

July 2018

Defence class cover

Payment of hire: is it a condition? 'Spar Shipping'

Introduction

Nearly two years after Mr Justice Flaux's controversial decision in *The Astra*¹, payment of hire has been restored to its original status as an innominate term. This article should be read in conjunction with the club's earlier publication '*Payment of hire: is it a condition?*' dated 2 March 2015.

A **condition** in a contract is defined as a promise or undertaking that is fundamental, **any** breach of which entitles the innocent party to terminate the contract and claim damages.

Conversely, a breach of an **innominate** term gives the innocent party the right to terminate **only if** the breach is so serious that it deprives the innocent party of substantially the whole benefit of the contract (a repudiatory breach).

On 18 March 2015, Mr Justice Popplewell handed down the judgment in *Spar Shipping AS v. Grand China Logistics Holding (Group) Co. Ltd.*² Despite the question as to whether payment of hire was a condition (or not) being only a subsidiary element of this case, the judge undertook a thorough reconsideration of this issue due to all the uncertainty that has followed since *The Astra* decision.

Background facts

In 2010, the claimant owner let three supramax bulk carriers to the defendant charterer using long-term time charters, on amended NYPE 1993 forms. In April 2011, the charterer fell behind on hire payments and, despite its consistent apologies, the situation did not improve for the next six months. The owner sent regular anti-technicality notices until September 2011, when it gave notice of withdrawal with immediate effect.

Under guarantees obtained from both the parent company of the defendant and the defendant itself, the owner made two claims:

1. The balance of hire due under the three charters prior to termination. This is a standard contractual claim and was not controversial.
2. 'Loss of bargain' damages for the remainder of the charter term. The recovery of future losses emerges either upon the breach of a condition or the repudiatory breach of an innominate term (see the **highlighted** text opposite).

The question, therefore, in this case was whether the punctual payment of hire amounted to a condition and, if not, whether regularly delayed payments of hire amounted to a repudiatory breach.

Is the payment of hire a condition?

Popplewell J approached this question by a comprehensive review of English case law over the last hundred years, including *The Astra* judgment. Popplewell J countered Flaux J's reasoning on two key bases:

1. First, he disputed that the existence of a right to terminate was suggestive that the obligation to pay hire punctually was a condition. Whilst the contractual right to withdraw a ship gives one characteristic of a condition, this alone isn't conclusive. In his view, there was also no evidence to suggest that a single non-punctual payment of hire amounted to a repudiation.
2. Second, Popplewell J reasoned that commercial certainty could be, and is, achieved without the general classification of all time clauses as conditions. An owner's



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commercial risk in a hire relationship is to cover the ship's running costs, but its right to withdraw the ship upon default of a hire payment adequately protects this: the owner is thenceforth able to find another charterer and extract full hire charges elsewhere.

Or is it an innominate term?

Whilst accepting that the sole aim of the NYPE right to withdraw is to protect future performance of the contract, Popplewell J commented that the language was neutral as to the common law rights of the parties. In fact, he argued that both the language and its interpretation suggested punctual payment of hire to be an innominate term. The judge gave several reasons for this conclusion:

- Primarily, the inclusion of a contractual right to withdraw upon any breach suggests that, without such a clause, there would be no such right.

In other words, breach of a condition would automatically give the right to terminate and withdraw the ship. Therefore, payment of hire cannot be a condition if such a right must be expressly provided for elsewhere in the charter.

- Most importantly, and the reason for panic post-*Astra*, payment of hire breaches can vary from the trivial (a few hours' delay) to the serious (outright refusal – namely, repudiation). Therefore, the classification of punctual payment as an innominate term is natural and logical. Indeed, Popplewell J picked up on the market criticism of *The Astra* decision, recognising the conceivable situation of parties automatically terminating a long-term charter after just a few moments' delay.
- Finally, commercial certainty is not undermined by this classification. Indeed, it is enhanced by the recognition that trivial delays should not trigger a rash and dramatic legal response. This is further achieved by the presence of anti-technicality clauses in charters, which act to define the seriousness of the breach. Recognising the vast array of possible situations, an anti-technicality notice helps to ascertain whether the breach should be considered repudiatory.

Conclusion

This judgment restores the previously accepted view that punctual payment of hire is not a condition. In order to recover future losses following a withdrawal therefore, an owner must be able to demonstrate a default of sufficient seriousness amounting to repudiation by the charterer. A failure to pay is not the same as a refusal to pay and can be effectively remedied by an owner's prompt withdrawal and the ship's rehire to a new charterer. It is not disputed that an owner is authorised to recover outstanding (earned) hire up to and until withdrawal.

In reaching his judgment, Popplewell J made comprehensive use of substantial case law and gave significant attention to commercial reasoning. The issue will most likely make its way to the Court of Appeal, but for the moment, this judgment has the last word. Following *The Astra*, it marks a welcome return to a much debated but historically consistent position.

Defence cover is, by its very nature, discretionary in that the club must be satisfied as to the merits and quantum of the claim in question, and the likelihood of achieving a successful outcome, if it is to lend support.

Members requiring further information on this topic should direct their enquiries to their usual contact at the club.

- 1 [2013] EWHC 865 (Comm)
- 2 [2015] EWHC 718 (Comm)

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