The Astra

CASE UPDATE

September 2013

PACIFIC
INTERMEDIARIES & CONSULTANTS
5th Floor, 6-8 Fenchurch Buildings
London, EC3M 5HR
United Kingdom
Tel: +44 20 73750002
Fax: +44 20 76917081
info@pacifics.co.uk

Introduction

The English High Court has in the recent case of *Kuwait Rocks Co v AMN Bulkcarriers Inc* (The Astra) [2013] EWHC 865 (Comm) held that a failure to pay hire under an NYPE Charterparty amounts to a breach of a condition.

The decision of Mr Justice Flaux has surprised many as it was widely held that payment of hire was not a condition of a contract. The general view had been that where the Charterers have missed consecutive hire payments and the Owners contractually withdrew the vessel from charter, the Owners would be entitled to claim for unpaid hire up to the date of the withdrawal and not beyond that. The Owners would only be entitled to damages for future losses if they established that there was a repudiatory breach. To do so Owners would need to prove that the Charterer evinced their intention to no longer be bound by the contract or to carry out the contract in a way that was inconsistent with the terms of the contract and deprived the Owners of substantially the whole benefit of the contract.

Facts of the case

The Astra had been chartered on an amended NYPE 1946 form dated 6 October 2008 for a period of five years. Under clause 5 of the NYPE form hire was payable in advance, failing punctual and regular payment of the hire the Owner would be entitled to withdraw the vessel. The Charterparty also contained an anti-technicality clause providing two banking days' notice to Charterers to rectify their failure to make payment of hire.

After a number of delayed hire payments and threats received from the Charterers that they would liquidate their company if the hire rate was not discounted, the Owners agreed to provide the Charterers with a reduced hire rate in for one year only. Subsequent to this agreement the parties entered the following addendum (the Compensation Clause) into the Charterparty:

"In the event of the termination or cancellation of the Charter by reason of any breach by or failure of the Charterers to perform their obligations, Charterers shall [...] pay to the Owners compensation for future loss of earnings"

Charterers made further requests to reduce the hire even further and when they failed to pay the hire on time in August 2010 the Owners withdrew the vessel and terminated the Charterparty.

The Owners took the matter to arbitration claiming the unpaid hire as well as their future loss of earnings for the period from withdrawal of the vessel up to the earliest redelivery date. The Owners argued the following:

(i) Charterers had breached a condition by not paying hire on time; and

(ii) Charterers conduct amounted to a repudiatory breach of the charter

Arbitration

The Tribunal considered the two arguments above.

With reference to Owners' first argument, the arbitrators did not agree that clause 5 is a condition. The Tribunal held that under English law a failure to pay hire did not amount to a breach of a condition. However, on the second point the arbitrators found the Charterers to be in repudiatory breach. The Charterers' repeated threats and requests for a reduction of hire along with their failure to honour the agreement of July 2009 was evidence they no longer intended to be bound by the charter. As a result, the Tribunal held that Owners were entitled to payment of the unpaid hire and future loss of earnings.

The Charterers appealed the Award on the second point and the Owners also challenged the tribunal's finding that clause 5 did not constitute a condition.

The Court's decision on appeal

On appeal, Mr Justice Flaux dismissed the Charterers' appeal and upheld the Award of the arbitrators that the Owner was entitled to damages for future loss of earnings.

On the request of the parties, Mr Justice Flaux gave his opinion on the question of whether clause 5 amounted to a condition of the contract. As Mr Justice Flaux provided his clarification on this point *in obiter,* his decision is not binding but will be persuasive in future claims.

Mr Justice Flaux held that clause 5 of the Charterparty amounted to a condition of the contract and failure to pay hire on time amounted to a breach, entitling the Owners to terminate the contract. He went on to say that this is irrespective of whether the breach was repudiatory or not. Mr Justice Flaux also made the following points:

(i) Even without an anti-technicality clause in the Charterparty, clause 5 of the NYPE form was a condition.

(ii) Mr Justice Flaux suggested that an anti-technicality clause constitutes a grace period for payment of hire and as a result an Owner can only terminate a charter for breach of condition once the grace period has expired.

(iii) Mr Justice Flaux agreed that the Compensation Clause referred to repudiatory breach or the breach of a condition. As this had been proven, upon termination the Owners were entitled to recover their loss of earnings.

Conclusion

Mr Justice Flaux has made a groundbreaking decision but it is still to be seen how the courts will decide on this point in future cases. This decision places the Owner in a better position in this falling market when dealing with a defaulting Charterer. Owners will still need to take caution when withdrawing the vessel to ensure that they do so correctly to avoid being in repudiatory breach by withdrawing the vessel too early or too late.

Charterers will also need to take care as late payments of hire could have greater consequences.

Further information

If you would like further information please contact:

Sarah Mokhtari
Tel: +44 (0) 20 73750002
sarah.mokhtari@pacifics.co.uk
info@pacifics.co.uk

www.pacifics.co.uk