# THE SHIPOWNER'S RIGHT TO WITHDRAW HIS VESSEL UPON NON-PAYMENT OF HIRE

The world of shipowning. Lord Essen observed, has romance to recommend it.[1] Far removed from the world of buccaneers, pirates, rovers and thieves, the shipping lawyer will hardly find the law on shipowning to be so. For him, it is an exacting world of, *inter alia,* arresting vessels, avoiding such arrest or securing release from such arrest and when he has to deal with claims in regard to bills of lading, he does not have the luxury of a three-year or six-year period of limitation.[2] Considering the colossal sums often involved and the fineness of the hairs split by lawyers and judges, it is not surprising that many fields of shipping law have become specialised areas best left to experts. If there be any doubt as to whether there has been, at times, superflous hair-splitting, the law on the shipowner's right to withdraw his vessel upon non-payment of hire should quickly dispel them.

The problem may be simply stated. Time charter-parties usually provide for hire to be paid in advance through a bank. They also usually contain a clause entitling the shipowner to withdraw his vessel in the event of a default of payment. In a falling freight market, the shipowner is, of course, quite willing to overlook any late payment of hire. In a rising freight market, his benignity disappears and he eyes the slightest of opportunities to withdraw his vessel in order to rehire it to another party or even to the same charterer at much higher rates. Given the nature of the chartering trade, the working habits of accountants and bankers and possible time differences should payment come from another country, there are ample opportunities for slip-ups in regard to prompt payment. When these occur, no quarters are given and payment half a minute late may not do. In recent years, the courts have have had to deal with an increasing number of disputes on withdrawal of vessels due to late payment of hire. Regrettably, judges, who have had to face a maze of legal and banking technicalities, have not always been the best of referees.

Admittedly, charter-parties have often been difficult to interpret. Explaining judicial difficulties, Lord Diplock once observed:

> 'There would be much to be said ... if the chartering of ships had been a recent innovation instead of the charter-party being one of the earliest of commercial contracts. Its form and nearly all the phrases used in it have evolved over many years, in some cases running into centuries, in the course of which their meaning in the special context of this kind of contract has acquired legal certainty by judicial exegesis. So one starts not with a clean slate but with a palimpsest on which even some of the earliest writing may still show through'.[3]

[1] E.F. Stevens Foreword to *'Shipping Practice',* Pitman, 1970.
[2] The limitation period is usually one year after delivery of the goods or the date when the goods should have been delivered.
[3] *Federal Commerce and Navigation Co. Ltd.* v. *Tradax Export S.A.* [1977} 3 W.L.R. 126 at 133.

One may be sympathetic to this plea for a better understanding of judicial reluctance to challenge accepted, if not always reasonable, interpretations of terms used in charter-parties. However, the sad state of the law on withdrawal of vessels upon non-payment of hire is the result of rather recent judicial decisions. This has been achieved without the slightest hint of assistance from ghosts of the past.

In the beginning, the law was rather pro-charterer. In *Nova Scotia Steel Co.* v. *Sutherland,*[4] the charter-party provided that monthly hire was to be paid in advance and failing punctual and regular payment of the hire, the shipowners were at liberty to withdraw the vessel from the charterer's service. On July 12, the second monthly hire became due. On July 14. the shipowners withdrew their vessel. On the same day but after the vessel had been withdrawn, the charterers tendered payment of the hire. As the shipowners refused to accept payment, the charterers had to pay an increased rate of hire in order to retain the vessel. They then sued for the return of the additional hire. Bigham J., before whom the case was heard, made a two-pronged attack on the shipowners, both of which proved fatal to their case. To begin with, he held that for the purposes of the transaction, a payment made two days after due date was still a regular and punctual payment of hire. Secondly, he disposed of the argument that the vessel had been withdrawn before payment of hire by holding that if the shipowners had intended to withdraw their vessel, they ought to have done so earlier. Not having done so until two days after due date, they must be taken to have waived their right to do so. Both of his Lordship's assumptions are open to attack. Firstly, it is highly questionable whether a payment two days after due date can be regarded as a regular and punctual payment. Secondly, to hold that the shipowners could not withdraw their vessel merely because two days had lapsed was to create unnecessary hardship for them. Shipowners must be given some time, albeit only a reasonable time, to contemplate their course of action. Only after a lapse of such time can it be said that they have waived their right to withdraw their vessels.

The charterer's lot was further improved by the Privy Council's decision in *Longford (SS) Co.* v. *Canadian Forwarding Co.*[5] In this case, advance hire became due on September 11. The shipowners waited until October 1 to give notice that the vessel would be withdrawn after the outward cargo had been discharged. On October 2, the vessel arrived at the port of discharge. On the same day, the overdue hire was paid. Preparations were made to load cargo for the homeward voyage but on October 4, the shipowners withdrew the vessel. The judgement, as reported, admits of several interpretations. One view is that the notice of withdrawal given on October 2 was ineffective as there had been no absolute withdrawal of the vessel. It was only on October 4 that the shipowner withdrew the vessel absolutely by which time the hire had been paid. As such, the shipowners had lost their right to withdraw the vessel. Another view is that the shipowners had waived the breach in question but it is not clear how waiver arose. Finally, the case has been said to hold that late payment of hire would remedy a failure to pay in advance.

[4] (1899) 5 Comm. Cas. 106.
[5] (1907) 96 L.T. 599.

This appears to be accepted by Lord Russel in *Mardorf Peach & Co. Ltd.* v. *Attica Sea Carriers Corporation of Liberia* (*'The Laconia'*)[6] when he criticised the Privy Council's decision. Whichever of the above interpretations is adopted, the charterer had reason to be pleased.

This pro-charterer tide was stemmed somewhat by the Court of Appeal in *Tyrer* v. H*essler.*[7] In this case, advance hire was to be paid fortnightly. On June 21, while the vessel was at sea, hire became due. The vessel arrived in Stockholm on June 25. The shipowners did not prevent the vessel from sailing on June 27 for another port in order to load cargo. On June 28, the vessel was withdrawn from the charterers' service. In the Divisional Court,[8] Kennedy J. provided a novel approach to Bigham J.'s decision in *Nova Scotia Steel Co.* v. *Sutherland Steam Shipping Co.*[9] a decision to which he attached the 'utmost value'. His Lordship suggested that it was wrong to assume that Bigham J. had intended that in every case, a withdrawal two days after due date would be ineffective. A vessel need not be withdrawn the moment default occurs. In the situation before Bigham J., the facts were such that the shipowners ought to have acted sooner. It is doubtful that Bigham J. intended his approach to be construed in this way but Kennedy J.'s interpretation brought a measure of fairness to the law. Turning to the facts before him, Kennedy J. found that the notice of withdrawal, which was given seven days after default of payment of hire, was not one which had been given within a reasonable time. As the delay had misled the charterer and prejudiced his business interests, the shipowners must be taken to waived their right to withdraw their vessel.

The Court of Appeal reversed the decision of the Divisional Court. Vaughn Williams J. said that the seven days delay was nothing more than a lapse of time during which the shipowners held their hands and refrained from determining the contract. Romer L.J. said the shipowners had done nothing other than to give the charterers an extra week to pay. On close examination, the Court of Appeal was not disagreeing with the Divisional Court on the law to be applied. Both agreed that if a shipowner's actions amounted to a waiver of his right to withdraw his vessel, he would lose his right to withdraw. The Court of Appeal was merely unwilling, on the facts, to find that there had been a waiver on the shipowners' part. On balance, Kennedy J.'s approach is to be preferred. If the shipowners' actions in this case did not amount to a waiver, one might well wonder what type of action would.

The next important decision emerged about half a century later. In *Tank Express A/S* v. *Compagnie Financiere Beige des Petroles* S/A,[10] an oft-cited and often misinterpreted case, the House of Lords took the opportunity to make it clear that payment of hire was a vital term of the contract and that late payment was not to be excused by in-advertence or accident. Lord du Parcq spoke for the House when he stated that if a shipowner insisted on a literal performance of the

6 [1977] 1 Lloyd's Rep. 315, at p. 332.
7 (1902) 7 Comm. Cas. 166; reversing 6 Comm. Cas. 143.
8 6 Comm. Cas. 143.
9 (1899) 5 Comm. Cas. 106
10 [1949] A.C. 76.

contractual obligation to pay hire in advance, a payment made even one day late would not protect the charterer from withdrawal of the vessel. *Nova Scotia Steel Co.* v. *Sutherland Shipping Co.*[11] was severely criticised and overruled. Lord Wright observed:

> 'A dictum or decision of Bigham J. in *Nova Scotia Steam Shipping Co.* has been relied upon as an authority that a certain latitude was permissable so that payment two days after the due date did not constitute a default in payment. But I cannot agree that so drastic a departure from the specific words of the charter can be supported. In that case, the clause provided for regular and punctual payment: these adjectives however add nothing to the stringency of the simple and unqualified language before this House. I think that so much of Bigham J.'s judgement as conceded a latitude as to the date of payment is erroneous in law and should be overruled'.[12]

For the next twenty-two years, the waters proved deceptively calm. However, in *Empresa Cubana De Fletes* v. *Lagonisi Shipping Co. Ltd. (The 'Georgios C.'),*[13] the Court of Appeal provided fresh avenues for the charterer to escape the shipowner's clutch. In this case, the shipowners withdrew their vessel some three hours after the charterers tendered their overdue payment of hire. As the payment had been overdue, the shipowners felt justified in rejecting the tender of hire. The Court of Appeal did not doubt that payment of advance hire was a serious matter and that the charterers had defaulted in regard to this obligation. However, the extent of a shipowner's right to withdraw his vessel depended on the wording of the withdrawal clause. In this case it read 'In default of payment, the Owners to have the right of withdrawing the Vessel from the service of the Charterers....' Interpreting this clause, Lord Denning M.R. said:

> 'I think in this clause the words 'in default of payment' mean 'in default of payment and so long as default continues'. It means that the owners have the option — so long as the charterers are in default — to withdraw the vessel. But once the charterers remedy their default by paying the instalment or tendering it, the owners have no right to withdraw'.[14]

It was not long before shipowners counter-attacked. Their opportunity came in *Tenax Steamship Co. Ltd.* v. *The Brimnes (Owners).*[15] In this case, the withdrawal clause differed from that in *'The Georgios* C.'[16] in that there was a specific reference to failure of *punctual* and *regular* payment. The charterer rightly argued that what was in issue was not whether a right of withdrawal had arisen but whether that right had been defeated by payment before withdrawal. However, the Court of Appeal (this time without Lord Denning, of course), held that the principles enunciated in *'The Georgios C.*' did not apply because of the introduction of the words 'punctual and regular payment'. Default of punctual and regular payment could never be cured. In such a case, a shipowner had the right to refuse to accept payment tendered after due date and proceed to exercise his right of withdrawal.

Commercial men were thereafter quick to exploit whatever slight differences there were in wording of withdrawal clauses to suit their

11 (1899) 5 Comm. Cas. 106,
12 [1949] A.C. 76 at 94.
13 [1971] 1 Lloyd's Rep. 7.
14 *Ibid.,* at 14.
15 [1974] 2 Lloyd's Rep. 241.
16 [1971] 1 Lloyd's Rep. 7.

ends. The crowning spectacle came in *Astro Amo Compania Naviara S.S.* v. *Elf Union S.A. and First National City Bank (The 'Zographia M'.)*[17] where Ackner J. phrased his difficulties in the following terms:

> 'In the instant case the words are neither *The Georgios C* words 'in default of payment' or *The Brimnes* formula which could be rewritten as 'in default of punctual payment'. The clause in this case is 'in default of *such* payment'. On which side of the line is this clause to fall?'

His Lordship found it a delicate task to furnish an answer but in his view, the word 'such' did not distinguish the withdrawal clause from that in '*The Georgios C.*'[18] After all, once payment had been effected, there was an absence of 'such' default.

The Court of Appeal made the position even more confusing in *'The Laconia'*.[19] In this case, advance hire was due on a Sunday, April 12. As London banks were also closed on Saturday, the charterers, if they wanted to be on the safe side, should have paid on Friday, April 10. However, they paid on Monday, April 13 through the shipowners' bank. A few hours after such payment, the shipowners withdrew the vessel. The charter-party incorporated a withdrawal clause which referred to punctual and regular payment. One would have thought that this case was indistinguishable from *'The Brimnes'*.[20] The Court of Appeal (this time with Lord Denning M.R. at the helm) pulled a surprise. The Master of the Rolls explained that the charterers had remedied the breach. In any case, the shipowners had waived the forfeiture, Lawton L.J. conceded that the right to withdraw had accrued and the late payment could be rejected. A payment was not effective unless the shipowners' accepted it so as to show that they were waiving their right to withdraw'. However, in not instructing their bank to reject the tender of payment, the right of withdrawal had been waived.

Judicial decisions were indeed becoming as uncertain as the spin of a coin. The shipowners, as expected appealed to the House of Lords,[21] giving it an opportunity to bring a measure of uniformity to the law. The House had to choose between *'The Georgios C.'*[22] and *'The Brimnes'*.[23] It chose to overrule the former. Lord Wilberforce declared that the Court of Appeal had, in *'The Georgios C.'* paid insufficient attention to the words *'payment in advance* which appeared in the clause on terms of payment of hire and had concentrated on the words in the withdrawal clause. Even so, it had misconstrued the meaning of the words 'in default of payment' by holding that it meant 'in default of payment whether in advance or later, so long as the vessel had not been withdrawn'. This was an unwarranted reconstruction of the withdrawal clause. There was no difference in effect between the phrases 'punctual payment' and 'payment in advance'. A late payment is neither a punctual payment nor an advance payment.[24] However much one may sympathise with the

17 [1976] 2 Lloyd's Rep. 382.
18 [1971] 1 Lloyd's Rep. 7.
19 [1976] 1 Lloyd's Rep. 395.
20 [1974] 2 Lloyd's Rep. 241.
21 [1977] 1 Lloyd's Rep. 315
22 [1971] 1 Lloyd's Rep. 7.
23 [1974] 2 Lloyd's Rep. 241.
24 [1977] 1 Lloyd's Rep. 315 at 318

charterers, the House warned against the dangers of allowing hard cases to make bad law. Lord Salmon minced no words when he criticised the Court of Appeal in the following strong terms:

> 'Certainty is of primary importance in all commercial transactions. I am afraid that ever since 1971 when *'The Georgios C.'* was decided, a great deal of doubt has been generated about the effect of clauses conferring the right upon shipowners to withdraw their vessels when charterers fail to pay hire in accordance with the terms of the charter-parties.... No doubt existed between 1949 (when the Tankexpress case was decided) and 1971 .... I hope that the doubts which have troubled the waters since 1971 will now be finally dispelled by this decision of your Lordship's House'.[25]

The approach of the House in regard to the issue of waiver will be commented on later. What is clear is that the House had taken the line of least resistance when it made up its mind purely from the point of strict construction of the terms of the charter-party. While this approach is not indefensible, it is regretted that no attempt was made to impose some even-handed rules. Surely, the choice before us need not always be between hard cases and bad law.

Although the scope for aiding defaulting charterers had been seriously curtailed by the House of Lords, the Court of Appeal made yet another laudable attempt to assist charterers in *China National Foreign Trade Transportation* v. *Evlogia Shipping Co. S.A. (The 'Mihalios Xilas').*[26] In this case, the charterers wrongly estimated that the ninth month was the last month of hire. Assuming that they could then make certain deductions in accordance with the terms of the charter-party, they assumed that only 75 per cent of the usual hire was due. This was paid before the due date. The shipowners who disputed the deductions accepted the hire and withdrew the vessel when the balance was not paid by due date. In the Court of Appeal, Lord Denning M.R. stressed, once again, that in such cases, what was required was a solution appropriate to a commercial relationship. The Court of Appeal had tried to meet that requirement in *'The Laconia'*.[27] This was a case of under-payment and not non-payment. The charterers had made a mistake and their erroneous deductions could have been adjusted without difficulty. The facts in this case were therefore distinguishable from those in *'The Laconia'* and the principles enunciated by the House of Lords in regard to non-payment of hire had no application. The Court of Appeal also held by a majority that the shipowners were not entitled to withdraw their vessel on another ground. In retaining the hire, they had elected not to withdraw their vessel.

The House of Lords[28] did not relish having its principles as enunciated in *'The Laconia'* confined to cases of non-payment of hire. The principle of election, it declared, was inapplicable. The charterer paid part of the hire before due date. When that part of the hire was paid, the charterers were not in default and there was thus no necessity for an election on the part of the shipowners. The shipowners were entitled to retain the sum paid and await due date before

[25] *Ibid.,* at 325.
[26] [1978] 2 Lloyd's Rep. 397.
[27] [1976] 1 Lloyd's Rep. 395.
[28] [1979] 2 All E.R. 1044.

deciding on their course of action. The House pointed out that the majority in the Court of Appeal had been misled by the wrong assumption that the charterers could not recover the hire that had been paid should the shipowners be allowed to withdraw their vessel. Unearned hire had to be refunded. As for Lord Denning M.R.'s comments on the need to find commercially acceptable solutions, Lord Salmon thundered that any further decisions similar to those of the Court of Appeal in '*The Georgios C.*', '*The Laconia*' and the present case could undermine confidence in the English system of justice.[29]

For shipowners and charterers, the game will go on. Considering the stakes involved, they can be expected to test the waters again and again. The rules may yet change again. They have changed before and to charterers, against whom the stakes are currently weighted, there remains the hope that they will change again. What then can be done for the future?

*Patterns for the future*

The House of Lords has consistently rejected commercially acceptable solutions in favour of a strict interpretation of the terms of the charter-party regardless of the harshness of such an approach. In the name of certainty, the law has developed an unblushingly pro-shipowner complexion. If a more even-handed approach is ever to emerge, there must be some rethinking on the nature of the withdrawal clause and the possibilities of applying equitable principles and the doctrine of waiver.

Every word in a withdrawal clause need not be worth a prince's ransom. A withdrawal clause should not be viewed in isolation from its nature. Lord Denning M.R has, of course, repeatedly labelled the clause as a genus of forfeiture clauses and identified the role of the courts in regard to such forfeiture clauses in the following terms:

> 'It is just such a situation against which the Judges have sought to relieve: and they have not been intimated by stipulations (like that here) excluding the Courts from interfering. Whenever a creditor stipulates for a penalty or forfeiture in case of non-payment — and prays in aid the strict letter of the law to enforce it — then the Judges both at common law and in equity — and in civil law — have used every means at their disposal to mitigate the rigour of it. The books are full of illustrations. Need I mention the forfeit which the moneylender sought to enforce against the Merchant of Venice?'[30]

Some objections have been voiced against treating withdrawal clauses as forfeiture clauses. In fact, in *'The Mihalios Xilas'*,[31] Lord Scarman went so far as to assert that the House of Lords had specifically declared in *'The Laconia'*[32] that it was wrong to attribute the consequences associated to forfeiture clauses with a shipowner's right to withdraw his vessel. This assertion is incorrect. Admittedly, Lord Wilberforce had, in that case, warned against 'extrapolating into the field of withdrawal clauses the law on forfeiture of leases'.[33] However,

[29] *Ibid.,* at 1056.
[30] *'The Mihalios Xilas'* [1978] 2 Lloyd's Rep. 397, at 403.
[31] [1979] 2 All E.R. 1044 at 1060.
[32] [1977] 1 Lloyd's Rep. 315.
[33] *Ibid.,* at 319.

the other members of the House did not adopt the same position. Lord Fraser made no reference to the point while Lord Russel mentioned without comment the Court of Appeal's antipathy to forfeiture clauses. Lord Simon used the phrase 'forfeiture' himself while Lord Salmon said that he accepted the term 'forfeiture clause' as one possible description of a withdrawal clause although he added that descriptive labels were of little consequence.[34] Finally, it might be pointed out that Lord Wright used the phrase 'forfeiture' in *'The Tankexpress Case'*.[35]

The matter is therefore not as closed as Lord Scarman would have us believe. There are merits in treating withdrawal clauses as a genus of forfeiture clauses. Needless to say, there will be differences between forfeiture clauses in regard to leases and withdrawal clauses in regard to hire of ships. However, what is material and which need concern us is eloquently summed up in *'The Laconia'* by Lord Simon in the following terms:

> 'The question would be whether there are material differences in relation to the power of equity to relieve against the effect of a 'forfeiture clause' in the respective contracts. In some respects, the law of contract already treats a ship as if she were a piece of realty'.[36]

A greater role for equity should therefore be explored. While authority for the application of equitable principles may be slender, they are there to be tapped. Apart from the above statement of Lord Salmon, it was clearly in Lord Uttwatt's mind in the *'Tankexpress Case'*[37] that there could be appropriate, though rare, situations where equity could grant relief. Where it would be clearly unconscionable for shipowners to take advantage of minor failures resulting from pure inadvertence or accident, equity could lend a hand. Paucity or lack of historical precedents need not prove daunting as we have never been led, at least not in recent times, to believe that equity is past child-bearing age.

Another way to ensure that more commercially acceptable solutions are found is to have a more flexible application of the doctrine of waiver. As a general rule, shipowners who knowingly allow charterers to expend their time, energy and money on fitting a ship for another voyage or on loading a ship when due date for payment of advance hire has passed, should run the risk of being held to have waived their right to withdraw their vessels. Thus far, the scope for applying the doctrine of waiver in such cases has not been properly mapped out and where the question of waiver has been raised, the results have not always been fair. For instance, in *Nova Scotia Steel Co.* v. *Sutherland,*[38] it was manifestly wrong that the shipowners should have been held to have waived their right of withdrawal merely because two days had passed since due date. On the other hand, the other extreme of imposing too stringent conditions for the application of the doctrine is hardly a preferable alternative. In this regard, the House of Lords must be criticised for rejecting the plea of waiver

[34] *Ibid.,* at 325.
[35] [1949] A.C. 76 at 99.
[36] [1977] 1 Lloyd's Rep. 315 at 322.
[37] [1949] A.C. 76 at 100.
[38] [1899] 5 Comm. Cas. 106.

in *'The Laconia'*.[39] In this case, the late payment of hire had been accepted by the shipowners' bankers and as Lawton L.J. persuasively argued in the Court of Appeal, such acceptance of payment on behalf of the shipowners must mean that the shipowners had waived their right to withdraw their vessel for if they had wanted to reserve to themselves the decision of accepting or rejecting the tender of hire, they should have instructed their bankers not to accept any such payment without reference to them.[40] The House of Lords preferred to treat the bank's actions as acts internal to the bank and not binding on the shipowners. While this approach is not indefensible, the House could have adopted the equally defensible and more commercially acceptable approach of the Court of Appeal. After all, one advantage of the doctrine of waiver is its arbitrariness which can be a boon as well as a bane. It is hoped that when harnessed to find commercially acceptable solutions, it will be more of a boon than a bane.

That a large volume of commercial contracts which have no connection with England continue to provide that disputes should be settled according to English law indicates some measure of foreign confidence in the English judicial system. In the last analysis, it is imperative that judges be innovative enough to ensure that the law on withdrawal of vessels for non-payment of hire is fair to all parties concerned so that that confidence is not eroded.

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[39] [1977] 1 Lloyd's Rep. 315.
[40] [1976] 1 Lloyd's Rep. 395 at 403

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