

## **WHEN CAN AN OWNER REFUSE TO ACCEPT A CHARTERER'S EARLY REDELIVERY OF THE VESSEL? A WEST DEFENCE CASE WHICH CAN, IN THE RIGHT CIRCUMSTANCES, PROVIDE A POWERFUL TOOL FOR OWNERS: "AQUAFAITH" [2012] (Isabella Shipowner SA v Shagang Shipping Co Ltd)**

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### **Summary:**

Usually, where a charterer repudiates a time charter party by redelivering the vessel early, ie sooner than the minimum charter period, the owner will accept the vessel's early redelivery, seek to re-fix the vessel and claim damages against the charterer for any shortfall that the owner has suffered due to the vessel's premature redelivery by the charterer. However, in the AQUAFAITH, when the time charterer, Shagang, purported to redeliver the vessel early, the court held that the owner was entitled to refuse Shagang's early redelivery and, instead, to keep the charter alive and claim hire for the remaining charter party period.

A word of warning: whilst The Aquafaith states a general principle, the case was based on specific facts which won't apply in all cases. Members should[ask their usual contact at the Managers + LINK] for advice in each case.

### **The case:**

In the AQUAFAITH, the charter was for a minimum duration of 59 months and there was 94 days, ie approximately 5% of the charter period, left to run when Shagang purported to redeliver the vessel. The owner (West's Member) argued that it was entitled to refuse to accept Shagang's early redelivery of the vessel, based e on a 1962 English House of Lords\* non shipping case, White & Carter v McGregor. White & Carter v McGregor concerned a 3 year advertising contract where the customer sought to cancel the contract on the same day that the contract was agreed and the court held that the innocent party (the advertising company) was entitled to hold the contract-breaker to his contract rather than being obliged to accept its customer's repudiatory breach of contract, mitigate his losses and claim in damages.

However, in Aquafaith, Shagang argued:

1) that the principle in White & Carter v McGregor did not apply because time charter parties fall within an exception to the White & Carter v McGregor principle, namely where the contract-breaker's co-operation or continual active performance is needed to perform the contract; and

2) that the owner had no “legitimate interest” in continuing to perform the contract (as opposed to accepting the charter party’s premature termination and claim damages).

The (sole) arbitrator agreed with Shagang on both their arguments.

The owner appealed against the arbitration award. However, on appeal, Cooke J overturned the arbitration award and decided in favour of the owner, namely that the owner was entitled to refuse to accept Shagang’s early redelivery of the vessel and was entitled to claim hire for the remaining charter party period. In particular, the Judge held that, even though a time charter party is characterised in English law as a contract for services, in a time charter, owners do not need the charterer to perform any service in order to keep the time charter party functioning: whilst the charterer should give voyage orders and provide bunkers to the vessel, should the charterer not do so, the owner could, if necessary, simply keep the vessel available to perform the charterer’s orders and stem bunkers itself (for the charterer’s account). In this regard, the Judge contrasted the position with a bareboat charter party where the charterer provides ongoing performance by providing the vessel’s crew.

As regards Shagang’s second argument, Cooke J decided that the arbitrator had applied the wrong legal test when considering whether or not the owner had a “legitimate interest” in maintaining the charter for the balance of 94 days and claiming hire. The Judge held that the arbitrator should have asked himself whether it would be “wholly unreasonable” for the owner to keep the contract alive. On the facts of the case, where there were only 94 days left of a five-year time charter and a difficult market, where a substitute time charter was impossible and trading on the spot market very difficult, the Judge found that it would be “impossible” to characterise the owner’s stance in wishing to maintain the charter as unreasonable, let alone “wholly unreasonable”. Therefore the Judge effectively shifted the burden onto the charterer, deciding that it is for the charterer to prove that the owner’s stance in keeping the charter party alive, rather than accepting the charterer’s repudiation and claiming damages, is “wholly unreasonable”.

A word of warning to owners: it won’t be in every case that an owner will be entitled to keep the charter alive !

Whilst, as the Judge commented, *The Aquafait* was not an extreme or unusual case on its facts, in order to persuade a court that it is entitled to keep the charter alive (rather than accept a charterer’s early redelivery, seek to refix and claim damages), an owner will need to prove – or, rather, to rebut the charterer’s allegation - that the owner has no “legitimate interest” in keeping the charter alive. For example, where damages would be an adequate remedy for the owner, it is unlikely that the owner will be held not to be entitled to keep the charter party alive and claim hire.

However, it is difficult to predict in which scenarios the owner will and will not be able to keep the charter party alive. In *The Aquafair*, the relatively short period of the charter that was left to run (approx. 5%) weighed in the owner's favour with Cooke J. However, in this scenario, it could, conversely, be argued that damages are more likely to be an adequate remedy for the owner.

Other factors which weighed in the owner's favour with Cooke J was the fact that the charter party contained an option for Shagang to sub let the vessel and it was found that there was no available market for the vessel when Shagang tried to redeliver her. Another factor which appears to have assisted the owner was that Shagang was in financial difficulties when Shagang tried to redeliver the vessel early. There was therefore a risk that, if it was held that the owner had to accept Shagang's early termination, re-fix the vessel and then sue in damages (as opposed to immediately claiming the hire rate multiplied by the remaining period of the charter), by the time that the case reached arbitration award, Shagang would no longer be able to pay an award in the owner's favour.

(Charterers, Shagang, were refused permission to appeal Cooke J's decision.)

\* The English House of Lords was re-named the English Supreme Court in 2009.