

Assessing damages for repudiation of a voyage charter - giving effect to the compensatory principal

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Under English law, the fundamental principle in assessing damages is the compensatory principle - the innocent party is, so far as possible, to be placed in the same financial position as if the contract had been performed.

In *Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV* [2015] EWHC 2505 (Comm), the English Commercial Court considered an appeal of an arbitral award of damages in favour of the ship owners following the charterers' repudiation of a voyage charter.

Background

The charterers chartered an oil/chemical tanker "MTM Hong Kong" (the "Vessel") in 2011 for the carriage of crude/refined vegoil from South America to 1-4 safe ports in the Gibraltar-Rotterdam range. On her previous voyage to the Democratic Republic of Congo, the Vessel suffered a grounding which eventually led to the owners accepting the charterers' repudiatory breach of the charter. The tribunal held that the voyage charter was repudiated by the charterers, who were therefore liable for damages.

The ship owners claimed damages comprising the difference between:-

1. the profit which the Vessel would have earned if not only the contract voyage but also the next two voyages had been performed; and
2. the profit actually earned on the substitute charter to Europe.

The charterers disputed the ship owners' method of calculating damages and contended:-

1. it was wrong, as a matter of law, to take into account the position up to the end of the substitute fixture which had terminated long after the charter voyage itself would have terminated; and that
2. the correct approach was to apportion the earnings under the substitute charter to reflect the amount earned up to the date on which performance of the subject voyage charter would have been completed.

The tribunal accepted the ship owners' case and determined that damages ought to be awarded to compensate the owners for the losses which had actually been suffered. The tribunal further held that there was no rule of law which prevented the full application of the compensatory principle by limiting the award of damages by reference to the period when the contract voyage would have come to an end. The charterers argued that the tribunal's finding went beyond the compensatory principle and appealed under s 69 of the Arbitration Act 1996.

The submissions on appeal

The usual measure of damages for repudiation of a voyage charter, established by the *Smith v M'Guire*¹ line of authority, is the difference between the vessel's actual and hypothetical earnings up to the date when the subject voyage charter would have ended. The charterers submitted that the tribunal had misunderstood or misapplied four principles of law which underpin this measure, namely:-

1. the compensatory principle²;
2. the need to distinguish between loss and mitigation;
3. the need for sufficient proof of loss; and
4. the allocation of responsibility under a voyage charter.

The charterers submitted that what the owners lost could not exceed the profit which they would have made had the charter been properly performed. This necessarily had to be assessed by reference to the period when the charter would have been performed later. Further, it might be necessary to take account of the Vessel's earnings beyond the contract period to determine what credit should be given for successful mitigation, but that would not justify extending the calculation of loss beyond that period.

The third principle (proof of loss) arose as a practical matter. There was a need to draw a line somewhere in assessing the loss caused by the charterers' breach. The charterers submitted that a pragmatic solution was to treat the date when the contract voyage would have been completed as a cut off point for the calculation of loss. In oral submissions, the charterers argued that it was an implied term of the voyage charter that the charterers did not assume responsibility for losses after the period when the contract voyage would have been completed.

The authorities on damages

The Court examined the leading text books and authorities³ on damages for repudiation of a voyage charter. It was observed that in none of the cases was a claim advanced for losses extending beyond the date when the contract voyage would have come to an end. In light of the authorities, the measure of damages is stated in *Scrutton on Charterparties*⁴ in the following terms:-

"In an action against a charterer for not loading a cargo, the measure of damage is the amount of freight which would have been earned under the charter after deducting the expense of earning it and any net profit the ship may, or might, have earned during the period of the charter on a substituted voyage. In calculating the net earnings on the substitute voyage, the Court will take account of the expenses of any deviation necessary to perform that voyage. The deduction of the net profit on a substitute voyage reflects the claimant's duty to mitigate, so there will be no such deduction if there has been no failure to mitigate. Where the substitute voyage is of a longer duration than the charter voyage, no attempt will normally be made to determine the relative positions of the shipowner in the period after the date on which the charter voyage would have been completed, unless there is clear evidence that the shipowner has obtained a benefit by reason of the longer duration of the substitute charter."

The court observed that the authors of the leading text books contemplate not only that credit may have to be given for a benefit received after the date when the voyage contract would have terminated, but that *"there is no rule of law to prevent the award of damages to reflect losses incurred after that date."*

A separate line of authority concerned remoteness and the assumption of responsibility. The general rule is that damages for breach of contract will not be recoverable where the damage suffered is too remote, meaning not within the reasonable contemplation of the parties⁵ at the time they entered into the contract⁵.

Application of the principles

The court noted that it was possible for a shipowner to suffer “*a different kind of loss*” from loss of the profit which it would have obtained had the charter been performed. In such a case, there is in general no reason why such loss should not be recoverable in damages, in addition to damages for loss of profit from performing the charter, subject to the principles of causation, remoteness and mitigation. Furthermore, failure to award such damages “*would be contrary to the compensatory principle*”.

The court then considered a number of commercial/market factors. The ability of a vessel to earn freight for an owner will depend to a large extent on the vessel being in a location where it might be able to pick up appropriate cargoes. Freight rates may be higher for shipping cargoes from one location as opposed to another location. The differences may exist due to particular market conditions, or could be permanent, and the court observed that these “*are important commercial considerations which the law of damages needs to recognise*”. The *Smith v M’Guire* measure of damages compensates the owner for loss of the freight, but does not address any loss which the ship owner may suffer if the vessel is positioned in a less advantageous location as a result of the charterer’s repudiation.

The court found that performance of the contract voyage would not only have allowed the ship owners to earn the freight payable under the voyage charter, but would have also positioned the Vessel in Europe, ready to take advantage of the higher freight rates available in the North Atlantic market.

The charterers’ repudiation had two consequences:-

1. The ship owners lost the charter freight and had to make do with the lesser freight earned under the substitute charter; and
2. The ship owners suffered a delay in repositioning the Vessel in Europe and thus lost the benefit of two transatlantic voyages which the Vessel would have been able to perform.

Accordingly, there was no reason why damages for the consequence of the Vessel’s delay in returning to the North Atlantic market should not be awarded in addition to the loss of the profit which would have been earned from performance of the contract voyage.

Decision on the appeal

The court dismissed the appeal and the charterers’ criticism that the tribunal had misunderstood or misapplied the principles of law.

In summary:

1. The tribunal’s finding was consistent with the compensatory principle;
2. In principle, loss which is caused by the breach and which is not too remote should normally be recoverable. There was nothing in the award to suggest that this normal position should not apply here;
3. There were no findings to suggest that the loss suffered was beyond the reasonable contemplation of the parties;
4. The implied term argument was rejected. There was no basis in the award to conclude that the charterers did not assume responsibility for loss of the kind suffered by the ship owners. Further, it could not be said that in the absence of relevant findings, such loss is necessarily irrecoverable as a matter of law.

In postscript, the court underlined three factors which had been important to the ship owners' success in the arbitration and the appeal proceedings:-

(1) The ship owners had acted reasonably in sending the Vessel to South America;

(2) There was no suggestion that the losses claimed were too remote; and

(3) It was possible to predict the Vessel's immediate future employment if the voyage contract had been performed. The damages claimed could be calculated with a reasonable degree of confidence.

¹ (1858) 3 H&N 554

² Affirmed by the House of Lords in *The Golden Victory* [2007] UKHL 12, [2007] 2 AC 353

³ See *The Concordia C* [1985] 2 Lloyd's Rep 55; *The Noel Bay* [1989] 1 Lloyd's Rep 361; *The Elbrus* [2009] EWHC 3394 (Comm), [2010] 2 Lloyd's Rep 315;

⁴ 22nd edition at paragraph 19-025

⁵ See *Hadley v Baxendale* (1854) 9 Exch 341

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