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PAYMENT OF HIRE IS NOT A CONDITION

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

Since judgment was handed down in *Kuwait Rocks Co v AMN Bulk Carriers Inc [2013] EWCH 865 (Comm) (the "Astra")* (see the article in Nordisk Medlemsblad no.576 for further details), there has been much discussion of the question of whether an owner is entitled to terminate a time charter for a single default in payment of hire and claim damages for any losses suffered as a result.

Whilst the position adopted by Flaux J in that judgment was favourable to owners, it was somewhat controversial given the existing case law and represented a departure from what the market had previously understood the position to be.

Popplewell J then took the opposite view at first instance in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718, which did little to resolve the uncertainty as to the effect of withdrawal clauses.

BY JOANNA EVJE

The Court of Appeal has now clarified the position in their judgment handed down on 7 October 2016 in *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982.

Background

The brief facts of the dispute are that owners and charterers entered into three long-term charterparties on the NYPE 1993 form (with amendments). Performance of charterers' obligations under those charterparties was guaranteed by Grand China Logistics Holding (Group) Co Ltd. Charterers were in default of their payment of obligations from April 2011 by reason of multiple missed and delayed payments. In September 2011 owners withdrew the vessels, terminated the charterparties and pursued initially charterers and subsequently the guarantor for the unpaid hire and losses suffered in respect of the unexpired period of the contracts.

At first instance, Popplewell J reviewed the existing case law and concluded that (counter to Flaux J's reasoning in the Astra) there was no basis on which to construe a right to terminate for non-payment of hire as elevating the obligation to pay hire to the status of a condition and that nothing else in the contract lead to the conclusion that payment of hire was a condition.

Owners were nevertheless successful in arguing that charterers were in renunciatory breach of the contracts by reason of charterers' repeated defaults and stated inability to pay. Owners were awarded damages for their loss of bargain over the remaining period of the contracts. Charterers appealed.

Court of Appeal

The matter then came before the Court of Appeal who concluded that whilst timely payment of hire is of great importance to an owner under a time charter, it was not a condition of the contract. Neither the inclusion of a withdrawal clause nor an anti-technicality clause renders payment of hire a condition.

They simply provide a mechanism by which an owner can bring the contract to an end. Clear words would be needed to turn the payment obligation into a condition and parties are free to agree such a provision should they so wish.

The Court of Appeal nonetheless held that charterers had renunciated the charterparties by reason of their repeated defaults and stated inability to pay and that owners were entitled to damages accordingly.

In reviewing the arguments on renunciation the Court of Appeal confirmed that the obligation to pay hire promptly lies at the heart of a time charterparty and that an owner who has contracted to receive hire in advance is not obliged to accept a charterer's unilateral decision to pay in arrears and require performance of services by the owner on credit. If the owner can show that the charterer has evinced an intention not to perform (i.e. an intention not to or an inability to pay punctually in the future) such conduct goes to the root of the contract and gives owners a right to terminate and claim damages for loss of bargain.

Implications of the judgment

Prior to the decision of the Court of Appeal, there were conflicting first instance decisions on the status of the obligation to pay hire. This latest judgment has now resolved that uncertainty in charterers' favour.

The question of whether a particular charterer's failure or repeated failure to pay hire in a timely manner (or apparent inability to do so) gives rise to a right to terminate and claim damages remains one that must be considered on the facts and in the context of performance of the contract in question.

Nevertheless, the discussion in the above judgment as regards renunciation of time charters may offer some assistance to an owner considering termination as a result of a defaulting charterer promising delayed and uncertain performance.

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INITIATION OF ARBITRATION AND APPOINTMENT OF ARBITRATORS

The importance of notifying the correct party

The Commercial Court has recently set aside an arbitration award under Section 72 of the Arbitration Act 1996 finding that the respondent had not been given proper notice of the arbitration.

Background

The dispute concerned a contract of affreightment ("COA") between Dana Shipping & Trading PTE Singapore as owners ("Owners") and Sino Channel Asia Ltd as charterers ("Charterers").

Charterers were a Hong Kong registered company. Mr Daniel Caix was the owner of a Chinese company, Beijing XCity. Charterers entered into an arrangement with Beijing XCity whereby Charterers would provide Beijing XCity with letters of credit and Beijing XCity would then arrange sale and purchase contracts, that were concluded in Charterers name.

BY VICKI TARBET

The COA was fixed via brokers (one on each side), who appear to have dealt exclusively (for Charterers), with Mr Caix. Owners' brokers were informed by Charterers' brokers that Mr Caix was "Charterers' guy" and he presented himself as "Daniel of Sino Channel" with business cards giving Charterers' Hong Kong address. All post-fixture correspondence was with Mr Caix. Unknown to Owners, Charterers delegated all responsibility for performance of the COA to Beijing XCity.

Ultimately, Charterers (via Beijing XCity) failed to perform the COA and in 2014, Owners commenced arbitration in London. The notice of arbitration was sent via email to Mr Caix with a copy also being forwarded via broking channels. Brokers confirmed that this was passed on to Charterers, however, it later became apparent they had merely forwarded the notice to Mr Caix. Mr Caix acknowledged the notice of arbitration, requesting more time to appoint, however, this was the last that was heard from him leading to the appointment of the arbitrator appointed by Owners as sole arbitrator. Charterers failed to participate in the arbitration proceedings

and Owners obtained an Arbitration Award in their favour, in the amount of approximately USD 1.7 million plus interest and costs. A copy of the Award was sent to Charterers' registered Hong Kong address in June 2015.

In November 2015, Owners commenced enforcement proceedings in Hong Kong, which prompted Charterers' principal, Mr Jung, to write to the Arbitrator informing him that Charterers had not received notice of the arbitration and had no information concerning the arbitration.

In January 2016, Charterers commenced proceedings in the Commercial Court under the Arbitration Act 1996 Section 72(1). The Hong Kong enforcement proceedings were stayed pending the outcome of said proceedings.

Commercial Court Decision

Section 72(1) of the Arbitration Act 1996 provides as follows:

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question -

.....

(b)whether the tribunal is properly constituted, or

(c)what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief

Although it was common ground that Charterers had entered into the COA with the intention that Bejing XCity would perform the entire contract, the Court agreed that Mr Caix did not have authority (whether implied or ostensible) to accept service of proceedings on behalf of Charterers. Although Mr Caix may have held himself out as being an employee of Charterers and/or having authority to accept service of arbitration, Charterers themselves had not made any such representations.

There was a distinction between a wide general authority to act on behalf of a principal and authority to accept service of proceedings. Charterers may have effectively delegated all responsibility for the subject COA, this does not (without more) include an authority to accept service of proceedings.

Nor was the Court convinced by an argument that Charterers had ratified Mr Caix's conduct by way of their failure to take any steps to dispute it after receiving the Award. Ratification required an unequivocal act. There was no evidence that Charterers had done anything to adopt the actions of Mr Caix. Charterers were entitled to wait until enforcement action was commenced before challenging the Award under Section 72 of the Arbitration Act. There was no time limit on when such a challenge must be brought.

The Court found in favour of Charterers and the arbitration award was set aside.

Impact of the Decision

The factual scenario behind this dispute was distinct, with Charterers lending their name to a third party and entering into a contract, in respect of which they intended to have no involvement whatsoever. Being so fact specific, the general applicability of the decision may be limited. However, the Judgment comes as a warning in the present climate where e-mail is relied on as the primary form of communication. Ultimately, the situation was avoidable, either by including clear notice provisions in the contract and/or, where there is any doubt as to who notice should be served on, sending a copy of the notice to the registered office.