References as below for class on Nov. 20, 2024:

Remoteness of Damage

Hadley v Baxendale, HL1854

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd, CA1949

H. Parsons (Livestock) Ltd v Uttley Ingham Co Ltd, CA1978

average, in maritime law, loss or damage, less than total (loss), to maritime property (a ship or its cargo), caused by the perils of the sea. An average may be particular or general. A particular average is one that is borne by the owner of the lost or damaged property (unless he was insured against the risk). A general average is one that is borne in common by the owners of all the property engaged in the venture.

Sylvia Shipping v. Progress Bulk Carriers

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Sylvia Shipping v. Progress Bulk Carriers

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DMC/SandT/10/14

English High Court

Sylvia Shipping Co Limited v Progress Bulk Carriers Limited [2010] EWHC 542 (Comm):

English High Court of Justice - Commercial Court; Hamblen J.; 18 March 2010

John Passmore, instructed by Jackson Parton, for the Appellant, Sylvia Shipping

Chirag Karia, instructed by Marine Law, for the Respondent, Progress Bulk Carriers

ARBITRATION APPEAL: TIMECHARTERPARTY: MEASURE OF DAMAGES FOR OWNERS' BREACH: WHETHER OWNERS LIABLE FOR TIMECHARTERERS' LOSS OF PROFIT ON CANCELLED SUB-CHARTER

Summary

The issue in this case was whether time-charterers could recover as damages for owners' breach of the charterparty maintenance clause the profits lost on a sub-charter fixture that was cancelled when repairs to the vessel rendered her late in presenting.

The classic or orthodox test for remoteness of loss will apply in the great majority of cases. Only in unusual cases, such as The Achilleas, where the context, surrounding circumstances or general market expectations make it necessary, will an inquiry be made as to whether or not a party has assumed responsibility for losses of the kind suffered by the innocent party. In this case, the Tribunal correctly concluded that the loss was not too remote. They applied the right test of remoteness by asking whether the loss claimed was of a kind which would have been within the reasonable contemplation of the parties at the time the contract was made as not unlikely to result. Further, it was reasonable to conclude that it would be well within the reasonable contemplation of a shipowner that delay of significance in arriving or being ready to load at the designated load port might result in the loss of a sub-charter and consequent loss of profit on that fixture.

Case note contributed by Sandra Healy, Counsel at Stone Chambers, Gray's Inn, London

Facts

By a period time charterparty on an amended NYPE (1946) form dated 22 February 2000 ("the Charter") the Claimants ("Owners") chartered the m/v "SYLVIA" ("the Vessel") to the Respondents ("Charterers"). The Vessel was a single deck bulk carrier of 22,525mt dwt, with 5 holds, built in 1981.

On 30 March 2004, Charterers entered into a sub-voyage charter with Conagra Trade Group Inc ("Conagra") for the carriage of a cargo of wheat from Baie Comeau to Casablanca, with a laycan spread of 14-22 April 2004. On 13 April 2004, Charterers declared the next loadport as Baie Comeau.

Following some problems with the state of the Vessel's holds at the previous port of discharge, on 19 April 2004, the Vessel arrived at Baie Comeau. The holds were inspected by Port State Control, who issued a detention order at 1500hrs that day due to violation of section 19 of SOLAS, recording "Main Structure wasted in cargo holds Nos 1, 3 and 4". Repairs were commenced on 22 April 2004.

However, on the same day, Conagra cancelled the sub-charter. On 23 April 2004 Charterers entered into a substitute fixture for the Vessel with York Ltd (“York”) for one time-charter trip to Lomé with delivery passing Baie Comeau anchorage outbound between 29 April and 3 May 2004.

Various claims and counterclaims were made in arbitration proceedings. The Tribunal (consisting of Messrs Alan Oakley and William Wingate) found that Owners had failed to exercise due diligence and were in breach of their contractual maintenance obligations. In relation to damages, the Tribunal found that the damages associated with the loss of the Conagra sub-charter were “forseeable” and “within the first limb of “Baxendale””.

As for quantum, the Tribunal awarded Charterers USD273,706, being the difference between the Conagra charter daily rate and the York charter daily rate for the period of the Conagra charter.

Owners appealed in respect of questions of law.

Issues

The essential issue was this: What is the proper approach to damages in this context and, in particular, are damages based on the loss of a sub-fixture too remote in law.

Owners contended that damages based on the loss of the sub-charter were too remote in law and that the recoverable damages were limited to the difference between the charter rate and the market rate during the period of delay. Owners relied on the House of Lords decision in Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48.

Judgment

Mr Justice Hamblen took the opportunity to consider and set out the basic principles of and the recent developments in relation to the law on remoteness of damages in contract. He started with the classic statements of the law in the cases of Hadley v Baxendale (1854) 9 Ex 341 and Czarnikow v Koufos (The “Heron II”) [1969] 1 AC 350 summarising the accepted test for remoteness as being “whether the loss claimed was of a kind or type which it would have been within the reasonable contemplation of the parties at the time that the contract was made as being not unlikely to result.”

Hamblen J then considered the impact of the recent House of Lord decision in The Achilleas. He considered the various speeches in the House of Lords and the two approaches to remoteness which can be distilled from those speeches, namely, the orthodox approach, based on the classic statements in Hadley v Baxendale and The “Heron II” and the broader approach, which requires an assessment of whether the loss was a type of loss for which the party in breach can reasonably be assumed to have assumed responsibility. Hamblen J concluded that the orthodox approach remains the general test of remoteness in the great majority of cases, but that there may be “unusual” cases, such as The Achilleas, in which the “context, surrounding circumstances or general understanding in the relevant market” make it necessary specifically to consider whether

there has been an assumption of responsibility. He also found that, in the great majority of cases, it will not be necessary to address specifically the issue of assumption of responsibility because usually, the fact that the type of loss arises in the ordinary course of things or out of special known circumstances will carry with it the necessary assumption of responsibility.

As for the Tribunal's conclusion on remoteness, Hamblen J found that there was no error of law disclosed by the Tribunal in directing themselves by reference to the first limb of Hadley v Baxendale, unless they were further required specifically to consider the question of assumption of responsibility. Hamblen J did not consider that this was one of those "unusual" cases bringing the assumption of responsibility test.

Owners contended that the Tribunal's decision was wrong in law because the case could not be distinguished from The Achilleas. Hamblen J decided that the present case did not contain the "unusual" circumstances that were present in The Achilleas and, in fact, there were a number of important distinguishing features between the two cases. These were:

• Firstly, there was no finding in the present case of a general market understanding or expectation that damages for delay during the currency of a time-charterparty are limited to the difference between charter and market rates for the period of delay. • Secondly, this was not a case in which it could be said that the resulting liability was likely to be unquantifiable, unpredictable, uncontrollable or disproportionate. Unlike follow-on fixtures, which could be for any period of time, a sub-charter is limited to the period of the head charter. • Thirdly, the Tribunal found that the parties would reasonably have contemplated that a delay in providing the Vessel's services during the course of Charter would, in the ordinary course of things, cause Charterers the kind of loss for which they claimed damages. This may be contrasted with the speech of Lord Rodger – on which Owners placed reliance – who, in the case of the Achilleas, found that, "…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…It occurred in this case only because of the extremely volatile market conditions…"

Hamblen J found that there was nothing surprising in the Tribunal's factual finding that the loss was a kind which arises naturally in the ordinary course of things, He reasoned as follows: "…A vessel is chartered in order to be traded… Trading will frequently involve sub-letting, and time-charters will include express liberty so to do. The trading of the vessel will often involve fixtures for the carriage of specific cargoes, usually by voyage charter but sometimes by time charter trip. The lifting of such cargoes under the charter will almost invariable involve a laycan or a cancelling date… As such, one would expect it to be well within the reasonable contemplation of an owner that delay of significance in arriving or being ready to load at the designated load port may result in the loss of a fixture, as the Tribunal found. If so, lost profit on such a fixture would equally be well within their reasonable contemplation."

Accordingly, Owners' appeal was dismissed.

Comment

At first blush it might seem that Hamblen J's decision is difficult to reconcile with The Achilleas. The situation is not helped by the different reasoning given by each of the judges in the House of Lords case. In the present case, it was decided that Charterers were entitled to damages for lost profit on a fixture lost as a result of a delay caused by Owners' breach of charter. Yet, in The Achilleas, where Owners claimed damages for lost profit on a lost fixture as a result of Charterers' late re-delivery, it was decided that they were not entitled to that lost profit. Owners may well be asking whether there is really a material difference between these two situations. The answer is "yes".

Upon a closer reading of the two cases it is clear that there are material differences between the two situations, not least of all the fact that in the present case it could not be said, as it could in The Achilleas, that there was a general market expectation that Charterers would not be entitled to lost profit. It is easy to see why the market expectation is as the case law has found it to be; surely it is only right that a limit is placed on the damages recoverable in circumstances where the potential loss of profit on a following time charter is completely unquantifiable as it could be for any length of time. This may be contrasted with the situation in the present case where the profit lost on the sub-charter was always going to have a limit because the sub-charter could not extend beyond the period of the head charter.

Hamblen J's decision is also supported by the leading textbook in this field. In Time Charters (6th ed. 2008) at para. 4.87 (quoted at para. 64 of Hamblen J's judgment) the authors state: "Where the owners are guilty of only a temporary failure to provide the charterers with the ship's services, ordinary rules of contractual damages apply to the assessment of the charterers' loss. The charterers are entitled to compensation to place them, as far as possible, in the position in which they would have been if there has been no breach of charter. The charterers can usually recover (so long as care is taken to avoid double-counting): (a) expenses thrown away during the period in which they are deprived of the ship's services; (b) loss of profits that they would have earned during the same period; and (c) any consequential loss of profits during the period following the ship's return to their service: The Derby [1984] 1 Lloyd's Rep. 635 , per Hobhouse,J., at page 644 (the case went to the Court of Appeal but on other issues; [1985] 2 Lloyd's Rep. 325). So, for example, the charterers may be entitled to recover the profit that they would have made on a lost sub-fixture: see, for example, the same case at page 643…"