"THE GLORY WEALTH"

- 1) ASSESSMENT OF DAMAGES [2013]
- 2) WHOSE LOSS IS IT ANYWAY? [2016]

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FACTS

- COA for carriage of 6 cargoes of coal in 2009, 2010 and 2011
- Collapse in market in late 2008, Charterers unable to nominate cargo, Owners insolvent by 2009.
- Two separate LMAA awards, one deals with breach in relation to 2009 and 2010 shipments, other award deals with 2011
- Two separate appeals both decided by Teare J

FACTS OF FIRST APPEAL
FLAME SA V GLORY WEALTH
[2013] EWHC 3153 (COMM)

- Owners named as "*disponent owner of the Glory Wealth to be nominated motorship*"
- Charterers failed to declare laycan for 5th & 6th cargo in 2009 & all in 2010
- Owners accepted each failure as repudiatory breach.
- Loss of revenue for shipments was $5.4m due to market collapse (difference contract/market freight)
- Charterers alleged that right to damages not proven since Owners would have been incapable of performing COA.

TRIBUNAL'S DECISION

- Charterers were in actual repudiatory breach
- Appeal 1) Tribunal rejected submission that Owners must prove that they would have been able to perform voyages by going into market and chartering vessel at relevant time. Tribunal relied on Treitel.
- Appeal 2) Anyway, Owners only obliged to nominate vessel to carry cargo, not to charter vessels. Owners would have been able to perform.
- Owners entitled to damages of $5.4m based on difference contract/ market freight rates.

JUDGMENT OF TEARE J ON S69 - & S68 CHALLENGE

- 1st QUESTION: Tribunal made an error of law in finding that it was not open to Charterers as contract breakers to allege that in proving damages Owners were bound to prove that they would have been able to perform the charter if it had not been repudiated.

- 2nd QUESTION: Tribunal had not made error in concluding that Owners would have been able to perform so award upheld and no need for remission.

- Section 68 challenged rejected.

THE BASIC REASONING

- THE COMPENSATORY PRINCIPLE –damages should be assessed to ensure that innocent party is placed in the same position as if contract had been performed but not in a better position.

- To assess damage it is necessary to assume that contract breaker performed but not necessary to assume that innocent party would have performed, otherwise there may be a windfall.

- Did the authorities preclude the application of the compensatory principle? No.

  Based on survey of 14 most important cases.

ESTABLISHES GENERAL PRINCIPLE APPLICABLE TO ALL CONTRACTS

To recover damages for repudiatory breach an innocent party must show that, had there been no repudiation, it would have been able to perform its obligations under the contract. There is no assumption that the innocent party would have been able to perform.

WHAT DIFFERENCE DOES IT MAKE?

- Extends scope of *The Golden Victory* [2007]
- Innocent party's right to damages for repudiatory breach depends on proving further element that may previously have been assumed.

WAS THERE A CLASH OF PRINCIPLES? IS THE ISSUE QUANTUM OR LIABILITY?

- COMPENSATORY PRINCIPLE – DAMAGES TO PLACE INNNOCENT PARTY IN SAME POSITION AS IF CONTRACT PERFORMED.

- THE PRINCIPLE THAT THE EFFECT OF AN ACCEPTED REPUDIATION IS TO EXCUSE THE INNOCENT PARTY FROM ITS OBLIGATIONS TO PERFORM.

  - This principle still applies but it goes to establishing liability (not to the quantum of damages).

  - Logical fallacy to apply that rule in establishing the quantum of damages since compensatory principle requires investigation of what would have happened if contract performed.

  - Distinguishes *Braithwaite , British & Beningtons v NW Cachar Tea*.

PRACTICAL CONSEQUENCES

- Where case of actual breach – innocent party needs to prove that it was able to perform in order to justify recovery of damages.
- What needs to be pleaded and proven? Ordinarily loss can be pleaded as usual. But contingencies will need to be dealt with, e.g. if claimant has become insolvent.
- Unlikely to cause uncertainty as to outcome in ordinary case.
- Same approach likely to apply where breach is an anticipatory repudiatory breach because *The Mihalis Angelos* and *The Golden Victory* covered this.

FACTS OF SECOND APPEAL GLORY WEALTH V FLAME SA [2016] EWHC 293 (COMM)

- Charterers failed to nominate cargoes for 2011.
- Due to financial difficulties Owners tried to protect assets from Rule B attachments by using two companies (E and F) owned by its directors, to receive all inward freight earned under the COA and pay all outgoing freight/hire.
- Purpose of arrangement was to protect funds so that claims could not be enforced.
- Arrangement was not disclosed in Singapore insolvency.
- Charterers argued that Owners suffered no loss at all and that COA was unenforceable for illegality.
- Owners argued that loss suffered as E and F held freight as its agent and that anyway as matter of law they suffered a loss.

OWNERS' CONDUCT IN ARBITRATION

- Owners had failed to disclose relevant documents.
- Owners knew its disclosure obligations but had decided not to comply with the Tribunal's orders.
- Its director's evidence on financial matters lacked credibility.

TRIBUNAL'S FINDINGS

- There was turpitude on Owners' part but did not invalidate COA.
- On the facts there was no agency arrangement with E and F.
- Right to receive incoming freight worth about $3m in profit.
- Charterers' breach deprived Owners of the right to receive the funds but this was not sufficient to establish a loss [WENT ON APPEAL].
- Owners would never have received the freight even if the contract had been performed (i.e. applying compensatory principle).
- No damages awarded.

TEARE J'S DECISION ON APPEAL

- Tribunal wrong to find no loss suffered by being deprived of right to receive freight.
- The right to receive freight had value and the fact that Owners would have directed that it be paid to E and F does not as a matter of law lead to the conclusion that no loss was suffered by reason of Charterers' breach.
- Owners' freight arrangement amounted to dishonest concealment. Owners also dishonest in arbitration.
- However, these did not affect the outcome on the question of law.
- Award set aside and substituted with award in Owners' favour for US$3 million.
- Permission to appeal to Court of Appeal but case settled.

REASONING

- The right to receive the freight was worth $3m and was not rendered worthless because Owners had decided that freight be transferred to someone else and that someone else would "own" the freight.
- One limb of right to receive freight is right to receive payment but another limb is the right to give it away. If Owners had arranged for the freight to be paid to charity or their bankers could it be said that no loss suffered if charterers defaulted?
- Court reluctant to treat the finding of no loss as a finding of fact, finding was a conclusion of law.

IMPLICATIONS

- Unattractive that Owners can have it both ways – can claim no ownership of freight in order to avoid enforcement but at same time claim that loss suffered. Could be said to run counter to compensatory principle but should contract breaker go free?

- Will be fact sensitive when case applied in future.

- Maybe tribunals could impose more sanctions for dishonest conduct in arbitration? – peremptory orders precluding claim?

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