

Remedies for Charterer's Breach of the Obligation to Pay Hire in Time Charters

Analysis of the availability of various remedies for the Owner and the consequences of Owner's choices

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1 Introduction

Time chartering is remarkably sensitive to any changes in the global economy. Changes in demand for particular products and services, over- or undersupply of certain types of vessels, downturn in Chinese economy and decreased export of products, they all have a significant impact on the shipping industry. The recent drastic decline in oil prices has adversely affected especially the oil industry. In such conditions, charterers under offshore contracts may be facing difficulties with cash flow which will most certainly cause contractual defaults. Similarly, the impact of possible recession caused by reduced trade with China might be reflected in financial problems for the charterers.

In case of charterer's failure to make punctual payment the owner is entitled to various remedies. He may exercise his right to lien the cargo, the freight and/or the sub-freight as well as the hire and/or the sub-hire. Most of the charterparties also provide for owner's right to withdraw the vessel from the charterer¹, albeit some of them require the service of an anti-technicality notice². This right is, however, not accompanied by a claim for damages for loss of the 'bargain' – typically loss caused by the market hire rate being lower than the charter rate.³ To recover the loss of future hire for the unexpired period of the charter under English law the owner has to prove that the charterer repudiated the contract.

Existing case-law concerning the subject of withdrawal of the ship and termination of the contract is a source of many uncertainties for the owners. The recent conflicting decisions in the *Astra* and the *Spar Shipping* cases have highlighted the legal difficulties associated with owner's right to claim damages for future losses. Historically, the generally accepted position as a matter of English law has been that the contractual obligation to pay hire un-

¹ Cf. New York Produce Exchange (NYPE) 1946 lines 61-62, NYPE 1993 lines 150-151, Shelltime 4 issued 1984 amended 2003 lines 196-199 and Baltime as revised 2001 lines 86-92

² Cf. NYPE 1993 clause 11, Shelltime 4 clause 9

³ Time Charters (2014) §16.127

der a charterparty is not a breach of a condition but rather a breach of an innominate term. As a consequence, in order to claim bargain damages the owner had to evince that the charterer repudiated the charterparty, i.e. he showed the intention not to perform it (and therefore not to be bound by it) in a way which deprives the owner of the whole benefit of the future performance. This general view was questioned by Flaux J in the *Astra*, where he held *obiter dictum* that the payment obligation was a condition of the contract and thus any breach of it would entitle the owners to recover future hire loss. The recent *Spar Shipping* case seems to have restored the payment of hire to its original status as an innominate term. Nonetheless, both decisions are *obiter* and the courts are free to follow one of them at their discretion. Until the Court of Appeal is called upon to decide the condition point, owners will continue to face uncertainty when charterers fail to pay hire.

Another important aspect of ship-owner's right to withdraw the vessel is the timeframe for exercising the right. Unreasonable delay in withdrawal might amount to an election not to enforce the right to withdraw and as such constitute a waiver of that right. On the other hand a prompt decision to terminate the contract might justify the charge of repudiation imposed on the owner.

This thesis has two main objectives. It intends to discuss owners' dilemma with regard to whether and how fast they can withdraw the vessel and/or terminate the charterparty and claim damages in the current uncertain legal environment. It also analyses the risk of inadvertent affirmation of the charter after the expiry of reasonable period of time in which the owner should accept charterer's repudiation/renunciation of the contract.

The thesis consists of five parts. The first part aims at introducing the research question and presenting the aim of this study. The following two parts part aim at fulfilling the tasks of the first objective of this thesis. The second part is divided in four main sections that present and analyse the availability of remedies available to the owner for charterers' breach of the contractual obligation to pay hire. The distinction between two contractual terms - conditions and innominate terms - is presented as well as the case law classifying the obli-

gation to pay hire as one of them. The third part defines the notion of repudiation in general and repudiation of a charterparty. It also provides the analysis of case law demonstrating the owner's dilemma when it comes to vessel's withdrawal. The fourth part is devoted to the *Fortune Plum* case. It analyses the legal grounds on which the case is based and discusses the risk of unintentionally affirming the charter. The last part summarizes the findings of the research and presents concluding remarks.

2 Remedies available to the owner for charterer's payment default

2.1 Legal and contractual remedies for breach of charterparty

2.1.1 Legal remedies available at common law

Whenever there is a breach of contract under common law the innocent party is entitled to a claim for damages. This right correlates with the contract-breaker's secondary obligation to pay monetary compensation for the loss sustained by the non-breaching party in consequence of the breach.⁴ The aim of damages is to compensate the loss of the injured party sustained as a result of the breach of contract. By means of compensation the claimant is to be put in the same position as he would have been in had the contract been performed as agreed.⁵ This principle was confirmed in the leading shipping law case concerning the remedy of damages for repudiation, the *Golden Victory*.⁶

Taking the above into consideration, the innocent party has right to claim his expectation interest.⁷ The non-breaching ship-owner is entitled to compensation for the expected gain under the charterparty. In other words, the charterer should compensate him for the loss of the benefit of his promised performance.⁸

Accordingly, if the charterer breaches his payment obligation, the owner has right to claim any unpaid hire until the termination date of the contract along with accrued interest on the late payment or payments. In certain circumstances this remedy might not be sufficient. Where the charterer defaults in more than one hire payments and/or hire inflows are necessary to cover ship-owner's expenses in relation to the services he provides, the owner might

⁴ *Photo Production* at 849 per Lord Diplock

⁵ *Robinson v Harman* at 855

⁶ *Golden Victory* at 9 per Lord Bingham, at 29 per Lord Scott and at 57 per Lord Carswell

⁷ Poole (2012) p. 325

⁸ *Robinson v Harman* at 855

wish to terminate the contract, withdraw the vessel and claim damages for future loss of expected hire. Unless stipulated in the charter, there is no such right under English law.

However, the above remedies may be claimed if the owner establishes that the charterer's default amounts to repudiatory breach of the charter, which allows the innocent party to treat the contract as repudiated (or terminated for the future).⁹ This assessment is a complicated matter and hinges upon the factual background of each case, which will be further discussed and explained in this thesis. If the charterer repudiated the contract, the owner has right to accept the conduct as terminating the charterparty, withdraw the vessel from the services and claim damages, including lost profit. Alternatively he may allow the contract to continue and claim ongoing losses.

In practice it is unclear how many missed payments or short payments and what kind of conduct suffice to bring the contract to an end. The right to terminate must be exercised at the right time. After expiry of a reasonable period of time to accept the repudiation the owner risks to have affirmed the charterparty. On the other hand a prompt decision to terminate the contract might lead to the owner himself being in a repudiatory breach.

The uncertainty of legal remedies available is further underlined by two conflicting decisions of the same level. Relying on the *Astra* case, the owner can argue that the payment obligation is a condition and therefore one missed or short payment is enough to terminate the charterparty and claim both the unpaid hire up to the date of withdrawal and bargain damages. This is, however, a very risky strategy in the light of both the *Spar Shipping* decision and the pre-*Astra* common law position, according to which the owner has to show that the breach was sufficiently serious to constitute repudiation.

⁹ Poole (2012) p. 284

2.1.2 Contractual remedies according to contractual terms

It has been indicated in the legal literature that the uncertainties of legal remedies available in case of charterer's default to pay hire brought about the development of contractual remedies.¹⁰ As mentioned in the Introduction the majority of the standard time charterparties stipulate the right for the owner to withdraw the ship from the service in case of charterer's payment default. The owner is granted an express contractual right of termination often subject to compliance with a detailed procedure preceding vessel's withdrawal. Where no such procedure is provided in the charterparty, the owner may withdraw the vessel as soon as hire is late or overdue. Most of the charterparty forms commonly used by the market contain, however, the so called anti-technicality clause. According to such provision the owners have to comply with certain formalities in order to grant the charterer a grace period prior to withdrawing the ship. Upon termination the owner is entitled to claim all late or short hire payments together with any other amounts due from the charterers as of the date of the withdrawal.

The contractual termination clauses do not confer a right to claim damages flowing from the termination itself. In *Financings v Baldock* the Court held that the contractual terms stipulating termination rights are to be interpreted as an option to cancel which does not provide for greater rights to damages than common law damages that would have existed apart from the clause.¹¹ Therefore, owner's right to claim damages for loss of bargain has to be expressly stated in the charterparty. As ruled in the *Astra* there is nothing penal in such clauses¹² and considering the conflicting decisions on this issue the owner may aim at including a 'compensation clause' in the charterparty to protect his interests. In the absence of said clause the breach of payment obligation does not give a right to claim bargain damages unless breach of it constituted a repudiation of the contract.

¹⁰ Rhidian (2008) §7.11

¹¹ *Financings v Baldock* at 280

¹² *Astra* at §31

2.2 Withdrawal of the vessel

As indicated above, unless the charterparty provides for the right of withdrawal in case of charterer's payment default, there is no such right under English law. In order to terminate the charter, the ship-owner has to establish charterer's repudiation.

Although most of the charterparties provide for a withdrawal clause, it has caused some interpretational difficulties and ambiguity. Lord Wilberforce explained in *Laconia* that under clause 5 NYPE form the ship-owner is entitled to withdraw the services of the vessel from the charter if a punctual payment of any instalment has not been made. Thus, the charterer who tenders an unpunctual payment later, but prior to withdrawal will not avoid the consequences of his failure.¹³

In the *Scaptrade* the House of Lords decided that a right of withdrawal accrues if the charterer does not pay a hire instalment "in precise compliance with the provisions of the charter".¹⁴ That was confirmed by Lord du Parc in the *Tankexpress*, who said that a payment made even one day late is not sufficient to protect the charterer against cancellation. He rejected the reasoning applied in *Nova Scotia* that a payment which is two days belated is not made too late as it is considered "a regular and punctual payment within the meaning of the charterparty".¹⁵

Finally, it is notable that the withdrawal clause does not deprive the ship-owner of the rights he would have had in the absence of the clause. If the owner succeeds in demonstrating a repudiatory breach on the part of the charterer, he will be entitled to the outstanding hire up to the termination date, as well as to damages calculated on the difference between the chartered rate and the rate they would have got for that period outside the charter.¹⁶

¹³ *Laconia* at 317 per Lord Wilberforce

¹⁴ *Scaptrade* at 257

¹⁵ *Tankexpress* at 57

¹⁶ *Lesile Shipping* at 253

2.3 Damages

Where one of the parties to the contract is in breach, the innocent party is entitled to be compensated for the loss it suffered which was caused by the breach.¹⁷ If a party fails to perform their primary obligation under the contract, the secondary obligation to pay damages arises.¹⁸

The first part of the withdrawal clause imposes on the charterers a primary obligation to pay hire in a manner specified in that clause. Failure to comply with this primary obligation by delay in payment gives rise to secondary obligation. According to general rules, the primary obligation is converted into the secondary obligation only when the breach of primary obligation occurs. However, if a party has manifested his intention no longer to be bound by the contract and that would result in depriving the other party of substantially the whole benefit of the contract, the innocent party may “elect to treat the secondary obligation of the other party as arising forthwith”. Thus, the party does not need to await the actual breach in order to claim damages.¹⁹

The measure of damages is dependent on the seriousness of the breach. The owner is entitled to recover the loss that arises as a natural and probable consequence of the non-payment of hire.²⁰ Such loss will comprise the outstanding hire up to the date the vessel was withdrawn together with accrued interest rate. Whether the owner is entitled to damages based on the loss of the benefit of the rest of the charter period will depend on the evaluation of the breach. If the failure to comply with the primary obligation to pay hire amounts to a ‘fundamental breach’ of contract, the owner will have right to claim also bargain damages from the charterer.

¹⁷ Poole (2012) p. 285

¹⁸ *Photo Production* at 552

¹⁹ *Afivos* at 341 per Lord Diplock

²⁰ Cf. *Lesile Shipping* at 253

2.4 Bargain damages

The charter comes to an end as a result of owner's decision to withdraw the vessel and not the charterer's breach. It was suggested that upon a valid withdrawal, the owner is not entitled to claim damages from the charterer for the loss of the value of the rest of the contract.²¹ The reason for that is that the owner by withdrawing the vessel 'breaks the chain of causation' and so the loss of 'bargain' is not caused by the charterer's default.²² In a falling market this loss might be significant as it usually amounts to the difference between the market rate of hire and the charterparty rate for the remaining period of the contract. To recover the loss following termination the owner must prove that the failure to pay hire was sufficiently serious to constitute a repudiation of the charterparty which gave him right to bring the charter to an end and claim damages.

In the first place, the availability of said damages is strictly related to the question whether the obligation to pay hire is an intermediate (or innominate) term or a condition of the contract.²³ Primarily, the distinction might be of significance for establishing how many unpaid instalments of hire amount to a repudiatory breach. It is conceivable that one outstanding payment could impose the liability for loss of bargain. However, as it will be demonstrated in this thesis, the owner will hardly ever be able to reasonably infer from such conduct the unwillingness on the part of the charterer to be bound by the charter.

Accordingly, if the obligation was a condition, one missed instalment would suffice to establish repudiation. The same applies to any failure to pay on time or to pay the full amount of hire. The owner would be entitled to damages based on the hire that would have been earned in the future even if the charterer paid just a couple of hours too late or an inconsiderable amount too short and even though it happened on one occasion only.

²¹ *Kos* at 95

²² *Ibid.* at 95

²³ Time Charters (2014) §16.128

On the other hand, if payment obligation was an intermediate term charterer's default would entitle the owner to withdraw the vessel under relevant contractual clause but not to recover bargain damages unless the owner could prove charterer's repudiation of the contract.

Thus, both from the legal and the commercial point of view it is significant to classify the obligation to pay hire as one of the indicated contractual terms.

2.4.1 Classification of the obligation to pay hire as a condition – The Astra

2.4.1.1 Conditions under English law

It is generally accepted that under English law there are three basic types of contractual terms: conditions, warranties and innominate (or intermediate) terms.²⁴ This thesis presents the distinction between the conditions and the innominate terms as the obligation to pay hire under charterparties has been classified as one of these terms by various courts and authorities.²⁵

Conditions are such terms which are fundamental to the contract. In general, unless the term or clause has been expressly classified by the parties to the contract, it will be a condition if it 'goes to the root of the contract'.²⁶ For that reason they are accorded special status: the breach of a condition is generally regarded as repudiatory. As a consequence such breach gives rise to an immediate option of terminating the contract or affirming it. In addition the non-breaching party is entitled to recover his loss of profit following termination.

²⁴ Some authors suggest that there is a fourth category of contractual terms, the "fundamental term" (cf. Treitel (2002) p. 127-138), but most of the legal literature supports the presented division (cf. Peel (2011) §18-048; Chitty (2011) §§12-019 – 12-024).

²⁵ Cf. *Astra* at §§109, *Spar Shipping* at §193, Time Charters (2014) §16.132, Time Charters (1978) p. 121, Lord Diplock in *United Scientific Holdings* at 924, Lord Diplock in *Afovos* at 341

²⁶ *Nanfri* at 207 per Lord Wilberforce

2.4.1.2 The Astra case

On 18 April 2013, Mr Justice Flaux handed down the judgment in *Kuwait Rocks Co v. AMN Bulkcarriers Inc.*, where the charter relationship was governed by the amended New York Produce Exchange (NYPE) 1946 form. The case concerns the interpretation of the hire clause in NYPE 46. After a thorough review of case law in respect of payment of hire under time charter Flaux J held that the obligation to pay hire punctually and regularly under Clause 5 of the NYPE 46 was a condition of the contract without regard to the existence of the anti-technicality provision in the charter. As a result, any breach of the clause, no matter how trivial, entitles the owner to terminate the contract and place financial responsibility for the end of it on the charterer.

Although the decision in the *Astra* case is *obiter dictum*, it is one of the most important charterparty decisions of the last years as there is no appellate level decision on this issue. Moreover, the NYPE form is commonly used by the industry and has a widespread application to other charterparties which provisions are similar to Clause 5. The amended Supplytime used by the oil and gas sector also contains a similar hire payment clause. Thus, *Astra* judgment can be applicable not only to the NYPE 46 charter but to a number of other standard and amended contracts functioning on the market.

The legal grounds on which the Tribunal's conclusion is based may be summarised as follows:

- (i) Clause 5 of the NYPE stipulates an express right of withdrawal irrespective of the gravity of the breach. In other words, any breach of the obligation to pay hire, including minor and trivial breaches, pure mistakes and slight delays entitles the owner to withdraw the vessel. In judge's opinion "*this is a strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that the provision was a condition*".²⁷

²⁷ *Astra* at §109

- (ii) The anti-technicality provision stipulated in Clause 31 allowing charters a grace period along with Clause 5 of the charterparty betokens that the obligation to pay punctually is a condition all along. The right to terminate is unavailable for minor breaches which can be remedied within the grace period. Therefore, breaches that give rise to termination go to the root of the contract.²⁸
- (iii) There is a general rule in mercantile contracts that time is considered to be of the essence. Where a provision requires something to be done within a specified time, it is a condition. There is an earlier court decision in the *Brimnes*²⁹ to the contrary, but Flaux J decided to distinguish that decision based on the absence of anti-technicality clause.³⁰
- (iv) Further in his reasoning, the Tribunal concluded, however, that the *Brimnes* decision cannot be followed in any event due to the fact that the condition point was decided wrongly.³¹ Time was made of essence by incorporation of anti-technicality clause in the contract. The reference was made to arguably analogical situations in the *Stocznia v. Latco* and *Stocznia v. Gearbulk* cases that establish the limit for any period of grace, after which the innocent party is entitled to terminate the contract.³²
- (v) Flaux J underlined also the importance of commercial certainty in business transactions. Such certainty can only be achieved by according the obligation to pay hire the status of a condition. Otherwise, the owners will always face uncertainties as to their right to withdraw the vessel in a falling market. Therefore, “a ‘wait and see’ approach to breach of charterparty is inimical to certainty”.³³
- (vi) The significance of the prompt hire payments for the ship-owners also supports the conclusion that Clause 5 is a condition. Assuming that the failure to pay hire was

²⁸ *Ibid.* at §111

²⁹ *Brimnes*[1972] at 482

³⁰ *Astra* at §110-114

³¹ *Ibid.* at §114

³² *Ibid.* at §111

³³ *Astra* at §115

merely an innominate term, the owner would have had no legal tools to remedy his loss in a falling market.³⁴

(vii) Finally, Flaux J supported his decision with pronouncements by the courts in the following cases:

1. Lord Diplock in *United Scientific Holdings*
2. Lord Diplock in *The Afvos*
3. Lord Diplock in *The Scaptrade [1983]*
4. Lord Rostill in *Bunge v Tradex*
5. Rix LJ in *Stocznia v Latco*

The judgment in the *Astra* contains an interesting analysis of previous case law regarding the sort of conduct that amounts to a renunciation/repudiatory breach. The decision of Flaux J is well reasoned and thoroughly discussed. However, since it can be described as ‘radical’ and ‘far-reaching’ it has induced a lot of discussion among legal practitioners the majority of whom express their views to the contrary.

It is suggested that the *Astra* decision brought about distinctly more certainty for the owners. Was it to be followed, so could the owner have a much clearer option to treat the charterer as in repudiation.

In the discussion on the issue of classifying the breach of the payment clause as repudiatory, the owners’ interests have emphasized the importance of regular and timely cash inflow from hire payments. Under the time charter the owners bear the cost of running the vessel on daily basis and thus it is crucial for them to be able to “ensure operations of the vessel under healthy financial condition”.³⁵ The purpose of hire payment in advance is to provide the ship-owner with a fund that can be used to meet the expenses of rendering the services promised to the charterer under the contract. In the absence of a punctual payment the

³⁴ Ibid. at §114

³⁵ Hjalmarsson (2013) [p. 2]

owner, relying on *Astra*, would now be entitled to permanently terminate the service for the charterer.

On the other hand, however, the owner facing a fundamental breach of the contract has an option to continue with the charter relationship. In light of the judgment, if the owner does not withdraw the vessel promptly after one late or partial hire payment, he might be held to have affirmed the charter, although inadvertently, as discussed below in Section 4.

At the same time, the decision exposes the charterers to greater commercial risks. The set-off of counter-claims by the charterers has to be well analysed and the charterer must be sure that the sums he deducts are correct. No disputed deductions should be made and the charterer should seek to agree deductible amounts with the owner in order to avoid any further claims for future losses.

2.4.2 Classification of the obligation to pay hire as an innominate term – The Spar Shipping

2.4.2.1 Innominate terms under English law

As opposite conditions, the innominate terms are contractual clauses which may be broken in a number of different ways, not all of which are serious. Thus, in order to determine whether the breach was severe enough to entitle to contract termination and remedy of future damages, the non-breaching party must prove that the other party repudiated the contract. The effects of the breach must be examined and only serious effects give rise to bring the contract to an end. Should the effects be found not to be serious, the innocent party will be limited to claim damages suffered as a result of the breach.³⁶

³⁶ Poole (2012) p. 291

2.4.2.2 The Spar Shipping case

Prior to *Astra* the prevailing view was that the obligation to pay hire was not a condition of the contract.³⁷ At the same time, it is remarkable that not many cases discussed the nature of hire provisions and their classification as a legal term.³⁸ Moreover, the statements to that effect are *obiter* and the question has never been addressed by the Court of Appeal directly. The general understanding accepted by most of the practitioners was that the owner could claim the loss of future earnings where the charterer's breach of the hire payment clause amounted to repudiation of the charter.

The controversial position arising out of the *Astra* judgment was reconsidered again on 18 March 2015 in the judgment in the *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd*. The issue whether payment of hire was a condition was only a subsidiary element to this case. Nevertheless, Mr Justice Popplewell focused the majority of his judgement on that question due to uncertainties following the highly disputed decision of Flaux J in the *Astra*. Popplewell J declined his analysis and held that Clause 11 of the NYPE 1993 is an innominate term.

This conclusion was supported by a thorough review of the authorities on the instant issue and based on the analysis that may be summarised as follows:

- (i) The existence of the express right of withdrawal by no means rendered the obligation to pay hire a condition. The contractual termination clause merely confers the

³⁷ Cf. Time Charters (1978) p. 121

³⁸ Two leading cases where the obligation to pay hire was held not to be a condition of the contract are *Brimnes*[1972] at 482 and *Kos*[2010] at 95. There were, however, also courts' analyses that seem to be to the contrary, e.g. *dicta* of the House of Lords in *Tankexpress, Laconia* or *Milhalios Xilas*, also: Lord Diplock in *United Scientific Holdings* at 924, Lord Roskill in *Bunge v Tradex* at 12, Lord Diplock in *Afovos* at 341 (however, it was questioned whether he used the expression "breach of condition" in the sense of giving owners the right to claim damages, see: Hjalmarsson (2013) [p. 3]), Rix LJ in *Stocznia v Latco* at 436 (although he admitted that the point was undecided and his view was "perhaps controversial").

option to cancel, as supported by the *Financings v. Baldock*. If the clause does not clearly provide for damages at common law, no greater rights to damages exist than the rights that would exist apart from the clause. The language of Clause 11 provides solely for liberty to withdraw the vessel. Moreover, the inclusion of contractual right of withdrawal for payment defaults means that in the absence of the clause there would have been no such right. If the payment of hire had been a condition, the withdrawal clause would have been otiose.³⁹

- (ii) The breaches of the clause might range from the trivial to very serious ones. Marginally late hire payment will either cause no loss to the owner or the loss will be insignificant in the context of the charter as a whole. That indicates that the term should be treated as an innominate term as opposed to a condition.⁴⁰
- (iii) There is a presumption that in commercial contracts stipulations as to the time of payments are not conditions unless the contract indicates to the contrary. Had the parties intended to introduce a provision indicating that the payment obligation was a condition, it should have been drafted in a way making it clear that time of payment was to be of essence or stating that timely payment was a condition.⁴¹
- (iv) The existence of the anti-technicality provision in clause 11(b) of the charter has no bearing on the classification of the payment of hire clause.⁴²
- (v) The certainty in commercial transactions is indeed desirable but it must be balanced against the undesired effect of allowing parties to terminate as a consequence of trivial breaches. In any event, the option to withdraw provides the owner with sufficient certainty and the right to claim damages need not be certain.⁴³

³⁹ *Spar Shipping* at §§190-192

⁴⁰ *Ibid.* at §197

⁴¹ *Ibid.* at §§196, 192

⁴² *Ibid.* at §193

⁴³ *Ibid.* at §200

- (vi) Further, Popplewell J argued that parties to all commercial agreements that rely on the timely payment of the counterparty face some uncertainty in a falling market. There is no rationale for treating the ship-owners more favourably.⁴⁴
- (vii) The Tribunal supported his views with a number of *dicta*:
1. Donaldson J in *The Georgios C* [1971] QB 488
 2. Lord Denning in *The Georgios C* [1971] 1 Lloyd's Rep. 7
 3. Brandon J in *The Brimnes* [1972] 2 Lloyd's Rep. 465
 4. The Court of Appeal in *The Brimnes* (by implication) [1974] 2 Lloyd's Rep. 241
 5. Mocatta J in *The Agios Giorgis* [1976] 2 Lloyd's Rep. 192
 6. Andrew Smith J in *The Kos* [2010] 1 Lloyd's Rep. 87
 7. Lord Sumption and Lord Mance in *The Kos* [2012] 2 Lloyd's Rep. 292

Popplewell J presented a comprehensive and lucid analysis of the arguments set forth in the *Astra* and the supporting case law. His conclusion is based on the requirements of commercial certainty as in his opinion making timely payment a condition could lead to uncommercial results. A minor breach on the part of the charterer in a rising market would give rise to disproportional losses resulting from inability to trade or sub-charter the vessel. The same trivial breach in a falling market, on the other hand, would be of no interest to the ship-owner, who would rather await successive payment defaults. On a risen market the charterers would have to in fact bear the market difference as the charter rate would have been higher. In a fallen market, in turn, they would be responsible for the fall in the rate as they would have to pay damages for repudiation.⁴⁵

⁴⁴ Ibid. at §200

⁴⁵ Ibid. at §141

2.4.3 Current state of case law

At present, both the owners and the charterers face uncertainty resulting from two diametrically opposed decisions of the same level. The *Spar Shipping* is in line with the traditional thinking, as during the decades before the *Astra* judgement ship-owners and charterers resolved disputes based on the premise that payment of hire is not a condition. The *Spar Shipping* has an advantage of carefully detailed reasoning and comprehensive use of case law. There is yet another reason for that decision to be followed. As noted by Popplewell J the doctrine of precedent requires to “follow the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction, the latter decision is to be preferred, if it is reached after full consideration of the earlier decision.”⁴⁶

Even after the *Astra* decision, the owners have been reluctant to base their claim for the bargain damages merely on Flaux J’s reasoning.⁴⁷ Common practice has been to advance an alternative case on the footing that there was a breach of an innominate term.⁴⁸

There is, however, a great uncertainty in the authorities on this issue. The decision of an experienced and respected commercial judge, Mr Justice Flaux, is a reflection of contradictory views surrounding it. Also the leading members of the Commercial Bar in the UK have expressed an opinion that the obligation punctually to pay hire is in effect a condition.⁴⁹ Therefore and due to its significant financial importance to time charterparties, the question has to be finally settled by the Court of Appeal.

⁴⁶ *Minister of Pensions v Higham* at 155 per Denning J

⁴⁷ Taylor (2013-2015) p.7

⁴⁸ London Arbitrations 12/13; 7/14; 16/14;19/14

⁴⁹ Taylor (2013-2015) p.8

2.4.3.1 Legal and commercial implications for the Owners

The position of a party facing a conduct which is ambiguous and may amount to a repudiation of the charterparty is very difficult.

First, the party not in breach needs to identify whether the time charter has been repudiated or the other party intended to repudiate it. In cases of charterer's payment defaults this places a heavy evidential burden on the owner.

Second, in the light of the conflicting case law, it is uncertain how many missed or late instalments of hire will constitute a repudiation of the charter.

Third, as indicated in the thesis in Section 4.1 the non-breaching party facing a repudiatory breach of the counterparty can elect to terminate the contract or affirm it and await contractual performance on the date set for it to begin. However, the ship-owner has to exercise their right with caution. If he terminates the charterparty too early, he might be found to be in the repudiatory breach himself as it might be subsequently shown that the charterer had not in fact evinced an intention not to be bound by the contract. As decided in the *Nanfri* case the election to accept the breach as discharging future obligation as a result of a mistake as to the other party's repudiation may amount to a repudiatory breach by the accepting party.⁵⁰ On the other hand, if the owner accepts the renunciation as terminating the charter too late, he might be held to have affirmed the charter and foregone his right to terminate.

It is submitted that in order to strengthen his position, the owner may try to negotiate with the charterer the inclusion of a 'compensation clause' in the charterparty as indicated above in Section 2.1.2. In the *Astra* the court held that the parties to a time charter 'have or at

⁵⁰ *Nanfri* at 206, 207 per Lord Wilberforce

least are taken to have equal bargaining power' as the charter is a mercantile contract.⁵¹ Thus, the principle of freedom of contract gives parties the freedom to amend the charter by providing expressly for the right to claim damages for future loss of hire. Such clause might, however, be problematic from the charterer's perspective. It is suggested that it could be more acceptable to the charterer if included along with an anti-technicality clause.⁵²

Furthermore, the owner's position may be protected by a guarantee provision in the charterparty. In case of charterer's default to pay hire such provision would oblige him to provide a bank guarantee or a group company guarantee for the disputed amount. The provision might be additionally strengthened by a cancellation clause giving the owner the right to cancel the remaining part of the charter in case no guarantee is provided.⁵³

Finally, it is suggested that in some instances the owners may prefer to suspend the performance of the charterparty until the hire due is paid instead of withdrawing the ship. The right to suspend services has to be expressly granted to the owner in the charter. It also has to be exercised with caution in order to avoid claims from charterers for damages based on owner's breach. If assisted by an anti-technicality notice, the suspension right will only arise upon lapse of the grace period.

2.4.3.2 Legal and commercial implications for the Charterers

From the charterer's point of view the recent decision in *Spar Shipping* marks a welcome return to the previously accepted position. The *Astra* judgment rendered the assessment as

⁵¹ *Astra* at §31

⁵² International Law Office report *When charterers fail to pay hire: dilemma for owners*, <http://www.internationallawoffice.com/newsletters/detail.aspx?g=4a1afa4c-1735-490e-ab5f-e71c64af3956>

⁵³ Gard report *Cancellation clauses and other means by which owners may protect against defaulting charterers*, <http://www.gard.no/web/updates/content/52189/cancellation-clauses-and-other-means-by-which-owners-may-protect-against-defaulting-charterers>

to what is a valid deduction from hire very stringent. In a falling market the charterer who does not tender the full amount of hire due to some counter-claims he decides to set off might be exposed to extensive financial liability. Should the deductions be found unjustified, he would be subject to a damages claim for the balance of the charterparty period. However, as indicated above, it does not appear very likely that the *Astra* decision will be preferred and followed by the courts and arbitrators, at least not until it is confirmed by the Court of Appeal. Thus, under the state of law following the *Spar Shipping* decision the position of charterers seems to be more favourable than that of the owners. The owners have no automatic right to damages and the burden of proof that the charterer's conduct was repudiatory is placed upon them. As demonstrated in this thesis⁵⁴ a pattern of persistent late hire payments will not impose the liability for loss of bargain on the charterer unless his conduct is such that it is reasonable to infer unwillingness on his part to be bound by the charter. The arbitration tribunal in the *Fortune Plum* held that there is nothing "seriously worrying" about belated payments.⁵⁵ If the previous defaults have been accepted by the owner and the charterer shows the will to continue with the contract for the future, the owners will most probably follow the 'wait and see' approach⁵⁶. In other words the owner will not be willing to withdraw the vessel until he will be reasonably confident that the charterer's behaviour will justify a charge of repudiation. In any case the charterer has to pay close attention to his communication with the owner and his actions with respect to hire payment. It is submitted that in the circumstances of a given case even one belated instalment might expose the charterer to a claim for bargain damages if accompanied by a conduct giving rise to repudiation.

⁵⁴ Cf. section 3.3 and 4.3.5.1

⁵⁵ *Fortune Plum* at §620

⁵⁶ As described by Flaux J in the *Astra* at §116

3 Repudiation/Renunciation of the Charterparty – circumstances

As discussed above, there are currently conflicting authorities regarding owner's right to claim damages in the event of charterer's payment default. Since the law on that issue is unclear and it has not yet been decided by the higher instance whether the contractual obligation of charterers to pay hire is a condition or an innominate (intermediate) term of the contract, the owner's position remains ambiguous.

In every case of charterer's default the owner will have to decide whether to follow the controversial *Astra* judgment and qualify the payment obligation as a condition or rather follow the well settled position established prior to *Astra* and confirmed in *Spar Shipping*. It is doubtful that the owners will base their claims solely on the decision of Flaux J. Therefore, in order to recover bargain damages, they will have to prove that the charterer's breach went to the root of the contract or evinced an intention not to perform contractual obligations. In other words, the owner will, again, need to show that the charterers repudiated the contract or intended to do so.

3.1 Breach and repudiatory breach of the contract

Where a party to the contract either fails or refuses to perform its obligations according to the agreed terms without lawful excuse, the party is in breach of contract. The same applies where the party performs, but fails to meet the required standard of performance.⁵⁷ Breach can occur in the following forms⁵⁸:

- (i) anticipatory breach: before the performance is due the party makes it clear that he does not intend to perform (renounces the contract) or disables himself from performing;

⁵⁷ Poole (2012) p. 284, Peel (2011) p.828

⁵⁸ Contractual Duties: Performance, Breach, Termination and Remedies (2011) p.84, Peel (2011) p.840,

- (ii) renunciatory breach: at the time of the promised performance the party announces that he is unwilling to perform (this requires a ‘clear’ and ‘absolute’ refusal to perform);
- (iii) breach by nonfeasance or misfeasance: at the time of the performance the party fails to perform, performs but not in compliance with the contract, his performance is delayed or he breaches the promise not to act.

Breach gives the innocent party right to terminate a contract if the other party has renounced (sometimes known as ‘repudiated’), performance has been rendered impossible by the default of the breaching party or the party breached a condition or seriously breached an innominate term.⁵⁹

The expression repudiation or repudiatory breach has not been precisely defined in contract law⁶⁰ and is used in different meaning by different authors to define serious types of breaches. It is suggested by some authors to distinguish between repudiatory breach (comprising non-verbal and actual default) and renunciatory breach (referring to verbal notification and unwillingness or inability to perform).⁶¹

In the *Spar Shipping* Propplewell J elaborated on some differences between renunciation and repudiation as follows⁶²:

- (i) Repudiation: refers to a conduct that deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract.

⁵⁹ Ibid. p.85

⁶⁰ *Herman v Darwins* at 378 per Lord Wright

⁶¹ Peel (2011) p.86,87

⁶² *Spar Shipping* at 208

- (ii) Renunciation: embraces the type of conduct that could lead a reasonable person to the conclusion that the other party has no intention to perform his future obligation the non-performance of which at the due date would be repudiatory.

The above presented distinction shows that breach or breaches of obligations that have fallen due may not be sufficient to constitute repudiation. Such breach might, nevertheless, amount to renunciation because a reasonable person might conclude that the breaching party has no intention to perform in the future. In such case the combination of the past and expected future breaches might be repudiatory.

Due to the fact that different formulations and metaphors are used in the legal literature and by the courts, it is submitted that in this thesis the term ‘repudiation’ refers to renunciation, anticipatory breach, breach of a condition and serious breach of an innominate term.

3.2 Repudiation of a charterparty

As presented above, every breach of a condition of a charterparty is a repudiatory breach regardless whether such breach was trivial or serious. Assuming, however, that the obligation to pay hire punctually and regularly is an innominate term, the main question of interest for the owners is in what circumstances a breach of this obligation amounts to repudiation. The answer to this question might differ slightly depending on the situation.⁶³

In *Mersey Steel & Iron Company v Naylor, Benzoni & Co.* Lord Selborne provided some guidelines for examining whether a conduct is repudiatory. The ship-owner must in his words “see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part”.⁶⁴ Buckley LJ developed

⁶³ *Nanfri* per Lord Wilberforce at 207

⁶⁴ *Mersey v Naylor* at 438

this statement urging the innocent party to examine the consequences of the breach and to decide whether it's fair to hold him to the contract. If the remedy in damages only would have been unfair considering the circumstances of the breach, then a repudiation has taken place.⁶⁵

It has been stated in the case law that it is not required to show that the repudiating party intended not to fulfil the contract. Their intention might have equally been to perform the contract but “in a manner substantially inconsistent with [their] obligations”.⁶⁶ If a party, however, objectively shows that his conduct threatens with a repudiatory breach, his subjective intention to maintain the contract is irrelevant. The innocent party is entitled to draw consequences from the other party's actions and not his subjective desires.⁶⁷ A charge of repudiation will be justified if the actions of the breaching party clearly indicate an intention to abandon the contract and refuse its performance as a whole. Alternatively, the conduct will be repudiatory if it evinces an intention not longer to be bound by the contract.⁶⁸ On the other hand, the conduct resulting from an honest misinterpretation of contractual terms or a mistaken view of the party's legal position does not give raise to repudiation.⁶⁹

In *Hongkong Fir* Diplock LJ summarized some previous tests for repudiation. The occurrence of the event has to be analysed as to whether it deprives “the party, who has further undertakings still to perform, of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings”.⁷⁰ This has been juxtaposed with the test provided in *Decro-Wall* case, where the court referred to a breach that is depriving the injured party of “a sub-

⁶⁵ *Decro-Wall* per Buckley LJ at 380

⁶⁶ *Bailey Son* per Lord Wright at 159

⁶⁷ *Nanfri* per Lord Wilberforce at 208

⁶⁸ *Freeth v Burr* per Lord Coleridge at 213

⁶⁹ *Bailey Son* per Lord Wright at 159

⁷⁰ *Hongkong Fir* per Diplock LJ at 492

stantial part of the benefit” to which the party is entitled under the contract.⁷¹ However, Lord Wilberforce opined in *Nanfri* that these two seemingly different expressions denote the common principle that a breach must go to the root of the contract in order to be repudiatory. The divergence between the formulations stems from the application of the test to different contracts.⁷² In *Astra* case it was advanced that *Nanfri* put a gloss on the two above mentioned cases. However, Flaux J concluded that there was not a ‘*Nanfri* gloss’ and the three cases represent “three ways of enunciating the relevant legal principle”.⁷³

3.3 Illustration of repudiatory conduct – case law

In the context of time charters the repudiatory breach has been analysed by the courts with respect to a wrongful order for the final voyage and a failure to pay hire punctually and regularly.

The *Dione* and the *Gregos* demonstrate that the illegitimate last voyage amounts to repudiatory breach of the contract. The illegitimate order does not itself constitute repudiation, but the charterer’s refusal to give a valid order evinces his intention no longer to be bound by the contract.⁷⁴ Thus by avoiding a legitimate order to employ the ship, the charterer is in a repudiatory breach of the charter.

In the context of the subject of this thesis the application of the repudiation test to charterer’s payment default is of main interest. Both for practitioners and for the ship-owners the question of what kind of charterer’s conduct satisfies the test is crucial. Is the number of unpaid hire instalments decisive or is it charterer’s behaviour that sheds the light on the judgment? What is the threshold for the evidence required to prove an intention on the part

⁷¹ *Decro-Wall* per Buckley LJ at 380

⁷² *Nanfri* per Lord Wilberforce at 207

⁷³ *Astra* at §24

⁷⁴ *Gregos* at 1476H and 1477A, *Dione* at 118

of the charterer not to comply with the charterparty? The answer to these questions is extremely important for the owners, who might be deemed to play a game with the charterers trying to win the balance of the charter period. This ‘game of wits’ was summarised by Lord Denning in the *Tropwind*, who said: “The story is familiar. When the market rates are rising, the ship-owners keep close watch on payments of hire. If the charterer makes a slip of any kind – a few minutes too late – or a few dollars too little – the ship-owners jump on him like a ton of bricks.”⁷⁵

The charterparties rarely provide for a specific deadline for payment referring to hours. In the absence of an express agreement or settled practise, the hire is tendered on time so long as it’s paid until midnight on the due day.⁷⁶

In a number of cases the owners were claiming damages resulting from charterer’s repudiation due to one late or missed hire payment. The analysis of these cases leads to the conclusion that failure to pay one instalment of hire on the due date would hardly justify a charge of repudiation.

The *Tropwind* case discusses the withdrawal of the vessel and owner’s claim for damages where one instalment of hire was paid in lower amount than agreed. The hire under the charter entered into in December 1972 amounted to \$3.70 per ton. During 12 months the market rate rose to \$8.50 a ton. At the same time, in December 1973 the charterers deducted the estimated costs of the bunkers from the last payment of hire. On this basis the owners rendered the notice of withdrawal and claimed damages for the remaining four weeks of charter in the amount of the market rate at that time, i.e. \$8.50. In fact, however, the vessel was not withdrawn and the ship-owners continued with the charter. Lord Denning held that “a few dollars too little” or “a few minutes too late” when considering payment of hire does not satisfy the repudiation test. This is underlined by the fact that the damages for such a

⁷⁵ *Tropwind* at 236

⁷⁶ *Afovos* at 340

breach would be insignificant.⁷⁷ It seems that the court also put weight on the fact that the owners were looking for the way out of the contract due to raising market rates. In court's view the owners were trying to find an excuse to give notice of withdrawal and that was a common practise in 1973.⁷⁸

In the *Brimnes* the hire was paid one day too late. The charterers, however, demonstrated a relatively long history of belated hire payments over the charter period from December 1968 to April 1970. However, the owners did not complain about late payments until January 1970. The ship was withdrawn in April after the last payment of hire was transferred to owner's account one day after due date. The court held that one late hire payment, albeit in the context of numerous previous defaults did not constitute repudiation. It seems that the owners' behaviour and their continuous acceptance of late payments without qualifications was significant for the court. Charterers' conduct in the opinion of the Court of Appeal "did not come anywhere near to being repudiatory in character".⁷⁹ It did not evince a clear intention not to be bound by the terms of the contract.⁸⁰

In *Afovos* the charterers were paying hire timely, but the last semi-monthly instalment was not paid on time due to an error committed by the charterers' agents – their banks. Lord Diplock held that failure to comply with the payment obligation by delay in payment of one instalment does not amount to a 'fundamental breach' of the contract, since it does not deprive the owner of substantially the whole benefit he is supposed to obtain from the unexpired period of the charterparty which is in effect for a period of 21 to 27 months.⁸¹

⁷⁷ *Tropwind* at 237

⁷⁸ *Ibid.* at 234

⁷⁹ *Brimnes* [1974] at 262

⁸⁰ *Ibid.* at 252

⁸¹ *Afovos* at 341 per Lord Diplock

Another case concerning late payment of one hire instalment due to an error is the *Georgios C*. The disputable hire fell due on Saturday, but owing to charterers' mistake it was paid on Monday. The charterers were convinced that were the banks are closed on Saturday and Sunday, a Monday payment will be a timely payment according to the contract. The court held that this was an obvious mistake and clearly not such as to amount to repudiation.⁸²

The analysis of the above presented cases demonstrates that the owners will face difficulties proving that one hire instalment which is paid late or not in the full amount evinces charterers' intention not to continue with the charter. Even if they succeeded in doing so, it's doubtful that any court would hold that one late or insufficient payment deprives the owner of the whole benefit of the charter. It seems that the courts are putting weight on other circumstances as well, such as ship-owner's acceptance of previous late payments or the influence of a raising market situation on their behaviour. It is submitted that the owner, who accepts some of the belated instalments without any complaints might be deemed to have considered charterer's conduct non-repudiatory. The repudiation charge in the court proceedings cannot, therefore, be justified. It also follows from the case law that also charterers' actions and evinced intentions have more bearing on court's decision than simply the number of missed hire payments.

However, determination that charterers conduct and intentions are seriously breaching the contract is a complicated matter. One of the London arbitration concerning the withdrawal of the vessel on the very day when the hire fell due shows that the threshold for the owners to evince a repudiatory breach on the part of the charterers is rather high. In this case the charterers evinced a history of late payments of previous instalments, were giving misleading excuses and as the Tribunal said were hardly behaving "in anything like a first-class fashion". However, all that was not sufficient to justify a finding of anticipatory repudiatory breach. In Tribunal's opinion the owner's withdrawal took place too early. The history

⁸² *Georgios C* at 14 per Lord Denning

of late payments is not evidence of an intention not to perform fundamental obligations, but rather of an intention to do it as late as possible. The Tribunal pointed to a contractual right of the owners to withdraw the vessel in case of a late payment and concluded that “the owners had lost any right to withdraw that they might have had in respect of any previous outstandings because they had accepted late payments.”⁸³

This decision seems to follow the *Brimnes* on that matter. Both decisions also show that even repeated lateness of payment is not sufficient to establish charterers’ unwillingness or inability to comply with the charter.

It is submitted, that in case of charterparties containing payment clauses obliging the charterer to pay hire “punctually and regularly”, it should be rather safe to assume that two missed hire payments ‘are going to the root of the contract’. In *Leslie Shipping* at the date of withdrawal two months’ hire was due. As to the first hire, the parties agreed to cover it by two bills of exchange issued by the owners. The bills were, however, later dishonoured by the charterers. Additionally, the charterers failed to pay the following hire instalment. That breach of the contract was found to have deprived the owners of the benefit of the rest of the chartered period. In court’s opinion it amounted “in law to repudiation of a fundamental part of this contract, namely, the payment of the hire in advance”.⁸⁴

The *Merlin* is another case where more than one missed hire payments was considered repudiatory. The court decided that where three hire instalments were outstanding the owners were entitled to withdraw the vessel in order to “protect themselves from the continuous non-payment of freight”. Charterers’ breach justified owners’ concern that if the charter continued they would not get money even as damages for loss of the remainder of the contract. Thus, the withdrawal was valid and the owners were awarded bargain damages.⁸⁵

⁸³ *London Arbitration 3/04*

⁸⁴ *Leslie Shipping* at 253

⁸⁵ *Merlin* at 186

In the *Astra* case the charterers clearly intended to pay only a significantly reduced rate of hire for the remainder of the charter (a period of more than three years). Soon after entering into the charterparty, the charterers attempted to negotiate the rate down, but as the parties failed to reach an agreement they ultimately defaulted and the vessel was withdrawn. It was proven that the charterers had no intention of paying the full charterparty rate of hire and that evinced the charterers' intention to "perform the balance of the charterparty in a manner which was not consistent with it". Flaux J held that it was justified to conclude that "the charterers were determined to perform the charterparty in a manner which deprived the owners of the substantial benefit they should have obtained from further performance".⁸⁶

The analysis of discussed case law seems to indicate that minor breaches of charterer's obligation to pay hire will not impose on the charterer the liability for bargain damages. Slight delays in payment seem not to amount to repudiation of the charter. The owners have to exercise caution if they want to terminate the charter when one instalment is missing, especially if they used to accept belated payments in the past. Although awaiting more than one outstanding instalment might in many cases not be a satisfactory solution for the owners, it protects them from the charge of repudiation due to unjustified withdrawal of the vessel.

4 Risk of affirmation of the charterparty by the owner following the charterer's breach

4.1 The right of an innocent party to affirm the contract

As indicated in Section 2.4.3.1 the position of a ship-owner that is confronted with an unclear conduct of the charterer failing to fulfil his payment obligation according to the char-

⁸⁶ *Astra* at §27

ter is highly uncertain. If the owner does not exercise his right to terminate at common law at the right time he risks the waiver of his right to withdraw the vessel.

As a starting point, the owner has the option under English law either to accept the repudiatory breach as terminating the contract or to affirm the charterparty. This has been confirmed by Lord Ackner in the *Simona* case: “When one party wrongly refuses to perform obligations, this will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages, or he may ignore or reject the attempt to determine the contract and affirm its continued existence”.⁸⁷ In case of charterer’s repudiatory breach of contractual obligations in the form of an actual breach or an anticipated breach of future obligations, the contract comes to an end solely when the ship-owner accepts the conduct as terminating. Such acceptance has to be unequivocal. The owner has to categorically refuse by words or conduct to perform the contract or categorically declare that he would only perform it under certain terms and conditions.⁸⁸ The alternative option is to affirm the charter which obliges both parties to perform all the obligations due under the contract.⁸⁹ In *White and Carter* Lord Reid set two exceptions to the principle that the innocent party has the right to elect whether to continue with the contract. The party is restricted to a remedy in damages in two situations. If the other party’s co-operation is required before the non-breaching party can complete performance of the contract, the party is entitled to damage claim only. The same applies where the innocent party has no legitimate interest in performing the contract rather than claiming damages.⁹⁰ It was, however, argued that any restrictions on party’s right of election would apply “in extreme cases, viz. where damages would be an adequate remedy and where an election to keep the contract alive would be wholly unreasonable”.⁹¹

⁸⁷ *Simona* at 203 per Lord Ackner . This was also confirmed by Lord Reid in *White and Carter* at 427

⁸⁸ Cf. *Bailey Son* at 158 per Lord Wright

⁸⁹ Poole (2012) p. 285

⁹⁰ *White and Carter* at 431 per Lord Reid

⁹¹ *Odenfeld* at 374 This was also confirmed in the *Dynamic* at 697,698 and in *Aquafaith* at 71

The owner has to make his election and if he does not do so, ‘the law might take the decision out of his hands’ and he might be held either to have elected not to exercise his right or on the opposite – to have elected to exercise it.⁹² Although it follows from the case law that the affirmation must be unequivocal⁹³, the owner might be deemed to have exercised a choice by his conduct. As Lord Scarman indicated in the *Mihalios Xilas* “When a man, faced with two alternative and mutually exclusive courses of action, chooses one and has communicated his choice to the person concerned in such a way as to lead him to believe that he has made his choice, he has completed his election.”⁹⁴ Furthermore, the intentions are immaterial. If an unequivocal act of election has been done and the other party has knowledge of that act, the election has been made.⁹⁵ Thus, the owner risks an inadvertent affirmation of the charter if after the breach he acts in a way that is only consistent with the charter continuing. In the words of Lord Scarman: “the consequence of the election, if established, is the abandonment, i.e. the waiver, of a right”⁹⁶.

Generally, the case law recognizes the existence of a period which the non-breaching party can utilize to consider its options to terminate the contract or affirm it. The innocent party is accorded some grace period in order to verify the precise intentions of the other party and non-withdrawal of the vessel within this period does not necessarily amount to treating the breach as repudiatory and electing to affirm.⁹⁷ However, it is not entirely clear for how long that period can last and “if [the innocent party] does nothing for too long, there may come a time where the law will treat him as having affirmed”.⁹⁸

⁹² *Kanchenjunga* at 398

⁹³ Cf. *Yukong v Rendsburg*, *Scarf v Jardine* at 361, *Kanchenjunga* at 398

⁹⁴ *Mihalios Xilas* at 314 per Lord Scarman

⁹⁵ *Scarf v Jardine* at 360 per Lord Blackburn

⁹⁶ *Mihalios Xilas* at 314 per Lord Scarman

⁹⁷ *Yukong v Rendsburg* at 609, *Stocznia v Latco* at 451

⁹⁸ *Stocznia v Latco* at 452

4.2 Waiver of the right to withdraw

4.2.1 Acceptance of late or insufficient hire payment

The owner may be deemed to have waived his right to withdraw the vessel on the footing that he accepted a late hire payment without any reservations or complaints. Similarly retaining tendered sums for a period of time that proves to be unreasonable might amount to a waiver of owner's right if the notice of withdrawal has not been rendered. On the other hand, such waiver will not be inferred from an acceptance of a timely but insufficient payment. These three situations were discussed in the following cases.

In the *Georgios C* case the charterparty provided that 'in default of payment' the owners had a right of withdrawal. A payment due was not tendered before two days later and the owners purported to give notice of withdrawal. Lord Denning held that the words "in default of payment" mean "in default of payment and so long as default continues". Therefore, as long as the charterers were in default, the owners were entitled to withdraw the ship. That right is, however, lost once the charterers remedy their default by tendering hire payment.⁹⁹ Lord Wilberforce held in the *Laconia* that the *Georgios C* does not establish a general rule applicable to other different cases that late payment takes the right of withdrawal, if not previously exercised.¹⁰⁰

One of the cases concerning similar circumstances, where another decision was made, is the *Brimnes*. In this case the withdrawal clause conferred the right to withdraw the vessel in the event of charterers' failing the punctual and regular payment of the hire'. The Court of Appeal held that this case is to be distinguished from the *Georgios C* and the right of withdrawal was exercisable by the owners notwithstanding a preceding payment of belated

⁹⁹ *Georgios C* at 14

¹⁰⁰ *Laconia* at 318 and 319

hire.¹⁰¹ However, the court further concluded that even though the hire is tendered late but nevertheless prior to ship's withdrawal, its acceptance without qualifications means that the owner elected not to exercise his right to withdraw. It was suggested by Cairns L.J. that in order to avoid a waiver the owner should in advance notify the charterer that the late payment will be accepted solely 'on account of hire already accrued and of any other sums due'. Furthermore, the charterer should also be informed that any balance will be repaid to them 'in due course'.¹⁰² This case provides important guidelines for the ship-owners. It demonstrates that in order to protect their rights to withdraw when retaining hire, the owner must communicate to the charterer the underlying motive for retention.

The *Laconia* discusses the situation where hire was paid late to the owner's bank and following its receipt returned to the charterer's upon owner's request who decided to withdraw the vessel. The House of Lords decided not to follow the *Georgios C* case and held that the receipt of payment order by the bank and the processing of it do not constitute an acceptance by the owners of the late payment. The processed payment has been returned to the charterers on the following day. As Lord Salmon said this must have been within a reasonable time. The owners would have waived their right to withdraw the vessel if they led the charterers to believe that they had accepted the payment. This would have been the case if the bank had retained tendered hire for an unreasonable time.¹⁰³

In *Mihalios Xilas* the House of Lords decided that there was no waiver of the owner's right to withdraw the vessel where, before the due date, the owners received notice that an insufficient payment was to be made and no instruction was issued to the bank to reject the payment. It was held that until the expiry of the last day for payment, the owner is unable to assess whether he is entitled to withdraw the vessel.¹⁰⁴ In the opinion of Lord Diplock

¹⁰¹ *Brimnes* [1974] at 251

¹⁰² *Ibid.* at 262

¹⁰³ *Laconia* at 326 per Lord Salmon

¹⁰⁴ *Mihalios Xilas* at 315 per Lord Scarman

waiver requires knowledge and before electing to withdraw the owner is entitled to inquire the correctness of the deductions made by the charterer from the hire.¹⁰⁵

It is noteworthy that the retention of tendered hire after a valid notice of withdrawal was rendered will not be deemed an affirmation of the contract. It was held in *Mihallios Xilas* that the retention of advance hire itself does not amount to the waiver of the withdrawal right if there are no other indications of such election. In the opinion of Lord Scarman it does not constitute an unequivocal act required by law and cannot as such be treated as an election to continue with the charter.¹⁰⁶ It follows from this case, however, that the owner has to exercise caution as to his actions and the language he uses, so that there is no implication to the new charter after the withdrawal. To protect his position he should clarify with the charterers that the funds are being retained as a security for damages claims under the charter and not as hire.¹⁰⁷

Both *Mihallios Xilas* and *Brimnes* discuss a significant aspect of ship-owner's conduct. They demonstrate the importance of owner's communication with the charterer. Owner's decisions must be clear and the charterer must be informed about the underlying reasons. Thus, it is recommended that the owners who seek to retain any funds without withdrawing or after a withdrawal notice was served elucidate to the charterers that the funds were accepted as a security for other damages claims under the charter.

4.2.2 Delayed withdrawal of the vessel

In order to ensure that any delay in withdrawal of the vessel is reasonable and does not amount to the waiver of the right to withdraw, the owners must give notice within a reasonable time after charterer's default. The circumstances of each case will be decisive when

¹⁰⁵ Ibid. at 307 per Lord Diplock

¹⁰⁶ Ibid. at 316 per Lord Scarman

¹⁰⁷ Cf. *Brimnes*

considering what the reasonable time is.¹⁰⁸ On many occasions it might be “the shortest time reasonably necessary to enable the ship-owner to hear of the default and issue instructions.”¹⁰⁹ This statement of Lord Wilberforce, however, is very rigid and was questioned in other judgements.¹¹⁰ As observed by Lloyd J in the *Scaptrade*, the withdrawal of the vessel from the time charterer is a serious matter and the owner must be allowed some time to analyse his position and where necessary consult his legal advisors.¹¹¹ The owner might also take time to make enquiries at his bank whether the money has been received.¹¹² When there is an insufficient payment of hire, the owner does not waive his right of withdrawal if he takes reasonable time to ascertain whether charterer’s deductions were correct before he decides whether to withdraw the ship or not.¹¹³

Since it is uncertain under the current case law how promptly the owner has to withdraw the vessel following a single missed hire payment in order not to waive his right, it is submitted that any acceptance of late or partial hire should be made subject to owner’s reservation of rights. It is suggested that such reservation is made in writing and contains a reference to owner’s right to accept late or insufficient payments as terminating the charter in the future.

4.3 The *Fortune Plum* case

4.3.1 Introductory remarks

The fine line between the innocent party’s acceptance of repudiation resulting in termination of the charter and the waiver of the right to withdraw the vessel by affirmation of the

¹⁰⁸ *Mihalios Xilas* at 312 per Lord Salmon and at 316 per Lord Scarman; *Antaios* at 240 per Lord Diplock

¹⁰⁹ *Laconia* at 321 per Lord Wilberforce

¹¹⁰ *Balder London* at 494 per Mocatta J, *Scaptrade* at 429 per Lloyd J

¹¹¹ *Scaptrade* [1981] at 429

¹¹² *Balder London* at 494

¹¹³ *Mihalios Xilas* at 307 per Lord Diplock

contract was examined in *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Limited*.

The withdrawal of the vessel might be deemed invalid and repudiatory itself even though the time the owners used prior to the notice of withdrawal was not unreasonable. This is the case when the owner has affirmed the charterparty in the meantime. The affirmation might be communicated by word or conduct and if it is done between the charterer's default and the withdrawal date, the owner will be bound by his choice to continue with the charter and the subsequent withdrawal will amount to a repudiatory breach of the charter.¹¹⁴

The *Fortune Plum* demonstrates the risk for the owner who might be deemed to have had affirmed the charterparty by his conduct even before he elected to do so. Another important question discussed in the case is whether the innocent party may, following its affirmation of the charter, accept a continuing repudiation so as to terminate it.

4.3.2 The background facts

The vessel MV Fortune Plum was chartered on an amended NYPE form charterparty for a period of 35/38 months. The hire payments were due on or before 23rd of each month starting from 23 August 2010 after delivery of the vessel on 23 July 2010.

First five hire instalments were paid a few days late. Subsequent payments were delayed on average for one week. A pattern of persistent late payments developed. Eventually a number of hire instalments remained unpaid. In September the owners first demanded payment of all outstanding amounts reserving their right to withdraw the vessel and then sent an anti-technicality notice. In both cases the charterers responded in apologetic manner, explaining their situation and promising to pay at hand. By the end of September the owners asked for a guarantee of the charterer's parent company in respect of past and future pay-

¹¹⁴ Time Charters (2014) §16.109

ments. When part of the outstanding amount was paid in the beginning of October, the owners assumed that the whole debt will be paid and declared that the vessel will not be withdrawn.

In mid-October the owners discovered that a freezing order has been issued by the English Courts against the assets of the group of which the charterers were part. They informed the sub-charterers that they were exercising a lien over sub-freights and sub-hires, served a statutory demand on the charterers claiming the overdue hire and informed that the vessel will be withdrawn. They also threatened to liquidate the company in case of further default. Although the invoice remained unpaid within the requested time, no withdrawal took place as the owners believed that the threat of winding up should be sufficient.

The owners discovered in the beginning of November that the sub-charter has been amended. The owners' right to a lien on sub-freights and sub-hires was deleted. Therefore, on 11th November the decision to terminate the charterparty was made on the footing that there was a repudiatory/renunciatory breach of the contract. However, the vessel was not withdrawn until 14th November, when she completed discharging and sailed from the port of discharge. On the same day the owners informed the charterers that they were in a repudiatory/renunciatory breach that has been accepted to terminate the contract. The charterers found the ship's withdrawal to be wrongful and claimed that the owners repudiated the charter themselves.

4.3.3 The Arbitrator's decision

The Tribunal found that the charterers were in renunciatory breach by 7th November when it became clear that the statutory demand had not been paid. On this day the owners were entitled to conclude that there has been a renunciatory or an anticipatory breach of the charterparty.

They further decided that after that date the owners had a reasonable period of time to consider whether to accept charterers' renunciation. This period expired 5 days later, on 11th

November, when the owners decided that they will terminate the charter. It is worth emphasizing that the history of charterers' payment defaults was lengthy in this case and the Tribunal concluded that the period between 7th and 11th November was reasonable in order to review that history. They also recognised that this time was necessary for the owners to seek the legal advice on the matter.

The owners were, however, found to have affirmed the contract by allowing the vessel to remain in charterers' service until 14th November for the purposes of discharging the cargo. It followed that vessel's withdrawal on that date amounted to repudiation of the charter by the owners. It is noteworthy that although the Tribunal recognised the commercial reasons that gave rise to owners' action, they concluded that "the continued compliance with the charterparty was a clear affirmation". Even though the owners have repeatedly reserved all their rights, the Tribunal held that such reservation was not sufficient to protect their interests if their actions were contrary to their decision to withdraw the vessel.

4.3.4 The Commercial Court's decision

The owners appealed to the Commercial Court arguing that the Tribunal had erred in law on the following conclusions:

- (i) A ship-owner must withdraw the vessel immediately upon the expiry of a reasonable period in which he is considering whether to accept a repudiatory breach.

Mr Justice Teare observed that there was no error of law on Tribunal's part. He argued that it is "a matter of common sense" that an innocent party should be entitled to a reasonable period in order to consider whether to accept the repudiation or renunciation or to affirm the contract. The Tribunal had expressly discussed what time was reasonable in the circumstances of the instant case, but had not found that the owners were required to terminate the charter and withdraw the vessel immediately upon expiry of that period as claimed in the appeal. The arbitrators had solely noted that no immediate withdrawal had taken place. Then the Tribunal went on to consider the essential ques-

tion: whether the owners had acted “in a manner consistent only with their treating the contract as still alive”. This was the correct approach in the opinion of the Court.¹¹⁵

- (ii) The act of discharging could on its own amount to an unequivocal act that gives rise to a conclusion that a ship-owner intended to affirm the charter.

Terje J considered that the finding of the Tribunal was a finding of fact and the Court, respecting the choice of the parties to have their dispute resolved by an arbitral tribunal, will not interfere with a finding of fact made by this tribunal. The Tribunal found that the owners chose on 11th November to comply with the charterparty until the loading was completed on the expense of the charterers on 14th November and decided that such conduct unequivocally amounted to affirmation of the charter. The Court concluded that it does not follow from the Tribunal’s decision that the Tribunal misunderstood the principles it applied. It should be noted, however, that the Court accepted the possibility that another court “might have concluded on the facts of the instant case that there was no affirmation”.¹¹⁶

- (iii) The owners were not entitled to terminate the charter in case of a continued renunciation of the charter - the situation where the charterers continued to evince an intention not to perform after the arguable termination of the charter.

The Court held that where the charterers continue to renounce the charterparty, the affirmation is not irrevocable. The innocent ship-owner can accept charterers’ continuous renunciation which takes place after the owner affirmed the charter as terminating it. Teare J referred to the findings of Jonathan Sumption QC in *Safehaven v Springbok* [1996] 71 P&CR 59 at p. 68 and concluded that when considering the continuous renunciation “the attention must be directed to the party’s behaviour after the affirmation”. If the charterers are silent, it is for the Tribunal to decide whether such silence demonstrates that the renunciation is continuing. As pointed

¹¹⁵ *Fortune Plum* at §§20-26

¹¹⁶ *Ibid.* at §§27-42

out in *Stocznia v Latco* the silence might be a “speaking silence” inferring a breach. The Court, therefore, held that the Tribunal was wrong in law as it cannot be simply assumed that the acceptance of renunciation of the charter after its previous affirmation constitutes a repudiatory breach. Rather, in such case it must be considered whether there were words or conduct which demonstrates continuous renunciation of the charter.¹¹⁷

4.3.5 The analysis of legal grounds on which *Fortune Plum* is based

The *Fortune Plum* case discussed four important questions concerning repudiatory and renunciatory breach of the charterparty. First, it demonstrates the difficulties of the judgment the owner has to make as to the repeated payment defaults on the part of the charterers and whether they amount to renunciation or repudiation of the contract. Second, if the owner decides that the breach was repudiatory and intends to terminate the charterparty, great care has to be exercised with respect to the time by which charterer’s conduct must be accepted. Third, the owner needs to be aware of what is said and done prior to his decision in order to avert the risk of unintentional affirmation of the charter. Finally, if the charterer persistently repudiates the charter after its affirmation by the owner, the owner is entitled to terminate it based on the continuous repudiation.

4.3.5.1 Failure to pay hire amounting to a renunciatory/repudiatory breach

The owner has to decide at which point a failure to pay hire, late or insufficient hire payment constitutes such a serious breach of the charter that the charterer can be said to have evinced an intention not to be bound by the contract. In the instant case, the period of non-payment lasted over many months. Although the charterers were paying hire late from the very beginning of the charter period, the Tribunal held that a reasonable owner, in the position of the owners in the subject case, was entitled to conclude on the 7th November that

¹¹⁷ Ibid. at §§43-54

charterers' conduct amounted to a renunciatory or an anticipatory breach, thus after more than a year of non-proper hire payments. Notwithstanding months of persistent late and irregular payments of hire and dishonoured promises to pay on the part of the charterers, the innocent owners would probably have been found to have repudiated the charter had they withdrawn the vessel before 7th November.

It is submitted that this decision sets the threshold for the allowed contractual non-compliance by the charterers quite high. By 14th September the amount of several outstanding hire payments was over US\$1m and even so the owners were not yet entitled to claim that the charterers have unequivocally evinced a clear intention that they were no longer willing or able to be bound by the charterparty. It seems that the courts did not consider a pattern of repeated late hire payments as sufficient to find charterers in repudiatory breach due to the owners not protesting about late payments of various instalments before September 2011.

Similar reasoning seems to have been applied in the *Brimnes*. In that case the charterers demonstrated a relatively long history of constant late hire payments. However, the court held that one missed hire payment in the context of numerous previous defaults did not constitute repudiation. The owners have accepted the first 13 out of 14 payments being late and that precluded them from claiming a repudiatory breach on the part of charterers.¹¹⁸ In the Court of Appeal Cairns LJ said: "if a month's hire in advance is tendered late, but before withdrawal, and is accepted without qualification, it must be taken to be accepted as hire for the month, which must amount to an election not to enforce the right of withdrawal, so constituting a waiver of that right".¹¹⁹

Case law in its majority demonstrates that the mere failure to make punctual payment of one instalment of hire by the charterer will be hardly considered a repudiation of the con-

¹¹⁸ *Brimnes*[1972] at 483

¹¹⁹ *Brimnes*[1974] at 262

tract. Lord Diplock held in the *Afovos* that the owner was not deprived of substantially the whole benefit of the charter when the charterer failed to pay one half-monthly hire.¹²⁰ On the other hand, the controversial judgment in the *Astra* has proven that the issue is arguable and the position of the owners uncertain. If followed strictly, it gives owners the right to terminate the charter on the footing that there was repudiation in case of solely one missed hire payment.

Whereas it follows from the case law that one missed hire payment might not satisfy the repudiation test, two or more outstanding payments seem to be a much stronger evidence of lack of the intention to perform in the hands of the owner. In *Leslie Shipping* the charterers were in default with two hire payments. Charterers' conduct was found to constitute a repudiatory breach. Greer J awarded damages for the loss of future hire arguing that a ship-owner should be "entitled to suppose from conduct of that sort that the charterer was not going to pay the hire for the subsequent months of the charter".¹²¹

Notwithstanding the above, it is submitted that, depending on the circumstances of the case, it is feasible that two missed payments would not give rise to a claim for damages for loss of bargain. As indicated in *Time Charters* "it is contentious whether late payment of hire instalments without more amounts to a repudiatory breach of the charter".¹²² The *Fortune Plum* case demonstrates that the sole fact that a number of hire instalments are missing might not be sufficient to evince repudiation or renunciation. It follows from the case that the whole range of factual circumstances influences the final evaluation of the often complicated reality. Charterers' conduct, their communication with the ship-owners, objectively shown intentions as well as their efforts to retrieve the situation – all these considerations deserve notice when analysing charterers' default in payment of hire. However, owner's attitude to charterer's actions, his reactions to late or non-contractual payments and his own

¹²⁰ *Afovos* at 341

¹²¹ *Leslie Shipping* at 253

¹²² *Time Charters* (2014) § 16.75

behaviour are equally relevant for the assessment. Acceptance of repeated overdue payments by the owner might be a strong indication for the court that the owner did not perceive charterer's breach as serious enough. Whether qualified as affirming the contract after a repudiatory breach or non-sufficient for establishing the repudiation, such acceptance might prevent the owner from claiming repudiation when the following hire payment is late. It is, therefore, extremely important that the owners consider very carefully their actions and words following each and every unpaid hire instalment.

4.3.5.2 The length of reasonable period

As presented above, the first difficulty the owner faces under the current state of law is to evince the intention of the charterer not to be bound by the charter. From this point in time the owner has a reasonable period to consider his position and decide about further actions. While taking legal advice, consulting the banks with respect to the payments and evaluating the situation, the owner must act cautiously not to be held to have affirmed the charter. Whether delay to withdraw the vessel is reasonable and the period the owner used is the shortest time reasonably necessary will depend on numerous factors.

In *Fortune Plum* Teare J decided that the time actually taken by the owners to make up their mind was the best evidence as to what the reasonable period would be in the circumstances of the case. If the owners in fact needed 5 days to accept the charterers' renunciation as terminating the charterparty, this period has to be deemed a reasonable period.¹²³

It is submitted that the court demonstrated a rather owner-friendly approach in the instant case. The time taken by the owner to consider termination of the charter will not always be deemed reasonable solely on the footing that this was the period required for an innocent party to make up his mind. It follows from the case law that the owners will usually be expected to react quickly. Lord Wilberforce held in the *Laconia* case that the reasonable time

¹²³ *Fortune Plum* at §23

“in some, indeed many cases, [...] will be a short time – viz. the shortest time reasonably necessary to enable the ship-owner to hear of the default and issue instructions”¹²⁴. In some cases 5 days might be deemed a delay that is unreasonable and not short. The longer the delay is, the lesser the probability that it will be deemed reasonable. And most likely the argument that the owner needed that period to make up his mind will not suffice.

Notably, the statement of Lord Wilberforce has not been consequently followed in other cases. In the *Balder London* the court held that although it might be applicable in many cases, the point is stated too rigidly and does not find application to the instant case. The owners did not give notice of withdrawal in the ‘shortest time reasonably necessary to enable them to hear of the default and issue instructions’. And yet the court found that they did not act unreasonably awaiting the confirmation from the bank that no hire was paid. The withdrawal of the vessel was 4 days delayed. It seems that this period of time was reasonable due to the fact that it often took a couple of days before the owners heard from their agents that the money was transferred. When, however, the owners ascertained after the weekend that the money did not arrive, they were in court’s opinion still within the reasonable period to withdraw the vessel.¹²⁵

As Lord Diplock noted in the *Antaios* “it is in the very nature of juridical discretion that within the bounds of ‘reasonableness’ [...] one Judge may exercise the discretion one way, whereas another Judge might have exercised it in another”.¹²⁶ Although it is difficult to set clear guidelines as to what amounts to reasonable period, it seems that the courts will balance the shortest time necessary with the previous practice between the parties and the requirements of commercial certainty.

¹²⁴ *Laconia* at 321

¹²⁵ *Balder London* at 493, 494

¹²⁶ *Antaios* at 240

4.3.5.3 Unintentional affirmation of the charter

Following the expiry of the reasonable period, the owner is at risk of unwittingly affirming the charterparty. Such affirmation might be inferred from owner's words or conduct notwithstanding his actual intention to accept the breach and bring the charter to an end. The *Fortune Plum* examines the risk of the waiver of owner's right to withdraw the vessel in seeking to obtain a short-term commercial benefit.

The owners in the instant case have decided that the cargo that was loaded on board has to be discharged on expense of the charterers prior to the withdrawal of the vessel. The Tribunal concluded that this evinced their intention to continue with the charter.¹²⁷ A continued compliance with the charterparty, even over two days only and with an intention to solely complete the discharge that has started before the decision to terminate was made, might be deemed to amount to 'a clear affirmation'. If the owner has knowledge of charterer's default and communicates to him by his conduct that he has chosen to continue with the charter, he will be deemed to have affirmed it even if he expressly reserves his rights to terminate. It is submitted that such reservation of rights will have no bearing on the owner's choice communicated by his conduct. He will be bound by his choice and the subsequent withdrawal of the vessel will be wrongful. Thus, mere continuation to follow normal voyage instructions might be found to constitute charterparty's affirmation.

Also a notice demanding payment of outstanding hire rendered by the owner to the charterer might constitute a waiver of his right to withdraw. It is so if the demand evidences an intention of the owner to keep the charterparty alive. It seems from the analysis of the arbitration and court decision in the *Mahakam* case that a pure demand for hire without any reservations might amount to affirmation of the charter, especially where the charter continues despite the non-payment. In the instant case the owners rendered five demands for the unpaid hire, but did not terminate the charter before the grace period expiry for the last

¹²⁷ *Fortune Plum* at §30

demand. After four unpaid instalments the owners notified the charterers that they were entitled at any point to serve notice terminating the charter and asked for a prompt commercial proposal to resolve the situation. The fourth and fifth notices were found not to constitute the waiver. The owners made it clear that they will draw consequences from the charterers' failure to pay the further instalments. On the other hand, previous demands might have constituted an evidence of owners' intention to continue with the charter.¹²⁸

It is noteworthy, that some actions of the owner within the reasonable period might be equivocal but in charterer's view might amount to a waiver of the right to withdraw the vessel. A judgment in the *Mihalios Xilas* constitutes an important guideline as to owner's behaviour before the withdrawal. The House of Lords decided that the retention by the owners of the hire in respect of the period after withdrawal of the vessel does not amount to said waiver. If the vessel was nonetheless withdrawn from service, the retention of hire does not render "the notice and act of withdrawal any less unequivocal".¹²⁹ It was further held that neither the acceptance of payment, nor the request for further information or any ultimatum made by the owners before the final date for payment amount to an election to treat the charterparty as continuing.¹³⁰ As long as the period by which the owner defers his decision is deemed to be reasonable, he may retain paid hire and make inquiries into its correctness without risking the affirmation of the charterparty.¹³¹

4.3.5.4 Later acceptance of continuing renunciation

If the owner affirms the charterparty despite the charterers continuing repudiation, he waives thereby the right to withdraw the vessel only "as it stood at the time of the affirma-

¹²⁸ *Mahakam* at 99

¹²⁹ *Mihalios Xilas* at 307 per Lord Diplock

¹³⁰ *Ibid.* at 310 per Viscount Dilhorne

¹³¹ *Ibid.* at 315 per Lord Scarman

tion”.¹³² If, following the affirmation, the charterer persists in the repudiatory or renunciatory conduct, the owner may accept this continuing breach as a new right to terminate the contract.

In order to determine whether the charterer’s renunciation continues, the attention must be drawn to charterer’s behaviour after the affirmation. The prior history of charterer’s breaches will be relevant in considering whether subsequent words or conduct demonstrated continuous renunciation, but the Court in the instant case emphasised the importance of the breaching party’s conduct after the charter has been affirmed.¹³³

Teare J. based his conclusion on two authorities. In *Safehaven v Springbok* Jonathan Sumption QC held that if the repudiating party persists in his refusal to perform, the correct analysis is directed at the party’s ‘behaviour after the affirmation’.¹³⁴ “The words and conduct said to demonstrate this must [...] do so clearly and unequivocally.”¹³⁵

These principles were approved by the Court of Appeal in another cited case: *Stocznia v Latco*. Rix LJ went, however, one step further. He provided an analysis of the silence as an indicator of repudiation after affirmation and concluded that where silence “is part of a course of consistent conduct it may be silence which not only speaks but does so unequivocally”.¹³⁶ In some circumstances, the charterers will be obliged to rectify their silence after the owner’s affirmation. By not doing so they will be deemed to continue the breach.

It is suggested to analyse the innocent party’s right to terminate the contract on the basis of continuous repudiation against different categories of conduct as defined in the *Spar Ship-*

¹³² Time Charters (2014) §16.109

¹³³ *Fortune Plum* at §48

¹³⁴ *Ibid.* at §47

¹³⁵ *Ibid.* at §48

¹³⁶ *Ibid.* at §49

ping. It seems that where the repudiatory conduct amounts to a total or partial failure to perform obligations which have fallen due, this will hardly survive as a continuing repudiation. On the other hand, a conduct which evinces an intention not to perform future obligations when they fall due will more likely give rise to a continuing repudiation. The same applies to the impossibility to perform future obligations when they fall due created by the defaulting party's own act.¹³⁷

4.4 Concluding remarks

The above discussed cases demonstrate the necessity on the part of the owner to ensure that he does not unwittingly waive his right to withdraw the vessel. He needs to act very warily not to demonstrate an intention to continue the relationship with the defaulting charterer.

It is notable that in the *Mahakam* some of the demands for unpaid hire were deemed to constitute waivers even though the owners indicated in all of them that they were reserving their rights. It might be concluded that in a situation where the vessel is on its voyage for instance to the port of discharge and the owner decides to continue the voyage despite the outstanding hire, a reservation of owner's right to withdraw the vessel upon arrival to the port will most likely not be sufficient to render such withdrawal lawful.

The *Fortune Plum*, on the other hand, demonstrates that regular orders as the employment of the ship will most likely amount to a waiver of the right to withdraw the vessel, even where the owner informs the charterer that the withdrawal due to repudiation will take place right after the aim of employment has been achieved. The owner is not entitled to such delays, he must decide upon withdrawal immediately after the expiry of a reasonable period. Accordingly, it is important from the owner's perspective to carefully consider whether obtaining a commercial benefit from the contractual term is worth risking an affirmation of the contract. The benefit of discharging the cargo at the expense of the charter-

¹³⁷ Wartski (2013-2015) p.42

ers in the instant case entailed the affirmation of the charter. That, in turn, might result in the owner's loss of right to accept the defaulting party's repudiation, and thereby place him in repudiation.

At the same time there is another important implication from that case. The said loss of right to terminate the contract due to affirmation pertains solely to the right available to the owner at the time he waived his right. The right to terminate will revive if the charterer continues to repudiate the contract in the period following the waiver. Thus, the owner who unwittingly affirmed the charter has to await charterer's conduct after affirmation. If it can be shown that the charterer continues with his repudiatory conduct, termination will be lawful. The analysis of *Fortune Plum* seems to indicate that repeated non-payment or late payment of hire, interrupted by owner's affirmation but further continued afterwards, will give rise to termination if it justifies the charge of repudiation.

5 Conclusion

The analysis of case law in this thesis has attempted to demonstrate the complications arising for the owners out of the current state of law. It creates a very fine line between the acceptance of charterer's breach as terminating the contract and the waiver of the owner's right to do so. Although there is some middle ground, the reasonable period for the owner to consider his options, the owner is often at great risk if he chooses either way. As shown on the basis of numerous cases, the affirmation of the contract might work against the shipowner in the future. It might be argued that his previous acceptance of late payments precludes the charge of repudiation in case of one outstanding instalment. Too prompt termination, in turn, if found unlawful, might result in the repudiation of the charter by the owner himself.

This thesis has attempted to analyse what legal remedies are available to the owner in case of charterer's breach of payment obligation and to present some guidelines for the owners on how to approach charterer's behaviour when considering vessel's withdrawal. It has shown that current state of law does not provide for any clear rules of conduct that can be followed in all circumstances. In light of the conflicting authorities, both owners and charterers should exercise great caution.

The attempted insight into case law allows identifying certain factors that have to be taken into consideration by the owners.

First, it is crucial to ascertain whether the charter at hand stipulates a right to withdraw the vessel and in what circumstances. Where the owner has no express right, he must in the first place establish that charterer's failure to pay hire amounts to a repudiatory breach of the contract. The number of outstanding instalments, the history of the relationship between the parties, as well as their communication and behaviour will be decisive aspects when

considering repudiation point.¹³⁸ Moreover, even if the charter provides for a withdrawal right, the owner must show that the breach was fundamental and the charterer evinced intention not to be bound by the charter in order to claim bargain damages.¹³⁹

Second, the owner needs to make sure that the hire was actually late. The payment is deemed to be made once owner's bank credits the account. If the due date falls on a non-banking day and the hire is supposed to be paid in advance, payment must be made before the due date. Notwithstanding the above, the owners must postpone the vessels withdrawal until the payment is late on the due date.¹⁴⁰ Where the charter does not specify a precise time for payment, the midnight rule applies.¹⁴¹

Third, the withdrawal must take place at the right time after it has been established that non-compliance with payment obligation amounts to repudiation of the charter. There are two important considerations in that context. Where the charter contains an anti-technicality provision, the charterer has to be awarded a grace period before the withdrawal.¹⁴² In absence of such provision the owner can withdraw the vessel as soon as hire is late or overdue. However, the owner should act warily and be confident that charterer's breach was fundamental and 'going to the root of the contract'. Otherwise, by withdrawing the vessel too early, where the repudiation has not yet been evinced, he risks a repudiatory breach himself.

Fourth, the owner has to carefully consider all his actions and words prior to vessel's withdrawal. Should his subsequent conduct indicate to the charterer that he has elected to continue the charter, the owner may forfeit this right to withdraw the vessel. Such waiver

¹³⁸ Cf. Section 3.2 and 3.3

¹³⁹ Cf. Section 2.4

¹⁴⁰ Cf. *Laconia*

¹⁴¹ Cf. *Afovos*

¹⁴² Cf. eg. Clause 11 NYPE 93

might take place if the owner does not terminate the charter within a reasonable time necessary to seek legal advice and inspect whether the funds were received and possible deductions justified.¹⁴³ Also acceptance of a full late payment without any qualifications might amount to a waiver.¹⁴⁴

On the other hand, even where the charter has been affirmed, the right of withdrawal is not forfeited for the future. The owner must await another fundamental breach of payment obligation following the affirmation and his right to terminate the contract will revive.

Finally, if the owner concludes that the charter has been repudiated, he must unequivocally accept the breach as terminating in order to bring it to an end. There are no particular requirements as to the notice of withdrawal. However, it must be rendered to the charterer, and not for instance the master. It also has to contain the wording making it clear that the payment default was treated as terminating the charter.¹⁴⁵

It is submitted that the situation of the owner would have been much clearer if the line of argumentation presented in the *Astra* would have been followed by the industry. On the other hand, the *Spar Shipping* decision seems to be redressing the traditional balance between owners' and charterers' rights with respect to the obligation to pay hire. Nonetheless, both decisions are 'almost diametrically opposed'¹⁴⁶ and therefore it is unlikely that the debate will be finally settled before the Court of Appeal has a chance to discuss this point.

¹⁴³ Cf. *Laconia*, *Scaptrade*, *Balder London*

¹⁴⁴ Cf. *Brimnes*

¹⁴⁵ Cf. Section 4.1

¹⁴⁶ Holman Fenwick Willan Shipping Bulletin report *ASTRA rocked: Charterers' failure to pay one hire instalment held not to be breach of condition*, April 2015, <http://www.hfw.com/downloads/HFW-Shipping-Bulletin-April-2015.pdf>

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