Damages Following Late Redelivery - The "Achilleas" Affirmed

The Court of Appeal, with Lord Justice Rix giving the only judgment, dismissed the charterers' appeal from the well publicised judgment of Christopher Clarke J in Transfield Shipping Inc v Mercoator Shipping Inc: The "Achilleas"[1]. In doing so Rix LJ confirmed that, following late redelivery, it was possible for an owner to claim not only the difference between the market rate and the contractual hire rate for the period of the overrun, but also lost earnings under subsequent fixtures lost or, in this case, varied.

A number of commentators on the first instance judgment have argued that it would be of limited application, requiring the coincidence of particular factors as well as needing to be pleaded in a particular way. There has also been considerable comment on the likely negative impact of the finding. Typically, Rix LJ’s judgment in the Court of Appeal was carefully reasoned and included a thorough review of the relevant authorities. Whether and to what extent the result can be justified on the basis of principle and precedent will be looked at in this article, as will its potential impact.

The issue both the appellate and the lower courts had to address in The "Achilleas" was whether an innocent party could recover lost future business resulting from breach. The vessel was redelivered late, in breach of the chartership contract, as a result of this late redelivery the vessel owners lost the rate at which they had chartered out the vessel under the subsequent fixture and had, instead, to accept a lower rate. The owners claimed from the charterer the difference in the original and the renegotiated rates for the period of the subsequent fixture. The parties submitted their dispute to London arbitration and the question the arbitrators, and the courts to which the charterers appealed, had to answer was whether the damages claimed by the owners were too remote.

Before looking at the three sets of findings in The "Achilleas", it is worth reviewing the law relating to damages in this context. It is somewhat surprising that the question that came before the courts was novel in the context of charterparty redelivery. The issue has invariably arisen when owners have been faced with late redelivery and the possibility of missing the vessel’s next laycan in a falling market, with English lawyers routinely advising, in line with orthodoxy, that the owners can only recover the difference between the market rate and the charter rate for the period of the overrun (i.e. the period from when the vessel should have been redelivered and when the vessel was actually redelivered, later). It was the widely held view that lost earnings under subsequent fixtures missed or renegotiated could not be recovered even though the English courts had never been asked the question.

A very similar question that had been addressed by the courts in the context of charterparties was whether a charterer could claim in respect of market losses resulting from delayed shipment or delivery of cargo, or would those losses prove too remote.

Historically, the leading authority on what damages an innocent party could recover following a breach of contract is the nineteenth century case, Hadley v Baxendale[2]. The rule in Hadley v Baxendale can be summarised as follows: the damages a claimant may recover for breach of a contract are such as may fairly and reasonably be considered either (a) arising naturally according to the usual course of things from such breach of contract itself or (b) such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of (c). Following considerable criticism, both academic and judicial, of the phraseology used in this case, and restatement of the rule[4], definitive guidance on its application was provided by the House of Lords in The "Heron II"[5], which is now the leading authority in this area.

That case concerned late delivery of sugar following late breach by a shipowner of its charterparty obligations. The charterers successfully claimed the difference in the market price of the sugar at the time it was actually delivered, and the (higher) market price the sugar would have realised had it been delivered on time. Whilst there was some variance in their Lordships’ judgments[6], the leading statement in that case, which has been relied on by subsequent courts (including both first instance and appeal in The "Achilleas"), is that of Lord Reid who redefined the test in Hadley v Baxendale as being whether the loss in question is:

"of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from breach... the words ‘not unlikely’ denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable”.

The two parts test in Hadley v Baxendale was reduced to a single question and this has largely been how the courts have applied it. What the defendant ought to have realised was not unlikely to result from breach is a question of fact and subsequent courts applying the The "Heron II" have treated as unassailable arbitrators’ findings of fact in this regard, notwithstanding a lack of consistency as demonstrated by two apparently conflicting decisions.

In The "Rio Claro"[7], the court was asked to consider the question of whether a charterer could recover from the vessel's owners an increase in the price of oil cargo. It was a term of the charterparty that the vessel would sail from Greece towards the load port (Ras Shuker) on 22 November 1980. The vessel did not in fact sail until 26 November and did not arrive at Ras Shuker until 1 December. On 19 November Platts Oilgram reported that the Egyptian authorities had notified customers of an increase of US $2 per barrel in the official price of the crude oil covered by the charterers' purchase agreement. The new price was effective from 1 December and charterers claimed their resulting losses. The arbitrators held these losses to be too remote. The charterers appealed.

Staughton J upheld the finding of the arbitrators. After quoting at length from the arbitrators’ Reasons in relation to remoteness he stated as follows:

"I conclude that the arbitrator found the following facts: (i) Any tanker owner would have known that there was a great probability that a charterer would be an oil trader buying and selling cargo for profit. (ii) price movements in a commodity such as crude oil are expected. (iii) it is not unlikely that the late arrival of a vessel may have adverse consequences on the sale or purchase contract concerning the cargo. (iv) the loss in this case was not the result in the change in market price, although such a change may have occurred. (v) It was the result of the terms of the charterers’ purchase contract, which were not known to the owners. (vi) Such loss, though foreseeable as a substantial possibility, would occur in only a small minority of cases. (vii) it was of a different category from the loss which could be contemplated as not unlikely, that is to say loss resulting from a change in market price.”

He concluded:

"In my judgment it cannot be said that there is in law one type of kind of loss which necessarily embraces both that which occurred in this case and that which should have been contemplated as not unlikely. It was open to the arbitrator in fact that one was of a different type of kind from the
The "Rio Claro" highlights the principle that the precise nature of the loss does not need to have been in the contemplation of the parties at the time of contracting. It is enough that loss of the same type or kind as that which in fact occurred should have been contemplated. This case demonstrates that the outcome of whether a claim is too remote can depend on how the type of loss is to be characterised, on which views may differ.

In the "Balearics" the Court of Appeal upheld an arbitration tribunal's findings that the owners of a gas carrier which delivered late in breach of the chartersy, thereby depriving the charterers of the opportunity to buy the propane needed to service their forward contracts, were liable for the losses suffered by the charterers under those forward contracts.

Lord Justice Neill, upholding the award and overturning the first instance decision of Webster J, made the following remarks:

"... The arbitrators referred to the fact that a carrier in this specialised trade would know a considerable amount about the pattern of trading to which he was catering. It seems to me that it is implicit in the arbitrators' conclusion that, though the owners had no knowledge of the existence or terms of specific trades or specific contracts made by the charterers, they must have realised that it was not unlikely that the charterers would have made forward sales at fixed prices. I recognise that in the "Heron II", Lord Ullmo emphasised that the knowledge of a carrier of goods may be limited and less than that of a seller of goods. In the present case, however, the arbitrators were entitled to place reliance on the specialised nature of the trade and to impute to a carrier a greater knowledge of the relevant market than might have been appropriate in different circumstances."

Both the "Rio Claro" and the "Balearics" illustrate that the courts are bound to abide by the factual findings of the arbitrators on remoneliness in the absence of any error of law. This so particularly for the former wherein Staughton J suggests that had it fallen to him to answer the question of fact, the result may have been different. It goes without saying that both the first instance judge and the Court of Appeal were similarly bound.

The Court of Appeal's decision in the "Balearics" would appear particularly relevant to the "Achilles", so it is somewhat surprising that it was referred to in neither the first instance nor Court of Appeal judgment, nor did it appear to have been relied on by counsel. This may be because it is seen as an award of damages of the variety that come within the second heading of damages in Hadley v Baxendale, but it is submitted that in light of the House of Lords findings in the "Heron II", that distinction is otiose. Although the types of claim in these two cases varied considerably, the claims are, nonetheless, similar in that they relate to forward contracts and lost opportunities thereunder and the "Balearics" would appear strongly to support the contention of the owners in the "Achilles".

In the "Achilles" the vessel had been chartered out for a period of "about 6 to 7 months" at a daily rate of USS 13,500 and extended by a further maximum 7 months at a higher rate. Under the extended fixture the latest redelivery date was 2 May 2004 (at midnight). The vessel was, in fact, delivered over eight days late on 11 May 2004[11].

On 21 April the owners fixed the vessel to Cargill at a daily rate of USS 35,500 with a laycan period of 28 April to 6 May. By 5 May it was clear the vessel would miss the cancellation date under this fixture so owners agreed with Cargill that the cancellation date would be extended to 11 May and, in return, owners had to agree to reduce the daily rate of hire by USS 6,000. It is revealed that it was common ground that both the original and the reduced rates under the Cargill fixture reflected the respective market rates at the time they were agreed.

Owners claimed as damages for late redelivery the drop in the Cargill charter hire rate for the entire period of that fixture (which lasted 191 days) – a total of USS 1,354,564[12]. In the alternative, the owners claimed USS 156,301.17 which was the difference in the rate of hire and the contractual rate of hire for the period of the overrun.

The arbitrators awarded the higher amount and this award, and the reasons behind it, were upheld by Christopher Clarke J in the High Court and by the Court of Appeal.

In reaching his decision Rix LJ reviewed the law relating to redelivery and the related issue of illegitimate last voyages, repeating the well-known extract from Lord Mustill's judgment in the "Gregos"[13], highlighting the conflicting interests of the parties to a time charter as it reaches its end. Rix LJ confirmed that irrespective of whether the last voyage was legitimate or illegitimate (but agreed by the owners with their rights to claim damages reserved) if the final redelivery date, to be surmised from the wording of the charterparty, was missed, the charterers were in breach.

The charterers in the appeal sought to rely on a number of authorities reviewed by Rix LJ, including Watson steamship v Merryweather[14], the "Dione"[15] and the "Pennon"[16], to support their contentions that the losses claimed in respect of the Cargill fixture were too remote and that there was precedent to the effect that owners could only recover the difference for the period of the overrun. The charterers sought to place the losses under the Cargill fixture in the second heading of damages in the test in Hadley v Baxendale (such losses as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of it. It followed that, since the Cargill fixture could not have been in the contemplation of the parties at the time the contract was made, damages in respect thereof could not be recovered.

Their argument, relying on the cases mentioned above, was that the "conventional" measure of loss in these cases was the difference in market and charter rates for the period of the overrun – such loss were those which came within the first part of the test in Hadley v Baxendale (losses arising naturally according to the usual course of things from such breach of contract itself. The "convention" the charterers seemed to rely on was the fact that the loss of subsequent fixture damages claimed by the owners had never before been awarded for late redelivery of a vessel. Rix LJ dismissed the suggestion that the authorities, as reviewed by him, supported these contentions; the courts in those cases had not had to address the question of subsequent fixture losses. In fact, the one case which did touch, albeit in a most indirect way, on this point was the "Gregos"[17], which, on Rix LJ's reading of it did little to help the charterers' case[18]. Rix LJ held that the owners were entitled the subsequent fixture damages for reasons similar to those given by the majority of the arbitrators and Christopher Clarke J.

The approach the charterers took in the Court of Appeal differed slightly to that taken in the arbitration and at first instance. At first instance the charterers' primary argument was that the loss of fixture damages came within the second heading of damages in the test in Hadley v Baxendale. However, as mentioned earlier in this article, the question of whether certain losses were within the contemplation of the parties under the Hadley v Baxendale test as re-formulated in the "Heron II", is one of fact such that the arbitrators findings in that regard were not open to re-assessment.

In the Court of Appeal counsel for the charterers appeared to focus on the reasons that are "commercial certainty" with particular emphasis being given to the irrelevance of the claimants' third party transactions – or re inter alia acts to quote from the charterers' skeleton argument: "A charterer guilty only of a short late redelivery is not to be faced in law with uncapped loss of profit claims based on unknown contracts of unknown length made at unknown times ..."[19]. It was suggested that a distinction be drawn between market measures of loss and losses under special transactions personal to the owners. Whilst this suggestion is logical, it is difficult to see how it can be applied to the dispute in question without first having to overlook how markets for commercially tradeable assets like ships function. A distinction can be drawn between a contractually-agreed rate at which a vessel should trade and "the market", which is nothing more than an index of contractually-agreed rates, if the contractually-agreed rate is in no way reflective of the market. As mentioned earlier in this article, the charterers accepted that both the original rate of the Cargill fixture and the amended rate reflected the market at the time they were negotiated. Thus making the distinction artificial.
Rix LJ, citing Gulf J (as he then was) in The *Elena d'Amico* [20] dismissed the charterers' *res inter alios acta* argument as erroneous in this context. Its proper place was in the context was a discussion of causation and not remoteness. A claimant's independent decision to operate outside the prevailing market (at the time of the breach) meant there was no causative link between the breach and the damages claimed. Causation was not an issue in *The Acharnes*, as the owners made the Cargill fixture at the market rate.

A related argument about the length of the subsequent fixture appears tenuous in light of Slaughton J's comments in *The Rio Clar a*, the Court of Appeal's decisions in *Parsons v Ulltrey Ingham* and, more recently, *Brown v KMR Services* [21], all of which illustrate that once the type of loss has been held not to be too remote, the extent of the loss is irrelevant in the context of remoteness. In any event, Rix LJ felt that no issue arose in the context of the Cargill fixture because a fixture of that type (with a duration of four to six months) was "not unlikely" [22].

The charterors also argued that the arbitrators' and the first instance judge's findings would lead to uncertainty, impose an unfair risk on charterors and would make the assessment of damages in redelivery disputes more complicated. It was submitted that these policy considerations militated strongly against upholding the decisions below.

Rix LJ was not swayed by these arguments. In fact he described the proposed restriction of damages to the difference in market and contract rates for the period of the overrun as "undesirable and uncommercial" [23].

Comparing this case to *The Heron II*, Rix LJ suggested that the facts of the former were stronger in favour of liability; Whereas in *The Heron II* it was held that it was "not unlikely" that the defendant shipowners would have had in their reasonable contemplation the commercial exposure of the sugar trader claimants, in *The Acharnes*, both the claimants and the defendants were in the same business — that of chartering ships.

In the context of Lord Reid's "not unlikely" test, Rix LJ commented as follows:

"The retaining of the vessel at the end of the charterers' charter was not merely "not unlikely" it was in truth highly probable."

Rix LJ, acknowledging the conflicting interests of parties at the end of a fixture, commented on by Lord Mustill in *The Gregory* [24] and saw no reason why the owners should not be compensated for the losses to which they were exposed in the event of the charterer breaching its redelivery obligations, potential losses of which the charterers were or at least should have been aware [25].

In reaching his conclusion, Rix LJ recognised that he, like the arbitrators and the first instance judge below him, was not overlooking precedent. There was no legal precedent directly on the issue and all that the courts were doing in *The Acharnes* was confirming that the normal principles of damages applied to breach of redelivery obligations and, it is submitted, there is no reason (commercial or otherwise) why they should not:

"The jurisprudence would ... not have to change in order to accommodate the damages allowed by the majority arbitrators in this case: it would merely have to develop, to reflect the claim now made for the first time. But its development would be entirely in accordance with principle. Its refusal to develop would not be in accordance with principle ... principle and the particular facts of the case in my judgment require this solution." [26]

The findings in *The Acharnes* underline the risks of paying over deference to perceived wisdom which has no founding in commercial practice or law, but rather seeks to rely on "practicality" as a justification. This "practicality" usually refers to ease of assessment and appeals to legal practitioners more than commercial ones, who are more acutely aware of what they have lost and are willing to fight to prove it. The rules of remoteness will continue to control the scope of a claimant's recovery and, for this reason, capping recoveries for late redelivery at the difference in the market and contract rates for the period of the overrun seems arbitrary. As a majority in the House of Lords recently demonstrated in *The Golden Victory* [26], albeit with the two commercial Law Lords dissenting, the compensation principle takes priority over the sorts of practical considerations which matter to lawyers, such as the time at which the contractual right should be valued. Whilst it would be naive to suggest that the need properly to compensate claimants is paramount, there is a difference between commercial certainty, namely what matters to the market, and legal practicality. The suggestion, made by the charterers, that an award of subsequent fixture damages would result in considerable difficulty and increased cost in the assessment of damages following redelivery was rightly dismissed by Rix LJ, according to whom:

"Business-like communication and co-operation between the parties to a charter ought to make a dangerous mishap an unusual event... If the shipping industry nevertheless feels that it cannot live with the result, clauses can be created to regulate the situation." [27]

It had been suggested by counsel for the charterers that where a new fixture is delayed in a rising market, the charterers overrun period damages could be off-set by the owner's recovery of a rate under the new fixture higher than would otherwise have been obtained. This is a valid point but one which Rix LJ felt to be answered when it arises. It did not arise in this case because the fixture loss claim was pleaded as an alternative to the overrun differential claim. Rix LJ did, however, appear (it is submitted) unduly sympathetic to the owners in this regard, stating that "where one party has used another party's property beyond the time allowed, there is much to be said for the proposition that the minimum party in breach should pay a current market rate." [28]. This suggestion is surprising in light of the rest of his judgment and the importance he places on the normal rules of assessing damages in a commercial context.

Charterers are seeking leave to appeal to the House of Lords and so this may not yet be the end of the matter. Any future developments will be reported in *Sea Venture* and on the Steamship Mutual website.

[1] [2007] 1 LLR 19
[2] [1854] 9 Exch 341
[3] Hadley v Baxendale involved a claim by a mill operator for profits lost due to the mill having to remain idle as result of delay by the defendant carriers in delivering a broken millshaft to its repairers. The mill operators claim was rejected because the defendants were not sufficiently aware of the facts to "show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person" (Alderson B. ibid. at 355).
[5] [1969] 1 AC 350
[7] [1987] 2 LLR 175
[8] ibid. at page 176
[9] Cf. *H. Parsons (Livestock) Ltd. v Utley Ingham* [1977] 2 LL Rep 522. That case involved the supply of a defective hopper which dispensed mousy nuts to a herd of pigs. The mousy nuts resulted in an outbreak of E. coli which killed much of the herd. The claimants sought to recover damages in respect of the death of the pigs, loss of profits, and expenses incurred in combating and controlling the outbreak. Scarman L.J. in the Court of Appeal finding for the claimants: "it does not matter, in my judgment, if the defendants thought that the chance of physical injury ... was slight, or that the odds were against it, provided they contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensured on breach."
11 The Charterers gave due notice under the charterparty as follows:
8 April 2004 – 20 days approximate notice of redelivery between 30 April an 2 May.
15 April – 15 days approximate notice of redelivery between 30 April an 2 May.
20 April – 10 days definite notice of redelivery between 30 April an 2 May.
The charterers sub-chartered the vessel for a fixture from China to Japan and advised Owners on 27 April that redelivery was likely to be on 4 or 5 May. The vessel was in fact delayed and no redelivery took place until 11 May.

12 A discount was given in respect of additional sums earned under the charterparty by reason of the late delivery. Precisely what these sums relate to remains unclear (cf. Rix LJ at para 16) but it is presumably credit in respect of the monies earned during the period between the due redelivery date and the cancellation date under the next fixture as same would not have been earned had the vessel been redelivered on time and had to idle pending delivery to the new charterers.

13 (1955) 1 L. Rep 1 at 4. "A cargo ship is expensive to finance and expensive to run. The shipowner must keep it earning with the minimum of gaps between employments. Time is also important for the charterer, because arrangements have to be made for the shipment and receipt of the cargo, or for the performance of obligations under sub-contracts. These demands encourage the planning and performance of voyages to the tightest of margins. Yet even today ships do not run precisely to time. The most prudent schedule may be disrupted by regular hazards such as adverse weather or delays in port happening in an unexpected manner or degree, or by the intervention of wholly adventitious events... As the time for redelivery approaches things become more complicated... If the market is rising, the charterer wants to have the use of the vessel at the chartered rate for as long as possible. Conversely, the shipowner must think ahead to the next employment, and if as is common he has made a forward fixture he will be in difficulties if the vessel is retained by the charterer longer than had been foreseen. This conflict of interest becomes particularly acute when there is time left for only one more voyage before the expiry of the charter, and disputes may arise if the charterer orders the ship to perform a service which the shipowner believes will extend beyond the date fixed for redelivery."

14 (1913) 18 Com Cas 294
15 (1975) 1 L. Rep 115
16 (1991) 1 L. Rep 100

16 In that case the charterers ordered the vessel on a final voyage which appeared impossible to complete by the final redelivery date. The owners refused to undertake it and threatened to treat any in default by the charterers (sic) should they do so as a repudiatory breach. In the meantime, the owners negotiated but did not conclude a new fixture at a higher rate. A without prejudice agreement was made between the owners and the original charterers whereby the charterers agreed to perform the last voyage, but if it was held in subsequent proceedings that owners would have been justly in terminating the contract, then they would receive compensation reflecting the lost additional earnings under the new fixture they negotiated. The House of Lords upheld the arbitrators’ finding that the charterparty could have been terminated. The charterer had to pay the amounts due under the without prejudice agreement and none of the courts had to address the issue of subsequent fixtures damages, but both the arbitrators and Hirst LJ. in the Court of Appeal, expressed some discomfort with what the latter called “windfall damages”. On this point, however, obiter comments were made by Lord Mustill, who seemed less troubled than the courts below. "The fact is that in a volatile market, of which merchant shipping is by no means the only example, a contract breaker may find the consequences of a breach are multiplied by a surprising degree by adventitious factors. Here the charterer chose to stand their ground in circumstances where, if they were mistaken, the owners would have the upper hand. I believe that if they were mistaken and must suffer the consequences, harsh as they may seem". Op. cit. Endnote 14 at p.10.

19 This extract is quoted by Rix LJ at para 82 of his judgment.
20 (1960) 1 L. Rep 75
21 (1995) 2 L. Rep 513. This case involved a claim by Lloyd’s Names against their underwriting agents. Massive losses were suffered by the claimants and the defendants sought to argue that the scale of the losses were such as to make them too remote. The Court of Appeal rejected the defendants’ arguments: the degree of the loss was immaterial if it could be shown that the type of the loss in question was foreseeable.

22 An interesting decision in this context was that of the House of Lords’ decision in Jackson v The Royal Bank of Scotland [2005] 1 Lloyd’s Rep 306. This case involved a claim by a defendant source of funds through Thai and supplied them to another firm in Preston (Economy Bag). There was considerable amount of trade between these parties all of which was facilitated through transferable letters of credit in error the Bank which arranged the letters of credit sent an invoice from the Thai suppliers to Economy Bag, revealing sensitive information, including the mark-ups. This was held to be a breach of the contractual duty of confidence.

As a result of the acquiring this sensitive information, Economy Bag cut the Claimants out picture and went straight to the suppliers with whom they did USD 1.5m of business for the following four years.

The First Instance judge HHJ Kershaw QC, held that the business the claimants lost were losses flowing naturally from the breach by the bank. However, since there was no actual contact between the claimants and Economy Bag, and what was lost was the opportunity, or chance, to do future business, the key question was whether this was a real chance of future profits or a speculative chance of future profits lost. HHJ Kershaw QC held that this was a real chance lost and awarded damages based on the declining percentage of the business that could have been done over the four years (this worked out to about a third of the claimants claim. The claimants appealed saying at least 50% was due. The Bank cross-appealed saying all the losses were too remote.

Court of Appeal held that the claim was recoverable in principle subject to the threshold for remoteness being overcome. According to Potter LJ, whilst damages were to be assessed on the loss of chance basis laid down by the Court of Appeal in Allied Mappes Group v Simmons & Simmons [1999] 1 WLR 1602, that was a method of quantification and did not relate to remoteness of damages. At the time of the breach the bank was only aware of two years trading, therefore the four year time frame used by the judge was unsustainable. The quantification was dealt with "on the broad basis that, while it could reasonably be contemplated that the established relationship of (the claimants) and Economy Bag would have continued for a time, and thus some award for loss of future business be to made, that time should in all the circumstances be limited to a period of a year from the date of breach, all losses thereafter being regarded as too remote."

The House of Lords reversed the Court of Appeal and upheld the judge’s conclusions. Lord Hope gave the lead judgment held that the losses were not too remote and the issue was one of quantification. At point 37: "If no cut-off point is provided by the contract, there is no arbitrary limit that can be set to the amount of damages once the test of remoteness according to one or other of the rules in Hadley v Baxendale has been satisfied."
(The Lords gave no guidance on how loss of chance should be calculated but, seemingly for convenience’s sake, deferred to the First Instance judge’s calculation.)

[23] It is undesirable, because it puts the owners too much at the mercy of their charterers: who can happily drain the last drop and more of profit at a time of raised market rates, taking the risk of late redelivery, knowing that they will never have to pay their owners more than the current market rate for the overrun period, a rate which will never in truth properly reflect the value to the charterers of being able to fit in another spot voyage at the last moment. It is uncommercial, because, if it is demanded that the charterers need to know more than they already do in the ordinary course of events, when they already know that a new fixture, in all probability fixed at or around the time of redelivery, will follow on their own charter, then the demand is for something that cannot be provided. All that an owner will be able to tell his charterer in most cases is that he plans to fix his vessel anew at the time of redelivery. To which the charterer might well reply: “Well, I know that already! But don’t expect that your fixture damages if I redeliver the vessel late and you turn out to lose your fixture!” Such and answer, however, reflects the uncommerciality and error of the charterers’ submission.” Rix LJ at para 119.


[25] Rix LJ at para. 96: “…in taking the risk of a delay on a last legitimate voyage, the charterers were of course seeking to squeeze the last drop of profit from what…was a particularly strong market. If by misfortune a delay on the last voyage put them in breach, they knew, or ought to have known, what the risks were for themselves and their owners. They may or may not have calculated that, if the delay they had put in motion, caused their owners to lose the next fixture, this would happen just at a time when there was a sudden crack in market rates. But if they had considered that possibility, they ought to have appreciated that, barring any unusual features of the subsequent fixture, the risk of that loss should fairly fall on themselves.”


[27] Para 120.

[28] Para 121.