

CONFIRMATION RECEIVED FROM THE COURT OF APPEAL: THE ASTRA WAS WRONGLY DECIDED



In 2013, the Commercial Court in the *ASTRA*¹ held controversially that the obligation to make punctual payment of hire by the charterers was a condition, thus entitling the owners to withdraw the vessel and claim a loss of bargain for the remaining period of the charter albeit the delay in payment of hire may only be a few minutes late.

In 2015, the Commercial Court in *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd*² (*Spar v GCL*), declined to follow the decision in the *ASTRA* and resumed back to the orthodox approach established since the *BRIMNES*³ that punctual payment of hire by the charterers was not a condition but an innominate term.

The Court of Appeal has earlier today handed down its judgment from an appeal of the decision in *Spar v GCL* and which has resolved the two conflicting first instance decisions. The Court of Appeal unanimously rejected the owners' arguments that punctual payment of hire by the charterers was a condition and held that the *ASTRA* was "wrongly decided" on this issue⁴. In

other words, a breach of the hire payment clause would not, absent express provision, entitle the owners to claim a loss of bargain, unless the breach is so substantial that it goes to the root of the charters.

Issues in dispute

By way of three time charters on the amended NYPE 1993 form, the owners chartered three Supramax bulk carriers to the charterers in 2010. However, from April 2011 onwards, the charterers were in arrears in payment of hire and the situation worsened in the next few months. Pursuant to various anti-technicality notices, the owners withdrew the vessels in September 2011 and claimed the balance of hire due under the charters plus damages for loss of bargain in respect of the unexpired period of the charters respectively.

There was no dispute that the owners were entitled to the balance of hire due under the charters prior to termination. The point in dispute was whether the owners were entitled to

1 [2013] EWHC 865 (Comm)

2 [2015] EWHC 718 (Comm)

3 [1973] 1 WLR 386

4 Lord Justice Gross at [65] and Lord Justice Hamblen at [94]



damages for a loss of bargain as well (namely the loss of hire/earnings for the remainder of the charter period) which amounted to approximately US\$25 million. Since a loss of bargain could only be recovered if there was a breach of a condition, alternatively a repudiatory breach of an innominate term, the issues before the Court of Appeal were:

1. Whether the obligation to make punctual payment of hire is a condition (the Condition Issue).
2. If not, whether the charterers had renounced the charters by repeated failures in paying hire on time (the Renunciation Issue).

The decision

The Condition Issue

Following a detailed review of the judgment in *Spar v GCL* and the *ASTRA*, the Court of Appeal accepted that this issue has “attracted much market interest and long generated conflicting observations from Judges of the highest standing”⁵. Nevertheless, the Court of Appeal affirmed the Commercial Court decision in *Spar v GCL* and concluded that punctual payment of hire is not a condition based on the following reasoning⁶:

1. **The withdrawal clause**
The inclusion of an express right for the owners to withdraw the vessel does not indicate that the obligation to pay punctual hire is a condition, but only provides the owners with an option to cancel the charter should the charterers fail to pay hire on time.
2. **Whether a clause is a condition**
As a matter of contractual construction, the hire payment

clause will be a condition only if there are express wordings to that effect.

3. **General presumptions as to time being of the essence**

In mercantile contracts, time is presumed to be of essence but such a presumption does not generally apply to the time of payment unless expressly stated. The hire payment clause in the charters did not make it clear that it was to be classified as a condition.

4. **Anti-technicality clause**

The clause does no more and no less than stating where failure to make punctual hire is due to one of the specified reasons, the charterers are entitled to a three day grace period to remedy the failure. As such, anti-technicality clause is devised to protect the charterers from the serious consequences of a withdrawal, as opposed to making time for payment of the essence.

5. **Certainty**

Certainty is essential in commercial contracts but it is equally important to strike the right balance. Since breaches of the obligation of punctual hire payment may have consequences ranging from the trivial to the serious, the downside of the certainty achieved by classifying an obligation as a condition is that trivial breaches will have disproportionate consequences.

6. **Market reaction**

The general market view has been that the obligation to make timely payment of hire is not a condition, nor does the shipping market require it to be since the

parties could have achieved it by appropriate express wordings if they so wish to.

The Renunciation Issue

While accepting that punctual payment of hire is an innominate term, the Court of Appeal concluded that the charterers nevertheless renounced the charters by their repeated failure of punctual payment of hire, thus entitling the owners to claim loss of bargain.

The test for renunciation, which was not in dispute, is essentially similar to that for repudiation, namely whether the owners have been deprived substantially the whole benefit of what they are intended to receive as consideration in the contract. In arriving the conclusion, three questions had been addressed by the Court of Appeal⁷:

1. **What was the contractual benefit that the owners intended to obtain from the charters?**
The Court of Appeal emphasised that the essence of the bargain under a time charter is the entitlement of the owners to receive regular, periodical advance payment of hire so as to meet the expenses of rendering the services they have undertaken to provide under the charter.
2. **What was the prospective non-performance foreshadowed by the charterers?**
Given the history of the charterers’ repeated late payments, the amounts and delays involved and the absence of any concrete or reliable reassurance from the charterers as to their future payment, it was reasonable for the owners to conclude that they could

5 Lord Justice Gross at [1]

6 Lord Justice Gross at [41] to [64]

7 Lord Justice Gross at [82] to [87]



have no expectation to receive future punctual hire payment in advance. The best that could be hoped for was that the charterers were willing to pay hire, but in arrears.

3. Was the prospective non-performance such as to go to the root of the contract?

The charterers' prospective non-performance would convert a contract for payment in advance into a transaction for unsecured credit without payment of interest. Following the answer to question one, the Court of Appeal had no doubt to conclude that the charterers' evinced intention not to pay hire punctually in the future went to the root of the charters, thus entitling the owners to claim loss of bargain damages.

HFW perspective

The Court of Appeal has now affirmed the Commercial Court's decision in *Spar v GCL* that punctual payment of hire is not a condition but an innominate term. Therefore, in order to recover a loss of bargain, the owners must be able to prove renunciation by demonstrating that they have been deprived of substantially the whole benefit of the charters. Whether there is a further appeal on this issue remains to be seen. However, at least for the time being, it is now certain that owners do not have an automatic entitlement to damages for a loss of bargain where the charterers are in breach of the hire payment clause. The Court of Appeal judgment has also repeated the general classification of contractual terms, which is a term is innominate unless a contrary clear intention is made.

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