The Denning Law Journal 2008 Vol 20 pp 187-195

CASE COMMENTARY

IS THE COURT OF APPEAL DECISION IN THE ACHILLEAS GOOD LAW?

Transfield Shipping Inc v Mercator Shipping Inc The Achilleas [2007] 2 Lloyds Rep 555

Jae Sundaram [*]

In September 2007 the Court of Appeal upheld the decision of the Commercial Court in *Transfield Shipping Inc v Mercator Shipping Inc The Achilleas*. The case relates to the assessment of damages where late redelivery under a time charterparty causes the vessel to miss the cancellation date for the next fixture. The Commercial Court had earlier held that where a time charterparty had no unusual provisions or features and the time charterer fails to redeliver the vessel in time for its next fixture, leading to a loss of profit in the next fixture, the shipowner's claim for damages based on that loss of profits against the redelivering charterer was not too remote, being a not "unlikely result" of late redelivery. This decision had come as a surprise to the shipping industry, especially amongst charterers.

THE ACHILLEAS – FACTS

In January 2003 Mercator Shipping time chartered their vessel *The Achilleas* to Transfield for a period of five to seven months at the rate of US$13,500 per day, with the option to extend for a further period. The charterparty was extended for a further period of the same duration with a revised rate of US$16,450 per day. The latest date for redelivery of the vessel was fixed as of midnight of May 2nd 2004. The charterers gave a notice of redelivery on April 20th. The shipowners fixed the vessel for a four to six-month period charter, on April 21st with Cargill, in anticipation of such redelivery. The rate was fixed at the then prevailing market rate of US$39,500 per day, with a laycan of April 28th to May 8th, in other words Cargill had the right to cancel the agreement if the vessel had not been redelivered by 8th May.

[*] Lecturer in Law, University of Buckingham, LLB (India), LLM in Maritime Law (University of Southampton), Advocate (India), Solicitor of England & Wales.

By late April it became apparent that the vessel was not going to be redelivered by the agreed date, and the shipowners negotiated an extension with Cargill of their cancellation date to 1st May. In return, the shipowners were constrained to reduce the hire charges by US$8,000 per day. In the intervening period there was a substantial fall in the dry market. The charterers redelivered the vessel to Cargill on May 11th, with a delay of 9 days. The charter to Cargill lasted for 191 days. The shipowners claimed a sum of US$1,364,584, for the loss of profit on the Cargill fixture, on the grounds of breach of contract in failing to redeliver by 2nd May, and in the alternative, 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 charterers maintained that the shipowners were only entitled to damages relating to the overrun period, which was agreed at around US$158,000. The charterers further contended that they could not be made responsible for the loss suffered by the shipowners in the charterparty with Cargill.

The dispute was referred to arbitration and the arbitrators awarded the higher amount to the shipowners. Both the High Court and the Court of Appeal upheld the award of the arbitrators and the reasons behind the same. The principle submission of the charterers before the Court of Appeal was that the measure of damages for late redelivery of a time chartered vessel should, for reasons of authority and principle, in the absence of any special knowledge of a subsequent fixture, be limited to loss of current market value during the overrun period, that the arbitrators and the judge at first instance had misapplied the rule laid down in *Hadley v Baxendale*[1] and that the losses claimed in respect of the Cargill fixture were too remote. In support of the above contention the charterers argued that the shipowners' transactions with a third party were *res inter alios acta* (a thing done between others) about which they did not have any knowledge at the time of contracting in 2003. Further, the charterers could not challenge the majority arbitrators' findings of fact before the Court of Appeal. The charterers argued that any loss sustained by the shipowners' was simply too remote in the absence of any specific information being brought to the charterers' attention before contracting and that limiting damages to the difference in rates for the period of the overrun was a matter of principle or policy, as applying any other rule would lead to uncertainty.

[1] *Hadley v Baxendale* (1854) 9 Exch. 341. Here, a mill in Gloucester had to remain idle due to delays caused by the defendant carriers in delivering a broken crankshaft to the repairers in Greenwich. The mill operator claimed for loss of profit as a result of the delays. The claim was rejected, as the defendant carriers were not fully 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 at 355).

The Court of Appeal held that both the arbitration panel and the Judge at first instance had correctly determined that the shipowners were entitled to recover damages relating to the loss of fixture. The Court of Appeal observed that the charterers knew (a) it was very likely that owners had entered into a new fixture upon re-delivery of the vessel by them and (b) were fully aware of the volatility of the chartering market and the effect of late re-delivery on hire rates and held that damages were not too remote to be recoverable and was within the *Hadley v Baxendale* principle.

The Court of Appeal in reaching its decision reviewed the position of law relating to illegitimate last voyages in a time charter and the development of the implication of a reasonable time within which the vessel must be redelivered, referring to the observations of Lord Mustill in *The Gregos.*[2] Rix LJ confirmed that irrespective of whether the last voyage was legitimate or illegitimate, the charterers would be in breach if the final redelivery date, inferred from the wording of the charterparty, were to be missed by the charterers. The Court of Appeal referred to cases relied on by the charterers which included *Grey & Co v Christie & Co,*[3] *The Dione,*[4] *The Black Falcon,*[5] *The Peonia*[6] and *The London Explorer.*[7] The case in *The Peonia* was one where damages were awarded for late redelivery after a legitimate last voyage.

Rix LJ observed, in particular, that none of the earlier cases was the recoverability of damages for the loss of a subsequent fixture actually in issue. This observation very nearly summed up the reasoning for the granting a judgment favouring the shipowners. The Court went on to hold that the *Hadley v Baxendale* test was to be applied as a composite whole and not as two separate set of tests and that the defaulting party should reasonably have contemplated that the result for which it seeks compensation was not unlikely. Commenting on the issue Rix LJ observed as follows:

---

[2] *Torvald Klaveness AS v Arni Maritime Corporation (The Gregos)* [1995] 1 Lloyd's Rep 1. Lord Mustill in his judgment had discussed and highlighted the conflicting interests of the parties to a time charter, especially in relation to illegitimate last voyages while the contract was nearing completion.

[3] *Grey & Co v Christie & Co* (1889) 5 TLR 577.

[4] *Alma Shipping Corp of Monrovia v Mantovani (The Dione)* [1975] 1 Lloyd's Rep 115 (CA).

[5] *The Shipping Corporation of India v NSB Niederelbe Schiffahrtsgesellschaft GmbH & Co (The Black Falcon)* [1991] 1 Lloyd's Rep 77.

[6] *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd (The Peonia)* [1991] 1 Lloyd's Rep 100 (CA).

[7] *London & Overseas Freights Ltd v Timber Shipping Co SA (The London Explorer)* [1971] 1 Lloyd's Rep 523.

> "The refixing of the vessel at the end of the charterers' charter was not merely 'not unlikely' it was in truth highly probable (barring other possibilities)."[8]

On the issue of remoteness, the court concluded that where a result is foreseeable as a substantial possibility, but happens only in a small minority of cases and would therefore be very unusual and not been in the parties contemplation, would then be considered to be too remote.

DISCUSSION

The judgment while stating the law raises a few questions for the shipping industry and the lawyer alike. In particular, a) if a legitimate last voyage overruns, are the charterers in breach of the contract and liable to pay damages limited only by 'remoteness' and b) Is it commercially reasonable that owners be able to recover for the loss of a following fixture when time charterers redeliver late?

The case of *Hadley v Baxendale* is still the leading authority on the issue of damages recoverable by an innocent party following a breach of contact. The damages that a claimant may recover for breach of a contract under the principles set out in the above case may be summarised as a) may fairly and reasonably be considered either arising naturally, ie, 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 both parties, at the time they made the contract, as the probable result of the breach of it. While ordering a retrial of the case in *Hadley v Baxendale,* Alderson B, delivering the judgment for the court, observed as follows:

> "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been

[8] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] 2 Lloyds Rep 555 at 574.

> known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."[9]

In *Victoria Laundry* case[10] the Court of Appeal expressed the opinion that the headnote to *Hadley v Baxendale* was definitely misleading in so far as it stated that the defendant carriers' clerk was told that the mill had stopped and the crank shaft had to be delivered immediately to the repairers. If the court in *Hadley v Baxendale* had actually regarded the facts as having been established, then it was "reasonably plain" from Alderson B's opinion in *Hadley v Baxendale* that it would have decided that case "the other way round."

The charterers in support of their argument that the losses claimed in respect of the Cargill fixture were too remote, sought to place such losses under the second head of the *Hadley v Baxendale* test. Their principle contention being that the Cargill fixture could not have been in the contemplation of the parties at the time of entering into the contract.

The House of Lords in *The Heron II*[11] set out the guidelines on the application of the rule in *Hadley v Baxendale*. Lord Reid in his judgment referring to the test in *Hadley v Baxendale* summarised it as being one where 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."[12]

In *The Achilleas*, the charterers knew that it was very likely that the shipowners had entered into a new fixture upon redelivery of the vessel by them and were fully aware of the volatile chartering market and any effects the redelivery may have on hire rates. The above facts would apparanently fall within the principles laid down in *The Heron II,* as the damages were not too remote to be recoverable and also within the *Hadley v Baxendale* principle.

---

[9] Above n 1, at 355.

[10] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 537 (CA).

[11] *Czarnikow (c) Ltd v Koufos (The Heron II)* [1969] 1 AC 350. It was a case where the charterers successfully claimed damages for late delivery of sugar as a result of breach of obligations on the part of the shipowners. The charterers claimed the difference in the market price of sugar at the time of actual delivery and the higher price the cargo of sugar would have fetched had it arrived in time.

[12] Above n 10, at 391.

While discussing the issue of late redelivery in a time charter Rix LJ had pointed out that it was *The Peonia* that first recognised that damages were indeed available for late delivery upon a legitimate last voyage and that a loss of fixture could only rarely occur.[13] In *The Peonia*, the terms of the charterparty defined the charter period as "about minimum 10 months maximum 12 months time charter. Exact duration in charterers' option. Charterers have further option to complete last voyage". The shipowners treating the final voyage orders as being illegitimate, requested for a revised order, or in the alternative for a higher rate of hire for the duration of the proposed final voyage which fell outside the charter period.[14] The shipowners were constrained to terminate the chartering contract as the charterers refused to go by either of the alternatives and the dispute was referred to arbitration. Both the Commercial Court and the Court of Appeal disagreed with the arbitrators and held that the expression "further option" only related to a legitimate last voyage and that the owners were right in their actions.[15] The Court of Appeal, before reaching the above conclusion, had the occasion to analyse the position at common law and the existing jurisprudence. Earlier, in *The London Explorer* the House of Lords was divided on the issue if it would amount to a breach when the vessel sent out on a legitimate last voyage was unexpectedly delayed beyond the charter's final delivery date.

In *The Baleares*[16] the Court of Appeal, while assessing a claim brought by charterers referred to the factual findings of the arbitrators[17] on the knowledge

[13] "As for the consequences of an illegitimate last voyage, the cases demonstrate that they may vary more widely, and also indicate that, for one reason or another, a loss of fixture claim could rarely occur." Above, n 8, at 566.

[14] The charter period was to expire on 11 June 1988 but in early May the charterers ordered the vessel on a final voyage, which was not expected to be complete before 19 July.

[15] It is to be noted that *The Peonia* did not involve any issue of the loss of any subsequent fixture by the shipowners.

[16] *Geogas SA v Trammos Gas Ltd* [1993] 1 Lloyd's Rep 215 (CA). Here the Court of Appeal upheld the findings of an arbitration tribunal that the shipowners' of a gas carrier were liable for losses suffered by the charterers from forward contracts as a result of late delivery of the vessel which deprived the charterers of buying the requisite quantity of propane needed to service their forward contracts.

[17] Lord Neill delivering judgment observed as follows: "…The arbitrators referred to the fact that a carrier in this specialised trade would know a considerable amount about the pattern of trading of the product which he was carrying. 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 Upjohn…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

that a shipowner may or may not posses about the pattern of trading in specific trades or specific contracts made by the charterers. It is to be noted that in the absence of any error of law, the courts are bound by the factual findings of the arbitrators on remoteness, as illustrated by *The Baleares*. The claims made by the charterers in both *The Heron II* and *The Baleares* relate to losses arising in forward contracts. *The Baleares*, although relevant, was not relied on by the courts.

CONCLUSION

Where charterers redelivered the vessel late, it had been held that in addition to paying hire charges for the extended period of time, the charterers were also required to pay damages to the shipowner which is the difference between the charter rate and the market rate for such extended period if in the event the marke rate was greater. *The Achilleas* presents a scenario where, in the event of the charterers redelivering the vessel late would be liable to pay much more in damages if the ship owner had entered into a new fixture and if it is reasonably foreseeable that such future employment would be compromised by late re-delivery. The above conclusion was reached by the Court of Appeal based on the principles laid down in the earlier cases of *The Heron II* and *The Peonia*.

Earlier, Lord Dennning MR, in *The Dione*, relying on an the decision of the House of Lords,[18] had held that when delays are caused in the legitimate last voyage, due to no fault of the parties, the charterparty would be presumed to be in operation until the end of the final voyage, regardless of the fact it may extend beyond the charter period. He further observed that in such instance the hire payable was only at the charter rate until redelivery, whether the market had gone up or down.

The Court of Appeal in *The Achilleas* did refer to the decision in *The Dione*, in particular to the judgment of Lord Denning MR, before reaching its conclusion. The Court was also quick to point out that it was not until *The Peonia*[19] that it became clear that a legitimate last voyage could result in a breach of contract if it overran the charterparty contract.[20] In contrast the facts

---

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."

[18] *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1971] 1 Lloyd's Rep 523.

[19] Above n 6.

[20] "…it was only finally in 1991 that it became clear that an overrunning legitimate last voyage could result in a breach of contract. Up to then, it had been assumed that only an illegitimate last voyage could amount to a breach of contract." Above n 10, at para 30.

of *The Gregos* presented a completely different picture where the parties entered into a without prejudice agreement to pay a certain amount as compensation for any overrunning of the charterparty terms. One should also bear in mind that there was no claim for loss of any subsequent fixture in issue in *The Peonia*.

Unlike in the case of *The Dione*, the issue before the Court of Appeal in *The Achilleas* was not one to ascertain the legitimacy or otherwise of a last voyage in a time charter, but if the shipowners would be justified and entitled to demand the losses that they may occasion from a lost fixtures in the event a legitimate last voyage overran. On the facts presented, the Court of Appeal had handed down a judgment stating that i. in such instances a shipowner could in fact claim damages relating to loss of fixture, as the charterers knew that ii. it was very likely that the shipowners had entered into a new fixture upon redelivery of the vessel, that the charterers iii. had full knowledge of the volatility of the market and its effect on the hire rates and iv. the damages were, accordingly, not too remote to be recoverable and was within the principle laid down in *Hadley v Baxendale*.

One could argue that the loss would not have been foreseeable in the instant case and the shipowners could not have been successful, but for the shipowners having a safety margin in their contract and the charterers having knowledge of the volatility of the market and the hire rates. The shipowners had, indeed, allowed for a safety margin between the latest possible contractual date for redelivery and the commencement date of the next fixture. The important question that we ask is if the judgment varies the existing law as regards damages for redelivery under a time charterparty? The answer would be in the negative, as it only affirms and adds to the existing authorities on the subject. In all the previous cases it had been held that in the event the vessel was redelivered late, the charterers were liable to pay damages calculated on the difference between the charter rate and the market rate for the extended period, in the event the market rate was higher. Further, the question of loss of future employment of the vessel did not arise in the previous cases.

It is to be noted that the Court of Appeal did not think its judgment would lead to any confusion in the highly commercial shipping industry and made the following observation:

> "Business-like communication and cooperation between parties to a charter ought to make a dangerous mishap an unusual event… It requires extremely volatile conditions to create the situation which occurred here. If the shipping industry nevertheless feels that it cannot live with this result, clauses can be created to regulate the situation:

> just as clauses have come into being to regulate last voyages, such as Baltime Clause 7 and Shelltime 4 Clause 19."[21]

In the light of the observations of the Court of Appeal in *The Achilleas* the time charterers will need to be much more careful in how they word their charterparty contracts and also in complying with their contractual duties as regards redelivery of the vessel to avoid paying out any large sums as damages. Following the judgment, where a shipowner had entered into a new fixture and if it were reasonably foreseeable that the future employment of the vessel would be put at risk by any late redelivery by the charterer, the damages that the charterer might be liable to pay would be much greater. It is the view of the author that this judgment will provide the template for the application of the principle that a shipowner would be within his rights to claim damages for the loss occasioned on the subsequent fixture as a result of late redelivery in a time charterparty.

[21] Above n 8, at 578