

# Punctual Payment of Hire Under Time Charterparties — A Condition or an Intermediate Term?

## *The Spar Shipping*

In *Spar Shipping*,<sup>1</sup> the English Court of Appeal decided that failure to punctually pay hire under a time charterparty amounts to a breach of an intermediate term.

A *condition* is a major term of the contract, any breach of which entitles the innocent party to terminate the contract. A *warranty* is, in contrast, a minor term of the contract such that no breach will entitle the innocent party to terminate the contract.<sup>2</sup> An *intermediate term* is neither a condition nor a warranty.<sup>3</sup> Where a term is intermediate, the question as to whether the contract can be terminated turns on the seriousness of the consequences of the breach.

In *Spar Shipping*, the charterer was in arrears in payment under three separate time charterparties. There had been a chronology of missed or delayed payments of hire for a period of some five months before the owners exercised their rights to withdrawal. The owners argued that the obligation to pay hire punctually was a condition<sup>4</sup> and, therefore, their late payments amounted to a repudiatory breach. Following that, the owners claimed not only the balance of hire due, but also damages for loss of bargain in respect of the unexpired terms of the three charters.

The Court of Appeal acknowledged that the general view of the market has been that the obligation to make timely payments of hire was not a condition as seen in *The Brimnes*.<sup>5</sup>

“...the major standard forms of time charterparty had not been amended to turn the obligation into a condition nor ... was there any regular practice of including bespoke terms to that effect in time charterparties.”<sup>6</sup>

In coming to the decision, their Lordships unanimously overruled the conflicting decision of *The Astra*<sup>7</sup> and dismissed the time charterers’ appeal.

## Commercial certainty

Their Lordships acknowledged that classifying a contractual provision as a condition had advantages in terms of certainty; in particular, the innocent party was entitled to claim for loss of bargain, regardless of the state of the market. Where, however, the likely breaches of an obligation may have consequences ranging from trivial to serious, then the downside of the certainty by classifying an obligation as a condition was that trivial breaches would have disproportionate consequences.<sup>8</sup> The issue was one of striking the right balance between achieving certainty, on the one hand, and proportionate consequences flowing from a breach, on the other hand.

Their Lordships found that the undesirability of disproportionate consequences for trivial breaches carrying the consequences of serious breach of condition defeats the importance for certainty in commercial transactions. Accordingly, they were persuaded that the obligation to pay hire punctually under a time charterparty ought to be classified as an intermediate term instead of a condition.

## Application of withdrawal clause

The inclusion of an express withdrawal clause did not provide a strong or any indication that the obligation to pay punctually is a condition.<sup>9</sup> The withdrawal clause is

1 *Spar Shipping v Grand China Logistics Holding (Group) Co Ltd* [2016] 2 Lloyd’s Rep 447 (“*Spar Shipping*”)

2 Following the commentary by Professor Andrew Burrows in para 19(9) in *A Restatement of the English Law of Contract* (Oxford University Press, 2016), at pp 113-114: see *Spar Shipping*, *supra* n 1 at para 20

3 Sometimes also referred to as “innominate term”

4 Based on *United Scientific Holdings v Burnley Borough Council* [1978] AC 904; *The Afvos* [1983] 1 WLR 195; *The Scaptrade* [1983] 2 AC 694; *Bunge v Tradax* [1981] 1 WLR 711; *Stocznia Gdanska v Latvian Shipping Co & Others* [2002] 2 All ER Comm 768: see *Spar Shipping*, *supra* n 1 at para 24 [1973] 1 WLR 386

5 *Spar Shipping*, *supra* n 1 at para 63

6 [2013] EWHC 865 (Comm). Flaux J held that the obligation to punctually pay hire in a time charterparty is a condition.

7 *Bunge v Tradax*, *supra* n 4

8 *Spar Shipping*, *supra* n 1 at para 65

intended to furnish an owner with a contractual option to terminate the charterparty if the charterer fails to make punctual payment, so putting to an end future performance obligation. The court found that:

“... it is a leap too far to argue from the mere presence of an express withdrawal clause to the conclusion that the punctual payment of hire is a condition.”

The failure to pay hire punctually, no matter how trivial, would not derail the owner’s performance under the charterparty. The owner will have to show that it has been substantially deprived of the benefits of the charterparty and/or the charterparty cannot be performed<sup>10</sup> for there to be a repudiatory breach.

As a matter of general principle, the court affirmed the principle expressed in *Bunge v Tradax*<sup>11</sup> that unless the contract made it clear that a particular term was a condition or a warranty, it was to be treated as an intermediate term and the court should not be too ready to interpret contractual clauses as conditions.

### Repudiatory breach

In what circumstances will failure to pay hire punctually amount to a repudiation of a time charterparty?

Given that punctual full payment of hire in advance lies at the heart of the bargain, a reasonable owner would realistically expect charterers to comply strictly with the payment terms under the charterparty. Therefore, when a charterer adopts a persistent pattern of failing to pay hire, an owner who seeks to recover on a loss of bargain following a termination must now persuade the court

that the charterer has unambiguously represented their intention to not perform the charterparty, so as to deprive the owner of substantially the whole benefit of the charter.

Matters to be taken into account will include the amount in arrears, the extent of historical delays, and the absence of any concrete or reliable reassurance from either the charterers or their guarantor as to the future performance.<sup>12</sup> As an alternative, the owner could insert a clearly drafted clause in the time charterparty that the obligation to pay hire is a condition. The wording must be very specific and include the consequences of the breach and that time is of the essence to the performance of the charterparty.<sup>13</sup>

On the facts of *Spar Shipping*, the charterers at best could only hope to pay the hire in arrears, which was not the arrangement envisaged by the owner when it entered into the contract with the charterer. The court found that the conduct of the charterer was such that it was reasonable to infer unwillingness or inability on their part to pay since the charterer could not realistically be expected to pay punctually in advance in the future.<sup>14</sup>

In departing from *The Astra*,<sup>15</sup> the Court of Appeal in *Spar Shipping* has now set the record straight. It now means that minor delays in the payment of hire will not lead to the draconian consequence that the owners can automatically claim for loss of bargain, though the owners can elect to withdraw the ship and claim for unpaid charter hire for the unexpired charter period.

**LH-AG**

10 *Ibid*, at para 54

11 *Supra* n 6

12 *Supra* n 10

13 *Supra* n 6

14 *Supra* n 1 at para 86

15 *Supra* n 7