ENGLAND AND WALES COURT OF APPEAL

Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS
(The "Spar Capella", "Spar Vega" and "Spar Draco")

[2016] FICR 26; [2016] EWCA Civ 982

Moore-Bick, Ryder and Christopher Clarke LJJ

11 and 26 October 2016

Shipping – Charterparties – Punctual payment – Innominate term, not condition – The Astra overruled – Repudiation – Renunciation – Whether goes to root of contract – Repeated failures to pay in advance evinces intention not to perform

Contracts – Conditions, innominate terms and warranties – Definitions of – Slow to find condition

Contracts – Repudiation – Renunciation – Whether goes to root of contract – Repeated failures to pay in advance evinces intention not to perform

Summary
This was an appeal from a decision of Popplewell J in the High Court that late payment of instalments under a charterparty was not a breach of condition giving rise to a right of termination, declining to follow Flux J in *The Astra* [2013] EWHC 865 (Comm); [2013] 2 All ER (Comm) 689, and that charterers were in renunciatory breach entitling termination: [2015] EWHC 718 (Comm).

Facts
Charterers of three vessels – the *Spar Capella*, *Spar Vega* and *Spar Draco* – were late in payments of instalments under the charterparties for over five months, with the arrears fluctuating between about US$1.5 to US$2.5 million. They repeatedly told the owners they were having cash flow problems but expected a cash injection from their parent which never materialised. The parent company had guaranteed the charterers' performance of the charterparties.

The owner called on the guarantee and then terminated the charterparties when the call was not met. They commenced arbitration in Hong Kong against the charterers for the balance of hire due under the charterparties and damages for loss of bargain for the unexpired term of the charterparties. The charterers went into liquidation shortly before the hearing and the owners then commenced proceedings in the High Court against the parent guarantor for the same claims together with the costs of the arbitration.

Popplewell J gave judgment for the owners for the full amount claimed of US$25,308,320.35 plus interest, holding that payment of instalments under charterparties was not a condition giving rise to a right of termination on breach,

but that the charterers were in renunciatory breach entitling termination because of the repeated late payments, unsatisfactorily explained.

The guarantor appealed, arguing that it had not renounced the charterparties, and the owners filed a Respondent's Notice arguing that payment of instalments under charterparties is a condition justifying termination on breach.

Each charterparty contained a withdrawal clause and anti-technicality clause as follows:

> **11. Hire Payment**
>
> (a) Payment
>
> Payment of Hire shall be made so as to be received by the Owners or their designated payee….in United States currency, in funds available to the Owners on the due date, 15 days in advance…….. Failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever of this Charter Party, 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 after the expiry of the grace period provided in Sub-clause 11(b) hereunder and while the hire 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 shall have no responsibility whatsoever for any consequences thereof, in respect of which the Charterers hereby indemnify the Owners, and hire shall continue to accrue and any extra expenses resulting from such withholding shall be for the Charterers' account.
>
> (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 clear banking days …..written notice to rectify the failure, and when so rectified within those 3 days following the Owners' notice, the payment shall stand as regular and punctual.
>
> Failure by the Charterers to pay the hire within 3 days of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw as set forth in Sub-Clause 11(a) above

Held, (per Gross LJ, Sir Terence Etherton MR and Hamblen LJ agreeing) dismissing the appeal:

(1) The obligation to make punctual payment of hire is not a condition of the charterparties entitling termination in event of breach. *The Astra* was wrongly decided on this issue.[64]-[65]

Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26; *Wickman Machine Tool Sales Ltd v L Schuler A.g.* [1972] 1 WLR 840; *Bunge v Tradax* [1981] 1 WLR 711; *Bremer Handelsgesellschaft Schaft m.b.h. v Vanden Avenne Izegem p.v.b.a.* [1978] 2 Lloyd's Rep. 109; *United Scientific Holdings v Burnley Borough Council* [1978] AC 904; *The Afovos* [1983] 1 WLR 195; *The Scaptrade* [1983] 2 AC 694; *Stocznia Gdanska v Latvian Shipping Co & Others* [2002] EWCA Civ 889; [2002] 2 All ER Comm 768; *The Georgios C* [1971] 1 QB 488; *The Agios Giorgis* [1976] 2 Lloyd's Rep 192; *The Laconia* [1977] AC 850; *The Kos* [2012] UKSC 17; [2012] 2 AC 164; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27; *Tankexpress A/S v Compagnie Financiere Belge Des Petroles S.A., The Petrofina* [1949] AC 76; *Leslie Shipping Co. v Welstead* [1921] 3 KB 420; *Financings Ltd v Baldock* [1963] 2 QB 104; *Dalkia Utilities v Celtech* [2006] EWHC 63 (Comm); [2006] 1 Lloyd's Rep. 599; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, considered.

The Astra [2013] EWHC 865 (Comm);[2013] 2 All ER (Comm) 689; *The Brimnes* [1973] 1 WLR 386, overruled.

(2) The inclusion of an express withdrawal clause does not provide a strong or any indication that cl. 11 of the charterparties was a condition. As a matter of contractual construction, the charterparties did not make it clear that cl. 11 was to be categorised as a condition. [65]

(3) Whether a term of a contract is a condition, an innominate term or only a warranty depends on the intentions of the parties and thus of the true construction of the contract. [52]

Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26, applied.

(4) Where on the true construction of the contract a term is to be classified as a condition, it is unnecessary and inappropriate to explore the gravity of the breach; it is open to the parties to agree that any breach of a particular obligation (regardless of its gravity) will entitle the innocent party to treat the contract as at an end. [52]

Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26, applied.

(5) If, on the true construction of the contract, the parties have not made a particular term a condition and if the breach of that term may result in trivial, minor or very grave consequences, then the term is innominate. [52]

Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26, applied.

(6) Unless the contract makes it clear that a particular stipulation is a condition or only a warranty, it is to be treated as an innominate term; the courts should not be too ready to interpret contractual clauses as conditions. [52]

Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26, applied.

(7) Time for payment under these charterparties was an innominate term as time was not made of the essence, payment was not directly or immediately required to enable the owners to perform, the consequences of breach were not spelled out and could vary dramatically from the trivial to the grave . [54]-[55]

Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75; [2010] QB 27, considered.

Financings Ltd v Baldock [1963] 2 QB 104; *Bunge v Tradax* [1981] 1 WLR 711, distinguished.

(8) Any presumption that time is generally of the essence in mercantile (or commercial) contracts does not generally apply to the time of payment, unless a different intention appears from the terms of the contract. [56]

Dalkia Utilities v Celtech [2006] EWHC 63 (Comm); [2006] 1 Lloyd's Rep. 599, at [130], cited.

(9) The anti-technicality clause does not apply and does more and no less than it says. It applies only in the stated circumstances of "oversight, negligence, error or omissions" on the part of charterers or their bankers. [57]

(10) Anti-technicality clauses were developed by the market to protect charterers from the serious consequences of a withdrawal, essentially in the case of a failure to pay hire on "technical grounds"; they were not devised , to make time for payment of the essence. [57]

The Astra [2013] EWHC 865 (Comm); [2013] 2 All ER (Comm) 689 at [111]-[113], disapproved.

(11) Certainty is plainly a consideration of major importance when construing commercial contracts such as the charterparties. It would be quite wrong to overlook commercial common sense, even recognising that its claims can be over-stated and its application vulnerable to the particular perspective of the party espousing them. [58]

Arnold v Britton [2015] UKSC 36; [2015] AC 1619, at [17]–20]; Sir Bernard Eder, 33rd Donald O' May Lecture, *The Construction of Shipping and Marine Insurance Contracts: why is it so difficult?* [2016] LMCLQ 220, cited.

(12) The key question is striking the right balance between certainty and flexibility. [59]

(13) Where the likely breaches of an obligation may have consequences ranging from the trivial to the serious, then the downside of the certainty achieved by classifying an obligation as a condition is that trivial breaches will have disproportionate consequences. [59]

Bunge v Tradax [1981] 1 WLR 711 at 727, cited.

(14) Where the question arises as to the classification of an obligation breach whereof triggers a contractual termination clause, the achievement of the appropriate balance calls for a still more nuanced approach. [60]

(15) The argument that the timely payment of hire is a condition must acknowledge that the briefest failure to pay a single instalment of hire punctually, falling just outside the terms of an anti-technicality clause, would entitle owners to terminate a long-term charterparty and claim damages for loss of bargain. [57]

(16) The general view of the market has been that the obligation to make timely payments of hire was not a condition and the market does not require it to be a condition. *The Astra* caused surprise and concern. [39], [63]

The Astra [2013] EWHC 865 (Comm); [2013] 2 All ER (Comm) 689, disapproved.

Wilford on *Time Charters* (7th ed, 2014) at paras 16.128 et seq; *Scrutton On Charterparties and Bills of Lading* (23rd ed, 2015) para 17-023; Lord Phillips of Worth Matravers, in *The Cedric Barclay Lecture 2015*, at pp. 26 et seq; Peel, *Withdrawal for late payment of hire under a charterparty* (2016) 132 LQR 177, referred to.

(17) In this case the parties would not have intended that a single payment of hire a few minutes late would entitle the owners to throw up a five- or three-year charterparty and claim loss of bargain damages. [62]

(18) Considerations of certainty here do not require the obligation to pay hire punctually and in advance under the charterparties to be classified as a condition. The trade-off between the attractions of certainty and the undesirability of trivial breaches carrying the consequences of a breach of condition is most acceptably achieved by treating cl. 11 as a contractual termination option. [62]

(19) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract. [67] , [72]-[74]

Federal Commerce v Molena Alpha (The Nanfri, Benfri and Lorfri) [1979] AC 757; *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26; *Decro-Wall International SA v Practitioners in Marketing Ltd.* [1971] 1 WLR 361, at 380, referred to.

(20) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory. [67], [72]-[74]

(21) Evincing an intention to perform but in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform. [67] , [72]-[74], [77]

Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60 at 72, cited.

(22) An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. [67] , [72]

Universal Cargo Carriers v Citati [1957] 2 QB 401 at 437, cited.

(23) Actual breaches which might be insufficient to amount to a repudiation might nevertheless constitute a renunciation because it would lead the reasonable observer to conclude that there was an intention not to perform in the future, and the past and threatened future breaches taken together would be repudiatory. [68]

(24) The reason why a defaulting party committed an actual breach might be highly relevant to what such breach would lead the reasonable observer to conclude about the defaulting party's intentions in relation to future performance" and therefore to the issue of renunciation. [68]

(25) The defaulting party's intention might be objectively evinced both by past breaches and by other words and conduct. [68]

(26) The starting point when considering the seriousness of the anticipated breach of contract is the benefit the innocent party was intended to obtain from performance of the contract. [77]

Ampurius Nu Homes Holdings v Telford Homes [2013] EWCA Civ 577; [2013] 4 All ER 377 at [51]; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61; (2007) 233 CLR 115 at [55], cited.

(27) Renunciation may be inferred where it is apparent that the defaulting party is doing no more than procrastinating in the hope that something may turn up. [77]

Forslind v Bechely-Crundall 1922 SC (HL) 173 at 191, cited.

(28) The test for renunciation is, *mutatis mutandis*, essentially similar to that for repudiation but as renunciation looks to the future, it may be inferred from both the nature and causes of past breaches (even if by themselves insufficient or irrelevant for repudiation) and the evinced unwillingness to perform in the future. [78]

(29) Three questions cover the test in law and the facts: what was the contractual benefit the owners intended to obtain from the charterparties; what was the prospective non-performance foreshadowed by the charterers' words and conduct; was the prospective non-performance such as to go to the root of the contract? [82]

(30) It is of the essence of the bargain under a time charterparty that the shipowner is entitled to the regular, periodical payment of hire as stipulated, in advance of performance, so long as the charterparty continues; hire is payable in advance to provide a fund from which shipowners can meet the expenses of rendering the services they have undertaken to provide under the charterparty; shipowners are not obliged to perform the services on credit; they do so only against advance payment. [83]

Tankexpress A/S v Compagnie Financiere Belge Des Petroles S.A., The Petrofina [1949] AC 76; *The Laconia* [1977] AC 850; *The Scaptrade* [1983] 2 AC 694, cited.

(31) The financial strength of the particular shipowner has no bearing whatever on the nature of the bargain entered into. The fact that an owner can better absorb charterers failures and prospective inability to perform the charterparties than some other owners does not mean that the owner is therefore obliged to accept payment of hire in arrears when it had contracted for payment in advance. [85]

(32) A reasonable owner in the position of the owner here could have no, certainly no realistic, expectation that charterers would in the future pay hire punctually in advance. [86]

Universal Cargo Carriers v Citati [1957] 2 QB 401 at 436, applied.

(33) An evinced intention not to pay hire punctually in the future is very different from failure to pay a single instalment of hire punctually and goes to the root of the charterparties. [87]

(34) The prospective non-performance went to the root of the contract because would unilaterally convert a contract for *payment in advance* into a transaction for unsecured credit and without any provision for the payment of interest, and an arithmetical comparison between the arrears (even comprising a number of instalments of hire) and the total sums payable over the life of the charterparties does not grapple with the nature and importance of the bargain for the payment of hire in advance. [87]

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