



## LEGAL BRIEFING

### *Azimut-Benetti SpA (Benetti Division) v Darrell Marcus Healey*

[2010] EWHC 2234 (Comm), Mr Justice Blair

#### *The Facts*

This case concerns an application by a luxury yacht builder, Azimut-Benetti SpA, for summary judgment under a guarantee. On 25 September 2008, Azimut and Shoreacres Limited (a company wholly owned by Mr Healey) entered into a yacht construction contract under which Azimut agreed to construct a 60 metre yacht with a hull number FB256. The price was €38 million payable in instalments and the scheduled delivery date was 30 November 2011. Mr Healey gave his personal guarantee.

Shoreacres had paid a deposit of €0.5 million but failed to pay the first instalment of 10% of the price, which was due on 17 October 2008. Azimut eventually terminated the contract on 22 January 2010.

Clause 16.3 provided that if Azimut lawfully terminated the contract, it would be entitled to retain or recover 20% of the price by way of liquidated damages as compensation for its estimated losses. This clause also required Azimut to refund the balance of instalments over and above the 20% amount.

During the period over which negotiations took place for yacht FB256, the solicitors and brokers retained for Shoreacres in relation to FB256 were independently retained for the purchaser of a similar yacht FB250. In the context of yacht FB250, there was evidence before the court of discussions regarding the commercial reasoning for clause 16.3. There was no evidence of discussions regarding this clause in relation to yacht FB256, but the parties' lawyers would have been aware of the discussions in relation to the other contract.

Mr Healey opposed the claim on the basis that the liquidated damages clause in the contract with Shoreacres was not a genuine pre-estimate of loss but a penalty, so that there was no liability on which the guarantee could fasten and the matter would have to go to a full trial. Azimut maintained that Mr Healey did not have an arguable case in that regard; or alternatively, that by the terms of the guarantee Mr Healey was liable even if the clause was an unenforceable penalty and the principal debtor (Shoreacres) was not liable.

#### *The Issues*

- (i) Was Azimut entitled to summary judgment on the guarantee?
- (ii) Would Mr Healey have been liable under the guarantee even if clause 16.3 was unenforceable and the principal debtor was not liable?

#### *The Decision*

Mr Justice Blair held that Azimut was entitled to summary judgment for €7.1 million, being 20% of the contract price of €38 million less €0.5 million paid by way of deposit, on the basis that it was not arguable that clause 16.3 was a penalty. As a matter of construction, at the time the contract was entered into the dominant purpose of clause 16.3 was not to deter Shoreacres from breach. The clause was commercially justifiable as providing a balance between the parties upon lawful termination by Azimut.

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Even though the Judge did not have to decide the issue given his conclusion that clause 16.3 was not a penalty, in an obiter comment he rejected Azimut's alternative argument that Mr Healey would have been liable under the guarantee even if the liquidated damages clause had been held to be a penalty. Such an outcome would be against public policy and in any event, since the guarantee was limited to the obligations of Shoreacres, if Shoreacres had no obligation under the contract, Mr Healey would have no obligation under the guarantee.

***Comment***

When parties freely enter into commercial contracts with the help of professional advice, it is extremely difficult to argue that a liquidated damages clause is a penalty and therefore unenforceable.

An amount specified as payable as liquidated damages must usually be a genuine pre-estimate of damage. However, clause 16.3 was more than just a bare liquidated damages clause as it served the further commercial purpose of returning the balance of instalments paid by Shoreacres upon termination. The balancing of commercial considerations for Shoreacres when entering into the contract was that upon termination it would have the advantage of an immediate refund of the balance of instalments already paid which totalled more than 20% of the price. Alternatively, if Shoreacres had not agreed to clause 16.3, Shoreacres would have been liable for Azimut's actual damages, with the possibility of considerable delay in receiving reimbursement of any amounts paid over and above the level of those damages. The contracting parties and the guarantor had agreed their bargain and had to abide by it.

In respect of a guarantee itself, it is possible by clear drafting to provide that a guarantor's liability may have a different extent to that of the principal debtor. But it is against public policy to allow the indirect enforcement of a claim for a penalty in this manner. This is a sensible and fair principle in favour of guarantors.

Andrew Hales  
October 2010