

LATE REDELIVERY: MARKET LOSS AND SPECIAL LOSS AFTER THE HOUSE OF LORDS' JUDGMENT IN THE ACHILLEAS¹

Background

1. Late redelivery claims are part of the staple fare of commercial arbitration. In the **Gregos** Lord Mustill identified why this is so:

“Ships do not run precisely to time. The most prudent schedule may be disrupted by regular hazards such as adverse weather or delays in port happening in an unexpected manner or degree or by the intervention of wholly adventitious events²”.

In addition, commercial demands “*encourage the planning and performance of voyages to the tightest of margins³”.*

2. Most of these cases were focused on liability⁴, but they contain a recurrent obiter theme as to the measure of damages for which the Charterer is liable: in a sense they had to do so, since a party is never simply liable in the abstract, but always liable for something. That ‘something’ was repeatedly identified in the cases and recorded in the textbooks. For example in the **Peonia** [1991] 1 LLR 100, Bingham LJ stated with confidence that in a late redelivery case the shipowner

“is entitled to payment of hire at the charter-party rate until redelivery of the vessel, and (provided he does not waive the charterer’s breach) to damages (being the difference between the charter rate and the market rate if the market rate is higher than the charter rate) for the period between the final terminal date and redelivery”⁵.

¹ [2008] UKHL 48

² [1995] 1 LLR 1, 4

³ *ibid*

⁴ For example, what are the principles to determine the last permissible date for redelivery; to what extent is the Charterer was liable in damages for late redelivery due to what could loosely be called misfortune risks; is the legitimacy of a Charters’ order for a last voyage to be judged at the time when the order was given or at the later time when the voyage is to start; what are the legal consequences of late redelivery.

⁵ Other cases include the **Dione** [1975] 1 LLR 117, the **Johnny** [1977] 2 LLR 1, the **Black Falcon** [1991] 1 LLR 77 and the **Gregos** [1993] 2 LLR 335 (overruled but not on this point).

3. The question of law in the **ACHILLEAS** was whether this measure of loss was the right measure in the ordinary case of late redelivery.
4. The essential facts were as follows. A ship was time chartered at a rate of \$16,750 per day. Under the charterparty the ship should have been redelivered by midnight on 2nd May 2004. But the ship was delayed on her last voyage and she was not redelivered until 0815 on 11th May. So there was a late redelivery of about 9 days. There was no finding of fact that the order to proceed on the last voyage was 'illegitimate' when given, or when the last voyage started. On the decided cases, there had been a breach of charter in redelivering late, because the Charterers took the 'misfortune' risk⁶.

The Arbitration

5. There was no argument on liability at the arbitration, but the Arbitrators were presented with two alternative measures of damages:
 - a) *The market measure.* The conventional measure for loss of use applied the difference between contract and market rate to the nine day period of overrun. This produced an agreed figure for damages of \$158,301. This was what the minority arbitrator, Mr Moss, wished to award.
 - b) *The particular loss of profit.* The loss of profit measure was based on the difference between the earnings on the Owner's lost follow-on fixture for 4-6 months (not performed due to the delay), and the Owners' actual earnings for the whole of the actual next charter period. This calculation was made unusually easy because the Owners had re-fixed with the same original charterer for the same period on the same terms save as to rate. The calculation for loss over the 192 day period actually performed⁷ produced an agreed figure of \$1,364,584.

⁶ See the **Gregos** [1995] 1 LLR 1 and the **Peonia** [1991] 1 LLR 100

⁷ Ironically, the next actual charter appears also to have overrun, and so the loss of profit period was taken as 192 days.

6. The majority held that the loss of profit measure was the correct measure in law, even though Charterers knew none of the terms of the next follow on charterparty at any relevant time.
7. Accordingly, the Owners were awarded \$1,364,584 for a nine day delay. This equates to around \$150,000 or more per day of breach. From one perspective, this made the nine day delay the most profitable earning period that the ship had ever known in its life. From another, this was fair recompense for real loss.

The competing policy considerations

For charterers

8. On a 'merits' approach, Charterers could argue that if the Award stood, it meant that a ship which is only slightly late – say 3 days - could have damages assessed by the loss of profit on a 1 year charterparty. Yet the charterer would know nothing of the details of the next follow-on fixture. The punishment does not fit the crime. Oddly, a 3 week delay might lead to exactly the same loss as a 3 day delay. In all ordinary deprivation of use claims, the loss stops when the chattel was restored in good condition to the claimant: here that did nothing to staunch the loss. It should be the Owner's independent speculation what he does with the ship after redelivery, and his decision should not increase or reduce the damages.
9. Furthermore:
 - a) The loss of use measure is simple, certain and well understood. It is a fair, if rough and ready, tariff which does broad justice in the great majority of cases.
 - b) The loss of profit analysis is complex. For example, why make the assessment at the end of the lost follow on fixture? The actual

replacement fixture could lead to the ship being redelivered in a better place for her future employment, or at a better time, freight wise.

- c) There is more than one charter market. There are voyage/time trip/ medium time/ long term time/ and possibly even demise markets. While the charterer can certainly foresee that the shipowner will choose to put the ship on one of these markets, he does not when the follow-on fixture will be made, or for how long, and the charterer should not have to pay damages unless he has consented to the risk of loss on that particular market.
- d) The parties contracted against a market expectation that the loss of use measure was the correct one. If Owners had wanted Charterers to pay by reference to a loss of profit measure they should have made it clear beforehand that they wanted Charterers to assume that risk, so that Charterers had a chance to exclude it.

For Owners

10. Owners could argue:

- a) They suffered a real loss through the late redelivery. Why should they bear most of that loss and not the guilty party?
- b) The Charterers know that a follow-on fixture will be made of some type. Unless the follow on fixture is extravagant or unusual (in which case it will be unforeseeable), Charterers should be contemplating that loss of profit, as a type of loss, will occur. Once the type of loss is foreseeable, the law has never required that the extent to the loss also be foreseeable.
- c) Charterers have had the use of the vessel in a rising market and have squeezed an illegitimate voyage in, and by so doing have deprived

Owners from participating in that rising market. So justice requires Charterers should pay.

- d) Once it is shown that the decided cases had not been addressing a loss of particular profit claim, they should be disregarded and the case decided on the basis of the fundamental principle enshrined in **Hadley v Baxendale/Heron II**.

The Court of Appeal Judgment

- 11. The Court upheld the conclusion of the majority Arbitrators.
 - a) In no reported claim had there been a claim based on loss of profit on a particular follow-on charterparty. So it was necessary to set to one side the earlier authorities and apply the **Hadley v Baxendale**, and **Heron II** test of what was in the reasonable contemplation of the parties.
 - b) Any charterer knows that it is 'not unlikely' in the ordinary course that the shipowner will conclude his next fixture before actual redelivery on the existing charterparty occurs. In this case, the next fixture was made the day after the Charterers gave their redelivery notice. If redelivery is late so that the Owners miss their next fixture, the Charterers have caused the Owners to suffer a particular loss in the form of the difference between what the Owners would have received over the length of their planned follow-on fixture, compared to what they in fact receive over that same period.
 - c) The particular loss was the product of an unusually volatile market. But once the kind of loss is foreseen, the extent of loss is recoverable, unless it is so extreme as to amount to an unusual or extravagant bargain.
 - d) Further, there is great force in the argument that redelivery should be treated as an exceptional situation where there is no market, because

- e) This is not a case where it is necessary for the Owners to show that the Charterers had assumed responsibility for the particular type of loss claimed by reference to the Owners' next fixture as opposed to a market measure. That doctrine only applies where relevant information amounting to special knowledge has come to the defendant casually from a third party
 - f) The arguments on practicality deserve serious consideration. However, this is an area where the law ought to be allowed to develop.
12. Rix LJ suggested that the correct measure was a hybrid measure (at paragraphs [106]–[108], [111]–[112]). This involved taking the length of the particular lost follow-on contract, but applying the market rate at the due date of redelivery to that length. He also suggested that the length of the expiring charter could arbitrarily be taken as a “*rule of thumb*” to cap the period over which damages are calculated on the particular contract measure. Finally he suggested that if there were a consistently rising market, and so the particular profit claim would give the Owners no loss, the Owners could elect to make a market measure claim.

What did House of Lords decide in the Achilles?

13. On the simplest level, the market rule (contract versus market for the overrun period) applies to late delivery absent special circumstances. The reasoning is also likely to apply to other well established ‘rules of thumb’ which have been consistently applied in recurrent situations.
14. Damages are not automatically controlled by the **Hadley v Baxendale/Heron II** test of ‘not unlikely’. It is not simply a question of probability. There is an initial question of what the parties are to be taken to have assumed liability for.

Or put another way, what they should be taken to have in mind, having regard to the nature and object of their business transaction.

15. A party is still liable for damages referable to a foreseeable 'kind' of loss, even if the loss is greater than anticipated (see the **Rio Claro**). But the definition or classification of the kind of loss depends upon the contractual context and the objectively deduced expectations of the parties.
16. The root question is that set out in the **Pegase**: would the Defendant have contemplated that in the event of breach, the facts in question would be taken into account when considering his responsibility for loss suffered as a result of breach. This is a wider question than simply 'what is not unlikely/ liable to happen?'
17. On the facts found by the arbitrators, there was no assumption of responsibility, and no expectation that the Charterers would be liable for any loss, however large, created by late redelivery when the Charterers had no knowledge of or control over the new fixture made by the Owners.

Can an owner now recover damages by reference to a lost fixture rather than the market measure in any circumstances?

18. The main factual possibilities seem to be as follows:
 - a) A charterer dishonestly gives an illegitimate last voyage order, representing in bad faith that the voyage will be completed before the redelivery date. If the owner relies on it the charterer is liable for all loss on the deceit measure of damages. Remoteness will not apply and there is a relaxed test of causation, so that loss by reference to a particular fixture could be claimed.
 - b) A charterer in good faith gives a last voyage order which cannot reasonably be completed before the due date for redelivery. This is an illegitimate order which the owner is entitled to refuse. If the owner

complies, he is entitled to damages on the market measure: see *The Dione* [1975] 1 Lloyd's Rep. 115.

- c) After a proper last voyage order has been given, but before that voyage is actually commenced, new facts arise which mean that the date of actual redelivery will be after the terminal date of the charterparty. The owner does not have to perform the voyage and if the charterer persists in the order, the owner is entitled to terminate the contract on the grounds of anticipatory breach. If, by contrast, the owner elects to perform the voyage he is entitled to market measure damages only: see *The Gregos* [1995] 1 Lloyd's Rep. 1.
- d) A proper (*i.e.*, legitimate) order is given and accepted, but due to misfortune occurring on the final voyage the vessel is redelivered late. Here, market measure damages alone are payable: see the **Achilleas**, itself, endorsing *The Peonia* [1991] 1 Lloyd's Rep. 100 etc.

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