Golden Strait Corporation v Nippon Yusen Kabushiki Kaisha [2007] UKHL 12

The Court of Appeal decision in this case was discussed in Sea Venture issue 4 and on the Steamship Mutual website. *Events After Repudiation - Impact on Damages?*

The matter was referred to the House of Lords and the decision handed down on the 28th March 2007.

The issue between the parties - at what date the quantification of damages is to be made - has divided practitioners and scholars alike. Most recently Professor Sir Guenter Treitel QC in his article “Assessment of Damages For Wrongful Repudiation” (2007) 123 LQR, commented on the Court of Appeal judgment. Amongst other observations he considered the issue of certainty in commercial affairs - best elaborated on by Robert Goff LJ (as he then was) in "The Scataphrod" [1963] QB 529.

"the English Courts have time and again asserted the need for certainty in commercial transactions - for the simple reason that the parties to such transactions are entitled to know where they stand and to act accordingly.”

In his article, Treitel, reflecting on the Court of Appeal judgment makes the following observation:

"The Golden Victory" seems to impair such certainty...the shipowners, as it turned out, could not "know where they [stood]" when their right to damages accrued; the value of that right fluctuated in the light of later events for which they were not responsible and which when they occurred, were "merely a possibility" and not "inevitable or probable". In this respect certainty was subordinated to the greater importance of the compensatory principle...

In their judgment of 28th March the House of Lords upheld the decision of the Court of Appeal by a majority of 3:2. Interestingly the two dissenting judgments came from Lords Bingham and Waller - the only members of the Appellate Committee with "commercial" backgrounds.

The Lords all began from the same starting point, (i) repudiation by one party to a contract, if accepted by the other, brings a contract to an end, (ii) that the innocent party is thereafter entitled to damages to compensate him for that loss and he is to be placed by those damages in the position he would have been had the contract been performed - the compensatory principle, (iii) as a general, although not invariable, rule damages are to be assessed at the date of breach and (iv) so far as repudiation of a charterparty is concerned, where there is an available market, the basic rule is that loss is to be measured at the date of acceptance of the repudiation.

Ultimately the majority preferred the general compensatory principle primarily justified by reference to *Brilliand v Merrythorpe Dare Steam Collieries* (1891) Limited v Pontypridd Waterworks Company [1909] AC 426, where a Court is assessing damages and has knowledge of what actually happened, it need not speculate but rather base itself on known facts. In the words of Lord Brown, "But not history; the Court need not shut its mind to that.”

The majority declined to accept that the finding of Megaw LJ in "The Mihalis Angelos" [1971] 1 QB 164, that reliance could only be placed on subsequent events when it could be shown such events occur as the result of the repudiation, was meant to operate as a general rule limiting consideration of subsequent events to only those predestined at the date of repudiation.

And as for certainty, Lord Scott said "there is, in my opinion, no such principle. Certainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle."

He took the view that certainty in commercial contracts is best achieved by settled principles of contract law and not by framing principles that can be employed by litigants as delaying tactics. In support of this approach Lord Carswell asserted took the view that Courts and Arbitrators are able to prevent such abuse if asked to proceed with dispatch.

The majority view is concisely summed up by Lord Brown in his assertion that the owners’ case, that they were entitled to damages assessed on the full term of the charterparty, sought to extend the available market rule at the expense of the fundamental principle that the purpose of damages is to restore the innocent party to the same position he would have been but for the breach, not to improve upon that position by asking the Court to ignore subsequent events.

In stark contrast to the majority view Lord Bingham comments at the outset: “A majority of my noble and learned friends also agree with that [Court of Appeal] decision. I have the misfortune to differ. I give my reasons for doing so, unauthoritative though they must be, since in my respectful opinion the existing decision undermines the quality of certainty which is a traditional strength and major selling point of English commercial law, and involves an unfortunate departure from principle.”

Whilst accepting the “Brilliand principle” Lord Bingham distinguishes this on the basis that none of the cases in which this principle - that when assessing damages, if a Court has knowledge of what actually happened it need not speculate and may base it’s decision on known facts - concerned the accepted repudiation of a commercial contract where there is an available market. He also distinguished those cases where the compensatory principle gives way to the date of breach principle, such as personal injury claims, or those cases where it was reasonable for a party to elect steps to mitigate loss and so reasonable to defer assessment of damages.

Further, and in considering those cases involving repudiation of commercial contracts, Lord Bingham clearly finds that the date of breach rule has been upheld in each of those decisions, notwithstanding any appearance to the contrary at first blush. So far as “The Mihalis Angelos” is concerned, the Court of Appeal may seem to have looked at a subsequent event but in Lord Bingham’s reading have viewed the case from the date of breach rule and, in fact, did not take account of later events but rather recognised that the value of what owners had lost was nil. The charter was bound to be cancelled lawfully only some three days after repudiation. As Megaw LJ put it: "...and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.”

This decision was followed by "The Wave"[1981] 1 LR 521 in which Mustill J declined to look to whether charter rates at a later date than repudiation would have had any bearing on the exercise of a “three months more or less option” as to the period of the charter. And by “The
As for "The Seaflower", which Mr Gaisford felt constrained him to find in Charterer's favour, Lord Bingham felt (i) early termination was "clearly predictable on the date when the repudiation was accepted", (ii) that Walker J had only relied on later events to fortify his conclusion, and (iii) a different decision would not have been reached had evidence of those later events not been before Walker J.

In concluding, Lord Bingham has scant regard for charterers' contention that owners would have been overcompensated if damages had been awarded for the remaining four years of the charter. Contracts are made to be performed not broken, he opines, and had charterers promptly honoured their obligations to pay damages an assessment would have been disposed of long before the second Gulf War took place.

Ultimately, Lord Bingham has real concern about the effect this judgment will have on the issue of certainty in commercial contracts.

In the Court of Appeal decision in this matter, Lord Mance, as he now is, held "Certainty, finality and ease of settlement are all of course important general considerations. But the element of uncertainty, resulting from the war clause, meant that the owners were never entitled to absolute confidence that the charter would run for its full seven-year period... There is no reason why the transmutation of their claims to performance of the charter into claims for damages for non-performance of the charter should improve their position in this respect."

And to that Lord Bingham responds

"I cannot, with respect, accept this reasoning. The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law... Professor Sir Guenter Treitel QC read the Court of Appeal's judgment as appearing to impair this quality of certainty... and I respectfully share his concern."