

## DAMAGES – WHEN THE MARKETS TUMBLED

By

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The volatility of the freight markets following the economic downturn of late 2008 was always likely to lead to disputes as to the manner in which damages are to be calculated when contracts are brought to a premature conclusion. Since 2010 a number of such cases that have been in arbitration have reached the English courts and the judgments handed down provide a valuable insight to the approach to be adopted in such cases. Each case had its own particular (and sometimes peculiar) facts but a thread of consistency in the approach to the calculation of damages is to be found in each judgment.

Before considering these recent cases, it is worth briefly reviewing the starting point for the calculation of damages. Two leading cases might be seen as laying the foundation for the principles to be applied in the calculation of damages. In the first case, *Robinson v. Harman* (1848) it was held that:

*"The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."*

The second case, the "*Elena D'Amico*", followed more than a century later in 1980. Describing the position in relation to early redelivery under a time charterparty, it was held that:

*"The normal measure of recovery in cases of premature wrongful repudiation of a time charter... is that, if there is at the time of termination of the charterparty an available market for the chartering of... a... vessel, the damages will generally be assessed on the basis of the difference between the contract rate for the balance of the charter period and the market rate for... that period."*

How then did the recent cases seek to apply these principles?

In the case of the "*Elbrus*" [2010] 2 Lloyd's Rep. 315, the vessel was redelivered 39 days early by its Charterers under a time charter. The Owners had already fixed the vessel's next employment with a laycan spread for dates after the end of the original intended charter period. The rate of hire for the next employment was higher than under the original charterparty. The next employment, however, required the vessel to be dry-docked before delivery.

When the Charterers redelivered the vessel early, the Owners could find no employment for the vessel and so decided to send it directly into drydock. After drydocking the vessel was delivered into the next employment several days before the original charter period would have expired if the vessel had been redelivered at the proper time.

The Charterers sought to recover overpaid hire from the Owners. The Owners, however, claimed that where, as here, there was no available market for the vessel when redelivered early their loss was the hire that they would have earned for the remainder of the original charterparty period less their actual earnings during that period: these earnings were low because the vessel had been in drydock with no income at the time. The Charterers, on the other hand, argued that the Owners had actually suffered no loss because due to the early redelivery of the vessel under the original charterparty the Owners had been able to drydock the vessel and deliver it into its next employment at a higher rate of hire earlier than they would have done if the vessel had been redelivered on time under the original charterparty. The Charterers said that the vessel had actually earned more over the period up to the end of the vessel's next employment than it would have done if they had redelivered the vessel to the Owners on time.

The Commercial Court, upholding the decision of the arbitrators, agreed that the early redelivery by the Charterers had provided the Owners with the opportunity to earn a profit under the next employment that might not have been open to them if the vessel had been redelivered on time. Whilst the Owners' position in assessing loss only up to the end of the original charter period might be right in many cases, it was not appropriate where the steps that they were obliged to take to mitigate their losses had benefitted them beyond the date on which the vessel should have been redelivered. In such circumstances that benefit should be taken into account when determining whether the Owners had suffered loss as a result of the Charterers' breach of the charterparty in redelivering the vessel early. It was a significant part of the Court's reasoning that, because there was no available market for the vessel at the time of the early redelivery, the Owners had been obliged to take the steps they took in order to mitigate their losses and this had led to the profit that the Court found should be taken into account.

In the second recent case, that of the "*North Prince*" [2011] Lloyd's Rep. Plus 19, the Charterers repudiated a time charter by redelivering the vessel to Disponent Owners about six months early. The Disponent Owners did not themselves immediately redeliver the vessel to the Head Owners but did later do so, 22 days before the earliest date for redelivery by the Charterers under the sub-time charter. The issue here for the Commercial Court to determine was whether, in calculating damages payable by the Charterers to the Disponent Owners, account should be taken of the savings which the Disponent Owners had made by redelivering the vessel to the Head Owners 22 days before the earliest date for redelivery under the sub-charter.

The arbitrators decided that the answer to this question was "no" and awarded damages for the difference between the sub-charter hire rate and the market rate for the balance of the full sub-

charter period with no allowance for any savings to the Disponent Owners for the 22 days. On appeal, the Commercial Court upheld the arbitrators' award. In contrast to the situation in the case of "*Elbrus*", where the benefit sought was a direct consequence of the steps necessarily taken to mitigate losses arising from the breach of charterparty, the Court found that there was no connection established between the Charterers' breach of the sub-charterparty and the early redelivery of the vessel by the Disponent Owner to the Head Owners. The early redelivery to the Head Owners was a commercial decision made by the Disponent Owners independently of the Charterers' repudiatory breach and so no credit for the Disponent Owners' savings was required. The fact, therefore, that an innocent party may choose to adopt a course of action (from several open to them) that may reduce their losses may not be relevant to the calculation of damages where it was not a choice that the innocent party was obliged to take and in fact decided to take for commercial reasons that were not an inevitable consequence of the original breach of contract.

In a third case, the "*Mamola Challenger*" Lloyd's Law Reports, [2011] 1 Lloyd's Rep. 47, the Charterers again repudiated a time charterparty and did not take the vessel on hire at all. Fortunately for the Owners, the market rate at the time of repudiation was actually higher than the charterparty rate. The Owners had, however, incurred expenses in installing a crane on board the vessel for the performance of the repudiated charterparty and they sought to recover those costs as wasted expenses.

The arbitrators found that the Owners were entitled to recover their wasted expenses independently of any loss or profit made on the substitute employment of the vessel. On appeal, however, the Commercial Court found that the arbitrators were wrong to regard claims for wasted expenses and lost profits as separate and independent of each other. Instead, the Court held that a comparison should be made between the Owners' actual position and the position they would have been in if the contract had been performed: profits made on the substitute voyage were, therefore, to be used to offset the Owners' wasted expenses. As the profits on the substitute employment more than covered those expenses, the Owners' claim therefore failed.

In the case of the case of the "*Sylvia*" [2010] 2 Lloyd's Rep. 81), the Commercial Court sought to explain the significance of the House of Lords decision in the case of the "*Achilleas*" (reported in the last edition of the LMAA Law Review). In that case the House of Lords stated that the party breaking contract will not be liable if he cannot reasonably be regarded to have assumed responsibility for the losses of the particular kind suffered. This had led to a degree of confusion and prompted lawyers in all field of damages to include a general denial of the assumption of responsibility by the contract breaker.

The "*Sylvia*" involved damages claimed under a time charter. The vessel was detained by Port State Control and missed the cancelling date of a voyage charter party between Charterers and sub-charterers. The Charterers claimed the difference between the sub-charter freight and the

lower rate obtained for a replacement fixture. The arbitrators found that the Owners had breached the maintenance obligation of the time charter. The issue arose as to whether the loss of the sub-charter was foreseeable within the first limb of *Hadley v. Baxendale*: the arbitrators said that it was and awarded the Charterers their loss of earnings.

On appeal to the Commercial Court, the Owners argued for the broader approach of the “*Achilleas*” on basis that Owners had not assumed responsibility for such losses. In dismissing the appeal the Court held that the effect of the “*Achilleas*” not as significant as first believed. Generally, the orthodox approach to the calculation of damages would apply: in unusual cases, however, the surrounding circumstances or general understanding of the market may require particular consideration of whether there was an assumption of responsibility by the contract breaker. This would generally be where the orthodox approach leads to unquantifiable, unpredictable and disproportionate liability or where there is evidence that an award of damages claimed is contrary to market understanding.

The Court held that the facts of the “*Sylvia*” itself were not unusual, as shown by the fact that the arbitrators found the loss claimed was within first limb of *Hadley v. Baxendale*. The time charter allowed the Charterers to trade the vessel and sub-let it. It was foreseeable that delay might cause the vessel to miss its’ cancelling date under a sub-charter and cause a loss of earnings to the Charterers: this was within the reasonable contemplation of the parties. There was no evidence of any different market understanding and the losses claimed were predictable and quantifiable and so recoverable in damages.