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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building
7 Rolls Buildings, London, EC4A 1NL
5 December 2012

B e f o r e :

MRS JUSTICE GLOSTER, DBE

Between:

Greatship (India) Limited	**Claimant/ Owners**
- and -	
Oceanografia SA de CV	**Respondent/ Charterers**

Nigel Jacobs Esq QC (instructed by Holman Fenwick Willan LLP) for the Claimant
Yash Kulkarni Esq (instructed by Thomas Cooper LLP) for the Respondent
Hearing dates: 5th October 2012

HTML VERSION OF JUDGMENT

Mrs Justice Gloster:

Introduction

1. This is an appeal by Greatship (India) Limited ("Owners'), pursuant to section 69 of the Arbitration Act 1996, against a Third Partial Final Award dated 13 April 2012 of Mr. Simon Rainey QC and Dr Aleka Sheppard ("the Award" and "the Arbitrators' respectively). The Award attached "Reasons Forming part of Award" which I shall refer to as "the Reasons'.

2. The appeal raises a short point of construction in relation to Clause 10(e) of the amended BIMCO Supplytime 1989 form of charterparty.

3. By a time charterparty on an amended BIMCO Supplytime 1989 form dated 15 August 2008 ("the Charterparty"), Owners agreed to charter the "Greatship Dhriti" ("the Vessel") to Oceanografia SA de C.V. ("Charterers') for "two years firm". Clause 31 of the Charterparty contained a London arbitration clause.

4. Clause 10(e) provided as follows:

"10(e) Payments – [1] ***Payments of Hire, bunker invoices and disbursements for Charterers' account shall be received within the number of days stated in Box 23 from the date of receipt of the invoice***. Payment shall be made in the contract currency in full without discount to the account stated in Box 22. However any advances for disbursements made on behalf of and approved by Owners may be deducted from Hire due.

[2] If payment is not received by Owners ***within 5 banking days*** following ***the due date*** Owners are entitled to charge interest at the rate stated in Box 24 on the amount outstanding from and including ***the due date*** until payment is received.

Where an invoice is disputed, Charterers shall in any event pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed portion provided that such portion is reasonably disputed and Charterers specify such reason. Interest will be chargeable at the rate stated in Box 24 on such disputed amounts where resolved in favour of Owners. Should Owners prove the validity of the disputed portion of the invoice, balance payment shall be received by Owners ***within 5 banking days*** after the dispute is resolved. Should Charterers' claim be valid, a corrected invoice shall be issued by Owners.

[3] ***In default of payment as herein specified***, Owners may require Charterers to make payment of the amount due ***within 5 banking days*** of receipt of notification from Owners; failing which Owners shall have ***the right to withdraw the Vessel*** without prejudice to any claim Owners may have against Charterers under this Charter party.

[4] ***While payment remains due*** Owners shall be entitled to suspend the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which Charterers hereby indemnify Owners, and Hire shall continue to accrue and any extra expenses resulting from such suspension shall be for Charterers' account"

5. As was the convention adopted in argument, the subparagraphs have been additionally numbered with numbers in square brackets. The key words which featured in the argument have also been emphasised in bold, italic text.

The question of law

6. On 6 July 2012, Popplewell J granted permission to appeal on the following question of law:

> "Whether on the proper construction of Clause 10(e) of the BIMCO Supplytime 89 form in order for Owners' right to withdraw[1] the vessel from the Charterparty temporarily to be validly exercised, Owners are required to give Charterers 5 banking days notice of the suspension."

Permission was granted on the basis that:

> "… the question is one of general public importance, arising on a standard form charterparty which remains in regular use, and the decision of the Tribunal is open to serious doubt".

7. Popplewell J also gave Charterers permission "to support the Award by reference to their alternative arguments of an implied term, if necessary", as sought in Charterers' Respondents' notice dated 14 June 2012.

The dispute

8. The present dispute arose from instances of non-payment of hire during the currency of the Charterparty. Owners purported to suspend the provision of the services of the Vessel for non-payment of hire and relied upon what they claimed was their right to do so under part [4] of Clause 10(e). There was a separate factual question before the Arbitrators (yet to be decided) as to whether or not Owners actually gave notice before or upon suspending the Vessel's services. That issue does not arise on this appeal.

9. Owners submitted before the Arbitrators that, upon its proper construction, Clause 10(e) did not contain any express or implied requirement for notice to be given before Owners were entitled to exercise their right to suspend the provision of services under part [4] of Clause 10(e); in other words that there was no requirement to give some form of antecedent or advance notice. Charterers' submission, on the other hand, was that it was an express or implied requirement of part [4] of Clause 10(e) that Owners would give five banking days' notice of intention before exercising their right to withdraw the vessel from the Charterparty whether permanently or temporarily.

10. The Arbitrators upheld Charterers' submission on the basis that the period of grace and express notification provision contained in parts [2] and [3] of Clause 10(e) governed part [4]: see paragraphs 9-29 of the Reasons. However (insofar as was relevant) the Arbitrators rejected Charterers' argument that there should be an implied term to such effect: see paragraphs 30-35 of the Reasons.

The Arbitrators' reasoning

11. In summary, the Arbitrators' reasoning appears to have been as follows:

i) As a matter of language, Owners' right to suspend performance of services in part [4] appeared to be "unfettered": see paragraph 11 of the Reasons. However, part [4] was not a separate stand-alone provision and could not be read, as Owners sought to read it, divorced from the context in which it appeared in Clause 10(e) of which it formed a part. The structure and organisation of the clause was important to an understanding of the intended purpose and effect of Clause 10(e).

ii) The "due date" for the purpose of payment (as referred to in part [2]) was the date fixed in part [1] and Box 23: see paragraph 15 (and also the second sentence of paragraph 19) of the Reasons.

iii) However since parts [2] and [3] provided for a grace period of five banking days, it followed that, as a matter of construction, it was an express requirement contained in part [4] that both the part [3] notification requirement and the period of grace in parts [2] and [3] must apply to "the lesser right to suspend performance of the vessel's services without withdrawing the vessel": see paragraphs 15-18 of the Reasons.

iv) It was significant that part [4] was located after parts [2] and [3] and not after part [1].

v) Accordingly, the phrase "while payment remains due" in part [4] did not refer to the period following the "due date" as referred to in part [2], but rather to the period after the provision of the 5 day notice under part [3]: see paragraphs 19 – 20 and 26 of the Reasons. In other words, payment remained (and necessarily "became") due for the purpose of part [4] only "following the giving of the notice requiring payment to be made within 5 banking days under part [3]".

vi) However, and apparently inconsistently with their conclusions in paragraphs 19–20 and 26, the Arbitrators then went on to hold that, on the true construction of Clause 10(e), in order for Owners' right "to withdraw the Vessel from the Charterparty temporarily to be validly exercised", Owners were not only required to give Charterers notice under part [3] but then were also required to wait five banking days before being permitted to exercise their right of suspension.

vii) Thus, whereas in paragraphs 19, 20 and 26 the Arbitrators appear to have held that payment remained "due" under part [4] following the provision of a part [3] notice, their conclusion in paragraph 28 was apparently based on the different premise that the words "while payment remains due" in part [4] referred to the period only beginning on the date which was after expiry of five banking days from Charterers' receipt of notification from Owners.

viii) Charterers' construction accorded "better with the commercial purpose of the right of suspension, objectively viewed.": see paragraphs 21-26 of the Reasons.

ix) However, contrary to the submissions of Charterers, there was no basis for the implication of any term that notice should be provided before the exercise of Owners' right to suspend the performance of their obligations: see paragraphs 30 - 35 of the Reasons.

The respective submissions of the parties in this Court

Owners' submissions

12. In summary, Mr. Nigel Jacobs QC, on behalf of Owners, submitted that, on the basis of the principles of construction reiterated by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraphs 16 and 23, the Arbitrators should have given effect to the clear, unambiguous and "unfettered" language used by the parties that under part [4] Owners were entitled to suspend performance "while payment remains due". He supported his arguments by detailed textual analysis of the relevant provisions of the Charterparty and of the Arbitrators' decision. He further submitted that the Arbitrators' decision in relation to the implication of a term was correct, but that their decision that no assistance could be obtained from the subsequent amendments to the BIMCO Supplytime Form was, in so far as relevant, wrong. He pointed out that other standard forms (such as the NYPE 1993 form) expressly linked the grace period to the right of suspension. He submitted that if the parties had wanted part [4] to be so qualified, they could easily have "borrowed" the concept from clause 11(a) of the NYPE form.

Charterers' submissions

13. In summary, Mr. Yash Kulkarni, counsel on behalf of Charterers, submitted that:

i) As a preliminary point, although the Court was entitled to take its own view in relation to matters of construction, where the tribunal from which an appeal was being made was experienced in relation to the subject matter of the appeal, its decision should be accorded a degree of deference by the Court; see e.g.: per Akenhead J in *Braes of Doune Wind Farm v Alfred McAlpine* [2008] 1 BLR 321, at paragraphs 31 and 32. In the present case, whilst it was not suggested that the tribunal had some special trade or industry knowledge in the present case, the Arbitrators were not only experienced and respected maritime lawyers with considerable experience of the Supplytime 89 form, but one of the arbitrators, Mr. Simon Rainey QC, was also the author of *The Law of Tug & Tow*, a leading textbook on charters for offshore work and the Supplytime 89 form. Mr. Rainey QC was, therefore, very familiar with the particular risks and responsibilities associated with the type of offshore work for which the Supplytime 89 form caters. In consequence, the Court should be careful before interfering with a considered Award from Arbitrators experienced in the particular type of contract and point of construction put before them.

ii) The Award should be upheld because the Arbitrators' decision on the proper construction of Clause 10(e) was correct, for the reasons which they gave. Their construction correctly allocated risk and responsibility between the parties in a fair way.

iii) In carrying out the construction exercise, the Court should also have in mind that the Supplytime 89 form was not an ordinary time charter. It was used for what were often complicated offshore activities, such as pipe-laying, which might very well have limited

weather windows within which operations could be carried out. The parties to such a contract would always, therefore, appreciate that a charterer would be using the vessel for what might be difficult, offshore activities and that the consequences of suspending a vessel in the middle of such operations were likely to be severe. Thus the risk profile of the charterer would be very high; if service were temporarily suspended, a charterer might well face substantial upstream claims from its contractors.

iv) When considering the parties' competing constructions of Clause 10(e), the Court should also have in mind that, as restated by the Supreme Court in *Rainy Sky* (*supra*), the more commercial construction is to be favoured. Here, Charterers' construction was clearly the more commercial construction by reason of the practical matters referred to above and the type of work that would normally be undertaken pursuant to the Supplytime 89 charter. That was a strong factor militating against adoption of Owners' construction of Clause 10(e). There was no erosion or emasculation of Owners' rights if Charterers' construction were to be adopted. If one balanced the requirement imposed on an owner of giving notice and waiting for the expiry of a five day period, as against the disruption that would be imposed on a charterer as a result of immediate suspension without notice, it was clear that the balance lay heavily in favour of a charterer. That was particularly so, given that, during the period of suspension, hire had continued to accrue.

v) Further, or in the alternative, the Award should be upheld on the basis that there should be implied into part [4] of Clause 10(e) an implied term that Owners be required to give notice to Charterers before exercising the right to suspend.

Discussion and determination

14. I am prepared to accept that the views of experienced arbitrators, such as the members of the tribunal in the present case, should be given appropriate weight, particularly in circumstances where they have experience of practice or procedures, or issues of the construction of contracts, in the relevant trade or industry. Nevertheless, the court necessarily has to arrive at its own conclusion on the arguments presented to it, and, in the event that it reaches the clear conclusion that a tribunal has made a wrong determination, the court is not constrained by the standing of the arbitral tribunal from departing from the latter's view.

15. Largely for the reasons put forward by Mr. Jacobs QC in his submissions, I conclude that the question of law should be decided in the negative. In other words, I hold that, on the proper construction of Clause 10(e) of the BIMCO Supplytime 89 form, in order for owners' right "to suspend performance of any and all of their obligations' to be validly exercised, owners are not required to give charterers five banking days notice of the suspension. I prefer <u>not</u> to use the expression "right to withdraw the vessel from the charterparty temporarily" as synonymous with the phrase "to suspend performance of any and all of their obligations'. In reality, when such a right on owners' part is being exercised, the vessel is not being withdrawn, even temporarily from the charterparty; the vessel remains on hire, but owners are entitled to decline to perform any of their obligations in respect of the vessel, or under the charterparty.

16. My reasons for this conclusion can be stated as follows.

Meaning of the words in part [4] of Clause 10(e)

17. In the recent case of *Rainy Sky* (*supra*), at paragraphs 16 to 23, the Supreme Court reiterated the principle of construction that, if the contract has used clear and unambiguous language, the court must apply it, however surprising or unreasonable the result might appear to be. But where there are two possible constructions, the court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business common sense. As Hoffmann LJ (as he then was) said in *Co-operative Wholesale Society Ltd v National Westminster Bank* plc [1995] 1 EGLR 97, at 99, after quoting a passage from the speech of Lord Diplock in *The Antaios* [1985] AC 191, 201,

> "This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."

18. As the Arbitrators themselves recognised at paragraph 11 of the Award, if one simply looks at the language in part [4] in isolation, the words "while payment remains due" clearly and unambiguously suggest that Owners were entitled to suspend performance of their obligations at any time after payment became due and whilst it remained unpaid. The time when payment became "due" under the Charterparty was addressed in part [1] and Box 23. As set out above, the former provided that:

> "Payments of Hire, bunker invoices and disbursements for Charterers' account shall be received within the number of days stated in Box 23 from the date of receipt of the invoice."

The latter provided as follows:

> "Payment of hire, bunker invoices and disbursements for Charterers' account (state maximum number of days) (Cl.10(e)): 23 days'.

Thus there can be no doubt that "payment became due" and "the due date" for payment was 23 days from the date of receipt by Charterers of Owners' invoice. That was also confirmed by part [2], which was in the following terms:

> "[2] If payment is not received by Owners within 5 banking days following the due date".

That was subject to the second paragraph of part [2], which made it clear that, if Charterers disputed a portion of an invoice, they were entitled to withhold payment; in those circumstances the disputed portion of an invoice would obviously have not been "due" for payment after the expiry of 23 days, but no issue arose in the present case in relation to disputed invoices.

19. On the clear wording of part [4], it is thus difficult, if not impossible, to construe the words "while payment remains due" in that part, as referring to anything other than the period after which payment has fallen due and remains unpaid under part [1] and Box 23. There is nothing in the express wording of part [4] to suggest or indicate that one should construe the words "while payment remains due" as referring to the period "following the giving of the notice requiring payment to be made within five banking days under part [3]," as the Arbitrators suggest in paragraphs 19, 20 and 26 of the Reasons.

20. Furthermore, there is nothing in the express language of part [4] which requires "the giving of notice requiring payment to be made within five banking days under part [3]" or for any period of grace prior to the entitlement of Owners to exercise their right of suspension. This is to be contrasted with the fact that the Charterparty contained numerous clauses for the provision of notices but part [4] of Clause 10(e), in contrast to part [3], contained no such requirement. I find it difficult to regard the absence of an express reference to notification and a period of grace from part [4] as an "oversight", as the Arbitrators appeared to have accepted in the context of the implied term argument; see paragraph 33 of the Reasons. If the parties had indeed intended to make the Owners' entitlement to exercise their right under part [4] dependent upon prior notification of their intention to exercise that right, they could and would have made express provision for the requirement of notice as they had in numerous other contexts outside part [3]; see, for example, the notice provisions in Clause 2(c); Clause 2(d); Clause 5(c)(iii); Clause 15(a); Clause 17(a); Clause 26(a); and Clause 26(b).

21. In addition, there is nothing in the express wording of either part [4] or part [3] to suggest that the exercise of the rights under part [4] is somehow linked to the giving of notices under part [3]. Part [4] begins as a distinct sub-paragraph within Clause 10(e) and there are no words linking the notification requirement in part [3] to the right to suspend in part [4]. In contrast to parts [2] and [3], part [4] simply does not contain any reference whatsoever to a period of grace and does not require the giving of notice. There is, therefore, no basis for reading part [4] as subject to any obligation to give five banking days' notice under part [3]. Part [4] merely links the right to suspend performance with the failure to make payment ("while payment remains due") without any reference to any written notice or period of grace. There can be no doubt that payment remained "due" at all times after payment had fallen due under Box 23 (and part [1]). By contrast, for example, clause 11(a) of the NYPE form 1993 clearly links the right of suspension to the grace period contained in the anti-technicality notice.

22. Mr. Kulkarni's submissions (and indeed the Arbitrators' conclusion) require a different meaning to be given to the words "due" in part [4] from that which is given to the word and the expression "due date" in box 23 and in parts [2] and [3]. I see no linguistic or other justification for such a departure or for depriving the words used of their natural meaning and effect.

23. For all the above reasons, I accept Mr. Jacobs' submission that, as a matter of language, the wording of part [4] is clear and unambiguous and that there is no scope for any alternative construction. I see no justification for what would, in effect, be a rewrite of the Charterparty. I do not regard the construction which I have concluded to be the correct one, as in any way surprising or unreasonable.

24. I accept that the right to suspend performance of owners' obligations may have serious consequences; but the right to suspend is not the same, or so draconian, as the right to withdraw the vessel from the charterparty and bring it to an end. I see no lack of commerciality in a provision which allows owners, for example, to refuse to take the vessel out of port in circumstances where charterers have failed to pay bunkers within 23 days of the receipt of an invoice. Why, in those circumstances, should there be any lack of fairness in a provision which does not require yet a further notice provision and yet a further lapse of time before owners can exercise their suspension rights? That is particularly so in circumstances where charterers are entitled to withhold payment in respect of invoices which they dispute.

The significance of the location of part [4] after part [3] of Clause 10(e)

25. If, contrary to my primary conclusion, this is a case, as the Arbitrators considered, where the words, "while payment remains due" is capable of "a number of possible meanings', I turn to consider the conclusion of the Arbitrators that the position of part [4] within Clause 10(e) was somehow significant in relation to its construction.

26. I accept that, in the construction of any contractual provision, one needs to construe the relevant words in the context, and against the textual background, of the entire contract and the objectively ascertainable intentions of the parties. However, in my judgment there is nothing in "the structure of Clause 10" (see paragraph 17 of the Reasons) or the "location" (see paragraph 18 *ibid)* of part [4] within Clause 10(e), or the contextual background of the BIMCO Supplytime 89 form, which supports the proposition that part [4] requires owners to give any form of notice before exercising their right to suspend performance of their obligations.

27. Contrary to paragraphs 18 and 20 of the Reasons, no inference can, in my judgement, be drawn from the position of part [4] within Clause 10(e) and, in particular, from the fact that it comes after part [3] rather than part [1]. Part [1] deals with the obligation to make payment; part [2] deals with the financial consequences of non-payment; part [3] deals with the so-called "nuclear" option of withdrawal and part [4] deals with the lesser right to suspend performance. Clause 10(e) is thus logically structured.

28. I agree with Mr. Jacobs QC's submission that it cannot simply be inferred from the location of the right to suspend performance within Clause 10(e) that the notification and five day grace period applies to part [4] as well as parts [2] and [3].

29. As set out above, part [2] provides for the payment of interest if "payments of hire, bunker invoices and disbursements' (i.e. "payment" under part [1]) were not received "within 5 banking days following the due date". There is no requirement in part [2] for the provision of any notice before Owners are entitled to charge interest at 12%. Part [2] follows from the payment obligations under part [1]. Accordingly apart from identifying "the due date" part [2] has no relevance to the construction of part [4]. It is impossible to see how the five day period of grace in part [2] impacts upon part [4]. Indeed, the five day period may be different from the part [3] period which is triggered by the giving of notice, rather than automatically.

30. In part [2], Owners are entitled to charge interest "if payment is not received by the Owners within 5 banking days following the due date". Thus the right to claim interest only arises if payment is not made during the five day period of grace although, if payment is not made, the obligation relates back to the "due date". At paragraph 27 the Arbitrators considered that this produced an "odd result" in the context of part [4], if the right to suspend services arose as soon as payment was not made by the due date fixed in Box 23. But why? These are two completely different consequences of non-payment with different regimes: part [2] does not require notice (i.e. interest must be paid five days after the due date without the need for written notice), and part [3] requires written notice prior to the exercise of the draconian remedy of withdrawal. The fact that Charterers were granted a period of grace within which to pay interest at the rate of 12% (considerably in excess of a normal borrowing rate) did not mean that, in the absence of an express provision, the Charterers had an identical period of grace before the Owners were entitled to exercise their right to suspend performance in circumstances in which hire, or indeed any other payment obligation of Charterers, had not been paid. This was simply an example of the allocation of risk for non-payment of hire and other sums. The two are in any event very different: the five day grace period for interest is inserted for the benefit of Charterers in case of banking delays leading to a plethora of small interest claims, whereas the right to suspend has been inserted for the Owners' benefit and without reference to any "anti-technicality" provision.

31. Part [3] then confers the right of withdrawal for non-payment of hire. It contains a specific requirement to give notice requiring "the Charterers to make payment of the amount due ...." Thus, in part [3] "the Owners may require the Charterers to make payment of the amount due within 5 banking days of receipt of notification from the Owners." In the event that payment was not made, Owners are entitled to withdraw the vessel. This again shows that the "due" date refers back to part [1] of Clause 10(e) and Box 23. As I have already said, in contrast to parts [2] and [3], part [4] simply does not contain any reference whatsoever to a period of grace and does not require the giving of notice.

32. In my judgment, Owners' construction is clear and certain. Part [1] of Clause 10(e) and Box 23 identify the time when payment of the sums identified in part [1] are "due". The fact that the Charterers have a period of grace in parts [2] and [3] does not somehow shift or alter the "due date" for payment which triggers the different consequences set out in part [2], [3] and [4]. As a matter of language the right to suspend performance is not linked to the provision of any notice or period of grace.

33. For the above reasons, I conclude that there is nothing in the location of part [4], in the context of the entire Charterparty, which justifies the Arbitrators' construction of its terms.

The commercial purpose of part [4]

34. I do not accept Mr. Kulkarni's submissions that the Arbitrators were correct to support the construction of part [4] on the basis that it "accords better with the commercial purpose of the right of suspension, objectively viewed"; see paragraph 21 of the Reasons. In my judgment, for the reasons which I have set out above, the language of part [4] was unambiguous. In

those circumstances, the language of the Charterparty had to be applied and it was not permissible in effect to re-write the Charterparty on so-called grounds of commerciality.

35. But even on the assumption that there were two, or even more, permissible constructions of the Charterparty, I do not accept that there was anything uncommercial with Owners' approach. As Owners submitted, there is a fundamental difference between permanent withdrawal of a vessel, and temporary suspension of service, during the period of which the vessel remains on hire. The right to suspend performance is a "lesser" or "intermediate" right. It is wholly unsurprising that the manner in which such rights are to be exercised are different. I see no reason why it should be regarded as uncommercial to give the owner the right to suspend performance immediately when the charterer fails to pay, on the due date, hire, bunkers or other obligations, in clear breach of the charterparty. It is for the charterer to ensure that the owners receive payment by the due date. I see no commercial reason why owners should be potentially obliged to provide the services of the vessel without payment for a period of seven to eight days (i.e. because of intervening weekends) before any notice of suspension became effective for the purpose of Part [4], in circumstances where the Charterers have failed to honour their payment obligations. On the Arbitrators' approach, if payment is not made, Owners would be powerless to prevent the loading of cargo during the five day notice period and then be effectively unable to withdraw the vessel because of the presence of cargo.

36. There is every commercial reason for a difference between the triggers permitting the exercise of the right to withdraw, and the exercise of the right to suspend services. Since permanent withdrawal cannot be contractually remedied by charterers after the vessel has been withdrawn, there is every commercial justification for the requirement that owners must give five banking days notice before their right to withdraw can be exercised. By contrast, the suspension of performance is temporary, can easily be remedied by the payment of hire (which charterers are bound to pay) and, therefore, there is no need to give five banking days notice prior to suspension. The consequences of the exercise of the respective rights are, therefore, of a different order and this is reflected by the different pre-conditions for the exercise of owners' respective rights.

37. Thus I accept Mr. Jacobs' submission that it makes commercial sense for the two rights to exist separately. Owners can first put pressure on the Charterers without permanently withdrawing the vessel. If non-payment is not remedied, the right to withdraw then applies.

38. Accordingly I cannot accept Charterers' contention that Owners' construction leads to an uncommercial result so as to justify Charterers' construction of the wording of part [4], even on the assumption, which I consider incorrect, that there is room for an alternate construction.

The amendment to the BIMCO 1989 form

39. At paragraph 3 of their Reasons the Arbitrators noted that the relevant "suspension" provision had been re-drafted in the BIMCO Supplytime 2005 form. Clause 12(f) now provides for owners to give notice of a failure to pay hire, but does not provide that owners are not entitled to suspend performance during any period of grace. It is unclear on the wording of the new clause whether suspension can only take place after notification has been given.

40. Whether or not it is impermissible (as the Arbitrators held it was) to use the later version of the form as an aid to construction of its predecessor (as to which see *ICS v West Bromwich Building Society* [1998] 1 WLR 896 at 912H-913B), I am not assisted by reference to the terms of the new BIMCO Supplytime 2005 form. In relation to the question in issue in the present case, I do not consider that the new provisions provide any further support beyond the arguments to which I have already referred.

Charterers' argument based on an implied term

41. I see no justification for the implication of a term in the Charterparty along the lines suggested by Charterers. In this respect, I agree with the analysis of the Arbitrators. Whilst the absence of an express term does not necessarily mean that a term cannot be implied, there is no business necessity to imply such a term in the present case. As the Arbitrators pointed out, it cannot be said that the Charterparty cannot properly work without such notice being given, since Charterers are already on notice from the wording of part [4] alone that non-payment entitles the Owners to suspend performance there and then. Moreover, there is real difficulty in seeking to imply a term into a detailed standard form contract such as the Supplytime 1989 form, where the strong presumption is likely to be that the detailed terms of the contract are complete; see *A-G of Belize v. Belize Telecom* [2009] 1 WLR 1988 per Lord Hoffmann at paragraphs 17-27; and *Mediterranean Salvage v. Seamar Trading* [2009] EWCA 531 per Lord Clarke MR. at paragraphs 10, 15-18.

Disposition

42. Accordingly I find in favour of Owners and allow this appeal. I conclude that, on the proper construction of Clause 10(e) of the BIMCO Supplytime 89 form, in order for Owners validly to exercise their rights to suspend performance of any and all of their obligations under the Charterparty pursuant to part [4] of Clause 10(e), Owners are not required to give Charterers five banking days notice of the suspension.

43. I will hear argument from counsel as to the appropriate form of the order and as to any consequential matters.

Note 1 The right to withdraw temporarily was in this formulation used synonymously with Owners entitlement "to suspend performance of any and all of their obligations" under part [4]. [Back]