Recoverable Damages and The “Achilleas” - A New Approach?

In its recent well publicised judgment, the House of Lords overruled Lord Justice Rix’s judgment in the Court of Appeal in Transfield Shipping Inc v Mercator Shipping Inc. The “Achilleas” and held that in cases of late redelivery under a charterparty an owner can not recover damages for profit lost under a subsequent fixture. Instead, the charterer’s liability is limited to the difference between the contractual rate of hire and the prevailing market rate for the period of the overrun.

In the leading judgment, Lord Hoffmann reviewed the test for “remoteness of damage”, which is the legal test used to decide which types of loss caused by a breach of contract may be compensated by an award of damages. If there is no explicit clause in the contract dealing with the assessment of damages, the law supplies a standard test which specifies the extent of responsibility implicitly undertaken by the parties. Although Lord Hoffmann’s judgment reflects the existing legal position in principle, it represents a fundamental shift in how the test is, in fact, to be applied.

The facts of The “Achilleas” are well known. The vessel had been chartered out for a period of “about 5 to 7 months” at a daily rate of US$ 13,500 and extended by a further maximum period of 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[9].

On 21 April the owners fixed the vessel to Cargill at a daily rate of US$ 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. Cargill therefore agreed to extend the cancellation date to 11 May, and because the market was falling owners agreed to reduce the daily rate of hire by US$ 8,000. 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 US$ 1,364,584[9]. In the alternative, owners claimed US$ 158,301.17 which was the difference in the market rate of hire and the contractual rate of hire for the period of the overrun.

The arbitrators by a majority awarded the higher amount and this award, plus the reasons behind it, were upheld by Christopher Clarke J in the High Court and by the Court of Appeal. Rix LJ, who gave the only judgment in a unanimous Court of Appeal, 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” [iii] which highlights the parties’ conflicting interests as a time charterparty reaches its end. Rix LJ noted that irrespective of whether the last voyage is legitimate or illegitimate, if the final redelivery date is missed charterers will be in breach.

Charterers appealed to the House of Lords, arguing that the loss of profit claimed in respect of the Cargill fixture was too remote to be recoverable, and that there was precedent to the effect that owners could only recover the difference for the period of the overrun.

Historically the leading authority on the damages that an innocent party could recover following a breach of contract was the nineteenth century case. Hadley v Baxendale[iv] : The rule in Hadley v Baxendale can be summarised as follows: the damages a claimant may recover for breach of contract are such as may fairly and reasonably be considered either as,

(a) arising naturally, in 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 it[i].

Following considerable criticism, both academic and judicial, of the phraseology used in this case, and restatement of the rule[v], definitive guidance on its application was provided by the House of Lords in The “Heron II”[vi], which was the leading authority in this area until The “Achilleas”.

The “Heron II” involved late delivery of sugar following a breach by a shipowner of its charterparty obligations at a time when the market was falling. Charterers successfully claimed the difference between the market price of the sugar when 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[viii]. the leading statement in that case, which has been relied on by subsequent courts (including both first instance and on 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 was not unlikely to result from the 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 part test in Hadley v Baxendale was thus reduced to a single question and this has largely been how the courts have applied it.

In The “Achilleas” charterers sought to argue that the lost profit under the Cargill fixture was capable of recovery only under the second limb of the test in Hadley v Baxendale and that because the Cargill fixture could not have been in the contemplation of the parties at the time the contract was made, the loss was too remote and could not be recovered. To quote from the charterers’ skeleton argument; “A charterer guilty of a short late redelivery is not to be faced in law with unapped loss of profit claims based on unknown contracts of unknown length made at unknown times...[x].” Instead, charterers argued that the “conventional” measure of loss in cases such as Watson Steamship v Merryweather[xi]. The Division and “The Pirouette” was the difference between the market rate and the charter rate for the period of the overrun, and that such loss came within the first limb of the test in Hadley v Baxendale. The Charterers stressed that damages for profits lost on a follow-on fixture had never before been awarded for late redelivery of a vessel.

Rix LJ dismissed the suggestion that the authorities, as reviewed by him, supported the charterers’ above 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”[xii], which, as Rix LJ read it, did little to help the charterers’ case[xvii]. Rix LJ held that the owners were entitled to damages in an amount equivalent to the profit they would have made had the original follow-on fixture been performed for reasons similar to those given by the majority of the arbitrators and Christopher Clarke J.

However, charterers’ above arguments prevailed in the House of Lords. The point of principle to be determined, in Lord Hoffmann’s view, was
framed as follows:

"It is the rule that a party may recover losses which were foreseeable (not unlikely) an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or it is prima face an assumption about what the parties may be taken to have intended, no doubt applicable in the majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses."[xv]

Lord Hoffmann preferred the latter view. He held that the arbitrators' factual finding - that a broker would have said that the "not unlikely" result arising from a late redelivery would include missing damages for a subsequent fixture - was not determinative of the question whether owners' losses were too remote. Instead, he considered that liability for damages should be founded "upon the intention of the parties (objectively assessed) because all contractual liability is voluntarily undertaken".

Put another way, Lord Hoffmann considered that it must be in principle wrong to hold someone liable for risks for which people entering into such a contract in their particular market would not reasonably be considered to have undertaken. He noted that the findings of the majority arbitrators showed that they considered their decision to be contrary to what would have been the expectations of the parties, but dictated by the rules in Hadley v Baxendale, as explained in The "Heron II". In his opinion, these rules are "not so inflexible; they are intended to give effect to the presumed intentions of the parties and not to contract them".

But how are the presumed intentions of the parties to be determined? In the majority of contracts the parties will not expressly identify all of the liabilities for which they are assuming responsibility. As indicated above, if the parties have not articulated their intentions expressly, the court will imply a term into the contract to give effect to their presumed intentions. In either case, the identification of the losses for which the parties intended to assume responsibility will turn on the construction of the contract as a whole, in its commercial setting.

One difficulty arising from the new approach is that whereas there are established principles to guide the court in deciding whether a term should be implied into a contract - namely business efficacy, and the "officious bystander" test - there are no established principles to guide the court in interpreting the extent of the risk the parties objectively have assumed under a contract. For this reason there is considerable scope for uncertainty.

A further, related, issue is that until the House of Lords' decision in The "Achilleas", a loss would not be too remote if it was of a "type" or "kind" that the contract breaker should have realised, at the time of entering into the contract, was "not unlikely" to arise as a result of the breach in question (see Lord Reid's test for remoteness in The "Heron II", above). The Court of Appeal's decisions in Parsons v Utley Ingman [xvi] and, more recently, in Brown v KMR Services[xviii] illustrate that once the type of loss has been held not to be too remote the contract breaker will be liable, regardless of the extent of the loss.

This proposition is thrown into question by Lord Hoffmann's suggestion that "the view which the parties take of responsibilities and risks they are undertaking will determine the other terms of the contract and in particular... the price paid... Anyone asked to assume a large and unpredictable risk will require some premium in exchange"[xviii]. Following Lord Hoffmann's logic it is difficult to see how one can still treat the type and extent of loss differently. On the face of it, a contract-breaker who has not been paid a premium arguably will not be taken to have assumed liability for large and unpredictable risks.

Lord Hoffmann addressed this issue at paras. 21-22 of his judgment. Although he recognised the principle that a contracting party may be liable for a loss which is unforeseeably large, if losses of that type or kind fall within one or other of the rules in Hadley v Baxendale he then seemingly blurred the distinction between the type and extent of the loss: "That is generally an inclusive principle: if losses of that type are foreseeable, damages will include compensation for those losses, however large. But... it may also be an exclusive principle and... a party may not be liable for foreseeable losses because they are not of the type or kind for which he can be treated as having assumed responsibility." It would appear, therefore, that the extent of the loss in question will, to some extent, determine its "type".

A third change effected by The "Achilleas" judgment is that the prospect of obtaining permission to appeal against decisions concerning remoteness is likely to increase. This is because the question of whether a given type of loss is one for which a party assumed contractual responsibility is "the whole question of interpretation... a question of law". Under English law, it is possible to appeal on points of law, but not on points of fact. Prior to The "Achilleas", arbitrators would simply ask themselves whether the damages in question were of a type that the defendant ought to have realised was not unlikely to result from the breach in question, and because this was a question of fact their answer was unappealable (cf. The "Rio Claro"[xxii] and The "Baleares"[xxii]). This is particularly significant given that the uncertainty created by The "Achilleas" is likely to encourage parties to appeal against arbitral decisions.

In conclusion, in light of the House of Lords' decision in The "Achilleas" it would appear that to formulate a damages claim, the claimant must first show that the defendant has assumed liability for the type of loss complained of. The House of Lords has offered little guidance as to the factors that are relevant for this purpose. Those factors that are mentioned appear to vary in the judgments of all five members of the House, though repeated themes include contract value, knowledge of and control over the risk that occasions the liability. Going forward, this decision may be relied on considerably to restrict contractual damages claims. How it will be applied, and refined, only time will tell. One can be confident however that it will generate considerable debate and with it, legal fees.

...[i] The Charterers gave due notice under the charterparty as follows:

6 April 2004 – 20 days approximate notice of redelivery between 30 April and 2 May.

15 April – 15 days approximate notice of redelivery between 30 April and 2 May.

20 April – 10 days definite notice of redelivery between 30 April and 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.

By 28 April Owners had been informed by local agents that timely redelivery would be a problem.

[ii] 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. Rex LJ at para 16 of the Court of Appeals judgment) 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 would not have been earned had the vessel been redelivered on time and had to idle pending delivery to the new charterers.

[iii] [1993] 1 L.R. 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."

[I] (1854) 9 Exch 341

[V] 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).


[VII] [1969] 1 AC 350

[VIII] A detailed analysis can be found in McGregor on Damages (Sweet & Maxwell), 2003, pp. 190-193.

[IX] This extract is quoted by Rix LJ at para 82 of his judgment in the Court of Appeal.

[X] (1913) 10 Com Cas 294

[XI] [1975] 1 Ll. Rep 115

[XII] [1991] 1 Ll. Rep 100


[XIV] 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 incidence by the charterers that they should do so as a repudiatory breach. In the meantime, the Owners negotiated but did not conclude a new fixture at a higher rate. Without prejudice agreement was made between the owners and the original charterers whereby the owners agreed to perform the last voyage, but if it was held in subsequent proceedings that owners would have been justified 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 charterers had to pay the amounts due under the without prejudice agreement and none of the courts had to address the issue of subsequent fixture damages, but both the arbitrators and Hirst L.J. in the Court of Appeal, expressed some discomfort with what the latter called "windfall damages". On this point, however, other 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 to a surprising degree by adventitious factors. Here the charterers chose to stand their ground in circumstances where, if they were mistaken, the owners would have the upper hand. I believe that they were mistaken and must suffer the consequences, harsh as they may seem". Op. cit. Endnote 14 at p.10.

[XV] Lord Hoffmann at para. 9.

[XVI] Cf. H. Parsons (Livestock) Ltd. v Utley Ingham [1977] 2 Ll. Rep 522. That case involved the supply of a defective hopper which dispersed moulty nuts to a herd of pigs. The moulty 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 ensued on breach".

[XVII] [1995] 2 Ll. 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.


[XIX] [1987] 2 Ll. R 175


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