Trade&Transport

CaseNote

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Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (2010) 2 Lloyds Rep 81

This is another case in which the vexed question arose as to the extent of damages payable when a charter party has been breached.

Readers will recall the House of Lords decision in *"The Achilleas"* (2008) 2 Lloyds Rep 275. In that case, the arbitrators (by majority), the High Court and the Court of Appeal had all allowed the owners to recover the damages claimed when there was a late redelivery of the vessel by charterers under an NYPE form. The vessel was due to be redelivered by 2 May 2004 but was not in fact redelivered until 11 May 2004. The charterers had given notice of redelivery between 30 April and 2 May. On 21 April the owners fixed a period charter of about 4-6 months and Laycans expired on 8 May. In the intervening period rates fell sharply and owners sought an extension of the cancelling date to 11 May and agreed to reduce the rate of hire from US$39,500 per day to US$31,500 per day.

The owners claimed damages at the rate of US$8,000 per day (being the difference between the two rates) for the whole period of the charter, totalling US$1,364,584.37. The charterers contended that the owners' entitlement was the difference between the market rate and the charter rate for the overrun period of nine days which came to US$158,301.17.

The traditionally accepted test for the recovery of damages for breach of contract applied by the Courts has been taken from the judgment of Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341 where His Lordship said that the proper rule is this:

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily*

> *follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."*

In *"The Achilleas"*, the House of Lords held that it was within the parties' contemplation that late delivery would result in the loss of use of the vessel at the market rate, as compared with the charter rate, during the period of overrun. However, a loss of profits from the fixture that the owners had made beyond the overrun period was not within the reasonable contemplation of the parties because, according to Lords Hoffmann and Hope, the charterers did not assume liability for losses arising from the loss of a following fixture; or according to Lord Walker, having regard to the common intention of reasonable parties to a charter party it was not proper to hold that an extraordinary loss arising over the whole term of that fixture was a type of loss which flowed naturally from late delivery; or in the opinion of Lord Rodger and Baroness Hale, it was not a type of loss which, at the time of the contract, would have been contemplated by the parties as resulting in the ordinary course of things from late delivery; it was a loss which stemmed from an unusual occurrence, namely extreme market volatility within a short space of time.

Many commentators have found that decision to be somewhat surprising, to say the least.

In the more recent decision of *The Sylvia*, the facts were that the vessel had been chartered on an NYPE form and charterers had entered into a subvoyage charter which was cancelled by the subcharterer when the vessel had been detained by Port State Control at the intended load port by reason of the wasting of the steel structure in three cargo holds. The charterers claimed damages, including the loss of profits, on the cancelled subcharter. The arbitrators held in their favour and the owners appealed, relying on *"The Achilleas"*.

In dismissing the appeal, Justice Hamblen distinguished *"The Achilleas"* and cited with approval judgments from:

- Flaux J who held in *"The Amer Energy"* (2009) 1 Lloyds Rep 293 that the House of Lords were not:

> *"intending to lay down some completely new test as to recoverability of damages in contract and remoteness different from the so-called rule in Hadley v Baxendale …"*

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- Cooke J in *Classic Maritime Inc v Lion Diversified Holdings Berhad* (2010) 1 Lloyds Rep 59 where His Lordship had said he would be "highly surprised" if *"The Achilleas"* established a new test for the recoverability of damages for breach of contract, and
- the Court of Appeal in *Supershield Limited v Siemens Building Technologies FE Ltd* (2010) 1 Lloyds Rep 349, where it was suggested that *"The Achilleas"* was only authority for the proposition that:

> *"There may be cases where the Court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties."*

Hamblen J went on to say:

> *"The orthodox approach therefore remains the 'standard rule' and it is only in relatively unusual cases, such as "The Achilleas" itself, where a consideration or assumption of responsibility may be required."*

Hamblen J, agreeing with the arbitrators, found that it was within the first limb of *Hadley v Baxendale* and the loss for charterers was:

> *"such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."*

As His Lordship pointed out, the trading of the vessel by a time charterer will frequently involve subletting, either by way of voyage charter or sub-time charter and it would be well within the reasonable contemplation of an owner that delay of significance in arriving or being ready to load at the designated load port may result in the loss of a fixture. Accordingly, the lost profit on such a fixture would equally be well within their reasonable contemplation.

Hamblen J distinguished *"The Achilleas"* further by holding that there was no finding in this case of a general market understanding or expectation that the damages for delay during the currency of a time charter party are limited to the difference between charter and market rates during the period of delay. Nor, unlike *"The Achilleas"*, could it be said that the resulting liability is likely to be unquantifiable, unpredictable, uncontrollable or disproportionate. As His Lordship pointed out:

> *"Where a follow-on fixture is made at the end of a charter, it could be for any period. It is entirely possible that it could be a long term charter lasting years even though the charter breached is for a relatively short term. It is the unpredictable and unquantifiable element introduced by the various possible links of follow-on charter that makes the potential liability disproportionate and commercially*

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unacceptable. By contrast, loss of a subcharter during the currency of a time charter can never be for a longer period than the time charter itself. Further, very often, as here, it will be for the loss of the specific charter voyage for which the vessel was fixed. Loss of a voyage fixture within the course of a charter party will result in a loss within reasonable and fixed confines. It is possible that market movements may mean it is a large loss, but it will be a loss based on a trading voyage."

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