

Shipping update

July 2008

The "Achilleas" in the House of Lords; certainty at last

In a recent judgment (handed down on 9 July 2008) the House of Lords has upheld an appeal by charterers in a much anticipated and significant decision concerning the measure of damages for breach of contract following late redelivery of a vessel under a time charterparty.

The facts

The "Achilleas" was chartered by Mercator Shipping Inc (owners) to Transfield Shipping Inc (charterers) at a daily hire rate of US\$ 16,750. At the end of the charter period, the charterers gave 10 days' notice of redelivery and the owners proceeded to arrange a follow-on fixture for the vessel with Cargill International SA at a daily rate of US\$ 39,500. Prior to redelivery charterers fixed the vessel under a sub-charter to perform one last voyage. However, through no fault of charterers but of its sub-charterers, the discharge was delayed and the vessel was redelivered nine days late.

Once the owners realised that the vessel would miss the cancelling date, they were forced to re-negotiate the follow-on fixture. It was agreed with Cargill that the cancelling date would be extended in return for a significant reduction in the hire rate from US\$39,500 to US\$31,500. The Cargill charter ultimately lasted for about 192 days.

The dispute

The charterers were clearly in breach of their redelivery obligations and the issue to be determined was what amount of damages the owners were entitled to claim and how they should be calculated.

The charterers submitted that the correct measure of damages was the conventional loss of use measure, namely the difference between the contract and the market rates for the period of the overrun. This method produced a figure of US\$158,301. The owners contended that the correct method was the loss of profit method, that is, based on the earnings that they would have acquired for the full duration of their follow-on fixture, i.e. US\$8,000 per day for 192 days.

Previous findings

At Arbitration, in the High Court and in the Court of Appeal, Owners were successful and were awarded damages based on the entire losses incurred over the full length of the subsequent charterparty.

Giving the leading judgment in the Court of Appeal, Rix LJ concluded that on the facts as found by the majority arbitrators, the owners' claim was not too remote. Owners had established that, to the knowledge of the charterers, it was recognised and accepted as a hazard of late redelivery that the vessel would miss her cancellation date for the next fixture.

The loss of a follow-on fixture was a loss which was liable, in the ordinary nature of things, to result from the charterers' breach in failing to redeliver the vessel by the contractual delivery date, and was accordingly a type of loss which ought reasonably to have been foreseen by the charterers as not unlikely to arise in the event of late redelivery of the chartered vessel.

The House of Lords

In a unanimous decision (albeit with Baroness Hale expressing some reservations) their Lordships allowed charterers' appeal and overturned the findings of the lower courts. In summarising the effect of various authorities on the measure of damages, Lord Rodger noted;

"In any event, amidst a cascade of different expressions, it is important not to lose sight of the basic point that, in the absence of special knowledge, a party entering into a contract can only be supposed to contemplate the losses which are likely to result from the breach in question – in other words, those losses which will generally happen in the ordinary course of things if the breach occurs."

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Applying these principles to the facts, Lord Rodger went on to conclude;

"..I am satisfied that, when they entered into the addendum in September 2003, neither party would reasonably have contemplated that an overrun of nine days would "in the ordinary course of things" cause the owners the kind of loss for which they claim damages. That loss was not the "ordinary consequence" of a breach of that kind. It occurred in this case only because of the extremely volatile market conditions which produced both the owners' initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture. Back in September 2003, this loss could not have been reasonably foreseen as being likely to arise out of the delay in question. It was, accordingly, too remote to give rise to a claim for damages for breach of contract."

For Lord Hoffman, taking a slightly different approach, the essential point was that on the facts it did not appear that the parties, when concluding the contract, could have considered that the charterers should take responsibility for losses arising from the loss of a following fixture. The risks would be unquantifiable because although both parties would be well aware that a following fixture was likely, they would have no idea when this would be concluded or what its terms would be. Another relevant consideration was that if it appeared that the final fixture was bound to overrun, the owners had the option of refusing to undertake it. As Lord Hoffman put it:

"[T]he purpose of the provision for timely redelivery in the charterparty is to enable the ship to be at the full disposal of the owner from the redelivery date. If the charterer's orders will defeat this right, the owner may reject them. If the orders are accepted and the last voyage overruns, the owner is entitled to be paid for the overrun at the market rate. All this will be known to both parties."

Lord Hoffman confirmed that the fact that the scope and extent of any additional losses (beyond payment for the overrun at the market rate) may have been foreseeable did not mean that it was a type of loss for which the charterers had assumed contractual responsibility. That was a matter of interpretation of the contract as a whole against its commercial background. It was held that in the circumstances of this case, the charterer could not reasonably be regarded as having assumed the risk of the owner's loss of profit on the following charter.

Comment

The decision of the House of Lords provides some much welcome certainty to an issue which has caused considerable controversy amongst owners and charterers alike. By adopting the approach that most in the market would have assumed to be correct prior to this case, their Lordships have reached a conclusion that will be welcomed by many, notwithstanding that, for owners, it restricts a route to potentially significant damages.

Of course, it remains open to owners to draw charterer's attention to potential losses related to subsequent fixtures when concluding a charterparty in circumstances where such losses seem likely, and, where necessary, ensuring that appropriate provisions are included in the charterparty.

Undoubtedly the case is very important from a shipping perspective, but it will also have significance in other contractual contexts. Although Baroness Hale went so far as to express a preference that the appeal should be allowed on the narrowest possible grounds, leaving the wider issues to be explored in another case and another context, their Lordship's analysis of the principles of remoteness of damage in contracts will have implications well beyond the world of shipping.

Further information

If you would like to have further information on any issue raised in this update please contact:

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