Right of affirmation in a charterparty context under English law

“The Aquafait”

Candidate number: 5521
Submission deadline: 5th November 2012
Number of words: 17 970
ACKNOWLEDGEMENT

I am heartily thankful to my supervisor, Trond Solvang, associate professor at the Scandinavian Institute of Maritime Law (University of Oslo), whose guidance, support, encouragement and precious comments on chapter drafts enabled me to develop an understanding of the subject in its details as well as complexity.

Lastly, I offer my regards and blessings to all of those who supported me in any respect during the completion of the project.
# Table of contents

<table>
<thead>
<tr>
<th>1</th>
<th>INTRODUCTION</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>RIGHT OF AFFIRMATION – THE MAIN RULE</td>
<td>4</td>
</tr>
<tr>
<td>2.1</td>
<td>The White &amp; Carter (1962) decision</td>
<td>4</td>
</tr>
<tr>
<td>2.1.1</td>
<td>Introductory remarks</td>
<td>4</td>
</tr>
<tr>
<td>2.1.2</td>
<td>Summary of the facts of the case</td>
<td>5</td>
</tr>
<tr>
<td>2.1.3</td>
<td>The decision of the House of Lords</td>
<td>6</td>
</tr>
<tr>
<td>2.1.3.1</td>
<td>The cooperation qualification</td>
<td>7</td>
</tr>
<tr>
<td>2.1.3.2</td>
<td>The legitimate interest qualification</td>
<td>8</td>
</tr>
<tr>
<td>2.1.4</td>
<td>The dissenting opinions</td>
<td>10</td>
</tr>
<tr>
<td>2.1.5</td>
<td>The conflicting principles and policy considerations</td>
<td>12</td>
</tr>
<tr>
<td>2.1.5.1</td>
<td>The owner’s interest</td>
<td>13</td>
</tr>
<tr>
<td>2.1.5.2</td>
<td>The charterer’s interest</td>
<td>15</td>
</tr>
<tr>
<td>2.1.5.3</td>
<td>The reconciliation of the conflicting interests</td>
<td>16</td>
</tr>
<tr>
<td>3</td>
<td>RIGHT OF AFFIRMATION IN THE CHARTERPARTY CONTEXT – SELECTED DECISIONS</td>
<td>19</td>
</tr>
<tr>
<td>3.1</td>
<td>The Puerto Buitrago (1976) – The “adequacy of damages” test</td>
<td>20</td>
</tr>
<tr>
<td>3.1.1</td>
<td>Introductory remarks</td>
<td>20</td>
</tr>
<tr>
<td>3.1.2</td>
<td>Summary of the facts of the case</td>
<td>20</td>
</tr>
<tr>
<td>3.1.3</td>
<td>The decision of the Court of Appeal</td>
<td>21</td>
</tr>
<tr>
<td>3.1.3.1</td>
<td>The cooperation qualification</td>
<td>22</td>
</tr>
<tr>
<td>3.1.3.2</td>
<td>The legitimate interest qualification</td>
<td>24</td>
</tr>
<tr>
<td>3.1.4</td>
<td>Conclusion</td>
<td>27</td>
</tr>
<tr>
<td>3.2</td>
<td>The Odenfeld (1978) – The “wholly unreasonable” test</td>
<td>28</td>
</tr>
<tr>
<td>3.2.1</td>
<td>Introductory remarks</td>
<td>28</td>
</tr>
</tbody>
</table>
1 Introduction

The shipping market is characterized by high fluctuation range and obvious periodicity, which affects not only the fleet planning of shipowners but also the charterers ability to meet their obligations. When the market falls substantially, the charterer might not be able to meet hire payments out of earnings on the employment of the vessel. Often the charterer will write to the owner, seeking reduction in agreed rates. The shipowner may in turn persist on the fulfillment of the original contract. The charterer may respond by attempting to negotiate a lower rate in exchange for a longer duration, etc. If the worst comes to the worst, the charterer may redeliver the vessel early, in breach of contract. Another scenario is a ”plain” premature redelivery of the vessel, without connection to a market downturn, i.e. one month prior to the expiry of the charterparty.

In both situations, the shipowner and the charterer will be interested in grasping their legal position – what are the legal consequences of such repudiation and what rights and obligations does such breach confer on them. The question of primary concern is whether the shipowner has the right to reject the charterer´s repudiation and affirm the contract. If the answer is negative, the shipowner is obliged to take the possession of the ship and his only remedy will be a claim for damages with the corresponding duty to mitigate. In practice, a considerable level of uncertainty, in respect of the shipowner´s right to affirm the contract, has led to a prevalent policy of accepting repudiation with a consequent claim for damages, even in situations where the charterer was not insolvent. That way, owners avoid potential significant losses which could arise should the shipowner wrongly
interpreted his legal position, affirmed and performed\(^1\) the contract, and subsequently learned from arbitrator’s/court’s decision that he was only entitled to a claim in damages.

Early delivery can be considered as a nearly eternal problem in the context of the charter-party relationship. It has a reappearing tendency on the agenda of maritime lawyers, defence clubs and defence departments of P&I clubs. Also, shipowners and charterers are very much interested in the accurate assessment of their negotiating and settlement position.

The methodology used throughout the thesis is based on an analysis of primary and secondary sources relating to the chosen topic. The examination of relevant English case law forms the substance of the thesis. I have opted for an analysis in a chronological order, starting with the discussion of the decision in *White & Carter*, which can be considered to be the ”roots” of the current system, since it constitutes a point of reference in all the subsequent cases. The decision is discussed in detail in the second chapter under the heading ”Right of Affirmation”. Under the same chapter I will focus the attention on conflicting policy legal principles and policy considerations, which were explicitly or impliedly weighted by the court. The purpose of the first chapter is to lay a general ground for the treatment of the right of affirmation under English law.

Subsequently, in the second chapter ”Right of affirmation in the charterparty context – selected decisions”, I will place the topic in the context of the charterparty relationship. In this connection several English judgments will be analysed. The presentation of the facts of each case will be limited to those factors which were relevant for the courts’ ruling on the owners right of affirmation. I will start with a theoretical discussion of the courts’ reasoning and then draw some conclusions following from the judgment. The thesis is not

\(^{1}\) The word perform in the context of the thesis refers to the performance of the duties of the owner under the charter, which is discussed further under subheading 3.2.3.1.1 and 3.3.3.1
meant to be an exhaustive examination of every decision connected to the theme of the thesis, but rather it focuses on the most influential judgments only. In this connection, the last discussed will be the recent *Aquafait* decision, from April 2012, which sparked a lot of interest between lawyers and shipping market participants.

The analysis is supplemented by a limited reference to judgments from other common law jurisdictions, where I found it appropriate and of potential interest of the reader. Further, I will refer to secondary resources, primarily citations of contract law textbooks, articles and standard books on charterparties.

The following questions in particular will be addressed in the thesis:

1) What is the main rule under English law in connection with the right of affirmation? And what are the competing principles behind that rule?
2) What are the various tests applied by English courts in connection with the availability of the right of affirmation?
3) What factors are considered relevant when deciding on whether the innocent party has the right to affirm the contract?
4) What are the practical implications of the current state of law in connection with the right of affirmation?

Even though, the right of affirmation within a charterparty relationship was in England and internationally subject to a considerable interest during the years, there was to my knowledge no publication specifically devoted to a systematic research of the topic. The thesis should be therefore considered as an attempt to fill this gap.
2 Right of affirmation – the main rule

The general rule established in common law is that “whenever a party to a contract manifests his intention to another party that he will no longer be bound by the contract, the other party may either affirm or cancel the contract.” This is also known as “right of affirmation”, i.e. right of an innocent party, faced with a repudiation or breach of contract, to elect to continue his own performance in the hope either of earning his contract price or of obtaining a decree of specific performance against the wrongdoer. “This right is often referred to as the rule in White & Carter, a decision of the House of Lords on appeal from the Court of Session of Scotland. The case is regarded as authoritative at common law.” In the following I will present the facts of the case and the reasoning of the court within the parameters of this thesis. As such I considered pivotal to discuss the speech of Lord Reid and Lord Hodson in majority. Nevertheless, I have also included the examination of the dissenting opinions, albeit in a more limited fashion, by referring merely to their skeleton arguments.

2.1 The White & Carter (1962) decision

2.1.1 Introductory remarks

2 A report by the Contracts and Commercial Law Reform Committee. The rule in White and Carter (Councils) Limited v. McGregor. Patterson C. I. (et al.). Wellington, (P.D. Hasselberg, Government Printer) 1983. p. 1. The report was a reaction to the New Zealand Law Society’s criticism of the rule in White and Carter, which suggested that the rule should be considered with a view to reform. However, the Committee came to the conclusion not to introduce any changes in law, since “a reasonable balance exists already in the law as it stands.” (p. 15)


As outlined in the introduction above, the judgment in *White & Carter* was a landmark decision in English law. It confirms that the innocent party might have the capacity to keep open the contract and complete his side of the bargain. At the same time, however, it formulates two restrictions upon the innocent party’s opportunity to take advantage of this rule. Before I turn to the analysis of the judgment itself, I will present the facts on which the Court based its decision.

### 2.1.2 Summary of the facts of the case

In 1954 the parties entered into a contract under which the appellant advertising contractor agreed to display advertisements on local authority litter bins for the respondent’s garage for a three-year period. The contract was renewed for a further three-year period in 1957. On the day that the renewal contract was concluded the respondent wrote to the appellants, seeking to cancel the contract on the ground that his sales manager, who concluded the contract on the respondent’s behalf, had no specific authority to make the contract. The appellants refused to accept the respondent’s cancellation and continued with performance of the contract. The respondent refused to pay for the advertisements. The appellants sued in accordance with the clause 8 of the contract, for the full sum due under the contract for the period of three years.

The respondent, however, maintained that he was not liable to pay the sum alleged to be due on the ground that he had repudiated the contract before anything had been done under it so that the appellants were not entitled to continue with performance and sue for the price.

The case was of great importance, although the claim was for a comparatively small sum. If the appellants were right, it would have consequences in any case in which, under a repudiated contract, services are to be performed for the earning of the contract price. Such situa-
tions would comprise also repudiations by charterers in cases of purported early re-
deliveries of vessels. In the following, I will address the decision of the Court.

2.1.3 The decision of the House of Lords

The House of Lords held by a majority 3 to 2 that the appellants were entitled to recover
the contract price on the ground that the respondent’s unaccepted repudiation of the con-
tract had not operated to terminate the contract between the parties. The appellants were
therefore entitled to continue with performance of the contract and recover the contract
price. The House of Lords held that, on an anticipatory repudiation of a contract, the inno-
cent party has an election. He may, if he wishes, terminate the contract forthwith and sue
for damages without having to wait for the other side to make actual default. Alternatively,
he may opt to hold the contract open. If he chooses the latter course, and is able to com-
plete his own performance, he can sue for the contract price on the due date as a debt owing
to him. The pursuer in that case, having elected to keep the contract on foot, and having
satisfied the terms of the contract entitling him to payment, was entitled to judgment for the
contract price as a debt owing to him.

After the confirmation of the general rule, Lord Reid went on to formulate two conditions,
which must be fulfilled in order for the innocent party to be able to claim the contract price.
As a first rule, the innocent party must be able to complete the contract in order to earn the
contract price. In the further text, I will refer to the restriction by using the convenient term:
"the cooperation qualification". The second limitation, following from the White & Carter
decision, is only implicated if the contract in question can be performed without the coop-
eration of the party in default. In accordance with this restriction, the innocent party cannot

5 In Hounslow London Borough council v. Twickenham Garden Developments, (1971)
1 Ch. 233 the Court described both limitations as important.
succeed in claiming the contract price, where the repudiating party is able to prove a lack of legitimate interest in affirming the contract. In the further text, I will refer to this fetter as "the legitimate interest qualification".

2.1.3.1 The cooperation qualification

In most cases the circumstances are such that an innocent party is unable to complete the contract without the cooperation of the other party. The peculiarity of the White & Carter case was that the appellants were able to completely fulfill the contract without any cooperation of the respondents. However, it has been noted by Lord Reid, that "if it had been necessary for the respondent to do or accept anything before the contract could be completed by the appellants, the appellants could not and the court would not have compelled the defender to act, the contract would not have been completed and the pursuers´ only remedy would have been damages." This is of central importance. Under English law, if the debtor is dependent upon the creditor´s (repudiator´s) cooperation in order to fulfill the contract, he will not have the right to affirm the contract because: a) the contract price is not earned without the cooperation and b) other solution would in reality involve a decision on specific performance against the creditor (repudiator), something the English law does not allow in principle.

There is a potential room for argument in the passage from the Lord Reid speech: "(…) if it had been necessary for the respondent to do or accept anything before the contract could be completed (…)" (emphasis added). In the context of a charterparty relationship, one might say, that the charterer must accept the services provided by the owner. However, the question following from the above passage is rather whether such acceptance of services is a pre-condition for the completion of the contract. With this regard an important clarification was made by Lord Reid. It was stated that non-acceptance of services in circumstances similar to those in White & Carter, i.e. where the innocent party is able to complete the

---

6 White & Carter
subject-matter of the contract, does not mean that the contract had not been completely carried out. This part of the ruling has some important implications in the context of a charterparty relationship, which will be elaborated further in the thesis. In this connection the following questions will be examined: What is the subject-matter of the charterparty relationship and whether it can be completed without the co-operation of the charterer. The questions will be examined in connection with both time charterparties and demise charterparties. As will be noted, the issue may entail complications depending on the specific terms of the contract.

2.1.3.2 The legitimate interest qualification

The other condition, noted by Lord Reid, in order for the innocent party to be able to claim the contract price, was the existence of a legitimate interest in completing the contract. It is important to note here, that the Court in White & Carter formulated the option of the innocent party to affirm the contract as a right in common law. Nevertheless, the Court admitted the possibility of limitation of such rights under the general equitable jurisdiction of the court based on “general equitable principle or element of public policy”. It was noted that:

“It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. (...) And, just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalize the other party by taking one course when another is equally advantageous to him.”

Two groups of legitimate interests were mentioned in the cited passage: financial and other, non-financial. Nevertheless, I consider it sufficient for the purposes of this thesis to exam-

---

7 White & Carter, Lord Reid referring to Langford & Co. Ltd. v. Dutch.
8 See subheadings 3.1.3.1; 3.2.3.1.1; and 3.3.3.1
9 See subheading 3.1

---
ine only the owners´ financial interests, since this is most practical in the charteparty context.\textsuperscript{10}\).

The Court has further used the term \textit{substantial interest} as a synonym to \textit{legitimate interest}. However, in this respect, Lord Reid expressed his opinion that “the de minimis principle\textsuperscript{11} would apply in determining whether his interest was substantial.” In other words, it need go only beyond the merely trifling. What is to be considered a substantial/legitimate interest, had not been further elaborated by the court. But it was ruled by the court that a decision on the lack of legitimate interest should be limited to ”\textit{extreme cases}”.

It was however stated, that the evaluation should not be based on the comparison of the benefits and losses of the parties upon affirmation of the contract and claim of contract price as opposed to the acceptation of the repudiation and claim in damages. As Lord Reid stated: “It is, in my judgment, impossible to say that the appellants should be deprived of their right to claim the contract price merely because the benefit to them, as against claiming damages and re-letting their advertising space, might be small in comparison with the loss to the respondent…”. The suggested test in \textit{White & Carter} focuses rather on asking whether the wastefulness of a party´s continuing performance outweighs its interest in performance and earning the contract price.

Further, it follows from the decision, that the legitimate interest limitation will only be applied in \textit{extreme cases} and that it is the repudiating party who bears the burden of proving that the other party had no legitimate interest in completing the contract.

\begin{flushright}
\textsuperscript{10}See subheading 2.1.5
\textsuperscript{11}Since then, the Supreme Court of Canada appears to have treated the “substantial” requirement as going well beyond the “\textit{de minimis}” rule. Asamera Oil Corpn. v. Sea Oil & General Corpn. (1979) 89 D. L. R. (3d) 1
\end{flushright}
2.1.4 The dissenting opinions

I considered it of importance to provide an account of the dissenting opinions in *White & Carter*, albeit not an exhaustive one. The findings of the two of their Lordships in minority, when compared with the majority view, are a good indication as to what are the conflicting principles present in connection with the right of affirmation. Therefore this part will serve as a convenient bridge to the next subheading\(^{12}\) ”The conflicting principles and policy considerations”.

Both judges in minority, Lord Morton and Lord Keith, thought that the company should have mitigated its loss by not taking action on the contract and by claiming damages instead. Lord Keith of Avonholm in his speech referred to the case of *Langford & Co. Ltd v. Dutch\(^{13}\*) where the circumstances were practically indistinguishable from those in *White & Carter*. He quoted the judge in the case, Lord President, who said that the law of Scotland did not afford to a person in the position of the pursuers the remedy thought, i.e. the recovery of the contract price. Lord President further added that the only reasonable and practical course, which the pursuers should have adopted, would have been to treat the defenders as having repudiated the contract and as being on that account liable in damages. The decision is however lacking an explicit reference to the principles which Lord President had in mind. Nevertheless, the words ”only reasonable and practical course” seem to point to the direction of economic wastefulness argument, which will be examined under the next subheading.

However, the reference to “the only reasonable and practical cause” was not accepted by the majority in *White & Carter* as a basis for a refusal of the innocent party’s right to affirm the contract. Lord Reid for the majority view said: “It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way, and

\(^{12}\) Subheading 2.1.5
\(^{13}\) [1 952] SC 15
that a court will not support an attempt to enforce them in an unreasonable way.” He argued that it "would create too much uncertainty to require the court to decide whether it is reasonable or equitble to allow a party to enforce his full rights under a contract.” The other judge in majority Lord Hodson agreed. He was of the opinion that if a party was not to be held to his contract unless the court in a given instance thought it reasonable so to do would introduce uncertainty into the field of contract. It would make an action for debt a claim for a discretionary remedy.

Both majority views, seem to refer to the principle of legal certainty\textsuperscript{14} in English law, without explicitly mentioning it. Lord Reid’s concern was "that it would create too much uncertainty to require the court to decide whether it is reasonable or equitable to allow a party to enforce his full rights under the contract”, while Lord Hodson held that the same "would introduce an uncertainty into the field of contract (…)” (emphasis added). Ultimately, the majority in their judgment gave preference to that principle above any other considerations.

Secondly, the two of the dissenting judges suggested that in all cases of repudiation there is, on the innocent party, a duty to minimize the liability of the party repudiating. The majority however held that the rule about mitigation of loss is a rule of the law as to damages and not to the actions for the contract price. There is no common law principle analogous to mitigation which would compel a contractor to reduce his contract price by the amount of any savings he is able to make in the course of his performance. Nor, for that matter, were the Lords aware of any principle of law, which entitles a court to interfere with a contract simply on the grounds that it is wasteful. The role of the mitigation rule was believed not to be the elimination of waste but as an aid to the quantification of damages recoverable in respect of the wrongdoer’s breach of contract. Thus, if the innocent party does not claim damages, there is no common law duty upon him to mitigate loss.

\footnote{\textsuperscript{14}See subheading 2.1.5.1}
I find the example used by the majority about a contractor apposite and I agree with their decision. Admittedly, it might be broadly said, that the White & Carter legitimate interest qualification and the duty to mitigate share the same goal of waste avoidance. However, the difference is that the White & Carter legitimate interest qualification addresses the innocent party’s ability to earn the contract price by continuing performance, rather than its ability to recover for certain avoidable loss. At the same time, there is a long-standing line of authorities that fix the time when a duty to mitigate arises in anticipatory breach cases at the time when the innocent party accepts the breach.\textsuperscript{15}

2.1.5 The conflicting principles and policy considerations

The decision has been subject to active criticism\textsuperscript{16} over the years and considered to be a controversial one. It has been criticized in a leading textbook\textsuperscript{17} and it has been said to give a “grotesque”\textsuperscript{18} result. It was contested that the right of affirmation contravenes the policy of mitigation rules as it allows the innocent party to disregard the repudiation and continue his performance of the contract so as to recover the contractual price\textsuperscript{19}. The decision therefore seems to encourage economic waste, since the innocent party was entitled to complete his performance and recover the price, even though the defaulter no longer wanted the performance in question. It was further criticized, that the House of Lords afforded the benefit

\textsuperscript{15} In contrast, under the American law, the duty to mitigate burdens the innocent party as soon as the anticipatory breach is communicated. Clark v Marsiglia 1 Denio 317 (NY 1845). In: Liu, Q.: The White & Carter Principle: A Restatement. In: The Modern Law Review. Volume 74 (March 2011), p. 186 - 188


\textsuperscript{18} \textit{ibid}

of the right of affirmation to an innocent party even though the defaulter had repudiated before the innocent party had completed, or indeed begun, his performance.

In the light of the above criticism, one may wonder why an aggrieved party should wish to go on and incur expense in performing the contract instead of accepting repudiation and recovering damages from the party in default. For several reasons, it is preferable from the innocent party’s point of view to pursue an action for an agreed sum rather than claiming damages. In the following, I will examine the conflicting interest of the parties.

2.1.5.1 The owner’s interest

First of all, the determination itself whether an action of a charterer constitutes repudiation might involve risk of misinterpretation. Also actions, which a lay person regards as a very clear repudiation of the contract may not be so regarded by the courts.\(^20\) Admittedly, in a number of instances, the repudiatory act is so unambiguous that the risk of misinterpretation will not arise. However, the number of decisions in England and other common law countries\(^21\), dealing with the question of whether a particular action constitutes repudiation, is a vivid proof that the issue is practical. The determination of courts is in principle discretionary. As said by Earl of Selborne LC in the House of Lords in *Mersey Steel and Iron Co*

\(^{20}\) In *Woodar Investment Development Ltd. v. Wimpey Construction (U.K.) Ltd. (1980) 1 All E. R. 571*, the claimant seller had agreed to sell land to the defendant purchaser. Completion was to occur after planning permission had been granted. The defendant purported to resile from the deal before completion. It mistakenly invoked a purported contractual right of withdrawal. That possible “exit” was contained in an obscure clause. In fact, that clause conferred no such right. The majority of the House of Lord held that defendant had not absolutely refused to perform. Instead, the parties had understood that, if the defendant’s reliance on this clause proved to be unfounded, the defendant would abide the contract.

"(Limited) f Naylor, Benzon & Co (1884): "(...) you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; (...) whether it amounts to a renunciation, to an absolute refusal to perform the contract…". Consequently the discretionary character of the evaluation has the potential of introducing an element of uncertainty into the innocent party’s decision making process. There is an obvious risk associated with it. An innocent party who makes wrong judgment and under the impression of an existing repudiation ceases to perform the contract puts himself in an essential breach of contract.

Secondly, the procedure for recovering an agreed sum is simpler than the ordinary action for damages. It is a claim for a sum certain where proof is simple and quantification raises no problem. By contrast, a damages claim raises more complicated problems of liability, remoteness and quantification\(^\text{22}\).

In practice, the charterers often question the extent of damages claimed by the owners. The parties may submit conflicting expert reports on the state of the market in order to substantiate their claim\(^\text{23}\). Consequently, it may take months for the decision on the extent of damages recoverable. As additional consequence, even though in theory the compensation in damages should correspond with what the owner would earn under the contract, in reality, due to the difficulties in the evidentiary part of the assessment of damages, it is not necessarily always the case. A claim of hire, on the other hand, is much more straightforward and difficult evidentiary issues normally do not arise. Thus within main reasons to keep contract alive is substantial difficulties in fair assessment of damages, especially when some part of loss is hardly recoverable because it is too remote.

\(^{22}\) The difficulty of the assessment of damages was also addressed by Kerr J in *Gator Shipping Corporation v. Trans-Asian Oild Ltd SA and Occidental Shipping Establishment* [1978] 2 Lloyd’s Rep 357 ("The Odenfeld"). For discussion see 3.2

\(^{23}\) See *Isabella Shipowner SA v Shagang Shipping Co Ltd* (2012) EWHC 1077 ("The Aquafait""). The decision is analysed under subheading 3.3
Thirdly, in case of claim for the agreed sum, the innocent party is spared from the burden of the duty to mitigate which would arise in case of a claim for damages. Although commonly referred to as a "duty to mitigate", it is acknowledged not to be a duty but a principle adopted in the measure of loss\(^\text{24}\). Nevertheless, the shipowner will very much feel it as a duty, an additional burden of deciding on and employing measures to avert or minimize loss. With a measure of oversimplification it may be said that the obligation to find employment for the ship transfers, by means of the duty to mitigate, from the charterer to the shipowner. It is therefore preferable from the view of the shipowner to insist on the performance of the original charterparty and avoid additional work in putting the ship back on the market in order to mitigate damages.

Another reason for the preference of the contract affirmation, as opposed to the acceptance of repudiation and claim for damages, is the commitments, which injured party may have with third parties, which he must honour as a matter of business. It is common when obtaining ship financing, that the banks require assignment of charter hire as security for their loan. Thus, any element of uncertainty as to the existence of the charterparty, introduces at the same time an undesired uncertainty into the relationship between the shipowners and bankers. Moreover, the innocent party (shipowner) may have other side benefits from affirming the contract. He may for instance want to keep his work force together.

I have considered at some length the reasons for preference of action for contract price as opposed to claim in damages from the shipowner’s point of view. I will turn now the attention on the charterer’s interests. This is much more simple, obvious and do not deserve much discussion. The charterer who repudiates a long-term contract will be interested in

\(^{24}\) *The Soholt* [1983] 1 Lloyd’s Rep 605 CA
reduction of his economic exposure by way of compensation of the innocent party in damages instead of the payment of the sum agreed. Therefore, a question arises whether there is any justification for providing some relief to a party who finds himself locked in a contract, which will prove to be ruinous to him if the other party insists on carrying out his side of the contract to the very letter.

Admittedly, the charterer’s interests, will be slightly different in situation where the charterer has a right to sublet the vessel under the charterparty. In such circumstances it is equally open for the charterer as to the owner to employ the ship on the market. Therefore, at least theoretically, it should lead to the same financial result for the charterer, whether the charterparty is kept alive or is repudiated. I write theoretically, because due to the uncertainties in the process of assessment of damages, the financial result for the charterer tends to be more favorable when it is the owner who trades the vessel as part of his mitigation of damages. However, the more pronounced advantage for the charterer, associated with the owner’s claim in damages, is the shift of the burden of fixing the vessel on the market from the charterer to the owner.

2.1.5.3 The reconciliation of the conflicting interests

The starting point seems to be that it is fundamentally wrong to encourage parties to believe that, if they find their contracts not to their liking, then they may escape from those contracts, even though they remain liable in damages. This is in line with the rationale behind the old maxim “equity mends no man’s bad bargain”. The right of affirmation has usually been justified on the basis that it would be wrong to allow a defaulting party to take advantage of his own default. The charterer cannot impose a termination on the other party
simply on the grounds of his own actual or intended default. Therefore, at the first glance, it seems to be wrong to allow the charterer to get out of the contract on a speculative basis, when the markets are not developing in accordance with the forecast. However, this is to a certain extent an oversimplified reasoning. The commercial risk will not transfer from the charterer to the shipowner by way of charterer’s repudiation, since the charterer will be in any case liable in damages for the difference between the charterparty rate and the applicable market rate. What transfers to the shipowner, is the burden of obtaining employment for the ship.

In many instances, the reason why a shipowner employs a vessel on a long-term charter-party is because he only has a limited organization which is not suited for employing the vessel on the spot market. Therefore it is in his interest to leave this part of the commercial operations to a charterer with a specialized competence. At the first sight, it seems to be fundamentally unrighteous to allow the shift of the activities connected to the commercial employment of the vessel from the charterer to the shipowner by way of the charterer’s wanton conduct. That is at least the practical consequence of the rule relating to mitigation of losses in connection with a claim for damages. The shift of the burden of finding employment for the vessel seems to be unfair also when we take into consideration that it is equally open to the charterer to trade the vessel under the running charterparty. This is especially the case where the charterers are entitled under the contract to sublet the ship.

On the other hand, the approach in White & Carter may lead to undesirable waste of physical and human resources. If the shipowner keeps the vessel fully crewed and ready to perform transport services despite a clear repudiation of the charterparty by the charterer, it may lead to an economic waste. It was claimed by the respondent in the White & Carter

______________

25 Photo Production Ltd. V. Securicor (Transport) Ltd. (1980) 2 W. L. R. 283, Hain Steamship Company Ltd v Tate & Lyle Ltd [1936] 2 All ER 597 per Lord Wright at p.608
appeal that it is against public interest to allow the innocent party to complete the contract under such circumstances.

Another argument against the outcome in *White & Carter* is that, from the economic point of view, contracts are entered into with a view to gain profit. It makes no difference, whether the profit is collected through the fulfillment of the contract or by way of payment of damages. A contracting party, who is paid compensation representing the profit of the transaction receives from economic point of view all what he expected to receive and no further sanctions are needed.\(^\text{26}\)

It follows from the above illustrated conflict between the individual interests, that what is to be balanced is, on one hand the right of the innocent party to rely on his contract against the defaulter, i.e. the principle of certainty in commercial contracts, and on the other hand, the interest of a defaulter to reduce the cost of his default and the interest of the society to eliminate economic waste. The question in this connection is whether the current state of law allows to strike an optimal balance between the competing principles. I will return to this question in the last chapter of the thesis\(^\text{27}\). At this junction, I consider it appropriate to set out the evolution of the case law, which forms the basis for the current state of law.


\(^{27}\) Under heading 4. Conclusion.
3 Right of affirmation in the charterparty context – selected decisions

The right of affirmation within the charterparty relationship has been addressed by the courts on several occasions. It was first and foremost the limitations of the right of affirmation set out in White & Carter that the decisions evolved around, i.e. 1) the cooperation qualification and 2) the legitimate interest qualification. The questions arising in this connection were relatively simple: 1) Is a charterparty a contract which requires cooperation from the charterer in order to be performed and 2) had the shipowner in particular circumstances a legitimate interest in affirming the charter, as opposed to accepting the charterers repudiation and claiming damages. The focus of this chapter will be on the courts´ application of the above limitations in particular circumstances. Ideally, this should provide us with some guidance as to the interpretation of the vague terms introduced by the majority in White & Carter, particularly in connection with the legitimate interest qualification.

As outlined in the introduction, I will limit the analysis under this heading only to the selected decisions. Neither the scope of the thesis does allow for including a full account of all related case law, nor is it necessary for the purposes of this thesis. I have chosen the decisions with the view to include the most influential ones, which formed a point of reference in the subsequent judgments and which brought some clarification into the issue of right of affirmation/ fetters on it. I will particularly address the contribution of each decision in connection with the two White & Carter qualifications described above.\textsuperscript{28}

\textsuperscript{28} See subheadings 2.1.3.1 and 2.1.3.2
3.1 The Puerto Buitrago (1976) – The “adequacy of damages” test

3.1.1 Introductory remarks

The Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei GmbH (“The Puerto Buitrago”)\(^{29}\) was one of the first judgments after the delivery of the decision in White & Carter, where the Court of Appeal had to decide on the question of repudiation within a charterparty relationship. The application of the principles in White & Carter, which in itself would not be a simple exercise, was even more complicated by the facts of the case. It is natural to provide first an account of the facts of the case.

3.1.2 Summary of the facts of the case

In The Puerto Buitrago the charterers chartered a vessel from shipowners for seventeen months. The vessel was on a bareboat time charter by demise, under which the vessel was manned and maintained by the charterers. After six months the vessel required substantial repairs. In accordance with the charter it was the charterers who were obliged to repair the ship and return it in good repair at the end of the charter. However, the charterers prematurely returned the ship without repair as the cost of repairing the ship would have exceeded its value. The cost of repairs was some $2 million, while the vessel was worth, in the second-hand market, only $1 million, even in fully repaired state. The scrap value of the vessel was about $12 million. The charterers admitted liability for $400,000 for the repairs, but they disputed the rest.

Seeing the huge claim by the shipowners, the charterers consulted their solicitors. They advised the charterers that it was open to them to redeliver the vessel to the owners in its unrepaired state – thus terminating the charter hire, but being liable in damages. On Sept. 22, 1975, the charterers telexed the owners´ agents, saying that they intended to redeliver the vessel at 12 noon the next day, Sept. 23. The owners, however, refused to accept rede-

\(^{29}\)Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei GmbH (1976) 1 Lloyd’s Rep 250
livery. They had a few men on the vessel and removed them next morning at 10.00. At 12 noon the charterers´men left. The only men left on the vessel were watchmen provided by the repairers.

The shipowners refused to accept the re-delivery of the vessel, contending that the charterers were bound to repair the vessel before redelivery and that the owners were entitled to hire until the charterers repaired the vessel. Consequently, the owners brought an action against the charterers claiming hire at the charter rate of $46,000 a month until the vessel was repaired and redelivered in sound condition. In their submissions they referred to the clause 15 of the charter as a basis for their claim that the repair of the ship was a condition for the owner´s duty to take redelivery: "Conditions on Redelivery The vessel shall be redelivered to the Owner in the same good order and condition as on delivery (…)" The judge of the first instance court gave a judgment in favour of the shipowners, holding in effect that the charterers were bound to repair the vessel before redelivery, and that the owners were entitled to the hire until the charterers repaired the vessel. The charterers appealed the judgment.

3.1.3 The decision of the Court of Appeal

The Court of Appeal rejected the shipowner´s argument, holding that 1) the obligation to repair the vessel was not a condition precedent to the entitlement of the charterer to redeliver the vessel, 2) on the true construction of the charterparty the redelivery of the vessel was effective notwithstanding that the vessel was not in proper repair, and 3) when the charterers tendered redelivery at the end of the period of the charter the shipowners ought in all reason to have accepted it and sued for damages. It is the last point of the decision which is relevant from the viewpoint of the subject-matter of this thesis. In the following I am going to deal with the reasoning of the parties and the court in this regard.
The shipowners relied on the decision of the House of Lords in *White & Carter*. Lord Denning, M. R. accepted that “even though it was a Scots case, it would appear that the House of Lords, as at present constituted, would expect us to follow it in any case that is precisely on all fours with it.” However, he expressed his view not to follow the decision in the particular circumstances. The two other judges, Lord Orr and Lord Browne agreed. In the following I will highlight the reasoning of Lord Denning and Lord Orr with respect to the 1) cooperation qualification and 2) the legitimate interest qualification following from *White & Carter*. I will conclude with the evaluation of the decision’s contribution to the clarification of the two *White & Carter* qualifications.

3.1.3.1 The cooperation qualification

Lord Denning has not explicitly referred to the qualifications following from *White & Carter*. Nevertheless, the arguments he used in his speech can be conveniently divided and linked to these two categories of qualifications. In connection with the first qualification, i.e. whether a charterparty is a contract which can only be performed with the cooperation of the charterer, an example has been developed by Lord Denning. He likened the charterparty relationship to that between a servant and a master. He said: “Take a servant, who has a contract for six months certain, but is dismissed after one month. He cannot sue for his wages for each of the six months by alleging that he was ready and willing to serve. His only remedy is damages.” In accordance with this reasoning, a contract between master and servant applies more closely to a time charter than the analogy of a simple debt because the owners supply the vessel and the crew, whilst the charterer supplies fuel oil, pays disbursements and gives orders.

30 Puerto Buitrago, p. 255
31 Lord Brown agreed with the speech of Lord Orr, without adding any comments.
32 Puerto Buitrago, p. 255
The argument "stems from a debate as to whether a contract of personal service forms an exception to the general rule that an anticipatory breach does not automatically terminate the contract but merely vests in the victim a power to terminate. Two opposing views present themselves in this regard. One, treats a contract of personal service as no different from other types of contracts. The other, usually excludes such a contract from the general rule." It has been noted that "the legal authorities are divided, but as a matter of precedent it seems to be that the former view has thus far gained the upper hand." The latter view, was also condemned by Templeman LJ as "contrary to principle, unsupported by authority… and undesirable in practice." In the charterparty context the argument of Lord Denning was criticised by Justice Kerr in *The Odenfeld* case. He said in this connection: "I confess that I am not impressed by arguments to the effect that a time or demise charter requires a degree of co-operation between the parties so as to make such charters analogous to contracts for personal services."

In summary, the analogy used by Lord Denning with the contract for personal service is at best uncertain and at worst not applicable to the charterparty relationship. As follows from the argument of Justice Kerr in *The Odenfeld* cited in the previous paragraph, the level of cooperation required between the parties is an important factor when determining whether the analogy is applicable. In the particular circumstances of *The Puerto Buitrago*, the degree of cooperation required from the charterer was slightly higher due to the requirement

---

33 These two views were helpfully summarised in *Robert Cort & Son Ltd v Charman* (1981) ICR 816 EAT 819 (Browne-Wilkinson J).
35 *ibid*
37 See subheading 3.2
38 *Gator Shipping Corporation v. Trans-Asiatic Oild Ltd SA and Occidental Shipping Establishment (The Odenfeld)* (1978) 2 Lloyd’s Rep 357, 373-374
of repairs being performed by the charterers. Probably, therefore, the analogy was more accessible to the judge.

Lord Denning also likened the situation to “a finance company which lets a machine or motor-car on hire purchase, but the hirer refuses to accept it. The finance company cannot sue each month for the installments. Its only remedy is in damages”\(^\text{39}\). In my opinion, it is questionable whether the example is fitting in the circumstances of the case. In \textit{The Puerto Buitrago} the charterer initially accepted the vessel, the case instead regarded the redelivery of the vessel and whether the owner could claim hire for the time until the vessel is redelivered in a repaired state. In subsequent decisions, another analogy was used, analogy to letting of an apartment, which will be examined later in the thesis\(^\text{40}\).

Lord Orr, unlike Lord Denning, referred explicitly to the cooperation qualification in \textit{White & Carter} decision. He said: “The present case differs from that case in that here it cannot be said that the owners could fulfill the contract without any co-operation from the charterers (…)”. The differentiation of the two cases was rather brief. It does not follow from the cited passage, what cooperation the judge had in mind. On the other hand, one might say that the issue was addressed by Lord Denning and there was no need for repetition. As such, it was likely the obligation of the charterer to repair the vessel, on which Lord Orr based his conclusion.

\subsection*{3.1.3.2 The legitimate interest qualification}

In connection with the legitimate interest qualification, Lord Denning reasoned that the decision in \textit{White & Carter} “has no application whatever in a case where the plaintiff

\textsuperscript{39} Karsales (Harrow) v. Wallis, (1956) 1 W.L.R. 936 (2nd point).
\textsuperscript{40} See subheading 3.3.3.1
ought, in all reason, to accept the repudiation and sue for damages – provided that damages would provide an adequate remedy for any loss suffered by him.”\(^{41}\) The test used by Lord Denning was later referred to by the legal theory as “the adequacy of damages test”\(^{42}\). In accordance with this test, the innocent party’s right to affirm the contract will depend on a discretionary determination of whether damages in particular circumstances are adequate and whether the innocent party ”ought, in all reason, to accept the repudiation and sue for damages.” Lord Denning further went on to develop his argument by saying:

“The reason is because, by suing for the money, the plaintiff is seeking to enforce specific performance of the contract – and he should not be allowed to do so when damages would be an adequate remedy. (....). They cannot sue for specific performance – either of the promise to pay the charter hire, or of the promise to do the repairs – because damages are an adequate remedy for the breach.”\(^{43}\)

Lord Denning here treated the claim for hire analogous to a claim for specific performance. This was likely due to the requirement of completion of repairs by charterers prior to redelivery. Therefore, it could be said that the claim for hire, in its effect, amounted to an attempt to enforce the charter by a specific performance. However, it has been suggested in legal theory that such analogy drawn in the English context is both lax and dangerous.\(^{44}\)” Once the victim fulfils all conditions precedent to the payment of the contract price, that price is payable ´as a matter of right´and a claim in debt is not subject to the court´s discretion. (…) Admittedly, Lord Reid´s legitimate interest qualification confers on the courts an

\(^{41}\) Puerto Buitrago, p. 255
\(^{43}\) Puerto Buitrago, p. 255
equitable jurisdiction to constrain the accrual of that entitlement."\textsuperscript{45} However, the issue in \textit{White & Carter} was not whether the victim, having fulfilled all the conditions precedent, should be awarded the contract price, but whether it should be allowed to fulfil those conditions in the first place.\textsuperscript{46} The doctrine of specific performance, on the other hand, regards the unavailability of certain remedies. Therefore, in my opinion, the issue should have been correctly approached through the legitimate interest qualification and not through the doctrine of specific performance, albeit the solution would not vary.

Lord Denning further pointed out the commercial absurdity of other solution. He said:

\begin{quote}
\textit{“What is the alternative which the shipowners present to the charterers? Either the charterers must pay the charter hire for years to come, whilst the vessel lies idle and useless for want of repair. Or the charterers must do repairs, which would cost twice as much as the ship would be worth when repaired-after which the shipowners might sell it as scrap, making the repairs a useless waste of money.”}
\end{quote}

Clearly, what was Lord Denning emphasizing was the commercial non-sense which would be a consequence of the affirmation of the contract as opposed to the redelivery and claim for damages. In the particular circumstances the court’s decision must be seen as the only rational option. It would be unlikely for any commercially aware judge to reach other conclusion.

\textsuperscript{45} \textit{ibid}

\textsuperscript{46} There are several other grounds distinguishing the legitimate interest qualification from the doctrine of specific performance, such as their focus and scope. See Liu, Qiao: \textit{The White & Carter Principle: A Restatement}. The Modern Law Review. Volume 74, (March 2011). p. 179
Lord Orr, the other judge in the case, concluded that the particular case differed from *White & Carter* because the charterers had set out to prove that the owners had no legitimate interest in claiming hire rather than claiming damages. Again, he had not referred to any specific circumstance which evinced the lack of owner’s legitimate interest in performing the charter. Nevertheless, as discussed in the previous paragraph, the facts of the case were so extreme that it would stretch beyond mere unreasonableness to affirm the contract.

3.1.4 Conclusion

In my opinion, the *Puerto Buitrago* decision brought some, if only a limited, light on the issue of charterers repudiation and the right of the owner to elect to affirm the contract. It seems, at least form the speech of Lord Denning, that what prompted the referred solution in the case was the commercial absurdity of other solution. And from this point the judges took different approaches in justification of it. Lord Orr explicitly referred to the fetters on the innocent party’s right to affirm the contract following from *White & Carter*. It was equally open for Lord Denning to do the same. The vagueness of the terms used in *White & Carter* would allow to reach the same conclusion through the interpretation of those terms. Instead, Lord Denning, took a more ”adventurous” road through analogy between the claim for hire and doctrine of specific performance. Apparently, it was the facts of the case, particularly the obligation of the charterer to repair the vessel prior to redelivery, which made it convenient to use such line of argumentation. However, I have doubts about the appropriateness of drawing such analogy for reasons set out above⁴⁷.

Nevertheless, Lord Denning contributed to the clarification of the vague *White & Carter* legitimate interest qualification with the formulation of the “adequacy of damages test”. As will be seen further, the test was accepted in subsequent decisions, albeit in a supplemented

---

⁴⁷ See subheading 3.1.3.2
form. Admittedly, the decision does not present a clear demarcation of situations where the owner is entitled to affirm the contract. However, this could hardly be expected in the light of the complexity of the issue.

Furthermore, it was clearly stated by Lord Orr, that a demise charterparty of a kind as in *The Puerto Buitrago*, i.e. where the charterer is obliged to repair the vessel prior redelivery, is not a contract which can be performed without any cooperation from the charterers. Whether the same could be said about time charterparties and demise charterparties, without the charterer’s obligation to perform repairs, remained unanswered. I consider this part of the decision to be of most practical value, since it follows from the *White & Carter* decision, that if any of the two qualifications is not met, the charterer may not bring an action for the contract price/hire. It follows, that in such situations an owner, will not be entitled to claim hire even if he has a legitimate interest in claiming it, due to the inability to perform the charter. The strict application of the *Puerto Buitrago* decision would therefore mean that in case of demise charterparties, of the same kind as in the case, the shipowner would only have a claim in damages in case of charterer’s repudiation.

### 3.2 *The Odenfeld* (1978) – The “wholly unreasonable” test

#### 3.2.1 Introductory remarks

In *The Odenfeld* a less restrictive approach to the scope of *White & Carter* was adopted as compared to *The Puerto Buitrago*. Justice Kerr provided a detailed description of the facts of the case and a thorough discussion of the questions of law. He referred to *The Puerto Buitrago* discussed under the previous subheading, however, as will be noted, he did not accept all the propositions presented in the case. I will continue with the same structure of the discussion, i.e. I will start with the presentation of the facts of the case, then address the two qualification rules from *White & Carter* and conclude with a short summary. Since the facts are very complex, I only propose to summarise them so far as practicable for the purposes of this thesis.
3.2.2 Summary of the facts of the case

The charterer and the shipowner entered in 1973 into charter for a basic period of ten years in respect of the vessel Odenfeld. After the first two years the charter hire rate was to be assessed by the London Tanker Broker Panel, subject to a minimum. A side letter from the owners to the charterers contained a ‘funding arrangement’ under which, if the hire fixed by the Panel was less than the minimum hire specified in the charter, the owners would pay the difference. The charterers knew the documents were written to help the owner raise a loan and that it was at least highly likely that the owner would not disclose to the lender the side letter. After the charter had been made, the owner approached the Gator Shipping Corporation for a loan, disclosing only the charter and not the side letter. The owners were granted a loan of $6,660,000 on the security of an assignment of the money due under the charter.

After some time, the freight market collapsed, and the Panel fixed a rate below the minimum level in the charter. The owner continued for some months to make the funding payments to the charterers as required in the side letter. By September 1975, however, they ceased to do so and claimed to justify the non-payments on the ground that they were entitled to a set-off against the charterers for hire due under other charters and contended that the charterers had made wrongful deductions from hire under them. The charterers disputed both contentions but continued to pay the full hire from September to December, 1975. However, on or about 6th January 1976, the charterers refused to continue to do so and said that they treated the charterparty as at an end due to the owners’ wrongful repudiation of it. In May and June the vessel performed two voyage charters for the charterers on a without prejudice basis and on July 2, 1976, after the completion of these voyages she was laid up. On September 22, 1976, the title in the vessel was transferred to the financing company and they conceded that the charter-party then came to an end.

The finance company Gator Shipping Corporation brought an action against the charterers claiming outstanding hire for the period January, 1976 to September 1976. The charterers
denied liability and counterclaimed declarations to the effect that the charter came to an end in January, 1976.

3.2.3 The decision of the Commercial Court

There were several preliminary questions to be decided by the Commercial Court, but the one relevant for the purposes of this thesis is the question no. 3: “Whether on the assumption that the charterers repudiated the charter, the charterers´ plea that the owners ought to have accepted the repudiation and that thereafter the only liability of the charterers was in respect of damages was correct: and if so when the repudiation ought to have been accepted.”

Another potentially interesting question is the one under no. 6, whether the charter came to an end when the vessel was laid up or only at the time of the transfer of the title to the vessel to the financing company. The answer to this question provides some light on the issue of what actions constitute an acceptation of charterers´ repudiation.

3.2.3.1 Preliminary question no. 3 – The right of affirmation

In connection with question no. 3 the charterers contended that the owners were under the duty to accept the repudiation of the charterers on or about Jan. 6, 1976, and to treat the charter as at an end. They contended that this was the only reasonable course for owners to take in the circumstances. Nevertheless, Justice Kerr ruled, that “the charterers´ plea was incorrect since the owners were not obliged to accept the charterers´ repudiation and treat the charter at an end.” In the following I will examine the reasoning of the Court in relation to the two White & Carter qualifications.

48 Odenfeld, p. 359
49 Odenfeld, p. 372
50 Odenfeld, p. 359
3.2.3.1.1 *The cooperation qualification*

In connection with the cooperation qualification, Justice Kerr saw it as a crucial factor that the charterers had the vessel at their disposal and that there was nothing to prevent or hinder them from giving orders to her and employing her normally under the charter. This was even more so, since the charterers in fact employed the vessel, even though on a without prejudice basis, on two voyages in May and June. He considered also of a considerable importance, that the charterers had an express right to sublet the vessel or to lay her up at a reduced rate of hire. Justice Kerr concluded that charterers “were under no obligation to employ the vessel; their only irreducible obligation was to make whatever were the payments due under the charter at any particular time (…)”\(^{51}\)

I agree with the reasoning of Justice Kerr. It is true, that the performance of voyages under the charterparty requires active participation from the part of charterers in form of orders, but the question expressed in *White & Carter* was rather whether charterer’s cooperation is needed for the accrual of hire. In this connection I find it decisive that under a time charterparty an owner fulfills his obligations by keeping the vessel ready to receive orders against the payment of hire by charterers. This forms the subject-matter of a time charter-party. The shipowner earns hire on the basis of the time during which the vessel is at the disposal of charterers and not on the basis of the performed voyages. Therefore, I am of the opinion that a time-charterparty is not a contract which could only be performed with the cooperation of the charterer. The *White & Carter* right of affirmation is therefore applicable, albeit subject to the fulfillment of the second qualification, which will be examined next.

3.2.3.1.2 *The legitimate interest qualification*

\(^{51}\) Odenfeld, p. 374
When examining the second *White & Carter* qualification, i.e. the owner’s legitimate interest in performing the contract, Justice Kerr considered the decision in *The Puerto Buitrago*. But, he did not regard the case as any authority for a general proposition to the effect that whenever the charterer repudiates a time or demise charter for whatever reason and in whatever circumstance, the owners are always bound to take the vessel back, because a refusal to do so would be equivalent to seeking an order for specific performance. He added: “Consequences of such a proposition would be extremely serious in many cases, and no trace of such a doctrine is to be found in our shipping laws.” I have discussed the deficiencies of the specific performance analogy above and here I only refer to it.

On balance, Justice Kerr considered the conclusion in *The Puerto Buitrago* to be based on the extreme facts of the case. Then he went on to formulate or further precise the legitimate interest qualification set out in *White & Carter*. He said: "It follows that any fetter on the innocent party's right of election whether or not to accept a repudiation will only be applied in extreme cases, viz. where damages would be an adequate remedy and where an election to keep the contract alive would be wholly unreasonable." (emphasis added). The cited passage can be seen as a prominent attempt to formulate a test for the applicability of the principle in *White & Carter*. Some described Kerr J in *The Odenfeld*, "as putting gloss" on the limitation expressed by Lord Reid in *White & Carter*. However, when Lord Reid’s speech is read in its entirety, it is clear that the innocent party’s right is not qualified by the need to act reasonably. It requires something beyond that before the courts will interfere and prevent the innocent party insisting on performance of the contract.

---

52 See subheading 3.1.3.2  
53 *ibid*  
54 *Odenfeld*, p. 373  
55 Charterers’ submissions in *The Aquafith* accepted by the arbitrator. However, the Commercial Court on the appeal said that the arbitrator was wrong to regard the comments of Kerr J as a “gloss” on Lord Reid’s dictum in *White & Carter*.  
56 See subheading 2.1.3.2
The first part of the test formulated in *The Odenfeld* decision is a restatement of the “adequacy of damages test” adopted by Lord Denning in *The Puerto Buitrago*. However I find the test suggested in *The Odenfeld* to be more in line with the intended balance between the competing interests expressed in *White & Carter* due to the added “wholly unreasonable” qualification. The application of the test formulated in *The Odenfeld* makes it assumably more difficult to confine the owner’s right to a claim for damages. I write assumably, because the test allows for a substantial discretion by courts in connection with the interpretation of the vague term “wholly unreasonable”.

*The Odenfeld* test was also commented on in the subsequent decision by Simon, J. in *The Dynamic*. He said: “Although, the use of the qualifying word *wholly unreasonable* in *The Odenfeld* properly emphasizes that the rule is general and the exception only applies in extreme cases, it adds nothing to the test (...)”. All the courts which have considered the matter since have taken the view that Lord Reid’s test has merely been expressed in other language in the later succession of authorities. Nevertheless, the judgment has in my opinion an indispensable effect since it lifts the requirement for the courts justification of the denial of the shipowner’s right to claim hire in individual cases. This is even more so since the judgment limits the fetter on the innocent party’s right of election whether or not to accept a repudiation to “extreme cases”.

On the basis of the particular circumstances the court held that the shipowners were not obliged to accept the defendant’s repudiation and treat the charter as at an end. Justice Kerr did not use the language of “legitimate interest”. But he must be taken to have found that

---

57 See subheading 3.1.3.2
59 Dynamic, p. 698
60 *White & Carter*
61 In Stocznia Gdanska SA v Latvian Shipping Co. [1998] 1 WLR 574, Clarke J after referring to previous authorities said that he did not think there was any real difference between those differing ways of putting the principle.
the charterers had failed to prove absence of legitimate interest on the part of the owners in claiming hire. One of the grounds on which Justice Kerr so found was the difficulty in calculating damages.

Further, it will be interesting to note what factors have been considered relevant in the case. On the facts of the case, Kerr, J, did not consider that damages were an adequate remedy because it would be difficult to assess damages for a prospective six and a half-year period following repudiation, as compared with a claim for hire. He also attributed significance to the fact that the plaintiffs were assignees of the owners (being lenders) and an acceptance of the repudiation as terminating the charter would have put the owners in breach of their covenants with them. Moreover, he considered of significance the charterers´ liberty to sublet, and to lay up the vessel, which meant that they had options as to the disposal of the vessel. Hence, it was equally open to owners or charterers to employ the vessel on the market or reduce the loss by laying-up the vessel.

It was however added, that this must not be seen as implying that the shipowners could necessarily have maintained the same position for a further six years. It was said that, “the passage of time might in itself alter the legal position of the parties, because an insistence to treat the contract as still in being might in time become quite unrealistic, unreasonable and untenable”. This passage implies that the time factor has a bearing on the right of the shipowner to keep the charterparty alive. In the particular case, the court acknowledged the shipowner´s right to keep the charterparty alive from the moment of charterer´s repudiation

62 In contrast, in The Alaskan Trader the Commercial Court refused to interfere with the decision of the arbitrator who found that the owner had no legitimate interest in keeping the contract alive in situation when the charterer repudiated the contract 8 months prior to the expiry of the time charterparty. The reason for charterer´s repudiation was the lack of employment for the vessel due to a market downturn. It was not accepted that the assessment of damages, on the facts of the case, presented any special difficulty.
63 Odenfeld, p. 375
in January to the laying up of the vessel in September, i.e. for a period of approximately eight months. Predictably, the judgment does not define a precise moment from which the charterparty could not longer be kept in effect. It is left for the courts to determine in individual circumstances, from which moment in time the keeping of the contract alive becomes “quite unrealistic, unreasonable and untenable”. This allows for a degree of flexibility in the decision-making process, albeit for the price of a degree of uncertainty. As a practical implication of this part of the judgment, it is important that the shipowners evaluate their legal position continuously, not only at the time of charterer’s repudiation.

3.2.3.2 Preliminary question no. 6 – Acceptance of repudiation

In answer to question no. 6, whether the charter came to an end when the vessel was laid up or only when the title to the vessel was transferred to the financing company, the Court decided, that “by laying up the vessel, the plaintiffs and owners should be regarded as having brought the charter to an end”\textsuperscript{64}. The Court considered the submissions of both parties. The charterers submitted that if the other side was purporting to keep the charter alive, the vessel had at all times to be ready and at the disposal of the defendants. They submitted that laying her up was a breach of the charter if the charter was then still alive. The Court, however ruled otherwise by holding that the laying up of the vessel did not constitute a breach; at any rate not a breach on which the defendants can rely when they were themselves in repudiation of the charter and treating it as having come to an end.

The Court then went on to consider the alternative submission of the charterers that by laying up of the vessel the shipowners impliedly accepted the repudiation and treated the charter as at an end. Justice Kerr had considerable hesitation over this point.\textsuperscript{65} In one sense there was clearly no acceptance of the repudiation, since the shipowners at all times contin-

\textsuperscript{64} Odenfeld, p. 378
\textsuperscript{65} Odenfeld, p. 379
ued to maintain that the charterers remained bound by the charter. Justice Kerr, nevertheless came to the conclusion, that by laying up the vessel the shipowners should be regarded as having brought the charter to an end. He further reasoned:

“It is true that the innocent party is dispensed from being ready, willing and able to perform a contract in all respects, at any rate at short notice, when the other party has repudiated it. (…) But the extent to which the innocent party is dispensed from continuing adherence to the terms of the contract must be subject to some reasonable limitation. For instance, if the innocent party has put it out of its power to perform or cannot for some other reason continue to perform, then he clearly cannot achieve anything by maintaining that the contract is nevertheless still alive. Similarly, if he maintains that the contract is still alive, but does something which is inconsistent with its continuing survival, then he must be treated as having acquiesced in its termination.”

However, the present case was not as clear-cut as the examples mentioned in the speech of Justice Kerr. It was accepted that the vessel could at any time have been brought back into service at short notice if the charterers had been willing to resile from their attitude. Nevertheless, Justice Kerr held on balance that laying up a vessel was so inconsistent with the continuing existence of a time charter that the shipowners could not be heard to say in the same breath that the charter was still on foot. He further reasoned: “To hold otherwise would lead to unrealistic and unfair consequences. The owners would not have to bear the

66 It might seem at the first impression, that the Court here denied the first qualification following from White & Carter, i.e. that the owner must perform the contract in order to earn the hire. However, the context here is slightly different. Here the Court did not deal with the question of whether the owner accrued the hire, but rather whether it is open for the charterer to claim that the owner by way of his actions (laying up of the vessel) impliedly accepted the repudiation. Admittedly, the borderline between the two aspects of the case is narrow. Since, if the owner cannot earn the hire, then in turn he cannot claim the hire and in such situation it is irrelevant whether the owner accepted the repudiation or not.

67 Odenfeld, p. 379
expense of manning the vessel or the other normal costs of keeping the vessel in service, but would nevertheless be entitled to recover the full hire (…).”

The legal effect of the laying up of the vessel was further addressed by the Court. It was mentioned that it was only consistent with action taken to mitigate loss resulting from the charterers´ repudiation of the charter and that it therefore operated as an implied acceptance of the repudiation, with the effect that from then onwards the plaintiffs only had a claim for damages.

The court interpreted the laying up of the vessel as an indication of the shipowners´ resignation as to the existence of the charter-party. The action clearly expressed a lack of hope for receiving of any future orders from the charterers. Also, the readiness of the shipowners to perform services required was impaired by the laying up of the vessel. The decision on this point is well justified. Even though the decision was not reached without hesitation, there is every ground to expect it to be followed in parallel situation.

Furthermore, there are some general rules, which follow from the decision. It was held, that when there is inconsistency between the verbal non-acceptation of repudiation and shipowner´s actions, the latter is given priority. The difficult part is to decide whether a particular action of a shipowner is incompatible with keeping the charter alive. In this connection, the decision reveals series of factors, which are of importance: 1) what the actions reveal about the shipowners´ perception of the situation, does he still consider the charterer to be alive, or does he now accept that it is at an end 2) is the purpose of his actions to mitigate damages, 3) would it be unrealistic or unfair to consider the charter-party to be still alive in the light of the shipowners´ actions.

__________________________

68 Odenfeld, p. 379
There is yet another point to be made in connection with this part of the decision. The Court decided in the particular case that the laying-up of the vessel was inconsistent with keeping the charter alive. There are however two form for lay-up known in practice, for a short term or long term period – the so called “hot” lay-up and “cold” lay-up alternatives. A “hot” lay up means leaving skeleton crew in place to keep all systems running on minimum power. A “cold” lay-up means shutting down the ship almost completely for an extended period, in practice at least two months. This leads to greater cost savings, but the ship usually needs dry-docking before coming back into service. It takes normally some months for the ship to be again ready to perform voyages.

The decision does not explicitly mention whether the form for lay-up was “hot” or “cold”, but since there was no crew present on board, it indicates a “cold” lay-up. The practical question, which arises, is whether the court would consider a “hot” lay-up as equally giving rise to inconsistency between shipowners´ actions and their verbal affirmation of contract. At first blush, there is much to say for a negative answer. One argument is that under “hot” lay-up the minimum requirements for the crewing of the vessel are met and the vessel can be ready to set out on a voyage usually within a week. In my opinion, such action would not indicate a resignation on the part of the shipowners as to the continuation of the charter-party, since “hot” lay-up is commonly used also during low employment periods of charter-parties, which were not repudiated. At the same time, it cannot be said that the vessel is not at the disposal of the charterer due to the presence of the crew and running of the vessel´ systems, even though at the minimum level. Although, the purpose of this form of laying-up is to reduce the running costs, the extent of it does not reach the same scope as in the case of a “cold” lay-up. On the other hand, it is an indication, even though on a smaller scale of an action to mitigate loss. The answer is therefore not unambiguous.

3.2.4 Conclusion
The contribution of *The Odenfeld* can be seen in the formulation of the ”wholly unreasonable test” in connection with the legitimate interest qualification. The decision acknowledges that there is a point at which court will cease, on general equitable principles, to allow the innocent party to affirm and perform the contract. The definition of such point is of course subject of some difficulty as it requires drawing a line between conduct, which is merely unreasonable and conduct which is wholly unreasonable.\(^{69}\) Moreover, it was held, that the limitation of the owner’s right to affirm the contract will apply only in ”extreme cases”.

The decision, at the same time, shed light on the issue of the cooperation qualification. The court held that the owner may perform the time charterparty without any need for cooperation from the charterer.

The last discussed part of *The Odenfeld* decision\(^{70}\), brought some clarification on the issue of what actions of the owner will amount to an acceptance of charterer’s repudiation. The Court specifically ruled, in this connection, that laying up of the vessel is an example of such action.

### 3.3 *The Aquafait (2012)* – The “perverse” test

3.3.1 Introductory remarks

In recent case of Isabella Shipowner SA v Shagang Shipping Co Ltd (“*The Aquafait*”)\(^{71}\), the Commercial Court considered application of the rule in *White & Carter* in circumstances when charterers repudiated time charterparty but owners decided to maintain the charter and claim hire instead of mitigating loss and claiming the balance in damages. The decision

\(^{69}\) Alaskan Trader, p. 651  
\(^{70}\) Subheading 3.2.3.2  
\(^{71}\) (2012) EWHC 1077
stirred a lot of interest since it brought some degree of clarity into the issue of owner’s right of affirmation, albeit it has not eliminated the existing obscurity completely.

The state of law prior to *The Aquafaih* was marked by a degree of uncertainty as to the interpretation and application of the *White & Carter* limitations on the innocent party’s right to affirm the contract, i.e. 1) the cooperation qualification and 2) the legitimate interest qualification. In accordance with the decision in *White & Carter* the qualifications were to be applicable only in extreme cases. Nevertheless, there were examples of decisions where the court/arbitrator rejected the right of the innocent party to affirm the contract in circumstances where it could be disputed whether they were extreme. 72

The shifting of the opinions as to the application of limitations on the right of affirmation can be illustrated by the amendments introduced in the most recent edition of ”Time charters”73. The authors in the latest edition after referring to the authorities draw a conclusion that the exception from the innocent party’s right to affirm the contract applies in circumstances where damages are an adequate remedy and it would be “wholly unreasonable” and state that the exception is applicable only in very clear cases74. In contrast, in the previous five editions75 we find the conclusion: “it seems that once it becomes clear that there is no room for a change of mind by the charterers, the courts are likely to insist that the owners accept the re-delivery and sue for damages – assuming that damages will be an adequate remedy”76. In summary, what was meant to be an exception, as per speech of Lord Reid in *White & Carter*, was presented in the older versions of ”Time charters” as a general rule. That opinion, in turn, due to its persuasive authority, had a potential to influence the legal and arbitration practice for many years.

72 *The Alaskan Trader*
73 *Time Charters*. Terence Coghlin... (et al.). London (Informa Law) 2008
74 *ibid*, para 4.35
75 1978 - 2003
76 *Time Charters*. Terence Coghlin... (et al.). London (Informa Law) 2003, para 4.41
In this context *The Aquafait* decision was important since it reinforced the reliability of owners on their right of affirmation following from *White & Carter*. In the following I will examine the contribution of the decision to the clarification of 1) the cooperation qualification and 2) the legitimate interest qualification following from *White & Carter*. I start with a summary of the facts on which the court based its decision.

### 3.3.2 Summary of the facts of the case

The vessel Aquafait was chartered on an amended NYPE form which included a warranty that the vessel would not be redelivered before the minimum period of 59 months, which, in the event, was 10 November 2011. On 6 July 2011, however, the charterers stated that they would redeliver the vessel on dropping the last outward sea pilot after discharge in China under the then current voyage, which was in the event on 9 August 2011. It was common ground that that constituted an anticipatory repudiatory breach. The owners did not accept the repudiation and sought to affirm the charterparty.

On 25 July 2011 the owners commenced arbitration proceedings seeking a partial final award declaring that they were entitled to refuse the redelivery and to affirm the charterparty, as they had done, and that the charterers were liable for hire for the balance of the minimum period (94 days).

The charterers, on the other hand contended that the owners were not entitled to affirm the charterparty. “They said that the case fell outside the rule in *White & Carter* because the owners could not complete the charter without the cooperation of the charterers. Moreover, the owners had no legitimate interest in performing the contract rather than claiming damages.”

---

77 *Aquafait*, p. 61
The arbitrator accepted both of the charterers’ arguments. He held that a time charter was not a contract that could be performed without the charterers needing to do or accept anything. He held that cooperation in that limited sense was necessary for the running of a time charter, stating by way of example the obligation of the charterers to provide fuel for the vessel to enable it to conduct its required operations. This, he held, took the present case outside the ratio of the House of Lords decision. He also expressly found that the owners had no legitimate interest in insisting that the charter remained alive. Accordingly, the owners were required to take redelivery of the vessel, trade her on the spot market by way of mitigation and claim damages. 78

The owners appealed to the Commercial Court, submitted that “the arbitrator was wrong in law both to hold that time charters fell outside the scope of the rule in White & Carter and to hold that the owners had no legitimate interest in refusing early redelivery (…)” 79

3.3.3 The Decision of the Commercial Court

Cooke, J considered the previous authorities and concluded on the facts of the case that there was “a clear error of law on the part of the arbitrator in finding that the White & Carter principle was of no application to the time charter in issue.” 80 In his judgment he addressed the two qualification rules following from White & Carter.

3.3.3.1 The cooperation qualification

78 Aquafaith, p. 61, 62
79 Aquafaith, p. 63
80 Aquafaith, p. 69
3.3.3.1.1 Time charterparty

The cooperation qualification has been discussed several times in this thesis. It follows from the decision in White & Carter that the innocent party will not be entitled to a claim for hire if he is not able to perform the contract without the cooperation of the charterer. It was argued that the relevant question to be asked in this connection is whether the charterer’s cooperation is necessary in order for the owner to be able to earn the hire. The Commercial Court in The Aquafaih adopted the same view. It was held by the Court:

“The question, to my mind, is very simple. Could the owners claim hire from the charterers under this time charter without the need for the charterers to do anything under the charter? The answer is yes. If the charterers failed to give any orders, the vessel would simply stay where it was, awaiting orders but earning hire. (...) Although the charterers are obliged under the terms of the charter to provide and pay for fuel, should the bunkers run out whilst awaiting orders, it is open to the owners to stem the vessel and to charge that to the charterers’ account. In order to complete their side of the bargain, the owners do not need the charterers to do anything in order for them to earn the hire in question.”

The Court’s ruling on the cooperation qualification is important as it brings the disparity of opinions on this issue to an end. The courts expressed conflicting opinions on the question of whether charter is a type of a contract, which can be performed without the cooperation of the charterer. In The Puerto Buitrago Lord Orr stated that it could not be said that the owners could fulfill the particular demise charter, without any cooperation from the charterers. This was obiter and contained no explanation for that conclusion. In The Oden-

---

81 Aquafaih, 68
82 at least in connection with time charterparties
83 Subheading 3.1.3.1
feld\textsuperscript{84} Kerr J, concluded that the owner is able to perform the time charter and claim hire without any cooperation from the charterer. On the other hand, Lloyd J, in \textit{The Alaskan Trader}\textsuperscript{85} was, at first blush (obiter) of the opinion that a time charter required the degree of cooperation referred to by Lord Reid which would make the application of the \textit{White & Carter} general rule impossible. In \textit{The Dynamic}\textsuperscript{86} the applicability of the \textit{White & Carter} right of affirmation to a time charterparty was accepted on all sides without argument. Equally, the standard textbooks, \textit{Time Charters}\textsuperscript{87} and \textit{Scrutton on Charterparties}\textsuperscript{88} have always accepted the applicability of the principle. On balance, there were more voices for bringing time charters under the principles of \textit{White & Carter} than against. The decision in \textit{The Aquafait}h can be considered as the “final nail in the coffin”.

3.3.3.1.2  Demise charterparty

\textit{The Aquafait}h decision did not concern a demise charterparty. Hence, the court has not provided a definite answer as to the question of the application of the cooperation qualification on the demise charterparty. Cooke J nevertheless dwelled upon the issue. He pointed out that there is a material difference between a demise charter and a time charter, as in the case of a demise charter, the charterer takes possession of the vessel, provides the crew and typically pays all outgoings on the vessel. The question is whether this material difference makes the \textit{White & Carter} principle inapplicable. The relevant question to be asked as formulated by Cooke J in \textit{The Aquafait}h is: Could the owners claim hire from the charterers under the demise charter without the need for the charterers to do anything under the charter? The subsequent question is then: What is the basis for the owners earning of the hire?

\textsuperscript{84} Subheading 3.2.3.1.1
\textsuperscript{85} not analyzed in the thesis
\textsuperscript{86} not analyzed in the thesis
\textsuperscript{88} Scrutton on Charterparties. Stewart C. Boyd...(et al.). London (Sweet & Maxwell) 2008. p. 351-352
Under a demise charter the owner transfers the possession of the ship to the charterer and earns hire on the basis of the time during which the owner parts with the whole possession and control of the ship\(^{89}\). It is irrelevant for the accrual of the hire whether the demise charterer in fact operates the ship or not. However, if the charterer abandons the vessel as it was the case in *The Puerto Buitrago*\(^{90}\) where only a ship repairer’s watchman were left on board, a question arises whether the owner still continues to earn the hire. In this connection it was held by the Court in *The Aquafait*, that the owner is not entitled to claim hire after regaining the possession of the ship.

The question left open is however, what would be the outcome if the owner had not regained possession of the ship. Would he be entitled to the hire under the demise charterparty? In *The Aquafait* decision Cooke J drew analogy between a demise charterparty and a renting of a flat. He referred to the decision of the Court of Appeal in *Reichman v Beveridge*\(^{91}\). This concerned a claim by landlords for rent arrears where the tenant had quit the premises, having no further use for them, and maintained that the landlord had a duty to mitigate its loss rather than hold the tenant to the terms of the lease and require payment of rent. The tenant’s submission failed. An analogical conclusion in the context of a demise charter would mean that the owner is entitled to the hire even though the charterer is no longer in possession of the vessel, provided that the owner has not regained the possession. I must admit, however, that the situation is not very practical since in most circumstances the owner of the vessel will be, compelled to regain the possession of the vessel due to the existence of substantial risk of damage/loss of the vessel along with a potential insolvency of the charterer.

\(^{89}\) Scrutton on Charterparties. Stewart C. Boyd... (et al.). London (Sweet & Maxwell) 2008. p. 55-56  
\(^{90}\) See subheading 3.1.2  
\(^{91}\) (2007) Bus LR 412
3.3.3.2 The legitimate interest qualification

In connection with the second *White & Carter* qualification, Cooke J, on proper analysis of all preceding case law, held that “The effect of the authorities is that an innocent party will have no legitimate interest in maintaining the contract if damages are an adequate remedy, and his insistence on maintaining the contract can be described as “wholly unreasonable”, “extremely unreasonable” or, perhaps, in my words, “perverse”.” Cooke J highlighted the exceptional character of the fetter on the right of the innocent party to affirm the contract by referring to the terms used by previous authorities, while he could not resist adding an additional adjective of his preference – “perverse”.

Some considered the use of the term “perverse” to amount to an overreaching from the part of the judge. In my opinion, however, it is clear from the above words of Cooke J, that he intended to use the word “perverse” as a synonym to the previously formulated tests and it does not present any change as to the test set out in *White & Carter*. Hence, I doubt that the term used by Cooke J has the potential of increasing the burden on the contract breaker seeking to extricate himself from a contract. Neither I agree with the view, that if Cooke J’s test gains precedence over its predecessors, it is possible that the scope of the *White & Carter* principle will be widened. Such consequence could only follow from ignorance of the context of the use of the term “perverse” and the ignorance of the previous authorities to which Cooke J referred to in his decision.

92 See subheading 3.1.3.2
93 See subheading 3.2.3.1.2
94 Aquafaith, p. 69
http://www.stonechambers.com/news-pages/08.05.12--article--keeping-repudiated-contracts-alive---aquafaith----andrew-leung.asp. [Visited 30th October 2012]
96 *ibid*
97 *ibid*
It will be of practical importance to note what factors Cooke J took into consideration when deciding on the legitimate interest qualification. As will be noted, the Court paid attention to several of owners interests.

First, the cash-flow implications of a claim in damages as opposed to the claim of hire were pointed out. Under the charter the charterers were under the obligation to pay hire up front, semi-monthly in advance. Thus, at the time of the repudiation there were moneys “sitting” in the owners account. If the owners decided to accept the repudiation, they could be required to repay the amounts corresponding to the hire not earned and wait for the outcome of the assessment of damages in arbitration. The assessment of damages itself was not simple on the facts of the case. The parties presented conflicting expert reports on the state of the market, giving rise to a potential significant argument as to proper mitigation of loss and the extent of damages recoverable. Under such circumstances the payment of any liability could be postponed until the conclusion of arbitration, months away, by which time the charterers could conceivably have become insolvent.

The Court accepted in the judgment that the difficult financial situation of the charterers was a relevant factor when examining the question whether the owners had legitimate interest in affirming the contract. In the actual circumstance, the owners had a clear financial interest in claiming hire, in a simple and fast procedure, rather than damages of uncertain quantum in a lengthier procedure with a accompanying risk of the charterer becoming insolvent. The litigation tactic was therefore, in my opinion, correctly chosen in the light of the facts of the case.

Secondly, Cooke J dealt with the “legitimate interest” argument that “the contract breaker was seeking to foist upon the innocent party the burden of seeking to trade in a difficult
spot market, where a substitute time charter was impossible, with all the management issues involved." 98 In this connection, the Court considered the option of the charterer to sublet to be “a matter of relevance”. 99 It was held by the Court that in the view of the existence of the charterer’s right to sublet, the charterers had the same opportunities to use the vessel as the owners. The repudiation by the charterer was therefore seen as an attempt to be shot of the difficulties in trading the vessel by imposing that burden on the innocent party. 100

Thirdly, the Court considered as relevant factors that 1) there were only 94 days left of a five-year time charter, 2) the market conditions were difficult, 3) a substitute time charter was impossible and 4) trading on the spot market very difficult. In the light of these facts, Cooke J held that “(…) it would be impossible to characterize the owners’ stance in wishing to maintain the charter and a right to hire as unreasonable, let alone beyond all reason, wholly unreasonable or perverse.” 101

One must bear in mind however, that it was the combination of the above facts of the case which lead to the court’s conclusion that the owners had legitimate interest in affirming the contract. It does not follow from the judgment whether any of the above factors weighted more than other. It is therefore an open question whether the Court would have reached the same conclusion if circumstances were different, for example where the charterer was not in financial difficulties, or the assessment of damages was a simple matter, or where the time left of the charterparty was more than 94 days.

3.3.4 Conclusion

98 Aquafait, p. 70
99 ibid
100 ibid
101 ibid
The decision was regarded as to provide some clarity in connection with the application of the *White & Carter* rule and to potentially strengthen the position of owners with vessels on time charter facing an early redelivery.\(^\text{102}\) It was said to be a “welcome news for owners faced with early redelivery in an adverse market.\(^\text{103}\) It is unlikely that the charterers were similarly enthused.

The decision was important from several aspects. First of all, the decision expressly states that time charter is a contract, which can be performed by the owner without need for any cooperation from the part of the charterer. Consequently, the effect of the decision is that it eliminates the previous uncertainty existing in connection with the *White & Carter* cooperation qualification. In accordance with the decision, the owners will be able to continue to accrue hire by keeping the vessel at the charterers disposal even when facing charterers repudiation, subject only to the requirement of legitimate interest in affirming and performing the charter. As a consequence, *The Aquafait* decision affords the owner a more favorable negotiation position by strengthening his reliance on the *White & Carter* right of affirmation.

Moreover, in connection with the second *White & Carter* qualification, the legitimate interest qualification, the decision provides some more clarity as to what factors support the conclusion in favor of the existence of legitimate interest on the part of the owner. It also confirms the previous authorities in maintaining that a fetter on the innocent party’s right to affirm the contract only applies in “exceptional cases”. At the same time, however, the Court accepted, that the innocent party’s right to affirm the contract is not unfettered. It was

\(^\text{102}\) Young, P: The owner’s right to reject the early re-delivery of a vessel on a time charter. A review of the “Aquafait” decision in the English Commercial Court. In Nordisk Medlemsblad, September 2012. p. 6259

in the light of the specific facts of the case that the Court concluded that the owners had legitimate interest in affirming the contract. By using the expression preferred by Cooke J, the affirmation of the contract was not “perverse” on the facts of the case. The owners are therefore encouraged to exercise caution when determining whether the conclusions in *The Aquafait* are applicable in concrete circumstances.\(^{104}\)

### 3.3.5 Practical scenarios in the light of *The Aquafait*

Since the delivery of the decision, it was hotly disputed whether and what the decision’s impact will be on the owners’ decisions facing charterers´ repudiation. It was noted by the legal practice, that "following recent judgments on damages for breach of time charter where difficulties have arisen in quantifying damages due to the lack of an available market, it is likely, that arguments of a right to affirm will be raised more often by owners in similar situations as in *The Aquafait*".\(^{105}\) In the following I will discuss the impact of the decision in connection with several possible scenarios.

In situations where the repudiating charterer is clearly insolvent, *The Aquafait* decision will not lead to any fundamental changes as to what constitutes a rational decision of the owner. In circumstances where it is obvious that the charterer will not be able to honour his obligations, it would be futile to bring a claim for the contractual hire. The owners will therefore wish to take the only rational step, accept the redelivery of the vessel and try to trade it. Thus, in this connection *The Aquafait* decision will be of no assistance.

\(^{104}\) Young, P: The owner´s right to reject the early re-delivery of a vessel on a time charter. A review of the “Aquafait” decision in the English Commercial Court. In Nordisk Medlemsblad, September 2012. p. 6259

Similarly, in situations where there is an available market, and the owners are able to find a comparable employment for the vessel, the owners may wish to accept the redelivery of the vessel and claim damages, if there will be any. The reason for this suggestion, lies in the uncertainties in connection with the owner’s right to affirm the contract which remained, albeit on a reduced scale, even after The Aquafait decision. Therefore the most sound solution in such circumstances will be the securing of a certain income through accepting and trading the vessel as opposed to an uncertain outcome of a claim for hire, even in cases where the charterer is “good for money”.

However, in circumstances where there is no or only limited available market, the solution will not be as clear-cut and will depend on the evaluation of the particular circumstances of the case. What is to be weighed in such circumstances are the advantages of the claim for hire as opposed to the acceptance of the repudiation and claim in damages on one hand and the level of uncertainty as to the owner’s right to affirm the contract. In connection with the latter a series of factors will be of relevance. Hence, the owners will want to make sure, prior to submitting a claim for hire, that the matter is clearly within the rule in White & Carter by analyzing the particular circumstances of the case in the light of the relevant case law. Since The Aquafait decision eliminated the uncertainties in connection with the “co-operation qualification”¹⁰⁶, the owners will be focusing on finding whether they have “legitimate interest” in affirming and performing the charter.

¹⁰⁶ In connection with time charters.
4 Conclusion

It was as early as in 1962 when the main rule applicable to the right of affirmation in English law was formulated as part of the White & Carter decision. In accordance with the decision, an innocent party has, as a starting point, right to affirm the contract in case of a repudiation of the other party to the contract. The right is however not unlimited. It is subject to two qualifications, which formed one of the main subject of discussion of the thesis, i.e. 1) the cooperation qualification and 2) the legitimate interest qualification.

The thesis further discussed the competing interests behind the main rule and its limitations. The court in White & Carter was presented with a daunting task of determining which of the two equally important values, such as certainty in commercial contracts or economic efficiency should prevail in the event of a clash. The court’s decision was a prominent attempt to devise a formula applicable to future cases. In general, the principle of certainty was given priority, but not unconditionally. The court intended to capture cases of extreme economic wastefulness and avoid the application of the right of affirmation in such circumstances through the notion of legitimate interest qualification. That brought an element of balance between the two competing interests but also an element of uncertainty, due to the essential equitable nature of the legitimate interest qualification. At the same time, the lack of express notion of the underlying clash of values exposed the later courts to the danger of striking an improper balance between the competing interests.

Following the decision in White & Carter, there have been several attempts to articulate a test for determining the lack/presence of legitimate interest in affirming and performing the repudiated contract. In the third chapter of the thesis the following tests were discussed: 1) the ”adequacy of damages” test (The Puerto Buitrago), 2) the ”wholly unreasonable” test (The Odenfeld) and 3) the ”perverse” test (The Aquafait). In accordance with the ”adequacy of damages” test, the innocent party will not have a legitimate interest in affirming the contract when damages would provide an adequate remedy for any loss suffered by him.
The second, "wholly unreasonable" test, added a further qualification to the "adequacy of damages" test. In accordance with this test, the innocent party will not have legitimate interest in affirming the contract where damages would be an adequate remedy and where an election to keep the contract alive would be wholly unreasonable. The last test, as was argued in the thesis, is only a restatement of the previous tests where the judge in The Aquafaith used an adjective of his preference – "perverse" – as a synonym to the words "wholly unreasonable". Thus, in accordance with this test, the innocent party, will not have legitimate interest in affirming the contract if his insistence on maintaining the contract can be described as "perverse".

Admittedly, the tests set out in the previous paragraph, have been expressed in vague terms requiring further interpretation and thus presenting an element of uncertainty from the shipowners’ point of view. The reason for their vagueness is that they refer to the legitimate interest qualification which is in its nature equitable and requires use of discretion by courts. The equitable character is meant to allow for striking balanced decisions in future cases, where the certainty in commercial contracts and the economic efficiency are present as competing values. Nevertheless, it follows clearly from the tests referred to in the previous paragraph, that the economic efficiency value shall prevail only in extreme cases, where it would be "wholly unreasonable" or "perverse" to keep the contract alive.

In the light of the discretionary evaluation of the facts of the case by courts, it will be of interest to summarize the factors which the courts considered relevant when deciding on whether the owner had legitimate interest in affirming the contract. In the two decisions discussed in the thesis where the court held that the owner had legitimate interest in affirming the contract – The Odenfeld\(^{107}\) and The Aquafaith\(^{108}\) – the following factors were considered relevant and supporting the conclusion on the existence of legitimate interest: 1) the

\(^{107}\) See subheading 3.2.3.1.2

\(^{108}\) See subheading 3.3.3.2
difficulty in calculating damages, 2) interests of third parties which could be affected by the termination of the charterparty (e.g. lenders), 3) charterers right to sub-let the vessel, 4) charterers right to lay-up the vessel, 5) cash-flow implications of a claim in damages as opposed to the claim of hire, 6) the contract breaker in effect seeking to be shot of the difficulties in trading the vessel by imposing that burden on the innocent party, 7) the amount of time left from the charterparty period (the less the more likely that owner has legitimate interest), 8) difficult market conditions (substitute time charter is impossible, trading on the spot market very difficult). It must be stressed however, that the courts have not granted more weight to any of the factors mentioned. The decisions were rather based on a complex evaluation of all relevant factors.

In contrast to the legitimate interest qualification, the current state of law in connection with the cooperation qualification is marked with more clarity. The court in *The Aquafait* decision stated expressly that the owners are in the position to earn hire under a time charter without the need for the charterers to do anything under the charter. Nevertheless, there is still a degree of uncertainty in respect of the application of the cooperation qualification to demise charterparties. In *The Puerto Buitrago* the court held that the demise charterparty under which, the charterer has a duty to repair the vessel prior to redelivery, is not a contract which could be fulfilled by the owner without any cooperation from the charterers. In *The Aquafait* decision, the court held that under a demise charterparty the owner will not be entitled to claim hire from the moment he retakes the possession of the vessel. On the basis of the decisions analyzed in the thesis it is, however difficult to make any more general remarks in connection with demise charterparties.

On balance, the current state of law does not allow to provide a standard answer to the question whether owner is entitled to affirm the contract, applicable to every case of charterer’s repudiation. The thesis rather outlines the different legal tests and factors relevant for the determination of the availability of the right to affirm the contract in particular circumstances. The uncertainty existing in this respect allows for striking the proper balance
in future decisions, provided that the courts are aware of the competing interests at stake and the balance intended by the Court in *White & Carter*. Moreover, an absolute certainty in contracts can hardly be attained anyway. There are other examples of legal rules, which may import a degree of uncertainty into commercial contracts, such as the doctrine of frustration.
5 Bibliography


Young, P: The owner’s right to reject the early re-delivery of a vessel on a time charter. A review of the “Aquafait” decision in the English Commercial Court. In Nordisk Medlemsblad, September 2012. Page 6259
6 Table of Cases

Alfred C Toepfer v Peter Cremer GmbH & Co (1975) 1 Lloyd´s Rep. 118, CA

Asamera Oil Corpn. v. Sea Oil & General Corpn. (1979) 89 D. L. R. (3d) 1

Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei GmbH (1976) 1 Lloyd´s Rep 250

Clark v Marsiglia 1 Denio 317 (NY 1845)

Clea Shipping Corporation v. Bulk Oil International Ltd (1983) 2 Lloyd´s Rep 646

DTRNominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423

Gator Shipping Corporation v. Trans-Asiatic Oild Ltd SA and Occidental Shipping Establishment [1978] 2 Lloyd´s Rep 357

Hain Steamship Company Ltd v Tate & Lyle Ltd [1936] 2 All ER 597

Hounslow London Borough council v. Twickenham Garden Developments, (1971) 1 Ch. 233

Howie v. Anderson (1848) 10D 355

Isabella Shipowner SA v Shagang Shipping Co Ltd (2012) EWHC 1077

Laird v. Pim (1841) 7 M. & W. 474

Langford & Co. Ltd. v. Dutch (1952) SC 15


Photo Production Ltd. V. Securicor (Transport) Ltd. (1980) 2 W. L. R. 283
Robert Cort & Son Ltd v Charman (1981) ICR 816 EAT 819

Karsales (Harrow) v. Wallis, (1956) 1 W.L.R. 936


Reichman v Beveridge (2007) Bus LR 412

Starlight Enterprises Ltd. v. Lapco Enterprises Ltd. (1979) 2 N. Z. L. R. 744

Stocznia Gdanska SA v Latvian Shipping Co. [1998] 1 WLR 574

The Soholt [1983] 1 Lloyd’s Rep 605 CA

Vaswani v Italian Motors (Sales & Services) Ltd (1996) 1 W.L.R. 270, PC

White & Carter (Councils) Limited v. McGregor (1962) A. C. 413

Woodar Investment Development Ltd. v. Wimpey Construction (U.K.) Ltd. (1980) 1 All E. R. 571
Illustration