



Oily waters

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SK SHIPPING (S) Pte Ltd v Petroexport Ltd (the Pro Victor) is an intriguing case. The central issue is well defined but the manner in which Flaux J answered it may provide a dilemma for the future.

The defendant was trading two parcels of naphtha and had voyage chartered the claimant's vessel to carry them. The defendant's sales fell through and it intimated as much to the claimant. While it seemed clear to the claimant that the defendant could not perform the charterparty, the defendant still, theoretically, had time to perform as the laydays had not expired. If the claimant brought the charterparty to an end it might end up as the guilty party.

The claimant terminated the charterparty, alleging anticipatory breach on two grounds. First, that the defendant had made it impossible to perform and second, that its conduct amounted to a renunciation of the contract. The defendant, predictably, argued that the claimant had acted wrongfully. Flaux J found for the claimant.

On the first point, Flaux J needed only to observe that the defendant could have loaded a part cargo or, indeed, no cargo at all but still paid the full lumpsum freight. It would have been possible prior to expiry of the laydays.

Looking at renunciation, he said: "The critical question is whether a party has evinced an intention not to perform the contract which a reasonable person in the position of the other, innocent, party would regard as clear and absolute... that question is to be judged at the time of the termination of the contract, having regard to all the circumstances."

At first sight, this is a highly objective test. The defendant, however, argued that the innocent party had to believe the other party was evincing an intention to rescind the contract. The judge found that at the material time the claimant did believe the defendant's conduct amounted to a renunciation of the contract and took the opportunity to express his view of the nature of the test.

There is surprisingly little judicial authority on the point, or at least nothing less than 90 years old, so this case may become important.

The judge's view was that both an objective and a subjective element is involved. He drew an analogy with misrepresentation: "Just as a claimant must show both actual reliance or inducement by a misrepresentation as well as that such reliance or inducement was objectively reasonable, so it seems to me a claimant who contends that the defendant has renounced the contract should have to show not only that the words or conduct were objectively evincing an intention not to perform but that the claimant subjectively believed that to be the case."

This is a notoriously difficult area for lawyers. Part of the evidence reviewed included cautious advice from the claimant's solicitors (accidentally disclosed to the defendant) containing a draft message for the claimant to send, clearly designed to reduce the risk associated with terminating the contract. By contrast, advice about misrepresentation is more often sought after the event, and in considering the question of reliance a client can be questioned about their past state of mind.

Here then is the dilemma: lawyers often become involved in renunciation cases when the problem is developing because their clients want to know whether they can safely get out of a contract. But it would seem that the client's state of mind at the time he is seeking the advice may be relevant. A lawyer may thus be driven to advise: "It looks like renunciation to me, what do you think, though?"

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