

Early Redelivery

THE AQUAFAITH

September 2012

Introduction

Where Charterers have repudiated the charterparty by redelivering the chartered vessel early, Owners will have the option to either accept repudiation and claim damages or affirm the contract and seek the remaining hire from Charterers. This principle was laid out by Lord Reid in the case of *White & Carter v McGregor* [1962] AC 413 (*White & Carter*). Lord Reid laid out limitations to the application of the principle and these were discussed again in the recent case of *Isabella Ship-owner v Shagang Shipping (The Aquafait)* 2012 EWHC 1077 (Comm).

The Aquafait was heard before the English Commercial Court on appeal from the Arbitration Tribunal. Mr Justice Cooke considered whether the Owners were right to refuse Charterers' early redelivery of the vessel and affirm the contract rather than accept the repudiation and claim damages from the Charterers.

The Facts of the Case

The parties had entered into a time charterparty on an amended NYPE form for the duration of 59 to 61 months. An express warranty within the charterparty maintained that the vessel would not be delivered to Owners before 59 months of the charter had passed. Despite this, Charterers redelivered the vessel to Owners 94 days earlier than agreed and admitted to repudiatory breach. Owners proceeded to arbitration and requested a partial final award declaring Owners' entitlement to refuse re-delivery, affirm the charterparty and hold Charterers liable for the balance of the minimum period. Owners argued that based on the principle of *White & Carter* they were entitled to do so.

The White & Carter Principle

The *White & Carter* principle states that if a party to a contract repudiates the contract, the innocent party has two options: (i) to accept the repudiation and then sue for damages for breach of the

contract, or (ii) to refuse repudiation by affirming the contract and sue for the agreed price.

Lord Reid explained that there are exceptions to the second option. If Owners want to refuse redelivery, they must be able to complete the contract without any action being taken on the part of the contract breaker, i.e. without the Charterers doing, allowing or accepting something. In addition to this, if it can be shown that the innocent party has no legitimate interest in the performance of the contract over claiming of damages, he should be stopped from putting a burden on the other party when there is no benefit to him.

The Aquafait at Arbitration

The tribunal considered Owners' argument but decided that Owners were not entitled to reject the redelivery. Firstly, the arbitrator stated that the *White & Carter* principle could not be applied to a time charter as time charters could not be performed without the Charterers' co-operation through their obligation to provide the fuel for the vessel. Secondly, the Owners had no legitimate interest in affirming the charterparty and so should be stopped.

The Award ordered Owners to take redelivery of the vessel and claim damages in respect of the loss after trading the vessel on the spot market by way of mitigation.

The Appeal

The Owners appealed against the tribunal's Award arguing that the arbitrator was wrong to render a time charter exempt from the use of the *White & Carter* principle.

The court considered the tribunal's decision and found that the arbitrator had applied the incorrect test. The court found that it was possible to perform a time charter without Charterers' participation. There were no obligations of performance on Charterers that the Owners'

ability to earn hire would be dependent on. If the bunkers ran out, Owners could stem the vessel without the Charterers having to do anything. The court explained that this is in contrast to a demise charter whereby the condition of hire is based on the Charterers possession of the vessel.

The court stated that the arbitrator had failed to consider whether Owners' refusal to repudiate was "beyond all reasons", or whether keeping the contract alive would have been "wholly unreasonable". Moreover, the arbitrator should have considered whether Charterers had discharged their burden of proof of showing Owners to have no legitimate interest in maintaining the charter and proving that damages would be an adequate remedy. Charterers needed to prove that keeping the charter alive would be so unreasonable that Owners should be stopped. The court went on to say that the arbitrator should have explored the benefits it would have for Owners and whether the benefit was small in comparison to the loss it would cause Charterers. And so the court made the following examinations:

Firstly, it was known that the Charterers were in financial difficulty therefore Owners were at risk of receiving the hire with delay or even not in full if Charterers decided to pay off other debtors first or if they went into liquidation. In such a position, damages would be an inadequate remedy for Owners.

Secondly, The Charterers had the option of sub-letting the vessel but instead they were placing the burden on the innocent party rather than taking responsibility themselves. The court held that the arbitrator had failed to take this important factor into consideration.

With these points in mind, the court held that the arbitrator had misinterpreted and incorrectly applied the tests of the *White & Carter* principle. The Court held in favour of Owners and varied the Award to that effect.

Observations

The court's decision in *The Aquafait* could potentially broaden the principle of *White & Carter*. Given the difficulties of the current market, there may be a rise in the number of early redelivery of vessels to Owners who may wish to reject the redelivery and affirm the contract instead. However, the issue of early redelivery and any decision to be made in this respect is indeed complex and delicate. We recommend that a prior advise is sought from a relevant P&I Club or a law firm before any decision is made either by the Charterers (in case of early redelivery) or by the Owners (in case of accepting Charterers' breach).

Further information

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