

C CHALLENGER - to rescind or not to rescind?

Chris Smith QC

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In what circumstances will a party to a contract lose a right to rescind for misrepresentation, or will a Court exercise its discretion to refuse rescission?

SK Shipping Europe LLC v (3) Capital VLCC 3 Corp (5) Capital Maritime and Trading Corp [2020] EWHC 3448 (Comm)

Approximately 8 months into a 2 year time-charter for the vessel C Challenger, the charterer purported to rescind/terminate it on account of alleged fraudulent misrepresentations and repudiatory breaches of the charter relating to the Vessel's consumption capabilities. Judgment has just been handed down by the Commercial Court after a 10-day trial of the ensuing dispute. Chris Smith QC was instructed by Fanos Theophani, and the associates Harriet Thornton and Hayley Flood at Preston Turnbull LLP. Whilst at first glance, this might appear to be a relatively niche shipping case, it in fact gave rise to some issues of general importance namely:

1. In what circumstances will a party, when offering to contract on certain terms, be held to have made implicit representations as to the subject-matter of those terms;
2. When considering whether there has been an affirmation, what is the relevance of the fact that the innocent party has consistently reserved its rights;
3. In what circumstances should the Court exercise its discretion to award damages in lieu of rescission and, in particular, where the representee has purported to rescind the contract, what is the relevance of the fact that if the Court refuses to rescind the contract, that will render the representee's purported rescission a repudiation of the contract;
4. In what circumstances will documents signed by a broker constitute a written memorandum of a guarantee for the purposes of the Statute of Frauds 1677.

The facts were straightforward. In November 2016, the Claimant, the owner of the Vessel, circulated details of the Vessel's speed and consumption capabilities to the market as part of its attempts to find a long-term charterer of the Vessel. Those attempts were successful and in December 2016, it was agreed that the Vessel would be chartered out to the 3rd Defendant ("the Charterer"), with 5th Defendant ("the Guarantor") agreeing to act as guarantor thereof. The Charter contained consumption warranties in a standard form.

The Vessel was delivered in February 2017. Throughout the life of the Charter, the Vessel consumed bunkers in excess of the warranted levels. The Charterer complained about this and, as early as March 2017, asserted that the Vessel's consumption capabilities had been misrepresented. Whilst the Charterer repeated this allegation on several occasions, it continued to employ the Vessel in the Charter service until September 2017. In September 2017, after a particularly significant bout of over-consumption, the Charterer refused to give further orders to the Vessel until the consumption issues were rectified. A stand-off ensued between the parties which culminated with the Charterer purporting to rescind the Charter and/or terminate it for repudiatory breach on 19th October 2017.

The Owner commenced proceedings claiming damages for breach of charter. The Charterer defended the proceedings and advanced a counterclaim on the basis that the Owner had fraudulently misrepresented the Vessel's consumption capabilities and thereby induced the Charterer into concluding the Charter. The Guarantor adopted the Charterer's arguments and also contended that its guarantee was unenforceable pursuant to the Statute of Frauds 1677.

The Existence of a Representation of Fact

The Charterer sought to rely on the details of the Vessel's consumption circulated to the market as constituting representations of fact. In addition, it argued that the Owner, by providing a speed and consumption warranty, was to be taken to impliedly represent that the Vessel's actual consumption was in accordance with the warranted levels.

This gave rise to an issue as to the circumstances in which a party to a contract is to be taken to make implied representations relating to the subject-matter of one of the contractual terms, or to the effect that it will in fact be capable of complying with the terms of the contract. The resolution of this issue involved a consideration of the decisions in *The Larissa* [1983] 2 Lloyd's Rep. 325 and *Kingscroft Insurance Co v Nissan Marine & Fire Ins* [1999] 1 Lloyd's Rep IR 603, and of whether the first of those cases was correctly decided.

It was held that there was no implied representation. The Court was unwilling to conclude that *The Larissa* had been incorrectly decided (or that the approval of that decision in *Kingscroft* was itself erroneous). More specifically, there were good reasons why the mere offer of a speed and consumption warranty by a shipowner should not be held to involve an implicit representation as to the vessel's actual performance levels. As regards the suggestion that the Owner had represented that it believed it would be capable of complying with the terms of the Charter, such a representation was only apt to be implied where the contractual term required the party in question to act, or refrain from acting, in a certain way. A representation of this nature ought not to be implied where, as here, one of the parties to a contract had offered a warranty as to a particular state of affairs with the warranty being concerned with the allocation of responsibility for certain costs in relation thereto.

Affirmation

Notwithstanding its use of the Vessel and delay in rescinding the Charter, the Charterer contended that it had not affirmed the Charter because it had persistently reserved its rights in its communications with the Owner.

The Court noted that there had not been extensive consideration of the effect of a reservation of rights in this context in any of the previous authorities. Having reviewed the limited materials available, and considering the position as a matter of principle, the Court concluded that a reservation of rights often will have the effect of preventing subsequent conduct from constituting an election to keep the contract alive, but this is not an invariable rule. In particular, a reservation of rights is likely to prevent a party from being deemed to have affirmed the contract whilst performing its own obligations thereunder or seeking information from its counterparty. By contrast, where the innocent party demands substantial contractual performance from the other, this is unlikely to be prevented from being treated as an affirmation simply because the innocent party has reserved its rights.

The Court's Powers Under the Misrepresentation Act 1967

The Court considered whether, if it had held that the Charterer was entitled to rescind the Charter, it would have nonetheless exercised its discretion under section 2(2) of the Misrepresentation Act 1967 ("the Act") to award damages in lieu of rescission and, if so, what damages it would have awarded.

On the first of these issues, the Court had to grapple with the difficult question of whether it should refuse to exercise the discretion in circumstances where, because the representee had purported to rescind the contract, the effect of so doing would be to put the representee in repudiatory breach of the contract. This is a point which has not previously been considered by the Courts. It was held that this was not a reason for declining to exercise the discretion to refuse rescission. The Court's decision was based on two factors. Firstly, the Court was of the view that damages in lieu of representation were not intended to be the monetary equivalent of restitution, and that this indicated that section 2(2) of the Act was not concerned with protecting the representee against the consequences of the Court refusing rescission. Secondly, the Court held that save for cases of fraudulent misrepresentation, rescission is a remedy that is effected by a Court, rather than a self-help remedy that can be exercised by a misrepresentee. As such, a misrepresentee who purports to rescind a contract and conducts itself accordingly, does so at its peril. In the circumstances, the fact that the Charterer had done precisely this was not a reason for the Court refusing to exercise its discretion to award damages in lieu of rescission.

So far as the measure of any damages awarded under section 2(2) of the Act, there are very few reported cases on this issue. The leading authority is the Court of Appeal's decision in *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, though the relevant findings in that case were obiter and have been described as "dangerously faulty" by McGregor on Damages. The Court held that if the Charterer had known the Vessel's true consumption capabilities, it would have paid USD 500 per day less for the Vessel than it in fact agreed to pay. An award of damages which reflected the difference between the actual hire rate and what the hire rate would have been if the true position had been known would be consistent with the decision in *William Sindall* and would also not fall foul of the criticisms that have been made of that case. Accordingly, the Court concluded that if the Charterer had been entitled to rescind the Charterparty, but the Court had decided to award damages in lieu of rescission, damages would have been calculated on such a basis.

The Application of The Statute of Frauds 1677

The claim against the Guarantor gave rise to a further tranche of issues, the most important of which concerned the enforceability of the Guarantee under the Statute of Frauds 1677. The Guarantor alleged that the Guarantee was not in writing and there was no signed written memorandum of the Guarantee for the purposes of the Statute.

A critical issue in this regard concerned whether the Owner could rely on communications sent by Poten, a ship-broker involved in the transaction. Poten was held to be an intermediate broker (though the Guarantor had argued that it was the Owner's broker) and as such did not have actual or ostensible authority to sign the guarantee or even any memorandum on behalf of the Owner. Notwithstanding this, the Court held that documents signed by Poten which purported to forward (unsigned) communications from the Guarantor, could satisfy the Statute as Poten had authority to forward on the relevant communications, and therefore the same legal consequences should flow as if the Guarantor had sent the relevant communications personally.

In so doing, the Court gave valuable guidance on an issue which, as was noted in the judgment, there is very little authority, namely the scope of the authority of an intermediate broker.

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Chris has a broad practice encompassing all areas of commercial law, with a particular focus on dry shipping, commodities, energy, and insurance disputes. He has appeared extensively in the Commercial Court, representing clients at all stages of proceedings, from urgent pre-action interlocutory applications all the way through to trial. Chris also appears regularly in both domestic and international arbitrations, and has undertaken cases before tribunals in London, Zurich and Hong Kong.

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