DOGS THAT DIDN'T BARK

The ACHILLEAS

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By all accounts, *The ACHILLEAS*[1] is the first case to raise the issue of damages arising from the cancellation (or, as here, the renegotiation) of a subsequent fixture through late redelivery under a time charter. Unfortunately, as predicted by the dissenting arbitrator, it has created a fair degree of uncertainty in the market. Of course, as the Court of Appeal has pointed out, if charterers find they cannot live with the result, they are free to negotiate suitable protective clauses. But that is what the courts usually say when they upset a well-established commercial understanding.

Although it is forty years since the shipping industry was placed on notice that maritime contracts are subject to the same rules of damages as any other - a warning since reinforced in the specific context of late redelivery - the text-books have continued to submit unequivocally that, absent special knowledge, damages for late redelivery should be limited to the difference between the market and the charter rates for the period of the over-run.[2]

Given the charterers' concessions, it is difficult to see how the appeal could have succeeded. Those sweeping admissions, however, masked a number of significant assumptions which will usually be live issues. The purpose of this note, therefore, is to disinter some of the unstated premises that were effectively thus buried.

Some of these concerns were canvassed before the judge. Charterers' counsel submitted that "*if the majority arbitrators were right, the assessment of damages might become very complicated. Suppose that a subsequent charter was lost that would have earned the Owners a generous rate of hire whilst it lasted but with the result that, when the vessel was redelivered under that charter, she would have needed employment at a time when the market had slumped. In fact, because she missed her subsequent charter, she obtained a less profitable immediate charter, but one that would have had her employed at above market rates during the market doldrums. Should account be taken of the fact that the rate was above market for a period after redelivery under the subsequent charter?*"

Significantly, perhaps, the judge was inclined to answer this question in the affirmative; but he could not, on the facts before him, accept such difficulties as entailing that the owners should in this case be confined to a recovery that was markedly less than their true loss.

THE FACTS AND DECISION

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[1] Transfield Shipping Inc. v. Mercator Shipping Inc. [2007] 1 Lloyd's Rep. 19. Upheld on appeal: [2007]. 2 Lloyd's Rep. 555.

[2] C Czarnikow Ltd. v. Koufos (*The HERON II*) [1967] 2 Lloyd's Rep. 457; Hyundai Merchant Marine Co. Ltd. v. Gesuri Chartering Co. Ltd. (*The PEONIA*) [1991] 1 Lloyd's Rep.100. The dissenting arbitrator described this as "*the well-established view in the industry*."

The relevant facts are simply stated. The final terminal date of the time charter was May 2nd, 2004; but in the event, owing to delays at the last discharge port (Oita), the charter ran on until the 11th.

On or about April 21st, the owners had fixed a time charter to Cargill with laydays/cancelling of April 28th / May 8th. The period of the Cargill charter was "about 4 to 6 months"; and the rate of hire was $39,500 per day.

By May 5th, the owners realised that they were going to miss the Cargill cancelling date; and so they negotiated a three day extension, until the 11th, against a reduction in the daily hire of $8,000. In the event, the vessel was redelivered at 0815 on this revised cancelling date, and simultaneously delivered to Cargill.

What had happened on the charterers' side was this. They had fixed the vessel for a final voyage with coal from Qingdao to Japan. Completing loading on April 24th, she discharged fairly quickly at Tobata and then proceeded to the second and final port, Oita, where she arrived on the 30th. It was here that the fatal delay occurred. [3]

The charterers did not dispute that they were in breach by redelivering late. The sole issue was the amount of damages due to the owners.

According to the judgment, the owners' primary claim, which counsel for the charterers characterised as "loss of profit," was for "damages at the rate of $8,000 per day … against which they gave credit for the additional sums earned under the Charterparty by reason of the late redelivery." The amount was $1,364,584.37.

In the alternative, characterised as "loss of use," the owners claimed damages of $158,301.17, being "the difference between the market rate of hire and the Charterparty rate during the period from midnight on 2nd May to 0815 on 11th May."

There was no suggestion that the duration or terms of the Cargill charter were unusual; and the charterers had conceded that both the original, and also the renegotiated Cargill rates of hire were market rates.[4] Indeed, it appears that the tribunal was effectively instructed by the parties to confine itself to a simple choice between the two competing calculations.

The majority reluctantly accepted this restriction. "*As a result of the agreement between the parties on quantum we were not, unfortunately, taken to the expert evidence. We were not, therefore, called upon to decide whether in terms of remoteness a trip charter should be considered differently from, say, a period charter. Further, the Charterers did not submit or otherwise argue that the original Cargill fixture was an extravagant or unusual bargain. Thus*

[3] The dates were unquestionably tight; but there is no suggestion that this last voyage was regarded by the owners as illegitimate, in the sense that it could not reasonably be expected to finish by the final terminal date. Perhaps they were content to take the redelivery notices at face value.

[4] This may seem surprising; but it was probably not unreasonable. The *ACHILLEAS* is a standard Panamax bulk carrier of 69,180 DWT, built in 1994. On April 15th, the average of the Baltic Panamax Index (BPI) for the 4 time charter routes stood at $40,594. The corresponding values on April 21st and May 5th respectively were $39,249 and $31,468. And by May 19th, the BPI 4-route average had fallen below $24,000.

we are not able to make any finding on whether the original Cargill fixture or the revised Cargill terms amounted to such a bargain."

They clearly felt that their hands had been tied by the charterers' concessions. Working from the cards which they had been dealt, they could only plump for the larger, loss of profit, claim.

And the judge was in much the same position. "*They [the majority] have determined that, to the knowledge of the Charterers, it was recognised and accepted as a hazard of late redelivery that the vessel would miss her cancellation date for the next fixture; that this was not something that was very unusual but, on the contrary, the kind of result which the parties would have had in mind; that rapid variations in market rates in either direction were market knowledge; and that the kind of loss suffered by the owners … was within the contemplation of the parties as a not unlikely result of the breach.*"

From the brief excerpts of the award which are cited in the judgment, it is not obvious just how far the charterers' concessions went. But the decision does suggest some commercial questions which would certainly be of significance in any parallel case where the points had not been surrendered.

COMMERCIAL ISSUES

(1) WOULD CARGILL HAVE CANCELLED THE ORIGINAL FIXTURE?

The immediate cause of the owners' loss was their decision to renegotiate the Cargill fixture: if the vessel had been redelivered at any time between the renegotiation and the original cancelling date of 8th May, there would have been no breach. But the owners would say, no doubt, that they really had no choice in the matter: when they agreed the new rate, on May 5th, the final terminal date had already come and gone, and they were simply acting reasonably, albeit prospectively, in mitigation of a certain loss.

Implicit in this argument is the assumption that, given the chance, Cargill was bound to cancel the original fixture. It is, of course, highly likely that a charterer would wish to cancel under such circumstances; but that does not make it certain that he would do so. He might have sub-chartered the vessel at a profit. Or it might have been fixed or nominated under a sub-charter with no right of substitution, so that cancellation would result in breach of that other commitment: although the award gave the date of the Cargill fixture as April 21st, it was actually reported during the previous week, which might suggest a fixture made subject to sub-charterers' approval.[5]

But all such considerations were swept aside by the charterers' concessions. On the facts as found, therefore, Cargill's conduct is to be taken as wholly market-driven.

(2) DID THE OWNERS HAVE TO RENEGOTIATE?

Both the majority arbitrators and the judge refer to the "need" for the owners to

[5] J E Hyde & Co. Ltd., market report 16 April, 2004.

renegotiate the Cargill fixture. In truth, the owners really had no need to do anything at all but wait and see if Cargill would cancel when they tendered their notice of readiness. While the renegotiation may have been a reasonable act in mitigation, there was no necessity or obligation attached to it. Indeed, as a matter of contingent fact, if the owners had actually been cancelled, and then happened to trade spot, so as to take advantage of the market uplift which occurred in October, the quantum of their claim might well have been less.

Perhaps this concept of necessity was imported into the award by the agreement between the parties. In general terms, however, it is difficult to see how the owners could have been faulted if they had waited until they were able to present their notice of readiness to Cargill, and then taken whatever the market might offer in the event of cancellation. Equally, one may wonder how, in most cases, an owner could establish that he had been left with no alternative but to renegotiate in order to avoid being cancelled.

(3) DID CARGILL REDELIVER LATE?

The Cargill charter ran from 0815 (local time) on May 11th to 0815 (GMT) on November 18th, a total of 191 days 11 hours. But if its contractual duration was indeed "about 4 to 6 months", as stated in the judgment, its final terminal date should have been November 11th – i.e. a maximum duration of 184 days.

It is not clear why the charterers would have accepted the owners' claim in respect of this over-run under the Cargill charter. If the period was extended by off-hire periods, it is difficult to see how the owners could claim damages for those days. If, by its end, the market had fallen below $31,500, the owners would have been better off as a result of the additional days. And if the market had risen – the more likely case, as the 4-route index stood at $42,325 on 18 November - the owners would presumably have had a good claim against Cargill for the difference between $31,500 and the then ruling market rate.

(4) HOW LONG WOULD THE ORIGINAL CARGILL FIXTURE HAVE RUN?

If the period of the Cargill fixture was indeed as reported, Cargill would have had the right to redeliver the vessel at any time after about 4 months. But the agreed damages figure appears to assume that Cargill would have kept the vessel for the same period as they actually did. It is by no means obvious that this is what would have happened.

During August 2004, the BPI 4-route average fluctuated between a low of $29,851 and a high of $32,585. During the first half of September, it remained in the range $30,283 / 32,419; and its high point for the month was $33,359, on the 24th. Against this background, one may reasonably ask: if a market-driven charterer was paying the original daily rate of $39,500, why would he elect to keep the vessel longer than the minimum period (subject to completing the voyage then in progress)?

(5) HAD THE OWNERS CUT IT TOO FINE?

It is evident that no point was taken about the six day interval between the final terminal date and the original Cargill cancelling date: "*There was no case on the part of the charterers that the fixture in question had been entered into … too early, or on too short a laycan basis.*" Commercially, this looks rather odd: while expert opinion might vary as to where the line should be drawn, there clearly must be a point, as the Court of Appeal recognised, where one would have to say that the owners were being over-optimistic and had caused their own loss, especially when armed with that "ease of communications" relied on by the arbitral majority, and all the more so in a booming market.[6]

Exactly where the line should lie must depend in part on what the owners knew. In the judgment, the narrative sequence might suggest that the orders for the final voyage arrived very late in the day – it was described by the Court of Appeal as a "last minute spot charter." That may be so; but the interesting question is surely whether the owners were aware of that last voyage when they fixed to Cargill.

As mentioned earlier, the owners may have committed to Cargill well before April 21st – possibly as early as the 15th. But the fixture of the final voyage, a sub-timecharter to Hanjin, was evidently made on or before the 14th.[7]

On the 15th, the charterers gave their 15 day approximate notice of redelivery for 30 April/2 May. If that notice was truthful, it must have reflected the Hanjin fixture; but from the Court of Appeal, we learn that the charterers' notice was supposed to state, not only the date, but the place of redelivery. If, therefore, the notice was given in the proper form, the owners had to know that the ship was going to end up in Japan, not China – indeed, if they were not in a position to pass on this information, why would Cargill have agreed to accept delivery at the point of the Transfield redelivery?

It is a commonplace that port congestion is a constant component of a strong freight market – partly cause and partly effect of increased demand for tonnage. This is something which is well known, even notorious, to any player actively engaged in the shipping market. And the owners, being such, could naturally be expected to make enquiries of the charterers and, once they knew the discharge ports, of the local agents, making full use of the modern "ease of communication," so as to form an intelligent estimate of when their ship might come free.

It is quite possible that the owners did this, in which case they may have acted reasonably in agreeing to the original cancelling date of May 8th; but one suspects that most experienced chartering brokers would say they were cutting it rather fine and taking a chance to grasp an attractive fixture in a rapidly crumbling market. On this view, the owners were betting against the odds, and were lucky to be allowed to lay off the not unlikely consequences on the charterers.

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[6] Implicit in the award is the finding that both parties were not lacking in experience, but "*actively engaged in the shipping market*" and "*experienced in the chartering markets*".

[7] J.E. Hyde & Co. Ltd., market report 14 April, 2004: "*delivery Dalian 17/20 April trip via N.China redelivery Japan $31,500 daily - Hanjin.*"

The Court of Appeal evidently thought the Cargill fixture had been made in response to the charterers' formal redelivery notices, including the definite notice given on April 20th. If, however, the commitment to Cargill had actually been made during the previous week, the Cargill fixture could only have been in reaction to the approximate notices given on the 8th and the 15th.

(6) SHOULD THE DURATION OR NATURE OF THE SUBSEQUENT FIXTURE MATTER?

Because of the charterers' concessions, the judgment contains a brief and, in this context, somewhat tantalising, discussion of foreseeability. The majority arbitrators had written: "*As … [Counsel for the Charterers] agreed in exchanges with members of the Tribunal, the "not unlikely" results arising from the late redelivery of a vessel were not numerous, but would include missing dates for (a) a subsequent fixture, (b) a dry docking and (c) a sale of the vessel.*"

The judge was not so sure: "*It is, I think, debatable whether missing a dry docking or, even more, the sale of a vessel on account of late redelivery is to be regarded as a contingency within the contemplation of the parties or whether it is sufficiently unusual to be outside their contemplation.*"

This comment really underlines what is, from the commercial standpoint, the most confusing aspect of the judgment. The charterers had argued that, where there is an available market, then, absent special circumstances, a contract made by the claimant with a third party must be treated as *res inter alios acta*, and that damages should be assessed by reference, and restricted, to the market for the period of the over-run.

This argument has now been knocked on the head, at least in this context. But, this bridge once having been crossed, why should it matter what is the nature or the length of that subsequent commitment, provided it is at arm's length as to pricing and terms? The relevant test is the type of loss, not its precise description or extent. "[*The* loss] *must be such as the contract breaker should reasonably have contemplated as not unlikely to result. To that direction must be added the point that the precise nature of the loss does not have to be in his contemplation. It is sufficient that he should have contemplated loss of the same type or kind as that which in fact occurred. There is no need to contemplate the precise concatenation of circumstances which brought it about".*[8]

If the trigger for the loss is the missing of a cancelling date, it should not matter what kind of contract that trigger is attached to. The consequence of the breach – missing the cancelling date – is exactly the same in each case. "*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.*"[9]

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[8] *The RIO CLARO* [1987] 2 Lloyd's Rep. 173, per Staughton J at p.175

[9] Torvald Klaveness A/S v. Arni Maritime Corp. (*The GREGOS*) [1995] 1 Lloyd's Rep. 1 (per Lord Mustill at p.10)

Looked at in that way, why should a lost sale be treated any differently than a cancelled charter? The judge was clearly not prepared, nor did he need, to deal with this hypothetical question. The Court of Appeal was also careful to skirt this particular pot-hole: "*It may be, but I see no need to decide, that as a rule of thumb a charterer should not, without further knowledge, be held liable in such a situation for the loss of a new fixture of longer length than that which he had himself contracted for.*" For rule of thumb, read policy. And what, one wonders, will the text-books make of that?

(7) IS A MISSED DRYDOCKING THE SAME AS A CANCELLED FIXTURE?

The point about a missed drydocking is rather different; and here, the judge's reservations seem to be well taken.

While it is probable that any case of late redelivery will involve the possibility of a missed cancelling date (express or implied) for an ensuing commercial commitment, scheduled drydockings normally only occur twice (or less) within a 5 year period. One would hardly say that any given vessel is "not unlikely" to proceed to drydock following redelivery: that would only happen in the small minority of cases. Even taking due note of Lord Pearce's caution in *The HERON II*, one would still want to say that the odds are heavily against it.[10]

Also, while the classification societies have certainly tightened up the application of their rules, there is usually some flexibility for delay on the immediately preceding voyage – unless, of course, the owners have already exhausted all of the permissible tolerance. So, even where the charterers are to be fixed with the knowledge that the vessel's next activity will be going to a drydock for intermediate or special survey, one would hardly say that the not unlikely effect of delayed redelivery will be to oblige the owners to carry out the work in a more expensive yard; and it must be highly unlikely that the delay would put the vessel altogether out of class.

OBSERVATIONS

The commercial reader of *The ACHILLEAS* judgments can only marvel at the extent of the charterers' concessions. On the face of it, they surrendered a number of solid and persuasive arguments, both as to causation and also as to quantum, even allowing for the legal impact of the subsequent appeals. The case would surely have benefited from a joint application to the

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[10] "*I do not think that Baron Alderson [in Hadley v. Baxendale] was directing his mind to whether something resulting in the natural course of events was an odds-on chance or not. A thing may be a natural (or even an obvious) result even though the odds are against it. Suppose a contractor was employed to repair the ceiling of one of the Law Courts and did it so negligently that it collapsed on the heads of those in Court. I should be inclined to think that any tribunal (including the learned Baron himself) would have found as a fact that the damage arose "naturally, i.e., according to the usual course of things". Yet if one takes into account the nights, week-ends, and vacations, when the ceiling might have collapsed, the odds against it collapsing on top of anybody's head are nearly 10 to one. I do not believe that this aspect of the matter was fully considered and worked out in the judgment. He was thinking of causation and type of consequence rather than of odds.*" (*The HERON II*, at p.481)

Court on a preliminary point of law.[11]

It is disappointing that the decision seems to have blurred, if not brushed away, any distinction, in terms of damages for late redelivery, between a legitimate and an illegitimate last voyage.

Where the owner contests the legitimacy of the last voyage orders at the time, the Court of Appeal has certainly suggested an interesting line of argument. In accepting under protest the order which, by its illegitimacy, lies outside the rights of the charterer as to employment, it may be that the owner is, in effect, responding to a fresh offer and forming a new contract, with the consequence that the second limb of *Hadley v. Baxendale* will relate to what the charterers knew, not at the date of the charter, but at the date of the owner's acceptance of the illegitimate order.

But what of the common case where the vessel over-runs the final terminal date, and the owner can then argue *post facto* that, for reasons unknown to him at the time, the voyage actually fell outside the scope of the charter? One might expect that this type of breach should merit a tougher sanction than would the merely adventitious over-run of a legitimate last voyage. Unfortunately, *The ACHILLEAS* appears to have pre-empted any such distinction.

What is, perhaps, the oddest section of the majority award was quoted by the Court of Appeal: "*The arbitrators agreed that if a lawyer had been asked for what damages the owners would be liable if the vessel was redelivered late, he would have referred to the overrun period measure of damages; however, if a broker had been asked the same question, he would have referred to the dangers of loss of fixture acknowledged in the award.*" To this, the reasonable response is surely: So what? This broker's assessment, so contrasted with the lawyer's, can only be the layman's view, commercially plausible but legally irrelevant. The clear implication is that the lawyer, by training, cannot divine the law where the commercial man, unencumbered by the intellectual baggage of *Hadley v. Baxendale*, veers naturally to the correct legal conclusion.

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[11] Under §45 of the Arbitration Act, the only two tests for an agreed referral are (i) that the point must substantially affect the rights of the parties; and (ii) that the question must be clearly identified.