. The following principles are generally accepted in relation to payment of hire under a time charter:

i) Under a time charter the risk of delay is fundamentally on the charterer, who remains liable to pay hire unless relieved of the obligation under an off hire provision: *The Eleni P* [2019] EWHC 910 (Comm) § 11.

ii) An off hire clause is a form of exception clause. The burden lies on the charterer to bring itself within the plain words of the clause; and, all other things being equal, doubts as to the meaning of an off-hire clause are to be resolved in favour of the owner: *The Eleni P ibid.*.

iii) The charterer's obligation to pay hire on or before the due date is an absolute obligation. If hire is not paid punctually, then under § 11 of the NYPE form the owner has the right to withdraw the vessel, reflecting the importance to the owner of the regular receipt of hire: Coglin & others, "*Time Charters*" (7th ed., 2014) § 16.3 (citing case law referring to § 5 of the 1946 form, the equivalent of § 11 in the 1993 NYPE form).

iv) In the absence of express contrary provision, the owner is entitled to claim the full amount of any advance instalment of hire on the day it falls due, even if it is obvious that it will never be fully earned (e.g. because the vessel will be redelivered during the period covered by the hire payment). Likewise, a charterer cannot withhold hire on the basis that the vessel will be off hire during the period covered by the advance payment (e.g. because of an agreed, future period of repairs). This avoids the need for an estimate of the amount of hire that may be due in the forthcoming period, an estimate that is at risk of being falsified by events. This does not prejudice the charterer because it has a lien on the vessel for the amount of any overpayment (such lien was expressly provided by clause 23 of the NYPE form in this case): see *Carver on Charterparties* (2nd ed., 2021) § 7-454 and cases cited.

v) Absent any contractual scheme to the contrary, in the event of a dispute over off hire, a charterer may exercise a form of self-help by making deductions from the amount of hire that it pays. That can put pressure on the owner by interrupting anticipated cashflow, but it exposes the charterer to the risk of the owner withdrawing the vessel and the deduction from hire ultimately being held to have been unjustified.

vi) It was therefore necessary to find a way of determining, at least on an interim basis, (a) what deductions a charterer can make before risking withdrawal of the

vessel and (b) when an owner can demand immediate hire payment despite claims asserted by a charterer. The solution devised by the courts is to allow a charterer to make deductions on an interim basis only where it can establish that they were made both in good faith and on reasonable grounds at the time of deduction (those requirements applying whether the deduction is made pursuant to equitable set-off or an express term of the charterparty). If the charterer cannot show those requirements are satisfied, then it must pay the disputed hire to the owner on an interim basis, albeit without prejudice to its right to have its cross-claim against the owner determined in court or arbitration in the ordinary course: *Carver* §§ 7-511 to 7-512.

24. As to the effect of a clause similar to line 146, in *SK Shipping Europe v Capital VLCC 3 Corporation (The "C Challenger")* [2020] EWHC 3448 (Comm), Foxton J considered a clause providing that "*[c]harterers shall not deduct any monies from hire/earnings without Owners' written confirmation*". He accepted the charterer's argument that this created a contractual discretion which had to be exercised by the owner for a contractually appropriate purpose (viz a genuine dispute as the amount of any deduction) and rationally (§ 300). On the facts, he found that it would not have been rational for the owner to withhold its written confirmation to reasonably calculated deductions from hire in the circumstances that had arisen.

25. Finally, in relation to the impact (if any) of the decision in *The Lutetian*, "*the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong*": *Lornamead v Kaupthing* [2011] EWHC 2611 (Comm), § 53, *Coral Reef v Silverbond* [2016] EWHC 3844 (Ch) § 47. In *Lornamead*, Gloster J followed an earlier first instance decision despite doubts as to its correctness (see §§ 49-56).

(E) APPLICATION TO PRESENT CASE

26. The Owners submit that the question of law on which permission was given, quoted in § 2 above, does not arise out of the facts found by the arbitrators, because the arbitrators made no finding that the vessel was off hire at the date when the hire instalment fell due. I do not accept that submission. The essential question raised in the appeal is whether hire remains payable (absent owners' written agreement) even if it may later be determined, or agreed, that the vessel was off hire. The construction of the charterparty which the Owners advance must, therefore, be shown to be valid even if the vessel is in fact off hire at the relevant date, albeit the matter is disputed at the time.

27. The Owners also object that the Charterers' appeal wrongly focusses on the meaning of a single word, "*deduction*", divorced from its context; that the meaning of an individual word is a question of fact (*Chitty on Contracts* 34th ed., § 15-050); and that the Charterers cannot by an appeal on a question of law challenge the arbitrators' finding of fact that the word "*deduction*" in line 146 is wide enough to encompass both (i) deducting a sum from a larger sum of hire that was due; and (ii) withholding a hire instalment altogether. I do not accept that contention. As the Owners naturally accept, the legal effect of a clause in a contract is a question of law. The arbitrators' decision, properly construed, is as to the legal effect of line 146 as a whole, considered in its full context; and the Charterers' appeal is admissible as raising the question of law as to whether arbitrators' construction is correct.

28. Turning to the substance, the Charterers' criticisms of the arbitrators' approach can be summarised as follows.

    i) The arbitrators' basic error, which underlies their reasoning as a whole, was to start with the parties' assumed commercial objective, rather than the words the parties actually used, leading to the arbitrators rewriting their bargain.

    ii) The word 'deduction' in line 146 pre-supposes that a sum is due in the first place; a deduction can only be made where there is something to deduct from. It is basic and inherent in the meaning of deduction that there must be something to deduct from in the first place. Therefore, a charterer makes a 'deduction' when he subtracts a sum from an instalment of hire that has fallen due for payment. Examples would be subtracting a sum to cover port expenses, or deducting the amount of a previous overpaid hire payment paid in advance for a period during part of which the vessel turned out to be off hire.

    iii) Thus line 146's prohibition of deductions is an 'anti set-off' provision, restricting Charterers' ability to set off, against an accrued obligation to pay hire, sums owed to them. It does not restrict Charterers' right not to pay hire on the ground that the obligation to pay hire has not accrued.

    iv) Where the vessel is off hire at the date on which a hire instalment would otherwise fall due, the effect of § 17 of the charterparty (being the equivalent of § 15 of the 1946 NYPE form) is that the obligation to pay hire is suspended: see *The Lutetian*.

    v) If (contrary to the Charterers' primary submissions) there is any ambiguity, line 146 should be construed against the Owners, because *"if set-off is to be excluded by contract, clear and unambiguous language is required*": *FG Wilson (Engineering) Ltd v John Holt* [2012] EWHC 2477 (Comm) § 83 per Popplewell J. Line 146 as interpreted by the arbitrators is even more potent than an anti-set off clause, because it requires a payment that would not otherwise be due. On that view, it creates a 'hell or high water' absolute obligation to pay, overriding both the Charterers' rights of set-off and the effect of the off-hire clause. However, it fails clearly and unambiguously to say so.

    vi) The arbitrators were wrong to say in Award § 15 that commercial parties such as the Owners and Charterers here would understand "*deduction*" in line 146 to mean that the Charterers cannot withhold payment of hire without the Owners' agreement, and that without the input of lawyers they would be most unlikely to use a word such as "*withhold*" in their contract. There was no evidential basis to assume lack of lawyer involvement; the proper approach was to use the language's ordinary meaning; and in any event "*withhold*" is not an uncommon contractual word.

    vii) The arbitrators were wrong to consider that the emphatic language of line 146 ("*for any reason under clause 17 or otherwise*") supported their conclusion, because it sheds no light on the logically prior question of what the word "*deduction*" means.

viii) The arbitrators were also incorrect to reject the Charterers' submission – that line 146 applies only to set-offs and cross-claims – on the basis that "*off-hire does not operate by way of a set-off or cross-claim*". The last phrase of § 23 of the charterparty provided that "*any overpaid hire or excess deposit was to be returned at once*"; and, as noted in Carver § 7-462:

> "*if the vessel is off-hire for all or part of a period for which payment has been made in advance, the charterer can recover the amount of any overpayment… In practice, any overpayment is deducted from the next instalment of hire but if necessary it can be recovered by action*".

That is the type of deduction (correctly so termed in *Carver*) at which line 146 is directed.

ix) The Charterers' interpretation of line 146 does not 'emasculate' line 146 as the arbitrators suggested. It still heavily cuts back the valuable set-off right which the Charterers would otherwise have.

x) The arbitrators were wrong to suggest, in Award § 19, that such clauses are seen as necessary to prevent a charterer from withholding payment on spurious grounds: were a charterer to do so, the owner would still be entitled to bring a claim of the kind brought in the present case.

29. In further support of point (ii) above, the Charterers point out that "*deduction*" has been used in the sense for which they contend in the context of charterparties. For example:

i) In *The Trident Beauty* [1994] 1 WLR 161, 163H-164A, Lord Goff said, "*given the circumstances [in that case] that the charter hire was payable in advance and that the ship might be off hire under one or other of the relevant clauses during a period in respect of which hire had been paid, it was inevitable that, from time to time, there might have to be an adjustment of the hire so paid. … The usual practice is, I understand, for an adjustment to be made when the next instalment of hire falls due, by making a deduction from such instalment in respect of hire previously paid in advance which has not been earned…."*; and

ii) *Carver ibid.* § 7-462 states: "*if the vessel is off-hire for all or part of a period for which payment has been made in advance, the charterer can recover the amount of any overpayment… In practice, any overpayment is deducted from the next instalment of hire but if necessary it can be recovered by action*".

30. Conversely, the word "*withholding*", which would have fitted the meaning for which the Owners contend, is not uncommonly used in contracts. For example:

i) In *BOC Group v Centeon LLC* [1999] 1 All ER (Comm) 970, the Court of Appeal held that a clause providing for payment to be "*absolute and unconditional and shall not be affected by … any other matter whatsoever*" was not adequate to exclude rights of set off. Evans LJ noted (at 980b) that "[t]*here is not necessarily a magic formula, but words such as "payment in full without deduction or withholding of any sort" <u>are all familiar in contexts such as this.</u>*

> *The failure of the parties to use any such words amounts to an eloquent silence*." (emphasis added);

ii) That statement was applied in *Lotus Cars v Marcassus* [2019] EWHC 3128 (Comm), where a clause provided that "[t]*he Dealer shall pay in full cleared funds without deduction, withholding, or qualification*". Phillips J held that wording to be "*more than wide enough*" to exclude rights of set off (§ 34).

31. As to point (iv) in § 28 above, Bingham J held in *The Lutetian* that, under the printed version of the NYPE 1946 form (similar in relevant respects to the current printed form), a hire instalment is not payable if the vessel is in fact off hire on the due date for payment of the instalment. There was no wording in the charterparty there equivalent to line 146. There was also no dispute in *The Lutetian* that the vessel was off hire on the relevant date.

32. I begin with points (i)-(iii) in § 28 above, focussing on the language used by the parties, read in the context of the terms of the charterparty as a whole.

33. Line 146 is embedded in the middle of the hire payment clause, § 11, which tends to underline its importance in the scheme of the charterparty payment provisions, as reinforced by its opening words "*Notwithstanding of the terms and provisions hereof*". It is notable that, whilst making clear its overall breadth of application, line 146 singles out § 17, the off hire provision, as one which it qualifies. That is significant because § 17 is not primarily directed at allowing the offsetting of overpaid hire: it is, rather, § 23 that states the Charterers' right to have any overpaid hire returned at once, and to a lien on the vessel for all monies paid in advance and not earned. § 17 is mainly directed at the prior question of whether hire accrues or ceases to accrue at all.

34. The only part of § 17 specifically directed at the making of deductions in the sense of subtractions from hire payments otherwise due is the last portion:

> "If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra provide directly related and actually paid expenses (always limited to one shift maximum) expenses [sic] … may be deducted from the hire only after having reached an agreement with the Owners on the figures (costs, times, bunkers)."

However, that portion of § 17 clearly includes its own bespoke provision requiring the Owners' written agreement.

35. The wording of line 146, *"no deductions from hire may be made for any reason under Clause 17 or otherwise (whether … alleged off-hire underperformance, overconsumption or any other cause whatsoever) …"*, indicates that it is directed at the whole of § 17: not merely at deductions under the portion quoted in § 34 above (which would make little sense anyway given that that portion already contains its own prohibition on deductions without the Owners' consent), and not merely at deductions pursuant to the right to recover overpaid hire provided for in § 23.

36. In other words, read as a whole and in context, the restriction on "*deductions*" in line 146 applies to any exercise of rights that would otherwise arise under or by reason of § 17 to reduce (wholly or partly) a hire payment based on the vessel being off hire. The fact that § 17, as a whole, is a primary target of line 146 clearly indicates that line 146 is intended to restrict *inter alia* such rights as would otherwise arise under § 17 to refuse to make a hire payment.

37. For completeness, that view is also at least consistent with the use of the words *"whether/ or alleged off hire …"* (which I suspect to be a typo for "*whether for alleged off hire*", though it does not matter). The word "*alleged*" connotes a situation where the vessel is said to be off hire, but that may or may not ultimately be found to have been the case. It underlines the point that line 146 is designed to cater for situations where a dispute exists about whether the vessel is off hire or not, and to address the situation by requiring the hire to be paid, leaving the argument for later. It seems unlikely that the parties intended to deal in this way with disputes about whether an off hire period gave rise to a right to make a deduction from a future hire payment, but not disputes about whether a current or anticipated alleged off hire situation gave rise to a right to refrain from paying a hire instalment in the first place.

38. As the arbitrators pointed out, there are good commercial reasons for such a clause to be inserted, to protect owners from losing critical hire income based on potentially spurious allegations that the vessel is off hire: see Award § 19. Conversely, charterers retain important remedies, as the Owners point out. The Owners do not have an unfettered discretion when deciding whether or not to agree to an alleged off-hire: as noted earlier, they have to exercise their discretion for a contractually appropriate purpose (so there has to be a genuine dispute about the deduction) and rationally. Further, under § 23 the Charterers have a cross-claim in debt for any overpaid hire ("*any overpaid hire or excess deposit to be returned at once*"), and that cross-claim is secured by a lien on the vessel because it would fall within the words *"monies paid in advance and not earned"* in § 23.

39. Turning to other points made by the Charterers against the arbitrators' approach,

    i) I do not consider there to be any ambiguity, so as to make it necessary to resort to presumptions of the kind referred to in *FG Wilson (Engineering) Ltd*. I also note that at § 85 of that case, Popplewell J added that "*[t]he draftsman's intention must be ascertained from the totality of the language which has been used*" and "*where the provision does expressly qualify the payment obligation, it may readily be construed as sufficiently clear to be effective*". By analogy, line 146 here expressly qualifies the off hire provision and reinforces the § 11 payment obligation.

    ii) Having regard to the slightly slipshod drafting of the amendments to the charterparty, I suspect that the arbitrators were right to assume that they were not drafted by lawyers. Further, the examples cited by the Charterers of the use of the word "*withhold*" both involved contracts very likely to have been drafted by lawyers. In any event, I do not regard these points as critical. The key point is how the word "*deduction*", in the context of line 146 and the charterparty as a whole, should be interpreted.

iii) I do not agree that the arbitrators were wrong to consider that the emphatic language of line 146 ("*for any reason under clause 17 or otherwise*") supported their conclusion. It does help shed light on the question of what the word "*deduction*" means, because it supports the view that line 146 is directed at, *inter alia*, the effect which § 17 as a whole would otherwise have.

iv) I also do not agree that the arbitrators were incorrect to reject Charterers' submission, that line 146 applies only to set-offs and cross-claims, on the basis that "*off-hire does not operate by way of a set-off or cross-claim*". I agree with the Charterers that the last phrase of § 23, and *Carver* § 7-462, indicate that a right to offset overpaid hire arises. However, § 17 is broader in effect than that, so the fact that line 146 specifically restricts the application of § 17 supports the arbitrators' conclusion.

v) The arbitrators were right, in my view, to consider that the Charterers' approach to line 146 would substantially undermine it. Though a set-off right restriction would be of some importance, it would be considerably less effective than a right for the Owner to receive hire payments without the risk of the Charterer declining to pay hire on the due date. Such a right is perhaps particularly important when hire is payable every 5 days: an alleged off hire period of any significant duration would, on Charterers' approach, quickly lead to cession of hire payments on their due dates, making a restriction on offsets largely irrelevant.

vi) I do not accept Charterers' contention that the Owners are adequately protected by the right to bring a claim of the kind brought in the present case. Even using the speedy procedure deployed in this case, it took months for the Owners to receive, on 20 December 2021, an arbitration award in respect of hire left unpaid in May, June, July and August 2021 (which, incidentally, counsel for the Owners informed me remains unpaid). Those actual events merely illustrate what would be apparent at the time of contracting, namely that any arbitral remedy would take at least several months. In the meantime, of course, all the Owners' usual expenses of running and financing the vessel will have continued to be incurred.

40. The Owners raised the further point that the Charterers did not originally (when the vessel was said to be off hire) rely on § 17 but only on § 67, which states that *"the vessel shall be off-hire"* but does not include the wording considered in *The Lutetian* about the payment of hire ceasing. The Charterers respond that where § 67 applies, the vessel is also off hire under § 17; and the arbitrators considered both clauses. Given my conclusions above, which are adverse to the Charterers even if they would be entitled to rely on § 17, it is unnecessary to consider this point further.

41. The conclusions I have reached make it unnecessary to consider whether or not I should follow the decision in *The Lutetian* that where the vessel is off hire at the date on which a hire instalment would otherwise fall due, the effect of what is now § 17 of the charterparty is that the obligation to pay hire is suspended.

42. *The Lutetian* clearly cannot be dispositive of the present case, because it contained no equivalent to line 146. Indeed, it might be thought that one of the reasons for including line 146 is to address the effect that § 17, as interpreted in *The Lutetian*, would otherwise

have: though it is unnecessary to reach any such conclusion in order to decide the present case.

43. The Charterers note that Bingham J observed at p.149 rhc of that case that there is "*a contrast between deduction from the hire in this instance and cessation of payment in the other*", which they say supports their view that the word "*deduction*" in line 146 does not include cessation of payment pursuant to § 17 based on the vessel being off hire. I do not agree. That passage of the judgment concerned a point made about the last portion of § 15 of the 1946 NYPE form, which was in terms similar to the final portion of current § 17 and stated:

> "and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and extra expenses shall be deducted from the hire."

The submission made to Bingham J by Mr Anthony Evans QC was presumably to point out that the example of a mere partial off hire event indicated that § 15 did not envisage the charterer being allowed to decline to pay hire. Bingham J stated:

> "Mr. Evans drew attention to the closing words of cl. 15, dealing with loss of time due to reduction in speed. But I do not think these words help him. The clause is there concerned with a partial, not a complete, loss of service over a period. This could only practically be dealt with by deduction. There is, however, a contrast between deduction from the hire in this instance and cessation of payment in the other."

44. Thus Bingham J used the word 'deduction', in the sense of subtraction from an amount otherwise due, to refer to the reduction/offsetting process provided for in the last portion of what is now § 17, and 'cessation of payment' to refer to the effect (as he found it to be) of the preceding part of § 17. It would, however, be fallacious to conclude that the word 'deduction' in line 146 must be similarly restricted. As I have already explained, line 146 is clearly intended to qualify § 17 as a whole; and, moreover, it would make little sense to confine it to the last portion of § 17 since that portion already makes provision for owners' agreement. Line 146, construed in the context of the charterparty in the present case, in my judgment has the effect for which the Owners contend.

45. As to the decision in *The Lutetian* itself, its essential reasoning was that there was no reason to confine the words *"the payment of hire shall cease for the time thereby lost"* in § 15 (now § 17) to the accrual of hire under § 4 (now § 10) to the exclusion of the payment of hire under § 5 (now § 11). The judge considered that that terminology would be surprising if the draftsman intended to convey that, whilst hire would cease to accrue, actual payment of hire would continue. Further, the judge rejected the submission that the words *"for the time thereby lost"* merely meant 'in respect of the time thereby lost' as distinct from 'during the time thereby lost'. Bingham J indicated at p.150 rhc that he did not find the construction of § 15 free from difficulty, but found the charterers' construction to accord more closely with the language used; adding that it was *"not, to my mind, in any way unlikely that the parties intended the owners to be*

secured by payment in advance in respect of hire which he would or might earn but not in respect of hire which he could never earn".

46. This last passage might be taken to suggest, as the Owners here submit, that *The Lutetian* does not apply where, as in the present case, there is a dispute about whether or not the vessel is off hire. The Charterers respond that the contractual wording cannot have different meanings depending on whether or not the owners dispute that the vessel is off hire. The Owners also point out potential difficulties with the decision in *The Lutetian* as applied, for example, to situations where a vessel is only partially off hire (for instance, due to breakdown of one of its cranes or other equipment). Such instances, the Owners submit, show that the words "*for the time thereby lost*" mean 'in respect of the time thereby lost'. More generally, § 17 compensates the charterer for net loss of time, which may not be a period of complete delay and can often be assessed only retrospectively. Further, it is suggested, the word "*cease*" § 17 applies more naturally to the concept of accrual of hire than to the obligation to make hire payments. The Owners add that *The Lutetian* has been the subject of criticism or doubt in *Time Charters* (§ 16.18) and *Carver* (§ 7-454 footnote 932).

47. In my view these issues are better explored in a case where they are decisive or material to the outcome. I therefore prefer not to express a view on them.

(F) CONCLUSION

48. For the reasons given above, I consider that the arbitrators' decision was correct in law, and that the appeal must be dismissed.

49. I am most grateful to both counsel for their clear and cogent submissions, both in writing and at the oral hearing.