The Denning Law Journal Vol 21 2009 pp 173-179

CASE COMMENTARY

REMOTENESS OF CONTRACTUAL DAMAGES

Transfield Shipping Inc v Mercator Shipping Inc (The "Achilleas") [2008] 2 Lloyd's Rep 275

John Halladay[*]

On 9 July 2008, the House of Lords handed down its decision in *Transfield Shipping Inc v Mercator Shipping Inc (The "Achilleas")*.[1] Overturning a series of lower decisions, the House of Lords unanimously decided to restrict the damages available for the breach of a charterparty caused by the late re-delivery of the ship. The case will undoubtedly be important for those in the shipping industry, but will also be important for the development of the doctrine of remoteness of damages in contract law.

FACTS

The Achilleas, a bulk carrier owned by Mercator, was let under a time charter dated 22 January 2003 to Transfield for about five to seven months at a daily hire rate of US$13,500. On 12 September 2003 the parties extended this for a further five to seven months at a daily rate of US$16,750. The latest date for redelivery was 2 May 2004. By April 2004 market rates had more than doubled. Transfield gave notice of redelivery between 30 April and 2 May 2004. Mercator then fixed the vessel for a new four to six month hire to Cargill, following on from the first charter, at a daily rate of US$39,500. The latest date for delivery to Cargill, after which they were entitled to cancel, was 8 May 2004.

With less than a fortnight of the original charter to run, Transfield fixed the vessel under a subcharter to carry coals from Qingdao in China across the Yellow Sea to discharge at two Japanese ports. It was reasonably expected that Transfield could still redeliver by 2 May 2004 and Mercator made no objection. The vessel was unfortunately delayed and was not redelivered to Mercator until 11 May.

[*] Senior Lecturer in Law, University of Buckingham, LLB (Toronto), LLM (Cantab), Barrister and Solicitor, Law Society of Upper Canada.

[1] [2008] UKHL 48; [2008] 2 Lloyd's Rep 275.

By 5 May it had become clear to everyone that the vessel would not be available to Cargill before the cancelling date of 8 May. By that time, rates had fallen again. In return for an extension of the cancellation date to 11 May, Mercator agreed with Cargill to reduce the rate of hire for the new fixture to US$31,500 a day.

Mercator claimed damages for the loss of the difference between the original rate and the reduced rate over the period of the fixture. At US$8,000 a day, the total sum amounted to US$1,364,584.37. Transfield said that Mercator were not entitled to damages calculated by reference to their dealings with the new charterers and that they were entitled only to the difference between the market rate and the charter rate for the nine days during which they were deprived of the use of the ship, which it estimated amounted to a total of US$158,301.17.

HISTORY

The dispute was referred to arbitration. The arbitrators all found that the damage claimed by the owners was of a type not unlikely to occur upon the breach of the contract and therefore fell within the first limb of the test in *Hadley v Baxendale*[2] as arising "naturally, ie according to the usual course of things, from such breach of contract itself".[3] In spite of this, all of the arbitrators found that had anyone in the shipping industry been asked, they would have said that this type of damages was not recoverable. The majority took the view however that, despite the view of the shipping industry , this had no effect on the recoverability of the damages, and therefore found for the claimant.

On appeal from the arbitrators, Christopher Clarke J[4] and the Court of Appeal (Ward, Tuckey and Rix LJJ)[5] upheld the majority decision. Rix LJ observed that in none of the earlier cases was the recoverability of damages for the loss of a subsequent charter actually in issue. The case was therefore to be decided based on *Hadley v Baxendale* principles and he found that "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)."[6] The

[2] (1854) 9 Exch 341.
[3] Ibid, at 354.
[4] [2007] 1 Lloyd's Rep 19.
[5] [2007] 2 Lloyd's Rep 555.
[6] [2007] 2 Lloyds Rep 555, at 574.

Court of Appeal decision was met by much criticism, partially on how the decision was so out of line with the accepted view in the industry.[7]

HOUSE OF LORDS

In the House of Lords, the appeal was allowed and damages were reduced to the difference between the charter rate and the market rate for the period of the delay. The damages for the loss of the subsequent charter were not recoverable as being too remote. There were two different approaches taken by the House in order to reach this result.

Lord Rodger and Baroness Hale took what Baroness Hale called the "narrower ground".[8] Lord Rodger explains:

> "…I am satisfied that, when they entered into the addendum in September 2003, neither party would reasonably have contemplated that an overrun of nine days would "in the ordinary course of things" cause the owners the kind of loss for which they claim damages. That loss was not the "ordinary consequence" of a breach of that kind. It occurred in this case only because of the extremely volatile market conditions which produced both the owners' initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture. Back in September 2003 this loss could not have been reasonably foreseen as being likely to arise out of the delay in question. It was, accordingly, too remote to give rise to a claim for damages for breach of contract."[9]

As this resolved the question on appeal, Lord Rodger and Baroness Hale found it unnecessary to decide on the issues discussed below.

The wider grounds for allowing the appeal are developed by Lord Hoffman, making reference to recent academic literature.[10] While the rule in *Hadley v Baxendale* will be usually be enough, in some cases there will need

---

[7] See J Sundaram "Is the Court of Appeal Decision in the Achilleas Good Law?" [2008] *Denning Law Journal* 187; Weale "Dogs that Didn't Bark" [2008] LMCLQ 6; Halson "Time Charters, Damages and Remoteness" [2008] LCMLQ 119.

[8] [2008] 2 Lloyd's Rep 275, at 293.

[9] [2008] 2 Lloyd's Rep 275, at 286.

[10] In particular A Kramer "An Agreement-Centred Approach to Remoteness and Contract Damages" in Cohen and McKendrick (eds) *Comparative Remedies for Breach of Contract*, (Oxford: Hart Publishing 2005) pp 249-286; Andrew Tettenborn "*Hadley v Baxendale* Foreseeability: a Principle Beyond its Sell-By Date" (2007) 23 *Journal of Contract Law* 120-147; Andrew Robertson "The Basis of the Remoteness Rule in Contract" (2008) 28 *Legal Studies* 172.

to be a further limit on damages. Lord Hoffman states that liability should be based "upon the interpretation of the contract as a whole, construed in its commercial setting"[11] referring to the use of terms implied as a matter of law developed in *Liverpool City Council v Irwin*.[12]

While there will not be much evidence of the commercial setting in most contracts, he suggests that some types of contracts, such as shipping and banking contracts, provide examples where a further limit on damages might be imposed by way of an implied term. Based on this, he finds that in a charterparty, there is an implied term as a matter of law that the loss of profit from a subsequent fixture is not a type of loss being assumed by the charterer.[13]

Lord Hope appears to agree with this approach. He says:

> "The fact that the loss was foreseeable - the kind of result that the parties would have had in mind, as the majority arbitrators put it - is not the test. Greater precision is needed than that. The question is whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility."[14]

Lord Walker's speech does not expressly follow either the narrow view or the wider view although he expressly adopts the reasons given in the speeches of Lord Hoffmann, Lord Hope and Lord Rodger.[15] But in conclusion, his decision returns to the large, unpredictable nature of the damages when he states:

> "But it was contrary to the principle stated in the Victoria Laundry case, and reaffirmed in *The Heron II*, to suppose that the parties were contracting on the basis that the charterers would be liable for any loss, however large, occasioned by a delay in re-delivery in circumstances where the charterers had no knowledge of, or control over, the new fixture entered into by the new owners."[16]

---

[11] [2008] 2 Lloyd's Rep 275, at 278.
[12] [1977] AC 239.
[13] Lord Hoffman draws an analogy with his own speech in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* (sub nom *South Australia Asset Management Corporation v York Montague Ltd*) [1997] AC 191.
[14] [2008] 2 Lloyd's Rep 275, at 282.
[15] Ironically Lord Walker impliedly criticises the decision in *The Heron II* for the same reason. He states: "The House's decision was unanimous but each member of the Appellate Committee gave a full opinion, and unfortunately none of them in terms expressed either agreement or disagreement with any of the others."
[16] [2008] 2 Lloyd's Rep 275, at 292.

DISCUSSION

(a) The narrow approach

The narrow approach taken by Lords Rodger and Walker and Baroness Hale appears to be in line with the decision in *Victoria Laundry v Newman.*[17] In *Victoria Laundry*, a distinction is made between the ordinary profits made in the usual course of things and the extraordinary profits that would have been earned under a government contract. The type of liability, lost profits, is within the contemplation of the parties when they make their contract. But at some point the loss becomes sufficiently large so as to make it of a type that goes beyond their contemplation.

In *The Achilleas*, the large fluctuations in the market result in the loss suffered on the subsequent charter being much greater than anticipated. This results in the damages being of a type not contemplated by the parties when the contract is made. There is therefore a well-established basis for reaching a decision based on these grounds.

But this approach does operate in a state of tension with the general principle that the remoteness test limits the type of damage but not their extent.[18] It creates an uncertain line as to when the extent of the damages makes them a different type of loss. Would there be a different decision if the change in the market was only slight so that the lost charter resulted in only slightly higher damages?

There is also a concern as to whether this is the correct approach to be taking to this case. Is the understanding of the shipping community that damages are not to include such losses irrelevant? It may be that Lord Hoffman is correct and that a broader view is required on these facts.

(b) The broader approach

The broader view is that this type of damage is not recoverable because in this type of contract, there is an implied term that these damages have not been assumed by the defendant. This type of approach is attractive as it resolves a number of questions created by a test which only uses *Hadley v Baxendale* principles. In the classic example of hiring a cab to take you to an

---

[17] [1949] 2 KB 528.

[18] *In C Czarnikow Ltd v Koufos* (The Heron II) [1969] 1 AC 350, there was a rise in the sugar market which was found to be not too remote. In *Seven Seas Properties v Al-Essa* [1993] 1WLR 1083, a large profit made by flipping the property to a second buyer was not "signalised" and was therefore too remote.

important meeting, no matter how much the cab driver is contemplating your loss,[19] he will not be liable for the loss you have suffered by missing the meeting. Lord Hoffman would say that in this type of contract, it is implied that the cab driver is not assuming liability for that type of loss.

The approach taken by Lord Hoffman does raise at least two questions. The first question relates to the burden of proof. Is it up to the defendant to prove it did not assume liability for the type of loss or up to the claimant to prove that it did assume liability. Lord Hoffman appears to be taking the approach that it is up to the claimant to show that there is an implied term whereby the defendant assumed liability.[20] But if this is what Lord Hoffman is arguing, he would not appear to have the support of Lord Walker.[21]

The second question is the process of implying a term as a matter of law in this type of situation. It is clear that this term is being implied into the particular type of contract. It is less clear whether this implication comes from the shared view of the industry or whether it comes from the need to avoid the uncertainty the defendant would face if this type of contract exposed it to this type of liability. It may be that a number of considerations can be taken into account when deciding whether to imply such a term.

COMMENT

By approaching remoteness as a term implied by law, Lord Hoffman has potentially found a new approach for remoteness and also many other doctrines of contract law. They all can be treated as a type of term implied by law. The great advantage of this approach is that you are not seeking to find what the parties would have said, but rather involve the court in trying to find the ideal default position for that type of contract. This will have to take into account what most parties would have said in the circumstances, but need not put words into the mouth of the particular parties. Hopefully it will try to find not only a reasonable position, but also try to find the most useful position for the type of contract. The ideas of the industry will be relevant to finding a useful default position. It might also take into account ideas of proportionality, risk allocation and insurance. The overall effort should be a pragmatic one, striving to find the position which is most useful to parties

[19] For instance because you have told him directly.

[20] [2008] 2 Lloyd's Rep 275, at 278. He makes the point that this is consistent with his approach in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* (sub nom *South Australia Asset Management Corporation v York Montague Ltd)* [1997] AC 191.

[21] He appears to reject the need to imply a term to create liability at para 68, following Lord Upjohn in *The Heron II.*

who wish to contract and which could be safely predicted at the time of the making of the contract.

The Achilleas potentially opens the door for a greater use of terms implied by law to resolve difficulties in general contract doctrines. It allows for the consideration of factors applying to a type of contract rather than making do with a single doctrine to fit all types of contracts. We will now see if future courts take advantage of that potential.