LLOYD'S LAW REPORTS

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[1980] VOL. 2] **Hyundai v. Papadopoulos** PART 1

HOUSE OF LORDS

Feb. 13, 14, 18 and 19, 1980

HYUNDAI HEAVY INDUSTRIES CO. v. PAPADOPOULOS AND OTHERS

Before Viscount DILHORNE, Lord EDMUND-DAVIES, Lord FRASER OF TULLYBELTON, Lord RUSSELL OF KILLOWEN and Lord KEITH OF KINKEL

Contract — Shipbuilding — Guarantee — Buyers defaulted in payment — Plaintiffs rescinded contract — Whether rescission based on contractual right — Writ issued after contract rescinded — Whether there was an accrued right to unpaid instalments before date of rescission.

The plaintiff building owners entered into a contract with the buyers for the construction of a ship. The contract was guaranteed by the defendants, the letter of guarantee providing that (inter alia):

> . . . We hereby jointly and severally irrevocably guarantee the payment in accordance with the terms of the contract of all sums due or to become due by the buyer under the contract and in case the buyer is in default of any such payment we will forthwith make the payment in default on behalf of the buyer.

Clause 11 of the contract which gave the plaintiffs a contractual right to rescind further provided that the rights thereby accorded were to be:

> . . . in addition to such other rights powers and remedies as the Builder may have elsewhere in this Contract and/or at law, at equity or otherwise.

The buyers defaulted in payment and the plaintiffs rescinded the contract and claimed under the guarantee.

The defendants denied liability contending inter alia that the rescission of the contract by the plaintiffs was based upon the contractual right to rescind given by cl. 11 and that since the contract had been rescinded before the writ was issued there was, on the date of the issue of the writ, no accrued right to the unpaid instalments which had become due before the date of the rescission.

———*Held*, by LLOYD, J., that the defendants had no arguable defence.

Judgment for the plaintiffs.

On appeal by the defendants:

———*Held*, by C.A. (ROSKILL, GEOFFREY LANE and BRIDGE, L.JJ.), that (1) on the facts there were no valid grounds for distinguishing this case from the earlier decision of *Hyundai Shipbuilding and Heavy Industries Co. Ltd. v. Pournaras*; and if that decision was right there was here no arguable defence;

(2) on the true construction of the guarantee and cl. 11, the words "in addition to" in cl. 11, meant "in derogation or in subtraction of" and the submission that once the provisions regarding contractual rescission were operated any accrued right to past unpaid instalments came to an end, could not be right in that the fact that the contract came to an end did not free the buyers from their obligation to pay the instalments, liability for which had already accrued and the defendants' liability for those instalments remained wholly unaffected;

(3) there was no reason why the order of events, whether the rescission came first or the writ, should affect the accrued right to the unpaid instalments since in either event there was an accrued right to the instalment in question when the writ was issued;

(4) here there had been a default by the buyers and the result was that the defendants became liable forthwith to make the payments in respect of which the buyers had defaulted.

Appeal dismissed with costs.

On appeal by the defendants:

———*Held*, by H.L. (Viscount DILHORNE, Lord EDMUND-DAVIES, Lord FRASER OF TULLYBELTON, Lord RUSSELL OF KILLOWEN and Lord

KEITH OF KINKEL), that (1) it was difficult to believe that commercial men could have intended that the guarantors were to be released from their liability for payments already due and in default just because the plaintiff building owner had used his remedy of cancelling the shipbuilding contract for the future (*see* p. 16, col. 1); the default by the buyer was the very event that gave rise to the defendants' liability under the letter of guarantee and the defendants' promise that they would forthwith make the payment in default showed that the obligation became prestable immediately upon default by the buyer and was not merely an obligation to pay any deficiency brought out in the final accounting (*see* p. 7, col. 1; p. 11, col. 1; p. 16, cols. 1 and 2; p. 17, col. 1);

———*Lep Air Services v. Rolloswin Investments Ltd.*, [1971] 1 W.L.R. 934 and *Hyundai Shipbuilding & Heavy Industries Co. Ltd. v. Pournaras*, [1978] 2 Lloyd's Rep. 502, applied.

(2) (per Viscount DILHORNE, Lord EDMUND-DAVIES and Lord FRASER OF TULLYBELTON) the cancellation of the contract by the plaintiffs did not release the buyer from his liability for the second instalment, the due date for payment of which had passed before cancellation and the buyer remained liable for the second instalment which had accrued despite the cancellation under cl. 11 (*see* p. 6, cols. 1 and 2; p. 7, col. 1; p. 9, cols. 1 and 2; p. 10, col. 1; p. 15, col. 1).

Appeal dismissed.

The following cases were referred to in the judgments:

Bradley v. Newsom Sons & Co., (H.L.) [1919] A.C. 16;

Brooks v. Beirnstein, [1909] 1 K.B. 98;

Chatterton v. Maclean, [1951] 1 All E.R. 761;

Dies v. British and International Mining and Finance Corp. Ltd., [1939] 1 K.B. 724;

Ettridge v. Vermin Board of the District of Murat Bay, (Aust. Ct.) [1928] S.A.S.R. 124;

Government of Newfoundland v. Newfoundland Railway Co., (H.L.) (1888) 13 App. Cas. 199;

Hyundai Shipbuilding & Heavy Industries Co. Ltd. v. Pournaras; Same v. Bouboulina Shipping S.A., (C.A.) [1978] 2 Lloyd's Rep. 502;

Johnson v. Agnew, (H.L.) [1979] 2 W.L.R. 487;

Lep Air Services v. Rolloswin Investments Ltd. (Sub nom: Moschi v. Lep Air Services), (C.A.) [1971] 1 W.L.R. 934; (H.L.) [1973] A.C. 331;

Leslie Shipping Co. v. Welstead, (1921) 7 Ll.L.Rep. 251; [1921] 3 K.B. 420;

McDonald v. Dennys Lascelles Ltd., (1933) 48 C.L.R. 57;

McLachlan v. Nourse, (Aust. Ct.) [1928] S.A.S.R. 230;

Palmer v. Temple, (1839) 9 A. & E. 508;

Prenn v. Simmonds, (H.L.) [1971] 1 W.L.R. 1381.

This was an appeal by the defendant guarantors, Mr. Petros Papadopoulos and others from the decision of the Court of Appeal (Roskill, Geoffrey Lane and Bridge, L.JJ.) ([1979] 1 Lloyd's Rep. 130), dismissing their appeal from the decision of Mr. Justice Lloyd given in favour of the plaintiffs Hyundai Heavy Industries Co. Ltd. and holding in effect that the defendants were liable under the letter of guarantee, the buyers having defaulted in payment of instalments due under a shipbuilding contract between the plaintiffs and the buyers.

Mr. Peter Curry, Q.C., Mr. Nigel Teare and Mr. Giles Caldin (instructed by Messrs. Constant & Constant) for the defendant appellants; Mr. Adrian Hamilton, Q.C. and Mr. Timothy Saloman (instructed by Messrs. Norton, Rose, Botterell & Roche) for the respondent plaintiffs.

The further facts are stated in the judgment of Viscount Dilhorne.

Judgment was reserved.

Tuesday, Apr. 1, 1980

JUDGMENT

Viscount DILHORNE: My Lords, on Aug. 30, 1975, a contract was made between Pitria Pride Navigation Co. Inc., a Liberian company, (hereafter referred to as "the buyer") and the respondent, (hereafter referred to as "the builder") whereby it was agreed that the builder should "build, launch, equip and complete" a 24,000 ton deadweight multi-purpose cargo ship "and deliver and sell her" to the buyer for U.S. $14,300,000. It was a term of the contract that construction of the vessel should proceed continuously from keel laying to delivery.

Article 10 of the contract provided that the price should be paid in five instalments, the first of 2.5 per cent. of the contract price i.e. $357,500; the second of the same amount to be paid on July 15, 1976; the third of 10 per cent. of the contract price; the fourth, of 17.5 per cent. of the contract price and the fifth and final instalment of 67.5 per cent. plus or minus any increase or decrease due to modifications to be paid at least three days prior to the scheduled delivery date of the vessel.

The date stipulated for payment of each instalment was referred to as "the due date" and this litigation arises from the non-payment of the second instalment on the due date.

It was also agreed in art. 10 that:

> . . . all payments under the provisions of this Article shall not be delayed or withheld by the Buyer due to any dispute of whatever nature arising between the Builder and the Buyer hereto, unless the Buyer shall have claimed to cancel the Contract under the terms thereof or in the case of the last payment, have rejected the vessel.

This provision is indicative of the importance attached to payment of the instalments on the due dates; and the increasing amount of the instalments shows that they were intended to reflect the increasing costs incurred in the building of the vessel.

Article 10 also provided that the payments made by the buyer prior to delivery of the vessel should constitute advances to the builder, and that if the contract was cancelled or rescinded otherwise than in accordance with the provisions of art. 11 "the full amount of total sums paid by the buyer to the builder in advance of delivery" should be refunded to the buyer.

Article 11 stated at its commencement that:

> The Buyer shall be deemed to be in default under this Contract . . . in the case of . . . the second . . . instalment, if such instalment is not received within the period of 30 days following the due date . . . or if the Buyer fails to be in punctual, due and full compliance with any of its obligations under this Contract . . .

It is not necessary in this case to decide whether the buyer was in default when payment was not made on the due date, July 15, or only became in default 30 days thereafter.

The article then went on to say:

> . . . In case the Buyer is in default of any of its obligations under this Contract, the Builder is entitled to and shall have the following right, power and remedies in addition to such other rights, powers and remedies as the Builder may have elsewhere in this Contract and/or at law, at equity or otherwise.

It was thus provided that the rights, powers and remedies given to the builder by this article were to be in addition to and not exclusive of any other rights, powers and remedies he might have in consequence of default on the part of the buyer.

This article then went on to provide that if an instalment remained unpaid for more than three days after the due date, the builder should notify the buyer of that, and that if the default continued for seven days after the builder's notification, the builder might "rescind" the contract by giving notice of rescission. In the case of the second instalment it was provided that—

> . . . the seven days notice to cancel this Contract may be given at any time after the twenty-third day following the due date . . . and shall be effective upon the expiry of the said seven day period if the Buyer is at the expiry of seven day period in default.

The second instalment not having been paid on the due date or thereafter, the contract was cancelled on Sept. 6, 1976, by notice given by the builder in accordance with this article.

This article stated that on cancellation the builder should be:

> . . . entitled to retain the instalments already paid by the Buyer to the Builder which shall be applied to recovery of the Builder's loss and damage including, but not being limited to, reasonable estimated profit due to the Buyer's default and the cancellation of the Contract.

The contract did not state what was to happen with regard to rights which had accrued prior to cancellation. I do not think that this express provision relating to instalments already paid, which was perhaps thought necessary in view of the obligation under art. 10 to refund all such instalments if the contract was terminated otherwise than under art. 11, throws any light on the consequences of cancellation with regard to instalments which had become due and had not been paid.

That article also gave the builder if he cancelled the contract in accordance with its provisions, the right either to complete or not to complete the vessel and to sell her in either a complete or incomplete state. It contained detailed provisions as to the application of the proceeds of sale if the builder decided to sell her and provided that if, after compensating the builder, there was any balance left, that should be paid to the buyer.

Contemporaneously with this contract the appellants (hereafter referred to as "the guarantors") gave the builder the following guarantee:

> In consideration of your entering into the Shipbuilding Contract . . . with Pitria Pride Navigation Co. Inc., Liberia ("the Buyer") we hereby jointly and severally irrevocably

guarantee the payment in accordance with the terms of the Contract of all sums due or to become due by the Buyer to you under the Contract, and in case the Buyer is in default of any such payment, we will forthwith make the payment in default on behalf of the Buyer. Our liability under this guarantee shall cease upon delivery of the Vessel or upon the previous assignment (with your consent) by the Buyer to a third party of this Contract upon terms that the assignee shall adopt to the exclusion of the Buyer all rights and obligations of the Buyer towards you under the Contract.

Payment of the second instalment not having been received, the builder on Mar. 14, 1978, issued a writ against the guarantors claiming the sum of U.S. $420,879.95, the amount of that instalment and interest thereon as provided by the contract. Mr. Justice Lloyd gave judgment for the builder under R.S.C., O. 14. The buyer's appeal to the Court of Appeal was dismissed on Oct. 6, 1978 (see [1979] 1 Lloyd's Rep. 130). On May 17, 1978, *Hyundai Shipbuilding & Heavy Industries Co. Ltd. v. Pournaras*, [1978] 2 Lloyd's Rep. 502 had come before a differently constituted Court of Appeal. In that case the contracts were similar in all material respects to that in this case; guarantees were given in the same terms and there had been default in the payment of instalments in consequence of which the builder had treated the contracts as repudiated and had accepted the repudiation.

Lord Justice Roskill, with whose judgment Lord Justice Stephenson agreed, said that in his view the true meaning of the guarantees was that if the buyer did not pay on time, the guarantors would pay. To hold otherwise was in his opinion to fly in the face of the obvious commercial purpose of the guarantees. He rejected the argument that once the contracts had come to an end, liability to pay instalments which had become due and had not been paid ceased and was replaced by a claim not in debt but in damages. In his opinion the ending of the contracts did not free the buyer from the obligation to pay the instalments liability for the payment of which had already accrued, and did not free the guarantors from liability under the guarantees.

The two main differences between that case and this are, first, that in that case the builder did not invoke art. 11 but treated the non-payment of instalments by the buyer as entitling it to treat the contracts as terminated and in the present case the builder had cancelled under art. 11; and, secondly that in that case the writ was issued against the guarantors before the repudiation was accepted whereas in this case it was issued after the cancellation.

Mr. Curry for the appellants contended that that case could on these grounds be distinguished from the present case, and if that were not so, that the decision in that case was wrong. He conceded that prior to the cancellation on Sept. 6, neither the buyer nor the guarantors had any answer to a claim for payment of the second instalment due on July 15, but he contended that the effect of cancellation by the builder was to relieve the buyer of the obligation to pay that instalment. Cancellation meant that that instalment was no longer due and not being due from the buyer, the guarantors were not under any liability to pay it. Cancellation meant that the builder was deprived of his accrued right to payment of the second instalment either from the buyer or under the guarantee.

If this argument is well founded, one curious consequence would appear to be that the very ground for cancellation was destroyed by the act of cancellation.

The first question for consideration appears to me to be: Does cancellation of the contract under art. 11 or the acceptance of a repudiation destroy accrued rights?

In this connection Mr. Curry placed great reliance on *Dies v. British and International Mining and Finance Corp. Ltd.*, [1939] 1 K.B. 724, a decision of Mr. Justice Stable. In that case the defendants entered into a contract to sell rifles and ammunition for £270,000 and on the date the agreement was made, the purchaser paid £100,000 to the defendants in prepayment of part of the purchase price. The purchaser failed to accept delivery of the goods and the defendants elected to treat the contract as at an end. The purchaser and his assignee then claimed repayment of the £100,000 less a sum for liquidated damages for the breach of contract by the purchaser and it was held that their claim succeeded. Mr. Justice Stable at p. 743 referred to Benjamin on Sale (7th ed. p. 989) where it was stated:

> . . . In ordinary circumstances, unless the contract otherwise provides, the seller on rescission following the buyer's default, becomes liable to repay the part of the price paid . . .

and said:

> . . . If this passage accurately states the law, as in my judgment it does where the language used in a contract is neutral, the general rule is that the law confers on the purchaser the right to recover his money, and that to enable the seller to keep it he must be able to point to some language in the contract from which the inference to be drawn is that the parties intended and agreed that he should.

Mr. Justice Stable, did not think that the foundation of the right of the purchaser to recover the money he had paid was that there had been a total failure of consideration. He held that there had not been.

Mr. Curry contended that in the light of this decision the buyer was entitled to be repaid the instalment paid on cancellation and would have been entitled to be repaid the amount of the second instalment if that had been paid; and that being so, after cancellation the second instalment ceased to be due from the buyer and the guarantors.

I do not find it necessary in the present case to consider whether the *Dies* case was rightly decided for in this case the contract was not just for the sale of a ship. As I have said, it was a contract to "build, launch, equip and complete" a vessel and "to deliver and sell" her. The contract price included "all costs and expenses for designing and supplying all necessary drawings for the Vessel . . ." It was a contract which was not simply one of sale but which so far as the construction of the vessel was concerned, resembled a building contract.

Hudson on Building Contracts (10th ed. p. 255) under the heading "Express terms for payment by instalments" states:

> Where the contractor has become entitled to an instalment payment, he will not normally forfeit his right to such payment by a subsequent abandonment of repudiation of the contract, but will be entitled to sue for any unpaid instalment if he has satisfied the conditions for it to become due, subject, of course, to the employer's right to counterclaim for damages for breach of contract. In *Taylor v. Laird* (1856) 25 L.J.Ex. 329 the plaintiff undertook to serve as a commander of a vessel at pay of £50 per month but wrongfully abandoned the contract after eight months having been paid for seven only. The court held that the plaintiff was entitled to recover £50 for the eighth month, Pollock C.B. saying "There [— i.e. in the contract —] 'per month' means each month or monthly and gives a cause of action as each month accrues which once vested is not subsequently lost or divested by the plaintiff's desertion or abandonment of his contract."

Hudson then cites the following passage from Salmond and Winfield on Contract (1927 ed. p. 286):

> . . . Every obligation which has accrued due between the parties before the rescission of the contract, and which so creates a then existing cause of action, remains unaffected by the rescission and can still be enforced. It makes no difference in this respect whether such accrued obligation and existing cause of action is one in favour of the party rescinding the contract or is one in favour of the other party . . .

and states that this passage was quoted with approval in two Australian cases *Ettridge v. Vermin Board of the District of Murat Bay*, [1928] S.A.S.R. 124 and *McLachlan v. Nourse*, [1928] S.A.S.R. 230.

Hudson then states that there are two qualifications to this general principle, one being that there may be a determination clause in the contract which if exercised by the employer will expressly deprive the contractor of an accrued right to an instalment, and it may well be that art. 10 of the contract in this case would be to deprive the builder of the right to an accrued instalment in the event of cancellation or rescission otherwise than under art. 11.

In *Brooks v. Beirnstein*, [1909] 1 K.B. 98 a hirer of furniture at a monthly rent was in arrear with the rent and the owners of the furniture retook possession of it as they were entitled to do under the contract. They then sued for the arrears of rent. Mr. Justice Bigham said that the agreement for hire in conferring the right to retake possession on a breach by the hirer, did not take away any other rights which the law gave to the owners, among which rights was that of suing for the monthly rent which had already accrued. He went on to say:

> . . . If it could be said that by taking away the goods the owners had deprived the hirer of all consideration for the rent, then I could understand that the accrued cause of action would be gone.

Chatterton v. Maclean, [1951] 1 All E.R. 761 was a decision to the like effect. In that case the guarantor of a hire purchase agreement relating to a motor car disclaimed liability on the ground that by accepting the hirer's breach of contract as repudiation of the agreement, the company had released all its rights under that agreement. It was held by Mr. Justice Parker that the hirer remained under any liability which had already accrued at the date of the repudiation and said:

> . . . If he remained liable for the accrued liability — and, of course, it was only right that he should remain liable, because he had had the benefit of the car for the period relating to it — prima facie, he being liable and the sum not having been paid, the guarantor is liable under his guarantee.

In the light of these decisions and of what was said in Hudson, I conclude that save in the case of sales of land and goods and where there has

been a total failure of consideration, it was the law prior to the decision in *Moschi v. Lep Air Services*, [1973] A.C. 331 that cancellation or rescission of a contract in consequence of repudiation did not affect accrued rights to the payment of instalments of the contract price unless the contract provided that it was to do so. It follows that the differences between the *Pournaras* case and the present case are immaterial.

In *Moschi v. Lep Air Services* in consideration for relinquishing a lien the debtor agreed to pay £40,000 he then owed by weekly instalments of £6,000. The contract included a guarantee by Mr. Moschi. The debtor defaulted in his obligations from the outset. The creditors treated his breaches of contract as repudiation and accepted it. They then sued the debtor for damages and the guarantor for the full amount of the weekly instalments less what had been paid. At the time the action was commenced, a number of instalments had accrued due. They claimed against the guarantor the amounts which had become due and those which would have become due if the debtor's repudiation had not been accepted, that is to say, the total amount.

In the Court of Appeal sub nom: *Lep Air Services v. Rolloswin Investments Ltd.*, [1971] 1 W.L.R. 934 Lord Justice Megaw delivering the judgment of the Court, said at p. 941:

> . . . It is, we think, plain beyond any real argument that an accrued liability for breaches of contract does not change its character so as to release the guarantor from his already existing liability in respect thereof, merely because the creditor has elected to exercise the right which is given to him as an incident of the general law of contract; the right, namely, to accept the wrongful repudiation constituted by those breaches, and thus to be enabled to treat the principal debtor's future obligations under the contract as having been irrevocably broken as from that moment. The mere fact that the creditor is thereupon entitled to additional damages in respect of the resulting immediate breach by the principal debtor of future obligations under the contract cannot have the effect of releasing the guarantor from his already existing liability referable to that already existing accrued liability of the principal debtor. The essential nature of that accrued liability is in no way changed.

In this House this part of his judgment was not subjected to any criticism or comment. The guarantor's appeal on the ground that his obligation was discharged by the respondent's acceptance of the repudiation was dismissed. Lord Reid at p. 344 said that the guarantor's next argument was more formidable. He summarized it as follows:

> . . . He [the guarantor] says, look at clause [XIII]. It merely guarantees that each instalment of £6,000 shall be duly paid. But by reason of the accepted repudiation the contract was brought to an end before the later instalments became payable. So they never did become payable. All that remained after the contract was terminated was a claim for damages. But I never guaranteed to pay damages. If the creditor chooses to act so that future instalments are not payable by the debtor, he cannot recover them from me.

This passage shows that the issue was as to liability for future instalments and not in relation to instalments the right to payment of which had already accrued.

My noble and learned friend Lord Diplock began his speech by holding that four instalments had become due when the creditor elected to treat the contract as rescinded. He went on to say:

> . . . as there has been no previous case upon the effect that the rescission of a contract has upon the liability of a guarantor in respect of the obligations of the principal debtor of which performance had not fallen due at the date of the rescission, I propose to make some observations about the general principles of the law of guarantee which, in my view, govern this situation.

My noble and learned friend Lord Simon of Glaisdale at p. 354 referred to the appellant's contention that the acceptance of repudiation discharged the guarantor from liability in respect of accrued instalments. That he said:

> . . . would make nonsense of the whole commercial purpose of suretyship: you would lose your guarantor at the very moment you most need him — namely, at the moment of fundamental breach by the principal promisor.

My Lords, none of their Lordships referred to the passage I have cited from Lord Justice Megaw's judgment. They surely would have done so if they had disagreed with it. The decision was concerned with future instalments and I find nothing in the speeches to lead me to the conclusion that the law with regard to accrued instalments was altered by that decision.

If, as I hold, in the present case the buyer remained liable for the second instalment which had accrued despite the cancellation under