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Key Points

There is some apparent tension between decisions of the highest court when resolving the question whether what would have been an innocent parties’ future inability to perform or repudiatory conduct should be taken into account on the assessment of damages when that innocent party has accepted a repudiation of the contract.

The recent case of The Glory Wealth is an important judgment supporting the argument that such matters should be taken into account in order that the innocent party is not put in a better position than it would have been had the contract been performed (following the majority House of Lords decision in The Golden Victory).

Parties in repudiatory breach will seek to extend The Golden Victory to its limits in respect of the assessment of damages. The challenge for the courts will be to ensure that those limits and those assessments are kept within manageable and reasonable bounds.

Introduction

1. An important issue in recent years has been the extent and valuation of an owners’ rights where charterers have repudiated a long term charterparty or contract of affreightment. Since damages claimed under such contracts can be very large, the courts have been taxed with issues including the availability of markets and discounts for the accelerated receipt of hire (Zodiac Maritime Agencies Limited v Fortescue Metals Group Limited (The Kildare))1, the remoteness of damage (Transfield Shipping Inc v Mercator Shipping (The Achilleas))2 and the effect of a war cancellation clause on damages (Golden Strait Corp v Nippon Yusen Kabushika Kaisha (The Golden Victory))3. In a recent case, the Commercial Court once again faced a question of law “...of importance to the general law of contract and, in particular, the assessment of damages for breach of contract”. Flame SA v Glory Wealth Shipping PTE Ltd (The Glory Wealth)4. Although there were two issues appealed under section 69 Arbitration Act 1996, this note concentrates on the damages issue.

2. The general issue arising can be stated shortly. A contract is repudiated and the repudiation is accepted. It could be a charterparty contract, sale of goods, provision of other services etc. The repudiator and guilty party alleges that the innocent party, on the due date of its performance, would never have been able to perform and therefore has not lost anything of value. Should this be taken into account when assessing damages?

3. In the interests of certainty and finally, the general principle is that damages are assessed at breach, which in the case of repudiatory breach is the date of acceptance of the repudiation. However, in The Golden Victory it was stated that the “lodestar” is that damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more. The effect of the majority decision in The Golden Victory was that considerations as to certainty would give way to this compensatory principle. As a result, The Golden Victory eroded the general principle of damages assessment. Subsequent events, in that case the operation of a war cancellation clause due to the 2003 Iraq war, were to be taken into account.

4. Given its significance it is perhaps surprising that in The Glory Wealth it was only after the Court (and after skeleton arguments) that the The Golden Victory was discussed in detail and, had it not been for an adverse factual finding, may even have won the day for the charterers.

The Facts

5. A contract of affreightment (the “COA”) dated 19 August 2008 provided for the carriage of 6 cargoes of coal in bulk in each of the years 2009, 2010 and 2011. The charterers under the COA failed to declare laycans for the 5th and 6th shipments of 2009 and for all 6 shipments in 2010. The disponent owners succeeded before the arbitral tribunal which found that the charterers were in actual repudiatory breach of the COA by failing to declare laycans for the voyages in question and that each such repudiatory breach had been accepted by the disponent owners as terminating the disponent owners’ obligation to carry cargoes on those voyages. They awarded damages to the disponent owners in the sum of US$5,426,698.68 plus interest, the large difference between the COA rate and the market rates being accounted for by the sudden collapse in the freight market following the Lehman Brothers collapse.

6. The charterers argued that due to the market collapse the financial position of the disponent owners had so deteriorated that, had the charterers declared the laycans in question, the disponent owners would have been incapable of providing the required vessels anyway. They therefore submitted that the disponent owners were only entitled to substantial damages if they, the disponent owners, could prove that if the charterers had declared any of the laycans in question the disponent owners would have been able to perform the corresponding voyages by going out into the market and chartering in a vessel at the relevant time. If that was not the case, then disponent owners would be put in a better position than they
would have been in if the contract had not been repudiated.

The tribunal decision

7. In finding for the owners on this issue, the tribunal accepted the reasoning in the leading textbook, Trellet on the Law of Contract, 13th ed., @ 20-082, based on the House of Lords’ decision in Gill & Dutris SA v Berger and Co Inc. *that where the charterer’s case was that he would have been entitled to terminate on account of the shipowner’s future breach* that cannot be taken into account so as to reduce damages to a nominal amount “for once the shipowner had accepted the charterer’s earlier repudiation and so terminated the contract for that anticipatory breach, the shipowner would be relieved of any further obligation to perform, so that his failure to perform on the due day could no longer be a breach.”

8. Standing alone, the second part of the quote from Trellet is of course correct. Once an innocent party has accepted a repudiatory breach it would be nonsensical for the innocent party to be continued to be required to perform. Not only from the point of view of a waste of resources and the futility of the matter but because where one party has ex hypothesi evinced an intention not to be bound, and this has been accepted then this ought to bring the innocent party’s obligations to an end. Thus, using an example from Trellet @ 17-026, where in a contract for the sale of goods to be manufactured by A to B’s order, B wrongfully repudiates the contract, and this is accepted by A. A is entitled to terminate the contract, and, if he does so, two things follow: A need no longer manufacture the goods, and he can claim damages from B.

9. Therefore, it follows that the innocent party’s failure to perform on the due date cannot be a breach of contract. However, this is arguably a very different matter to any allegation by the guilty party that the innocent party would not have been able to perform on that date and therefore has not suffered a loss. If that can be shown on the evidence to have been the case then not to take this into account would seem to put the innocent party into a better position than he would have been in if the contract had gone ahead as planned. This was the issue debated before the Court.

The Court decision

10. Teare J carried out a comprehensive review of the apparently conflicting authorities on this issue. His lordship held that although the reasoning of the House of Lords in Gill & Dutris and in The Golden Victory led in different directions, neither was a decision on the actual point to be determined. The court was dealing with a question concerning the assessment of damages and since there had been no clear decision of an appellate court binding upon the court and pursuant to which the application of the contractual principles regarding an accepted repudiation had led to an award of damages which put the innocent party in a better position than he would have been in had the contract been performed, his lordship concluded that the court should follow the compensatory principle endorsed by the House of Lords in The Golden Victory. Although, the owners were supported by the reasoning in Gill & Dutris, that reasoning did not address the compensatory principle and the decision was not one in which the innocent party was placed in a better position than he would have been in had the party in breach repudiated the contract.

11. As a result, his lordship held that the assessment of loss necessarily requires a hypothetical exercise to be undertaken, namely, an assessment of what would have happened had there been no repudiation. That enables the true value of the rights which had been lost to be assessed. The innocent party claims damages and therefore the burden lies on that party to prove its loss. That requires the innocent party to show that, had there been no repudiation, it would have been able to perform its obligations under the contract. If the court were to assume that the innocent party would have been able to perform, rather than to consider what was likely to have happened in the event that there had been no repudiation, the court might well put the innocent party in a better position than it would have been in had the contract been performed. When assessing what the innocent party would have earned had the contract been performed the court must assume that the party in breach has performed its obligations.

12. In The Glory Wealth, in the end the charterers’ legal victory was of little consequence. The Court held that the finding of the tribunal that, on the totality of the evidence before it, the disponent owners would have been able to fulfill their obligations if the charterers had called upon them to do so effectively concluded the issue. Thus, the result of the arbitration would have been no different.

Comment

13. The Golden Victory has been the subject of strong distinguished academic criticism (for example by Professor Francis Reynolds). However, in The Glory Wealth the court endorsed the compensatory principle set out in that decision. The Mihailis Angelos (cancellation clause) and The Golden Victory (war clause) both concerned cases where there was an express contractual term dealing with the subsequent event or contingency. In The Mihailis Angelos the Court of Appeal had held (obiter) that the damages would be nominal where at the date of the accepted repudiation it was inevitable that the charterers would cancel since the vessel would not arrive in time. The Golden Victory allowed the Courts to look at events that had occurred by the time that assessment of damages took place even though those events were a mere possibility at the date of breach. The Glory Wealth arguably extends these decisions and supports the argument that the reasoning and effect of those cases applies equally to future repuditory breaches that may have occurred by the innocent party as well as other political and non-contractual contingencies or events e.g. government requisition. It merely supports the argument since it is a decision of first instance and was arguably only obiter since, as the arbitrators had already decided the factual issue against charterers, the determination of the legal point was not essential. Another important point to note is that The Glory Wealth, like The Golden Victory, involved an actual repuditory breach. However, there is little reason to suppose that the reasoning would not apply in cases involving an anticipatory breach.

14. Underlying the court’s reasoning in The Glory Wealth (and repeated a number of times) was that in none of the previous authorities was the claimant placed, by an award of damages, in a better position than he would have been in had the contract been performed. It could be argued that this conclusion entails within it the assertion that in those previous decisions the courts did not appreciate the distinction between liability and damages and that the effect of their pronouncements could be interpreted to apply to issues concerning damages as well as liability, thus awarding substantial damages to parties who may not have been able to perform. However, be that as it may, it would be correct to say that the authorities are not entirely clear. In support of the decision in The Glory Wealth it may be observed that in two decisions where there was clearly the risk of overcompensation (The Mihailis Angelos and The Golden Victory) the Courts declined to allow this. Indeed, even in Gill & Dutris arguably there is some support for the conclusions reached in The Glory Wealth. At the end of the passage on page 392 Lord Diplock states: “In the events that happened the certification clause in the contract is in my opinion relevant only to the measure of damages to which the sellers are entitled. It does not go to their liability even if they could show that the damages should be nominal only.”

15. This passage, although coming directly at the end of a passage quoted in The Glory Wealth, was not referred to in the judgement. Instead, Teare J stated that “Lord Diplock did not say that the buyer’s liability in damages could be extinguished altogether or that the seller would be unable to prove any substantial damages because the buyer would have been able to reject the goods themselves.” However, Lord Diplock in the passage quoted did not appear to exclude entirely the prospect of damages being reduced to a nominal amount. The contrary argument, of course, would be that the reference to nominal damages in the passage was not to nominal damages due to what would have been a future repuditory breach by the innocent party, but as a result of already pre-existing breaches as at the date the repudiation was accepted. Thus, if goods shipped were defective in the extreme then such a breach could enable buyers to argue that damages should be nominal if the goods are, say, valueless.
However, the argument would continue) the passage quoted above does not justly the repudiating party proving that since it would have rejected the goods anyway, then damages should be reduced to a minimum.

16. This then raises questions as to the precise scope of Lord Diplock’s meaning in the quoted passage and in exactly what circumstances the buyers (or the innocent party) would be allowed to argue that the damages should be nominal. Although the view expressed in *Treitel* is based on *Gill & Duffus* the actual proposition derived from the case is not entirely clear from the judgment, nor was there a decision reached by the House of Lords on the compensation principle or inability to perform by the innocent party on the due date. Although this is not the place to enter into a detailed consideration of *Gill & Duffus*, there is at least some potential for debate on its precise scope, dealing with a fairly technical point involving *CIS* contracts, and if that is correct, then the door does remain open for the compensatory principle to be given prominence. In any case, *Gill & Duffus* will need to be reviewed in the future since there is a tension perceived amongst academics as well as practitioners in the case law of the highest court which would need to be grappled with by subsequent courts.

17. In the circumstances, it is submitted there are good prospects that *The Glory Wealth* will be followed in the future. However, for the time being and on a practical level, *The Glory Wealth* means that the innocent party is to be put in the same position, and in no better position than that he would have been in had the contract been performed. Thus, it will not be contended that the contract be voided. *The Glory Wealth* means that the innocent party would have performed its obligations insofar as the issue of damages is concerned. The relevance of the older line of cases discussed in *The Glory Wealth* is that the party in breach cannot rely upon a future hypothetical breach as an ext post facto justification for its repudiation, although it can refer to it on the question of damages.

18. This does, however, mean that the ultimate result may now be even less dependent on whether repudiation is accepted or not by the innocent party. The effect of decisions such as *Avery v Bowden* and *Feronorietal S.A R.L v Mediterranean Shipping Co SA* (*The Simona*) has been that where a repudiation is not accepted then the contract remains alive for the benefit of both parties. Thus, in *Avery v Bowden* the repudiating party was subsequently allowed to rely on a subsequent frustrating illegality and in *The Simona* the repudiating party was allowed to serve a further cancellation notice.

19. A fuller examination of the facts in *The Simona* will help illustrate the point. There the voyage charter provided for a laycan of 3 to 9 July. The charterers refused a requested extension to the cancelling date and purported to cancel the charter, which was wrongful as they tried to do so before 9 July. Their repudiation of the charterparty was not accepted and charterers then sent another notice of cancellation on 12 July. It was held that they were entitled to do so, the right to cancellation having survived since the repudiation had not been accepted by owners. Some commentators (e.g. *Treitel*) have drawn from the fact that the repudiation in fact accepted the repudiation rather than affirmed the contract, then the subsequent intervening events would not have assisted the repudiating party and the innocent party would have succeeded in full. However, if the recent cases are correct then whether the repudiation is accepted or not is rendered largely academic since the issue of subsequent conduct and events can be taken into account on the issue of damages. In *The Simona* even if they had not cancelled by 9 July the charterers would have cancelled after that date due to commercial reasons and the new line of authority suggests that this must be taken into account (even if not “pre-directed” to happen at the date of breach as in *The Mihalis Angelos*). The issue is largely academic, of course, because if the repudiation is accepted then nominal damages may still be claimed but not otherwise.

20. Some may argue that this is the fairer result. Take for example, the innocent party who knows at the time of the repudiatory conduct that it is in some difficulty and therefore will not be able to perform. It therefore decides to accept the repudiation. If its subsequent insolvency was not taken into account when assessing damages, then matters uniquely within that party’s knowledge would allow that party to take advantage and claim for loss it would never have suffered and indeed, if the contract had continued, would have concerned matters for which it may have been found liable in damages. Although it may be argued that the guilty party takes this risk by its conduct, one should not lose sight of the attractiveness of the opposite argument to the courts.

21. On a fact investigation level parties will, of course, need to be astute to such arguments and an important factor may well be the resources and/or financial standing of the innocent party and/or any other reason that party may not have been able to perform. It is interesting that in *The Glory Wealth* one of the complaints made by the charterers under section 66 was that they had received incomplete/late disclosure of documents relating to owners’ ability to perform. They also made attempts to appeal findings of facts in relation to this issue as a point of law. Since success with such arguments is notoriously difficult (the charterers did not succeed) any party will (in common with other aspects of the case) wish to ensure proper disclosure from the other side at a reasonably early stage so that it can properly tailor its case. Parties will also want to be astute in ensuring that they can obtain proper findings of fact from the fact finding tribunal. For the guilty party this will include findings not only that the other party would have been unable to perform or been otherwise in repudiatory breach of contract but that this hypothetical breach would then have been accepted. Of course, the innocent party may well blame the guilty party for its inability to perform or rely on arguments as to estoppel which will give rise to their own reasons.

22. Notably in *The Mihalis Angelos* the cancellation was inevitable (e.g. Megaw LJ referred to it as “predestined”). In *The Golden Victory* the relevant event had already happened. The question arises what is to happen at lower levels of risk. If *The Glory Wealth* is correct, then what happens if at the date that damages are assessed, if this occurs prior to the intended date for performance, there are some prospects, less than the balance of probabilities, that the innocent party would not have been able to perform on the latter date? In *The Golden Victory* the point was not relevant since the event had already occurred. However, it was discussed and it was suggested by the House that lower levels of risks were to be taken into account. Thus, Lord Scott referred to a “real possibility” that was more than conceptual. Lord Brown referred to contingencies of less than 50% chance of happening if “... of some real and not just minimal significance”, and Lord Carswell referred to the contingency lying “anywhere on the scale between extreme unlikelihood... to virtual certainty”. In *The Glory Wealth* Teare J referred to the passage from the judgment of Lord Scott although not specifically endorsing it on this point. Thus, following the dicta referred to, if the chance of repudiatory conduct occurring at the date of performance is assessed as being 50% then this would presumably need to be taken into account and proportionate deductions made. However, it is fair to say that the courts will not want to see every contingency derogated and that some limits will be placed on this as otherwise the result could be chaotic. How and where the limits are placed remains to be seen.

23. It could be argued that the result of *The Glory Wealth* is that there is even more incentive for the guilty party to delay settlement and/or the hearing or to embark on fishing expeditions in the hope that an event or some facts may be revealed which would allow it to argue that nominal or lower damages only should be awarded. This has indeed been a recurrent criticism of *The Golden Victory*. However, there the majority in the House of Lords did not regard that point as sufficient to deflect them from their conclusion, and pointed out that the innocent party and tribunal could attempt to proceed with dispatch and expediency to avoid such stratagems.

Conclusions

24. *The Glory Wealth* is important in the comprehensive consideration of the case law surrounding the important issue of the proper calculation of damages and the valuation of rights lost where a future inability to perform by the innocent party is alleged. How the law develops in the future will...
be of interest to both academics and practitioners. A lodestar is “a star that is used to guide the course of a ship, especially the pole star” (Online Oxford Dictionaries). Parties in repudiatory breach will no doubt seek to extend The Golden Victory to its limits. To guide the courts towards ever speculative assessments, and the challenge for the courts will be to ensure that those limits and those assessments are kept within manageable and reasonable bounds.\(^\text{12}\)

An update on The Glory Wealth article - Update: Glory Wealth Shipping PTE Ltd v Flame SA - is available on the Steamship Mutual website.

\(^1\)[2001] 2 Lloyd's Rep 360
\(^2\)[2009] IAC 61
\(^3\)[2007] 2 AC 353
\(^4\)[2013] Lloyd's Rep 653
\(^5\)Lord Scott @382
\(^6\)Formerly written by Professor Sir Guenter Treitel and now edited by Professor Edwin Peel
\(^7\)[1984] AC 382
\(^8\)[1970] 2 Lloyd's Rep 43
\(^9\)Para 5
\(^10\)(1856) 5E. & B. 714
\(^11\)[1989]1 A.C. 788
\(^12\)The author is grateful to Mark Jones, Stone Chambers, for his comments on an earlier draft of this article.