

Is repudiation for non-payment of hire now hopeless after Spar Shipping?

Sean O'Sullivan QC

The background: Failure to pay hire

- Owners will usually have a contractual right to withdraw a vessel for non-payment of hire.
- But contractual termination does not carry with it right to damages.

The background: Failure to pay hire

- Not a problem where there is a rising market.
- In a falling market? Owners:
 - may have no choice but to terminate: see The Kos [2012] 2 AC 164 at paragraph [7]; but
 - ideally want to recover damages from Charterers.
- Claim for damages only if can terminate for repudiatory / renunciatory breach.

Terminology: repudiation vs renunciation

■ Repudiation

- Breach of a “condition” of the contract; or
- Breach of an innominate/ intermediate term in a way which deprives the other party of “substantially the whole benefit of the contract”

■ Renunciation (or anticipatory repudiation)

- By words or conduct, evincing an intention to breach the contract.
- Breach must be of a nature that would be repudiatory

Problem for lawyers: where is the line?

- In cases involving repeated late payment or short payment of hire, Owner wants to know: when should I terminate?
- No easy answer.
- Always safer to wait another month...



Three strikes?

- Need some way of deciding when is enough.
- Three strikes “rule”: three missed payments.
- But artificial and ultimately unhelpful. E.g. what counts as a “strike”?

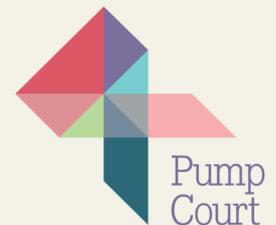
The Astra – Flaux J

- In The Astra [2013] EWHC 865 (Comm), Flaux J. held that the obligation to pay hire on time under the NYPE form was a **condition**. Three reasons:
 - Importance of term: Owners do not provide services on credit.
 - Express contractual right to withdraw said to show intention.
 - Certainty: late payment = repudiation. No debate.



Spar Shipping – Popplewell J.

- Three C/Ps on NYPE 1993 form. Various hire payments were made late and not in the full amount.
- Popplewell J. held that:
 - The obligation to pay on time was not a condition.
 - But there was a renunciation, because the conduct of Charterers showed that they were “*unwilling, because unable*” to pay hire punctually.



Spar Shipping – Court of Appeal

- The Court of Appeal agreed with Popplewell J.
- Obligation to pay hire is not a condition, so no repudiation.
- But Owners in that case were entitled to terminate for renunciatory breach.

Repudiation is dead?

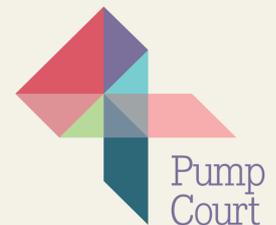
- Obligation to pay not a condition:
 - Express contractual right to withdraw vessel did not suggest right to terminate at common law.
 - Since The *Brimnes* [1973] 1 WLR 386, market had not thought shipowner had a right to terminate at common law.
 - Certainty being purchased at too high a price. Could have trivial breaches.
- Single missed/ late instalment now very unlikely to be repudiation.

Renunciation lives?

- Multiple failures to pay on time could still amount to renunciation:
 - Emphasis on importance to Owners of cash flow and payment of hire in advance... which had been one of key reasons for decision of Flaux J. in The Astra!
 - Saying reasonable observer would conclude that Charterers will not pay hire punctually *in the future*.

Are we back where we started?

- No certainty.
- No clear line or simple rule for lawyers to apply.
- Back to the “three strikes” rule?
- Back to telling clients: perhaps better to wait until next month...?
- Recipe for happy clients?



Improved clarity (1): Punctual payment matters

- Previously debate about whether late payment could ever be said to deprive owners of substantially the whole benefit of the C/P
- The Court of Appeal made clear that regular, periodic payment in advance of performance is “*of the essence of the bargain under a time charterparty*”.

Improved clarity (2): Can't pay = won't pay

- Previously debate as to what inferences to draw concerning the “intentions” of Charterer.
- Charterers always complaining about difficult market and promising that will pay “tomorrow”.
- The Court of Appeal echoing Devlin J. (in UCC v. Citati [1957] 2 QB 401): “*I would like to but I cannot’ negatives intent just as much as ‘I will not’*”.

Future problem areas?

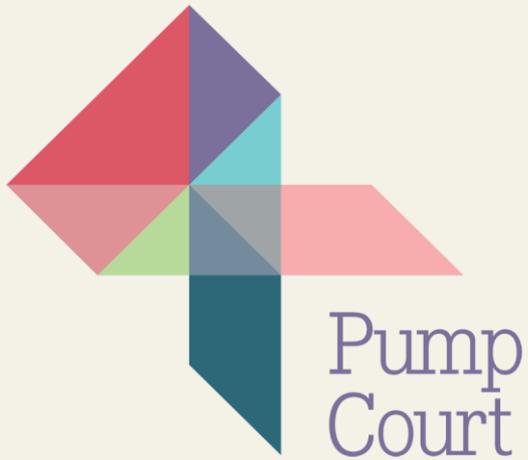
- What inference about future conduct if dispute about entitlement to hire?
 - E.g. Woodar v Wimpey [1980] 1 WLR 277; Eminence Property v Heaney [2013] EWCA Civ 1168.
- If “renunciation” not accepted and C/P affirmed, what is effect of delay to next hire payment?
 - E.g. The Fortune Plum [2013] EWHC 1355 (Comm)

Other ways forward?

- Solve problem with drafting?
- Could agree that prompt payment of hire is a condition.
- Or make clear in C/P what consequences of failure to pay hire on time will be:
 - as in the NYPE 2015 form cl.11(c);
 - but note Charterers P&I Club's circular no. 004 2015...

Concluding thoughts

- Unlikely to be repudiation for non-payment of hire, unless expressed to be condition.
- Renunciation if repeated failures to pay on time: improved clarity as to how conduct of charterers to be assessed.
- But back to being very difficult call for shipping lawyers.



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