THE CEDRIC BARCLAY LECTURE 2015

Lord Phillips of Worth Matravers

On 26 September 1974 as a relatively young barrister I was appearing in a maritime arbitration in the Baltic Exchange. I cannot now be sure, but I think that Cedric Barclay was the arbitrator. I was in the middle of cross-examining a witness when one of the staff put her head round the door and announced "Mr Phillips, you have had a baby girl". And so I had. And for that reason alone this was my most memorable maritime arbitration. I had at the time a very strict clerk who did not believe in "time lost waiting for birth" so when my wife went off to the maternity wing of our local hospital I went off to the Baltic Exchange. The Baltic Exchange in those days, before it was blown up by IRA terrorists, was a happy working environment. It was the practice of the arbitrators to host lunch for all taking part in the arbitration, parties, lawyers and witnesses alike. These were quite considerable social events with an abundance of good wine, which certainly helped to keep the dispute resolution a friendly and well-mannered affair. Cedric Barclay had his own individual way of keeping everyone sweet. If he felt that the proceedings were getting at all heated, he would dive into his brief case and distribute Mars Bars around the room.

I rather think that he would be as pleased to be remembered here for the Mars Bars as for his great distinction in the world of arbitration and, indeed, for his part in the founding of this Congress.

I spent much of my early life in the law appearing as counsel in maritime arbitrations, and later, after I had taken silk, I sat occasionally as an arbitrator. I was taken away from the sea by the Lord Chancellor, Lord Hailsham who, in 1987 summoned me and told me that he wanted me to go on the bench. In those days you did not apply to become a High Court Judge. You were offered an appointment by the Lord Chancellor. And this was an offer that you could not refuse – if you did you were not asked again – and so I was, rather against my inclination, turned into a judge. I sat in the Commercial Court, so I got the occasional shipping case, but maritime law virtually vanished from my diet as I climbed the judicial ladder. Instead I found myself immersed in the unfamiliar areas of criminal and public law.

Now my world has turned full circle, and as an Arbitrator I am again enjoying involvement in shipping disputes, and in company with many with whom I worked in my life at the Bar.

But I have found considerable changes in the world of arbitration and I propose to start this lecture by looking back at the world as it was when I first met Cedric Barclay before examining two areas of the law that he helped to develop.

I joined 2 Essex Court in 1962, initially as a pupil of Barry Sheen, later Sir Barry Sheen, the Admiralty Judge. There was at that time a demarcation between those who practised in wet shipping work and those who practised in dry shipping work. Wet shipping work involved collisions and salvage, and in those days there was plenty of it. Amazingly there were no separation zones in the English Channel. A good fog and you could anticipate several juicy collisions leading to actions in the Admiralty Court. Radar was in its infancy and around the globe its use tended to bring about collisions rather than avert them. These also led to actions in the Admiralty Court, because London was where the ships were insured. Salving vessels in distress was big business. Professional salvors stationed tugs around the world solely for this purpose. And the salvage services were rendered under Lloyds Open Form of contract on “no cure no pay” terms with the amount of the award to be determined by arbitration in London.

2 Essex Court specialised almost exclusively in wet shipping, as did our rivals Queen Elizabeth Buildings. Most practitioners had served in the Navy, either during the war or as national servicemen. What counted in collision actions or salvage arbitrations was skill in navigation and seamanship, not knowledge of the law. We brought compasses and parallel rulers into court, not law books. Indeed, it was reckoned to be rather bad form to take a point of law at all.

In general, wet shipping did not attract barristers of the highest intellectual achievement. Those went into the Commercial Chambers that dealt with dry shipping. Pre-eminent were 3 and 4 Essex Court – originally a single set of chambers that the Lord Chancellor had forced to split when they were thought to be becoming too powerful – and 7 King's Bench Walk, which also did a little wet shipping work. These chambers were the seed-bed of judges who were to play a major role in the development of our shipping law: Lord Roskill, Lord Donaldson, Lord Mustill, Lord Lloyd, Lord Saville, Lord Goff, Lord Hobhouse, Lord Mance, Lord Justice Megaw, Lord Justice Kerr, Lord Justice Evans, Lord Justice Longmore, Mr Justice Mocatta and Mr Justice Colman.

All of these sat in the Commercial Court, all of these dealt with points of law that originated in arbitrations over which Cedric Barclay had presided, and all of them knew Cedric well and enjoyed and valued his qualities. I have not mentioned two judges who did not originate from these three sets of commercial chambers but who were to play a dominant role in the development of maritime law. The first was Lord Denning and the second Lord Diplock. Lord Denning presided in the Court of Appeal from 1962 to 1982. Before that he had spent 5 years in the House of Lords, which he had not found to his taste. He had gone on the bench when I was only ten years old and in his time he delivered about 2000 reported judgments. Many of these were in commercial cases that had started as arbitrations. Denning enjoyed these and ensured that they were in his list. He prided himself on applying common sense and a creative approach to the legal problems that came before him. Lord Diplock was made a Law Lord in 1968 and remained one until his death in 1985. He contributed greatly to the development of our law of contract, but in a manner whose orthodoxy was sometimes at odds with the more creative approach of Lord Denning.

If you look through the case index of a modern text-book on the law of contract you will find a quite remarkable number of cases whose title includes the name of a ship. Almost all of these started life as arbitrations. Up to 1979 the parties were not able, even if they wished, to exclude the power of the Court to direct the arbitrators to state a case, that is refer a point of law for determination by the court, and normally arbitrators were prepared to do this at the request of one of the parties. No less than 135 arbitrations in which Cedric Barclay was one of the arbitrators raised points of law that were referred to the Commercial Court and resulted in reported decisions. Not all parties who had agreed to refer disputes to arbitration were overjoyed to find that the arbitration was only the start of a slow, lengthy and expensive journey to the House of Lords. It was of little consolation, especially to the losing party, to be told that they had participated in an important development of the English law of contract. Our law has changed. Today most maritime disputes begin and end with an arbitration. This is to the benefit of the swift resolution of disputes between commercial men, but to the detriment of the development of commercial law and the definitive resolution of contentious issues of law. I am bound to say that I sometimes hanker for “the good old days”.

In this lecture I am going to conduct two case studies in relation to issues that received extensive consideration by many of the judges to whom I have referred, including Lord Denning and Lord Diplock. The first of these is largely of historic interest, but of considerable interest on that basis none the less. Mustill & Boyd's wonderful work on Commercial Arbitration described it as "one of the most important decisions in the history of English arbitration". It is also the best illustration that I know of in-fighting between judges in the Commercial Court and the Court of Appeal on the one hand, and those who had ascended to the rarified atmosphere of the House of Lords on the other. The second case study focuses on an old issue that has very recently sprung into life in as much as it has, unusually, reached the courts and led to conflicting decisions on the part of two commercial judges.

My first case study is of the *Bremer Vulkan* case[1]. In the 1970s there seems to have been a spate of sleeping beauty arbitrations - arbitrations that had been asleep for years before the Claimants in them attempted to give them the kiss of life.

[1] *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corpn* [1981] AC 909.

Sometimes the delay had resulted in evidence being lost or becoming unobtainable, so that a fair resolution of the claim was no longer possible. The question arose of whether there was any way in which a respondent, faced with the resurrection of such a claim, could get it struck out or otherwise discontinued. In 1979 this question was raised in two cases that were heard together in the English Commercial Court. One of them was *Bremer Vulkan.* That was a dispute arising out of a contract governed by German law, but with a London arbitration clause, under which a German shipbuilder agreed to build five bulk carriers for an Indian shipowner. The ships were delivered in 1965 and 1966. In 1972 the buyers commenced an arbitration alleging that the ships were defective. Over four years elapsed before the points of claim were served. The builders contended that the delay had been so long that they could not properly defend the claim. Documents had been destroyed. Vital witnesses had died. So they brought proceedings in the English Commercial Court seeking two remedies. The first was an injunction restraining the buyers from proceeding with the arbitration. The second was a declaration that the arbitrators had the power themselves to issue a final award dismissing the buyers' claims on the ground of delay

The case came on before Donaldson J. He was a judge who did not believe in hanging around. The hearing came finished on March 26 1979 and he gave judgment on 10 April. He started by considering what the position would have been if the delay had taken places in English court proceedings, rather than in an arbitration. He concluded that the court could have dismissed the action for want of prosecution if satisfied that there had been inordinate and inexcusable delay that rendered a fair trial impossible or severely prejudiced the defendant. He went on to hold that an arbitrator had exactly the same power. He said this[2]:

> "*Courts and arbitrators are in the same business, namely the administration of justice. The only difference is that the courts are in the public and the arbitrators are in the private sector of the industry. Their problems are the same and so should be the solutions that they adopt. In my judgment the parties who submit disputes to arbitration impliedly clothe the arbitrators to give effect to their rights and remedies to the same extent and in the same manner as a court…"*

[2] p. 921

Mr Justice Donaldson then went on to hold that the court also had power to grant an injunction restraining a claimant from proceeding with an arbitration where that claimant had been guilty of inordinate and inexcusable delay to the extent of rendering a fair trial impossible. His analysis was that such conduct by a claimant constituted a repudiation of the arbitration agreement, which the respondent could then accept as bringing the agreement to arbitrate to an end. The respondent was under no obligation to take steps to move the arbitration along. He could "let sleeping dogs lie". After considering the facts Donaldson J ruled that the buyers had repudiated the agreement to arbitrate by their delay and the builders had accepted this repudiation as bringing the arbitration proceedings to an end. Accordingly he granted an injunction restraining the buyers from proceeding further with the arbitration. In making this ruling Donaldson J was unable to point to any previous case that directly supported it. Indeed he disregarded an earlier judgment by one of his colleagues that an arbitrator had no power to dismiss proceedings for want of prosecution[3].

[3] Bridge J in *Crawford v A.E.A. Prowting Ltd* [1973] QB 1

A year later a similar case came before Lloyd J in the Commercial Court[4]. The dispute arose out of the charter of a vessel called the *"Splendid Sun".* In 1969 she took the ground when manoeuvring into a berth that the charterers had nominated. Owners alleged that the berth was unsafe and commenced an arbitration in September 1969, appointing Cedric Barclay as their arbitrator. The Charterers appointed their arbitrator the following month. Thereafter nothing happened for over eight years. Then, out of the blue, the owners served a points of claim on the charterers. Charterers' reaction was to go to the Commercial Court to seek an injunction restraining owners from proceeding with the arbitration, citing Donaldson J's decision in *Bremer Vulkan* as showing that the Court had power to grant this. In the light of where we are it is worth observing that junior counsel for the charterers was one Mr Geoffrey Ma, led by Roger Buckley QC, members of 1 Brick Court, Chambers to which I myself had moved from 2 Essex Court. Lloyd J's reasoning differed a little from that of Donaldson. He held that it was wrong to apply the same law that would be applicable in the case of court proceedings.

[4] The "*Splendid Sun"* [1980 1 Lloyd's Rep 333.

Instead he applied conventional principles of the law of contract. Delay by a claimant would become a repudiation of an arbitration agreement when its effect became so great as to frustrate the arbitration agreement. That test was satisfied in the case of the *Splendid Sun.* The Charterers' position had been prejudiced by a catalogue of disasters, that Lloyd J described:

> "*It is very likely that the plaintiffs would have wished to call Captain de Lesparda* [their marine surveyor] *to give evidence…he alas is now too ill to move; indeed I think that he has lost his power of speech. They would have wished to interview the pilot,… Captain Velasquez, but Captain Velasquez is also now immobile. Furthermore they would no doubt have wished to interview the harbour master…Captain Figallo, but Captain Figallo now says that he has forgotten all about this casualty…all the details have gone from his mind…*

In these circumstances Lloyd J had no hesitation in granting an injunction restraining the owners from proceeding with the arbitration.

Six months later, *Bremer Vulkan* reached the Court of Appeal. Lord Denning remarked[5]:

[5] p. 934

> "*The parties appointed* [as arbitrator] *Sir Gordon Willmer, who had recently retired from this court. They could not have picked anyone better. But that was nearly eight years ago, when he was 72. The parties have not been near him since. He is now 80 … If the arbitration is to proceed ... The arbitrator will have died or got past it …"*

This observation was a little ironic as Lord Denning himself was 80 at this time, and had no intention of retiring. He went on to hold, somewhat uncharacteristically, that he was precluded by long-standing authority from upholding Donaldson J's finding that an arbitrator had power to dismiss an arbitration for delay. Arbitrators, he concluded, "*are impotent*"[6]

Not so the court. Lord Denning went on to hold[7]:

> "*I am of opinion that this court has an inherent jurisdiction to restrain arbitration proceedings where it would be right and just to do so: and it may be right and just when the defendant has been guilty of such inexcusable and inordinate delay that a fair hearing is impossible. In other words, the court can dismiss the claim for want of prosecution, just as it can an action.*"

[6] p. 937
[7] p. 939

Lord Denning went on to hold that there was an alternative route to the same result. A claimant in an arbitration had a legal obligation to use reasonable dispatch. If he delayed so long as to frustrate the very object of the arbitration, namely a fair hearing and a just result, the respondent was entitled to treat this as a repudiation of the agreement to arbitrate and accept this as bringing the arbitration agreement to an end. In so holding he followed the approach of Lloyd J in the *Splendid Sun.*

Lord Denning had invited Lord Justice Roskill, a highly experienced commercial judge, soon to be promoted to the House of Lords to sit with him. He agreed with Lord Denning that an arbitrator had no power to dismiss for want of prosecution. He also agreed with Lord Denning that, on the facts of the case, the Court had power to grant an injunction restraining the buyers from proceeding further with the arbitration. He did not accept Lord Denning's finding that this fell within the inherent jurisdiction of the court, but based his decision on principles of the law of contract. He did not agree with Lord Denning that it was an implied term of an arbitration agreement that the claimant would proceed with reasonable dispatch.

Rather he held that it was an implied term that the claimant would not be guilty of such delay as to frustrate the object of the arbitration agreement, namely a fair resolution of the dispute. The buyers in *Bremer Vulkan* had been guilty of just such delay and so they could be restrained by injunction from proceeding with the arbitration. The builders were not prevented from doing so by their own inactivity. They had been entitled, as Donaldson J had observed, to "let sleeping dogs lie". This reasoning was very similar to that of Lloyd J in *The Splendid Sun.*

The third member of the Court, who did not have a commercial background, gave a very short judgment, agreeing that the court's right to grant an injunction depended upon there being a repudiation by the buyers of the agreement to arbitrate which had been accepted by the builders, so he also adopted the approach of Lloyd J in *The Splendid Sun.*

A year later the *Bremer Vulkan* reached the House of Lords. There it was subject to the searching scrutiny of Lord Diplock. He started by holding that Lord Denning had been wrong in asserting that the High Court had an inherent jurisdiction to supervise the conduct of arbitrators.

Any power that the court had to intervene in arbitrations was the creation of statute. The Court had power, however, to grant an injunction in support of a legal right. In principle if one party committed a repudiatory breach of an agreement to arbitrate, the innocent party could accept the repudiation and bring the arbitration to an end, and then obtain an injunction restraining the guilty party from going on with the arbitration. But there was no reported case where the court had granted an injunction to restrain a party from proceeding with an arbitration on the ground that that party had, by inordinate delay, committed a repudiatory breach of the agreement. Lord Diplock went on to explain why, in practice this was simply not possible. Under an agreement to arbitrate, both parties were under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay. If they did not do so they were equally at fault and one party could not seek injunctive relief on the ground of the fault of the other. He ended his judgment as follows:

> "*For failure to apply for [to the arbitrator]… before so much time had elapsed that there was a risk that a fair trial would not be possible both the claimant and respondent were in my view in breach of their contractual obligations to one another;*

and neither can rely on the other's breach as giving him a right to treat the primary obligations of each to continue with the reference as brought to an end. Respondents in private arbitrations are not entitled to let sleeping dogs lie and then complain that they do not bark."

Two other members of the Committee expressed agreement with Lord Diplock, without adding to his reasoning. Two gave reasoned dissents. They did not agree that a respondent was under a duty to take steps to move the arbitration along if the claimant was not doing so, so that if the claimant delayed so long that a fair hearing was no longer possible the respondent was not precluded from treating this as a repudiation.

I well remember the furore that Lord Diplock's decision provoked in Essex Court, where the custom was for such developments in the law to be discussed without inhibition over a beer or two in the Devereux public house just outside the Temple. The effect of the decision was that there was no practical way of preventing a claimant in an arbitration from reviving a stale claim, however prejudicial the delay might be to the respondent. The proposition that a respondent owed a duty to stimulate an arbitration that had gone to sleep struck most commercial practitioners as at odds with the real world.

But the reason that I particularly remember Lord Diplock's speech in *Bremer Vulkan* is that I had received instructions to lead for the charterers in the pending appeal to the Court of Appeal by owners in the *Splendid Sun.* Unfortunately I did not have the benefit of the assistance of Geoffrey Ma, who must, I believe, have returned to Hong Kong. I had, however, an able replacement in Richard Aikens, now Lord Justice Aikens.

It seemed to us that we had no chance of supporting the decision of Lloyd J having regard to Lord Diplock's speech in *Bremer Vulkan,* so we decided to run an alternative argument. This was that it could be implied from the total inactivity of both parties for a period of 8 years that they had mutually agreed to abandon the arbitration.

Lord Denning sat on the appeal with Eveleigh LJ and Fox LJ, neither of whom had a background in commercial law[8]. So far as Lord Denning was concerned, we need not have worried about Lord Diplock's decision. This is what Lord Denning had to say about Lord Diplock's statement that both parties to an arbitration had a mutual obligation to get on with the case:

> "*This mutual obligation comes as something of a surprise to everyone.*

[8] *The "Splendid Sun"* [1981] 2 Lloyd's Rep 29

Especially to the denizens of Essex Court and St Mary Axe. Nothing of this kind was propounded before the Judge, nor before us in the Court of Appeal. It appears for the first time in the speech of Lord Diplock in the House of Lords … It is said to be based on an implication. As such it goes beyond anything that I have hitherto understood. To my way of thinking the implication is neither obvious, nor reasonable, nor necessary. Nor does it accord with reality. If the claimant does not pursue his claim – if he makes no application to the arbitrator – it is said that the respondent is bound himself to do so. Who ever heard of a respondent doing any such thing … I cannot believe that the House of Lords intended any such thing. I think that we must have misunderstood the ruling in some way or another."[9]

At the end of his judgment Lord Denning stated:

"… the reasoning of the majority is so capable of being misunderstood that we should await its further consideration before acting on it. Meanwhile it is open to the Court to find that an arbitration has come to an end by abandonment , or by frustration, or by repudiatory breach.

And that is just what Lord Denning did.

[9] pp. 31-2

He held that the arbitration had been abandoned, had been frustrated and had been terminated on the ground of the buyers' repudiatory breach. In so doing he propounded a new doctrine of frustration:

"*There can be frustration by the mutual default of both parties*"[10]

The other two members of the Court did not treat Lord Diplock's judgment in the same cavalier fashion. Instead they embraced the new way that we had put our case – that it was to be inferred from the eight years of total inertia that had occurred that the ship owners had decided to abandon their claim and the charterers had agreed that they should do so. The ship owners were given permission to appeal to the House of Lords but they decided not to do so.

But the House of Lords was to have the last word, for yet another delay case came on the scene – *The Hannah Blumenthal.* The dispute was between the buyers and the sellers of that vessel under a contract concluded in 1969. The sellers commenced an arbitration claiming that the vessel was defective and appointed their arbitrator in August 1972 and the buyers appointed their arbitrator, none other than Cedric Barclay, in December 1972.

[10] p.33

Preparations for the arbitration proceeded at a snail's pace, with one period of three years and one period of one year when nothing happened at all. In July 1981 Staughton J heard an application by the sellers for an injunction restraining the buyers from proceeding with the arbitration[11]. He found that the lapse of time had rendered a fair trial of the arbitration completely impossible. While making it plain that he was not happy with Lord Diplock's finding that in such circumstances both parties were in breach of their mutual obligations he said that he would loyally follow it. What he then did was to apply the novel doctrine of frustration that Lord Denning had propounded. He held:

> "*…there can be frustration of an arbitration agreement where it is delayed by the mutual fault of both sides, if it continues for so long that a fair trial is impossible"*[12]

Applying this test he held that the arbitration agreement was frustrated.

Inevitably the case went to the Court of Appeal[13]. This time Lord Denning selected to sit with him Griffiths LJ and Kerr LJ, the former a distinguished common lawyer and the latter an outstanding commercial lawyer.

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[11] *The "Hannah Blumenthal"* [1981] 3 WLR 823
[12] p. 832
[13] [1982] 3 WLR 49

Lord Denning boldly declared that Lord Diplock's statement that both parties to an arbitration owed a "mutual obligation" to get on with the case was "obiter" and wrong. He held that the buyers were in repudiatory breach and that the sellers, who had not been at fault in failing to act themselves, had accepted this. Alternatively he held that Staughton J had been right to hold that the arbitration agreement had been frustrated. Lord Denning's two colleagues did not join him in his iconoclastic attack on Lord Diplock's speech. Griffiths LJ, while indicating that he did not agree with it, held that it closed all avenues to finding that the arbitration had been brought to an end. So far as frustration was concerned, he held that this required a supervening event that rendered performance impossible and occurred without fault on either of the parties. Frustration was ruled out because, on Lord Diplock's analysis, both parties were at fault.

Kerr LJ made the following comments on the decision of the House of Lords in *Bremer Vulkan.*

> "*Until [this decision] I do not think that it would have occurred to any practitioner, arbitrator or businessman familiar with arbitration that our law is powerless in situations such as the present.*

I think that I can properly say that from my own knowledge this decision has been received with the greatest concern, not only in the City and the Temple, but also abroad among practitioners who look to this country as an important venue for commercial arbitrations."

He pointed out that the legislature of Hong Kong was taking immediate steps to neutralize the decision. He accepted Lord Diplock's finding that both parties to an arbitration had a duty to cooperate in the process, but held that a respondent could not be blamed for waiting for the claimant to take the initiative. The sellers had simply been waiting for appropriate action from the buyers, and had been under no duty to wake them up. In these circumstances he held that the sellers were not precluded from contending that the arbitration agreement had been frustrated by the passage of time.

Nemesis followed swiftly. When the *Hannah Blumenthal* reached the House of Lords [1983] 1 AC 854 Lord Diplock invited Lord Brandon to deliver the leading speech. He stated that there was no question that Lord Diplock's observations in *Bremer Vulkan* of the mutuality of obligation of both parties to an arbitration agreement were obiter. He rejected the attempts of the courts below to get round them.

In particular he held that there could be no question of frustration in the absence of (1) some supervening event and (2) an absence of fault on the part of both the parties. He added[14]

> "*The fact that a decision of your Lordship's House is so unpopular with members of the Courts below that they are led to seek a way to get round it if they can, reflects greater credit on their independence of mind than on the established and indispensible principle of judicial precedent."*

All the other Law Lords, including Lord Diplock, delivered concurring speeches. The only consolation prize was that Lord Diplock, Lord Roskill and Lord Brightman all agreed that the *"Splendid Sun"* had been correctly decided on the basis that there had been an implicit mutual agreement to abandon the arbitration.

A few comments: I do not consider that this was the most glorious chapter in the history of the development of our commercial law. Lord Diplock's analysis was admirable in part. It clarified that the Court had no general power of supervision of arbitrations. These were governed by the law of contract and the power of intervention on the part of the court was governed by the principles of the law of contract.

[14] p. 47

But it was surely highly unsatisfactory if a claimant could permit an arbitration to go to sleep for so long that the respondent could no longer fairly respond to the claim, and then revive it years later.

It should not have been beyond the ingenuity of the House of Lords to exercise their common law powers to fashion an answer to the problem. Would it not have been possible to hold that it was an implied term of a typical arbitration agreement that each party would perform his role in the sequential process with reasonable expedition, so that if the arbitration went to sleep because of the claimant's inertia the respondent could not be blamed for letting sleeping dogs lie? Or could not the Lords have countenanced an extension of the doctrine of frustration so that it applied when the contractual adventure became impossible of performance as a result of the mutual fault of both parties to it? As it is it was left to Parliament to step in to clear up the mess. In 1992 legislation was brought into force that now forms section 41(3) of the Arbitration Act 1996. This provides:

> *If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay-*

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in the claim, or

(b) has caused or is likely to cause, serious prejudice to the respondent,

the tribunal may make an award dismissing the claim.

This gave statutory effect to the law as Lord Denning would have had it. No doubt in his retirement in Hampshire, where he was still going strong in his nineties, he would have said "I told you so".

I now turn to my second case study, and I shall take that rather more shortly.

Clause 5 of the New York Produce Exchange Form has long provided that hire is to be paid 30 days in advance and that:

"failing the punctual and regular payment of the hire, or bank guarantee, or any breach of this Charter Party, Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers …"

This provision is usually coupled with a so called "anti-technicality clause" that protects the Charterers against an inadvertent failure to pay hire on time. Unusually, within the last year or so, two judges of the Commercial Court have considered the effect of clause 5 and reached conflicting conclusions. The issue is highly topical at a time when the market has collapsed, so that owners under long term time charters are entitled to be paid hire at rates far in excess of current market rates. The issue is this. Is the obligation to make prompt payment of hire a condition, breach of which constitutes a repudiation of the charter party that entitles the owner not merely to withdraw his ship but to recover damages for loss of the balance of the charter? Or is his right to withdraw simply a contractual right to recover the use of his vessel? Whether a term of a contract is a condition, breach of which can be treated as a repudiation, is a question of interpretation of the contract.

Over 40 years ago in *The Brimnes*[15] Brandon J had to decide whether the obligation to pay hire promptly in Clause 5 of the NYPE charter was a condition – or as he called in "an essential term". He held that it was not. He gave his reasons for so deciding in one sentence:

[15] [1973] 1 WLR 386

> *"I have reached the conclusion that there is nothing in clause 5 which shows clearly that the parties intended the obligation to pay hire promptly to be an essential term of the contract, as distinct from being a term for breach of which an express right to withdraw is given"*

This decision of Brandon J has received some criticism over the years, but until the first of the two decisions to which I have just referred, that of Flaux J in *The Astra*[16], no judge had held in terms that Brandon J was wrong. The editors of *Time Charters,* over seven editions, have stated that under English law the obligation to pay hire promptly under Clause 5 of the NYPE form is not a condition breach of which amounts to a repudiation. Three years ago in *The Kos*[17] Lord Sumption and Lord Mance expressed the view that the obligation to pay hire promptly was not a condition. Yet Flaux J. has boldly declared that Bandon J's was wrong. The part of his judgment that is devoted to this issue runs to some 98 paragraphs. This is something of a contrast to the single paragraph in the reasoning of Brandon J.

[16] [2013] EWHC 865
[17] [2012] UKSC 17

It is, however, exceeded by the analysis of the point in the judgment of Popplewell J in the *Spar Shipping Case*[18] in which he has concluded that Brandon J was right and Flaux J was wrong. This runs to no less than 115 paragraphs.

These rival judgments contain an exhaustive analysis of the relevant authorities, from which we see, as one might expect, that Cedric Barclay played a part as one of the arbitrators whose decision in favour of the ship owners was upheld by the House of Lords in *The Laconia*[19]. The relevant[20] authorities contain expressions of opinion as to whether payment of hire is a condition, but no express decision on the point. Those who expressed the view that payment of hire was a condition included Lord Diplock, on no less than three occasions[21], Lord Roskill[22] and, more recently, Rix LJ[23]. Those who expressed the view that payment of hire was not a condition included Donaldson J and Lord Denning in *The Georgios C,* Mocatta J in *The Agios Giorgis*[24] and Lord Sumption and Lord Mance in *The Kos.*

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[18] *Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd* [2015] EWHC 718

[19] [1977] AC 850

[20] [1971] I QB 488

[21] *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 at p.924; *The Afovos* [1983] 1 Lloyd's Rep 335 at p. 341 and *The Scaptrade* [1983] 2 AC 694

[22] *Bunge v Tradax* [1981] 1 WLR 711at 725

[23] *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436.

[24] *The Agios Giorgis* [1976] 2 Lloyd's Rep 192

As to the last case, I was party to the decision and expressed agreement with Lord Sumption's judgment. But the relevant observations were made without reference to authority in circumstances where the owners had conceded that the obligation to pay hire was not a condition.

It seems to me that the conflict of judicial opinion leaves it open to the arbitrator to make his own choice between the judgment of Flaux J and that of Popplewell J. My current view is that the judgment of Flaux J is to be preferred. I have reached that conclusion largely because the judgment of Popplewell J does not lead to a sensible commercial result.

Clause 5 of the NYPE form gives the shipowner the right to withdraw his ship in the event that a single payment of hire is out of time by no more than a matter of minutes. Why should that be? The answer is, I think, obvious. Not because a single late payment of hire will be so detrimental to the shipowner that he will not wish to continue with the charter. The object is to impose a sanction that is so draconian that it will induce the charterer to make quite sure that his hire payments are made on time. Prompt and regular payment of hire is of great importance to the ship owner.

He is likely to be relying on it to fund his own obligations under the charter, or to pay instalments due under finance arrangements that had funded the building or purchase of the ship. Hire has been described as the lifeblood of the commercial adventure.

Where the market has risen since the conclusion of the charter, the owner's right to withdraw the vessel if hire is not paid promptly will be a powerful incentive to the charterer to make sure that the hire is paid. Withdrawal will rob the charterer of the fruits of what has turned out to be a valuable contract and confer a commensurate windfall on the owner. It is a truly draconian remedy. For this reason, where the market has risen, the right to withdraw the vessel if hire is not paid promptly will be an effective sanction that is likely to ensure due payment of hire.

Contrast this situation with that where the market has fallen since the vessel was fixed. The unfortunate charterer is under an obligation to pay more than the market rate for the use of the vessel. The threat that the owner may withdraw his vessel if hire is paid late is of no concern to him at all, if it does not carry with it the liability to pay damages to the owner for his loss of future hire.

On the contrary, the charterer would be overjoyed to have the vessel withdrawn, enabling him to charter in a substitute at a lower rate of hire. If the obligation to pay hire promptly is to carry any weight in a falling market, it must be a condition of the charter, so that the charterer faces a liability in damages if the vessel is withdrawn.

At para 114 of his judgment Popplewell J states:

> "*If full and punctual advance payment of hire is the lifeblood of the owner, on which he is entitled to insist, a withdrawal clause which amounts to an option to cancel adequately protects his commercial interest: once exercised the owner is free to employ his vessel elsewhere, trusting to the performance of a different charterer to pay hire fully and punctually in advance. I see nothing in the owners' interest which is not adequately protected by an option to cancel.*"

This statement makes no sense where the market has fallen, so that the owner will only be able to obtain alternative employment for his vessel at a fraction of the hire he has lost. In reality, where the market has fallen, no owner is going to rush to withdraw his vessel for a late payment of hire, if there is a reasonable prospect of recovering it in due course.

Only when repeated failures to pay hire put all future receipts in doubt will the owner contemplate withdrawal. Here again it is important that the prompt payment clause should be a condition, for he may otherwise be uncertain whether the stage has been reached at which the charterer's defaults amount to renunciation or repudiation.

Popplewell J recognises this uncertainty, but comments that it is an uncertainty regularly faced by commercial parties whose contracts contain innominate clauses and that there is no reason why shipowners should be treated more favourably than others.[25]

I find this an odd approach to construction of a charterparty.

Elsewhere in his judgment Popplewell J comments:

> "*If payment of hire were a condition entitling owners to terminate at common law and claim damages, charterers' exposure would be just as great if the market had fallen as if it had risen. On a risen market the charterers would bear the market difference by having to charter in at a higher rate; in a fallen market charterers would have to pay owners for the fall in the rate as damages for repudiation.*"[26]

[25] para 200
[26] para 141

This is not correct. Even if prompt payment is a condition, withdrawal will hit the charterer harder if the market has risen than if it has fallen. The additional hire that he has to pay if the market has risen leaves him worse off. The damages that he has to pay if the market has fallen leave him, and the owner, in the same financial position as if he had continued to perform the charter. On a falling market the right of withdrawal is worthless if it is not accompanied by a right to damages for the loss of the charter. It is a recognized principle of the construction of a commercial document that one should try to construe it in a way that makes commercial sense. The right to withdraw for non-payment of hire only makes commercial sense on a falling market if prompt payment of hire is a condition. It is essentially for this reason that I prefer the decision of Flaux J to that of Popplewell J.

Unfortunately the conflict between these two cases would not seem likely to be resolved by a higher court, because in each case there was a finding of actual renunciation so that it made no different to the result whether or not prompt payment of hire was a condition.

This means that we arbitrators are likely to be called upon to choose between them.

I should emphasise that if called upon to do so I shall be open to persuasion that the provisional view that I have expressed in this lecture is not correct.

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