

Isabella Ship-owner

– v –

Shagang Shipping

**“THE AQUAFAITH”****INTRODUCTION**

This case concerns the circumstances in which, following a breach of charterparty and purported early redelivery of the vessel, the owners can elect not to accept redelivery and instead affirm the contract claiming hire as opposed to damages.

**FACTS**

The vessel “Aquafaith” was chartered for a minimum period of 59 months on an amended NYPE form in 2006. In an admitted anticipatory breach of the charter in July 2011, the charterers stated that they would re-deliver the vessel. They made it clear to the owners that they would have no further use for the vessel during the remaining 94 days of the charter.

On the 25<sup>th</sup> July 2011 prior to the vessel being redelivered, the owners commenced arbitration proceedings seeking a partial final award declaring that the owners were entitled to refuse redelivery and affirm the charterparty.

The arbitrator held that the owners were required to take redelivery of the vessel, trade her on the spot market by

way of mitigation and claim damages in respect of the loss.

**THE LAW**

The owner’s argument was based on the decision of *White & Carter v McGregor* [1962] AC 413. In this case it was decided that where a party to a contract repudiates it and makes it clear that he will not carry out his part of the contract, the innocent party has an option to either accept the repudiation and claim damages, or to affirm the contract and claim the contract price.

One of the main criticisms of this decision is that by allowing the innocent party to earn and recover his contract price, the law allows him to avoid the constraints which would have applied had he elected to terminate immediately and sue for damages (the so-called “duty” to mitigate).

In his judgment in *White & Carter*, Lord Reid observed that “*in most cases the innocent party cannot complete the contract himself without the other party doing, allowing or accepting something...the party in breach can compel the innocent party to restrict his claim to damages*”.

He also went on to say:

*"It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself."*

This had the effect of restricting the innocent party's right to affirm the contract to situations where no cooperation was required from the breaching party to fulfil the contract and where damages would not provide an adequate remedy. A number of shipping authorities where this principle had been applied were considered by the judge in the present 'Aquafaith' judgment including, inter alia:

- *The Odenfeld* [1978] 2 Lloyd's Rep.357
- *The Alaskan Trader* (No.2) [1984] 1 All ER 129
- *The Dynamic* [2003] 2 Lloyd's Rep 693

## THE APPEAL

The question of law on appeal was:

*"Whether, as a matter of law, owners were entitled to refuse early re-delivery of 'Aquafaith' at Jintang on the 9<sup>th</sup> August 2011 and affirm the charter, or whether they were bound in law to accept early re-delivery and merely entitled to sue for damages?"*

The charterers had submitted to the arbitrator that, on the facts, the owners could not complete the charter without the charterers doing something and that the charter involved cooperation to the extent that the principle in *White & Carter* did not apply. Additionally they argued that owners had no legitimate interest, financial or otherwise in performing the contract rather than claiming damages.

During the appeal owners submitted that the arbitrator was wrong in law in finding in favour of both of the charterer's submissions above.

## THE DECISION

The Judge considered the authorities listed above, firstly in relation to the question "*could the owners claim hire from the charterers under this time charter without the need for the charterers to do anything under the charter?*" Very simply he found that the answer was yes. His reasoning was that owners only had to hold the vessel at the disposal of the charterers during the remaining charter period and that there was no need for cooperation from the charterers. As a result he found that the arbitrator had made a clear error of law.

The judge also found that the arbitrator had applied the wrong test when considering whether or not owners had a legitimate interest in maintaining

the charter and had not asked himself: whether the owners should “in all reason” accept the repudiation (or to put the point the other way, whether owners’ refusal to accept the repudiation was “beyond all reason”); he never asked whether it would be more than “unreasonable” and “wholly unreasonable” to keep the contract alive and did not make reference to the language of the Court of Appeal in the various cases.

During the arbitration owners had submitted that damages were an inadequate remedy because the charterers were in financial difficulty and that a delay to the end of the charter period to quantify damages would prejudice them. The judge on appeal observed that the expert reports in relation to the state of the charter market were not identical, giving rise to the possibility of significant argument as to proper mitigation of loss and the extent of damages recoverable. Accepting repudiation would have tasked owners to trade the vessel on a difficult spot market as no alternative time charter was available. In these circumstances the judge held that the ability of the charterers to sub-let the vessel was a relevant consideration.

The Judge held that the arbitrator’s finding that there was no

legitimate interest was a conclusion based upon a misunderstanding of the test and a failure to take into account the relevant factors.

## COMMENT

It has long been accepted that there are a number of reasons why a party would want to affirm a contract, these include; that a claim in debt for the contract price is a claim for a sum certain, proof is simple and quantification raises no problem. A claim in damages, on the other hand, raises problems of liability, remoteness and quantification and ultimately becomes a matter for the courts rather than the parties themselves. Following recent judgments on damages for breach of time charter where difficulties have arisen in quantifying damages due to the lack of an available market, it is likely, in our view, that arguments of a right to affirm will be raised more often by owners in similar situations as a result of this case.

Ben Macfarlane & Co is a maritime law practice with over the 25 years’ experience. We provide an efficient, effective and value for money service for all of your maritime/insurance law matters. Please see [www.bjm-co.com](http://www.bjm-co.com) for more details or call Ben Macfarlane on +44(0) 207 190 2988.