

# SOUNDINGS

## Is payment of hire a condition?

In a 2013 judgment Mr. Justice Flaux suggested that a failure to make punctual payment of hire could be breach of a condition (*Kuwait Rocks Co v AMN Bulkcarriers Inc.* [2013] EWHC 865 (Comm.) (the “ASTRA”)). That case created a great deal of debate as the judge’s comments seemed to be contrary to the generally held view that the obligation to pay hire punctually under a time charter was to be considered as an innominate term.

The classification of such charter provisions is significant. A breach of a condition would allow a claim for repudiatory breach and would entitle the innocent party to terminate the contract. This could be done regardless of the severity of the breach; a trivial oversight could lead to the termination of a long term contract. The breach of an innominate term would not automatically entitle the innocent party to terminate the contract. Breach of such a clause would normally allow the innocent party to claim damages. They could only seek to terminate the contract if the breach was so serious so as to deprive them of substantially the whole benefit under the contract.

On 18th March, 2015 Mr. Justice Popplewell delivered his judgment in *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd* [2015] EWHC 718 (Comm.)

(“Spar Shipping”) in which he declined to follow Mr. Justice Flaux’s approach in the ASTRA. Mr. Justice Popplewell restated the generally accepted view in the industry that the obligation to pay hire is an innominate term.

### Facts

In Spar Shipping the owners chartered out three ships under long-term NYPE 1993 contracts to a Grand China subsidiary, whose performance was guaranteed by Grand China Logistics.

The charterparty provided that upon the charterer’s failure to make punctual and regular payment of hire “the Owners shall be at liberty to withdraw the Vessel from the service of the Charterer without prejudice to any claims they may otherwise have on the Charterers.”

continued overleaf

Initially hire was paid punctually. However, from April, 2011 the charterer defaulted. Between April and September, 2011 the owner regularly sent anti-technicality notices in compliance with the anti-technicality clause within the charter. However no further hire was paid and in September, 2011 the owner withdrew the ships from the charterer's service. The owner then commenced arbitration proceedings and claimed loss of bargain damages on the basis that the charterer was in breach of a condition or was in repudiatory breach of an innominate term. Ultimately, as a result of the charterer going into liquidation, the owner claimed under the guarantees issued by Grand China Logistics.

### The Spar Shipping judgment

Mr. Justice Popplewell held that the option to withdraw the ship did not make the obligation to pay hire a condition.

He did not believe that the existence of an option to withdraw the ship because of a failure to make punctual payment then meant that any non-payment justified termination. He stated:

*"A clause which merely provides a contractual remedy for default is not naturally to be interpreted as determining what remedies are available if the contractual remedy is not relied on. Moreover if it had been intended to introduce a provision to make clear that payment of hire was a condition, one would expect it to be framed by reference to the term requiring payment, stating that it was to be treated as a condition or that time of payment was to be of the essence..."*

The judge held that there was force in the argument that provision for an express right of withdrawal for failure to pay hire tends to show that the obligation was not a condition. The inclusion of a contractual right of withdrawal for non-payment of hire suggests that there would be no such right in its absence. Mr. Justice Popplewell emphasized that:

*"there is the presumption that in mercantile contracts, stipulations as to the time of payment are not to be treated as conditions absent a contrary indication in the contract, of which there is none in these charters."*

The judge also observed that where breaches of a contractual term may have consequences ranging from the trivial to the serious it is *"a strong indication that it is to be treated as an innominate term. This applies as much to a time charter as any other form of contract..."*

In the absence of a contractual withdrawal clause, owners and charterers should not be taken to have intended that a payment of hire a few minutes late would entitle the owners to withdraw the ship from a long time charter.

### Conclusion

It remains to be seen whether the Court of Appeal may be called up on to decide whether the obligation to pay hire is a condition. However, the decision by Mr. Justice Popplewell suggests that the historical approach of treating breach of an obligation to pay hire as breach of an innominate term is to be preferred to treating such a breach as justifying termination, without more.

Where an owner has a contractual right of withdrawal, it can withdraw the ship and claim unpaid hire up to the date of withdrawal. However, in order to claim damages for the remaining charter period, such an owner will have to prove that the charterer was in repudiatory breach of the charter. That owner will need to prove that the charterer has either evinced an intention not to be bound by the charter terms, or that it has expressly declared that it is or will be unable to perform its obligations in some essential respect. In many cases this will continue to be a difficult burden to overcome as it is largely fact-dependent. According to the judge:

*"owners will not have absolute certainty in a fallen market in determining when the exact moment comes at which exercising the right will enable them to recover damages for the loss of bargain."*

Members are advised to carefully consider charter terms. If it is intended that time should be of the essence for the payment of hire then the contract terms should make that clear.

**If Members have any questions concerning these judgments please contact your local Managers' office.**

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