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COURT OF APPEAL DECISION IN SPAR SHIPPING HANDED DOWN:

Is prompt payment of charterparty hire a contractual condition? - Certainty returns!

Today's hotly anticipated Court of Appeal judgment in Grand China Logistics v Spar Shipping has clarified the position under English law as to whether failure to pay charterparty hire on time is a breach of condition, holding that it is ***not****.*

Assuming that the decision is not appealed to the Supreme Court, it draws a line under recent uncertainty in this regard arising from conflicting first instance decisions, and will be broadly, if not universally, welcomed by the market.

(Grand China Logistics Holding (Group) Co Ltd v Spar Shipping [2016] EWCA Civ 982)

Introduction

Up until the 2013 decision of Flaux J in *The Astra* [2013] 2 Lloyd's Rep. 69, it had been the general understanding of the market that the failure to pay hire punctually and in advance under a time charterparty was **not** a breach of condition entitling a shipowner both to terminate the charter and claim damages for the loss of the remainder of the charterparty period. This understanding reflected the decision of Brandon J in *The Brimnes* [1972] 2 Lloyd's Rep. 465 which, perhaps surprisingly, remained the only decision on this important point for about 40 years.

The decision in *The Astra* therefore generated significant market interest in holding, contrary to *The Brimnes*, that the punctual payment of hire was indeed a condition. It was soon followed by another first instance decision on the same point, that of Popplewell J in *Spar Shipping* [2015] 2 Lloyd's Rep. 407. Popplewell J held that the obligation is not a condition, but an innominate term, meaning that a shipowner is only entitled to claim damages, based on any difference between the charterparty and market rate of hire for the balance of the agreed charter period, if charterers' actions are repudiatory/renunciatory.

In light of the above conflicting first instance decisions, it was with some relief on the part of the market that permission to appeal *Spar Shipping* was granted. The Court of Appeal's judgment has today (7 October 2016) been handed down, and the key aspects of the ruling are as follows:

(1) Prompt payment of time charterparty hire is **not** a contractual condition. *The Astra* was wrongly decided;

(2) As such, absent express contractual provision, an owner wishing to claim loss of bargain damages after electing to terminate a charterparty for late payment of hire will need to demonstrate that the charterer's breach goes to the root of the contract; and

(3) Whether or not the charterer's breach goes to the root of the contract is a matter of fact and degree, depending on issues such as: the number of unpaid instalments of hire; the length of the charterparty; and charterers' position as to future performance of the contract.

We understand that it is relatively unlikely that permission will be granted for *Spar Shipping* to be appealed to the Supreme Court. In the meantime, the Court of Appeal's judgment on this important point is extremely welcome.

Background facts

In *Spar Shipping*, shipowners Spar Shipping AS (Spar) time chartered three vessels to charterers Grand China Shipping (Hong Kong) Co. Ltd (GCS), under separate charterparties with materially identical terms. The withdrawal and anti-technicality clauses in all three charterparties gave Spar the right to withdraw the vessels following non-payment of hire by GCS.

Following a spate of missed or delayed payments, Spar withdrew all three vessels and terminated the charterparties. Following GCS's insolvency, High Court proceedings were brought against the appellant, Grand China Logistics Holding (Group) Co Ltd (GCL), under letter of guarantees issued pursuant to the charterparty.

First instance judgment

As already noted above, at first instance Popplewell J declined to follow the decision in the *Astra*, and instead found that the requirement promptly to pay hire was not a contractual condition. However, judgment was still given for Spar against GCL, on the basis of a finding that GCS had renounced the charterparties by failing to pay hire punctually for approximately five months and demonstrating that it was clearly unable to do so for the balance of the charterparty periods.

GCL appealed to the Court of Appeal on the finding of renunciation, with Spar cross-appealing on the question of whether timely payment of hire was a condition.

Court of Appeal judgment

In short, the Court of Appeal judgment upheld the first instance decision, finding that (a) prompt payment of time charterparty hire is not a contractual condition; and (b) GCS had indeed renounced the charterparties.

Whilst the judgment is a useful summary of what an owner needs to show in order to demonstrate that the charterer has renounced a charterparty, this note concentrates solely on the decision in relation to the contractual classification of the obligation promptly to pay charterparty hire.

The reasoning of all three Court of Appeal justices (Sir Terence Etherton MR, Gross LJ and Hamblen LJ) provides valuable insight as to the arguments for and against prompt payment of time charterparty hire being a condition. However, the key findings of the Court, per Gross LJ and Hamblen LJ, were as follows:

(1) Under English law the modern approach to the classification of contractual terms is that a term is innominate unless it is clear that it is intended to be a condition or warranty;

(2) It was not clear that the payment clause was a condition. Whilst the charterparties included an express option to terminate, this did not indicate that prompt payment was a condition. Indeed, per Hamblen LJ, it instead suggested that the payment provisions amounted to an innominate term, given that the inclusion of an express right of termination would not be necessary if payment of hire timeously were a condition;

(3) Whilst classifying the payment clause as a condition would achieve greater certainty than finding it to be innominate, this would come at the expense of proportionality. The example given was a single payment of hire a few minutes late entitling a shipowner to throw up a five- or three-year charterparty and claim loss of bargain damages;

(4) Arguments put forward as to the anti-technicality clause and as to time being of the essence in mercantile contracts were not regarded as significant; and

(5) The finding that prompt payment was not a condition accorded with the general, albeit far from settled, market view.

Conclusion

This long-awaited decision brings welcome clarity to the question of whether failure to pay hire on time amounts to a condition, and restores the status quo in this regard.

Owners wishing to preserve their rights to claim damages in the absence of renunciation/repudiation might wish to consider making express contractual provision for such by way of, for example, Clause 11 of the NYPE 2015 form.

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