

# “MTM HONG KONG”

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- 1. Can owners ever recover damages for a wrongfully terminated charterparty that extend beyond the period when the contract voyage would have ended?
- 2. The answer is ..... sometimes.
- 3. The “MTM HONG KONG” was chartered to carry vegoil from two safe ports/berths within a range of load ports in South America to one safe berth at one to four safe ports in the Gibraltar/Rotterdam range.
- 4. Under her previous charterparty, the vessel discharged her cargo in the Democratic Republic of Congo. She commenced her ballast voyage towards the charterparty loading range in South America on 19th January 2011. As a result of the delays that had occurred, there were exchanges between the parties which led to the owners accepting the charterers’ stated position as a repudiatory breach which brought the charterparty to an end on 21st January 2011.
- 5. The vessel continued to sail towards South America because the owners considered that to be the most promising area in which to find substitute business. She arrived in Uruguay on 2nd February 2011. However, she was not fixed until 24th February 2011 to Glencore for a voyage from San Lorenzo in Argentina to Rotterdam with a cargo of vegetable oils. That substitute fixture was completed on 12th April 2011 when the vessel completed discharge at Rotterdam.

6. If the voyage charter had been performed, the voyage would have taken a little over 43 days, completing on 17th March 2011. The evidence was that the vessel would then have carried at cargo of urea ammonium nitrate from the Baltic to the United States, followed by a chemical cargo from the United States to Europe.

7. The owners claimed damages of US\$1.2 million representing the difference between the profit which the vessel would have earned not only if the contract voyage had been performed but also if the next two voyages, namely to the United States and back to Europe, had been performed and the profit actually earned on the Glencore substitute charter to Europe.

8. The charterers argued that in accordance with the principle in Smith v. M'Guire the damages should be assessed by reference to the vessel's actual and hypothetical earnings up to but not beyond the date when the contract voyage would have ended.

9. Patrick O'Donovan, Christopher Moss and I allowed the basis of claim advanced by the owners.

10. Our award was upheld by Mr Justice Males. He held that if the facts warranted it, it might be necessary to depart from the Smith v. M'Guire principle to give full effect to the compensatory principle that the innocent party was so far as possible to be placed in the same financial position as if the contract had been performed.

11. In this case the owners lost the charter freight and had to make do with the lesser freight earned under the Glencore charter. However, they also suffered delay in repositioning the vessel in Europe and lost the benefit of the two transatlantic voyages. These were two distinct heads of loss and the owners were entitled to recover them.

12. Mr Justice Males commented that generally an owner cannot lose more by way of lost profit than the freight and any demurrage which would have been earned by performing the charter. However, he concluded:-

*“The position is different if the owner suffers a different kind of loss, that is to say something different from loss of the profit which would have been obtained from performance of the repeated charter. In such a case, there is in general no reason why such a loss should not be recoverable in damages in addition to damages for loss of profit from performing the charter subject of course to the principles of causation, mitigation and remoteness. On the contrary, failure to award such damages would be contrary to the compensatory principle. However, caution will be necessary in considering such claims, bearing in mind that such losses must be sufficiently proved. If proof of such losses require complex hypothetical calculations about the future employment of a vessel, the tribunal of fact is likely to conclude that they are too speculative to be recovered. The more complex the calculation, the less likely the claim is to succeed”.*