

“ACHILLEAS”

Return to the market rules

After a period of market uncertainty the House of Lords has unanimously reversed the majority arbitrators, the Commercial Court and the Court of Appeal and upheld the minority dissenting Arbitrator, Mr. Christopher Moss.

The earlier decisions had complicated the assessment of Owners' losses on a late redelivery. This has led to delay and costs in resolving some redelivery disputes. The House of Lords' decision, therefore, should be welcomed as it reinforces market certainty and clarifies the assessment of damages for breach of contract.

The Owners claimed that the nine days late redelivery of the “ACHILLEAS” forced them to reduce hire by US\$8,000 per day on their subsequent fixture, giving a loss of US\$1,364,584.37. They said that the general understanding in the industry that liability was limited to the market rule was irrelevant, and that the “not unlikely”¹ result of a late redelivery would include missing dates for a subsequent fixture, a dry docking or the sale of the Vessel.

The Charterers argued that the market rule should prevail and that the loss should be the difference between the market rate and the charter rate for the overrun giving a claim of US\$158,301.17.

Lord Hoffman, who gave the lead opinion said:-

“The case therefore raises a fundamental point of principle in the law of contractual damages: is the rule that a party may recover losses which were foreseeable (“not unlikely”) an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a prima facie assumption about what the parties may be taken to have intended, no doubt applicable in a great majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not

¹ Per Lord Reid *the “Heron II”* [1967] 2 Lloyd's Rep 457 at 462

reasonably have been regarded as assuming responsibility for such loss?"

In other words, as a matter of principle, in order to know where to draw the line, the Court has to look at what risk a party would reasonably have assumed at the time of making the contract. While this could create problems of assessment, Lord Hoffman considered that there would be general expectations in markets such as shipping and banking which would assist in deciding what limitations should be imposed on a claim for damages.

In the case of the "ACHILLEAS" there was a substantial difference between the Owners' and the Charterers' assessment of the loss. Given the volatility of the market this could have been even higher. A delay of nine days, or even less, which led to the cancellation of a sale of the ship where the market had fallen substantially created, potentially, massive damages. This has now been resolved.

Lord Hoffman said the starting point for assessing damages was to decide:-

"whether the loss for which compensation is sought is of a "kind" or "type" for which the contract breaker ought fairly to be taken to have accepted responsibility".

The key point, therefore, is what the contracting party would have reasonably regarded as significant for the purposes of the risk he was undertaking. The Charterers would have no idea about what the Owners were proposing to do with their ship after the termination of the Charterparty, even though they would know that the likelihood was that it would be fixed elsewhere. Therefore the Charterers would not assume responsibility for any or all losses suffered by the Owners in their subsequent fixtures.

Lord Hoffman pointed out that the Owners were at liberty to refuse an order that was likely to take the ship beyond its redelivery date and that this shows that the purpose of the redelivery provision in the Charterparty was to enable the ship to be at the Owners' disposal from the agreed redelivery time. If the orders are accepted then the Owner is entitled to be paid for the overrun at the market rate.

Lord Hope agreed with the minority arbitrator who had pointed out that a party cannot be expected to assume responsibility for something he

cannot control and which he cannot quantify because he does not know anything about it.

Lord Rodger considered that when the "ACHILLEAS" Charterparty was extended neither Owners or Charterers would reasonably have contemplated that an overrun of nine days would, in the "ordinary course of things"², cause the Owners the loss which they claimed. This meant that the loss was not an "ordinary consequence"³ of the breach. In the case of the "ACHILLEAS" it was the extremely volatile market conditions which produced a particularly lucrative follow-on fixture and subsequently the pressure to re-negotiate the rate downwards. It was not a loss which would have been reasonably foreseen as being likely to arise out of the delay when the Charterparty was extended. Baroness Hale agreed with Lord Rodger.

Lord Walker considered, in some detail, the decision in the "HERON II" where the test of foreseeability was variously described as "real danger", "seriously possibility" and "not unlikely". Lord Walker said:-

"It was not simply a question of probability. It is also a question of what the contracting parties must be taken to have had in mind, having regard to the nature and object of their business transaction."

So the House of Lords has affirmed that, in the case of shipping at least, the loss a Charterer would normally be expected to assume when chartering a Vessel is based on the market rule.

It remains to be seen whether the earlier decisions in the "ACHILLEAS" have affected the market expectation for fixtures made after the Commercial Court judgment. Hopefully, in those circumstances, Charterers have protected themselves by inserting a provision in their charterparties limiting losses to the market rule. Following the House of Lords' decision that protection appears to be no longer necessary although a prudent Charterer might still want it.

Swinnerton Moore were instructed on behalf of the Appellant Charterers by Consult Marine. Dominic Kendrick QC was briefed on the appeals and led Ben Parker in the House of Lords.

² Per Asquith LJ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539-540

³ Per Wiles J *Horne v Midland Railway Co* [1872] LR 7 CP 583 at 590