SQUIRE PATTON BOGGS

IS POSITIONAL LOSS RECOVERABLE?

Louis Dreyfus Commodities Suisse SA (Charterers) v MT Maritime Management BV ["MTM Hong Kong" (Owners)] [2015] UKSC 43

Departing from the *prima facie* rule originally set out in the case of *Smith v M'Guire* (1858) 3 H & N 544, Mr Justice Males awarded the shipowner its damages for positional loss. It was held that a failure to award such damages would be contrary to the compensatory principle.

Mr Justice Males held that, where necessary, there is no reason why, in calculating damages for repudiatory breach of voyage charter, one could not include events arising after the completion date of the contracted voyage to assess the loss. The decision to award such damages is of wide commercial importance and raises difficult legal questions connected to the doctrines of foreseeability and remoteness.

The Background Facts

The Charterers chartered the "MTM Hong Kong" ("Vessel"), an oil/chemical tanker, from Owners by a voyage charter dated 6 January 2011. The charter was for the carriage of a cargo of crude/refined vegoil from a South American port to the Gibraltar – Rotterdam range.

As a result of grounding suffered on the River Congo, the Charterers repudiated the contracted voyage, which the Owners accepted on 21 January 2011.

To find substitute business, the Vessel sailed towards South America, the area Owners considered to be the most promising. The Owners subsequently fixed a substitute voyage from San Lorenzo, Argentina to Rotterdam on 24 February 2011. This substitute fixture was completed on 12 April 2011.

If the original contracted voyage had been performed, the Vessel would have discharged in Europe on 17 March 2011. The Owners would then have had the opportunity to complete two additional voyages from the Baltic to the US, followed by a chemical cargo from the US to Europe.

The North Atlantic chemical trade between Europe and the US commanded higher freight rates than the vegoil cargoes available in South America. The Owners therefore claimed the lost profit from the two additional voyages. The charterers relying on the *prima facie* measure of damages set out in *Smith v M'Guire,* contended that damages could only be assessed up until the completion date of the contracted voyage. As such, charterers argued that the two additional voyages should not be included in the assessment of damages. It comes as a surprise to the undersigned authors that the Charterers did not appear to have argued that the positional loss the Owners allegedly suffered was too remote.

The *Smith v M'Guire* Measure

The *prima facie* measure for calculating a shipowner's loss in an action against a charterer for not loading cargo is: (a) the daily profit which the vessel would have earned under the contracted voyage ("CP"); less (b) the daily profit which the vessel earned under the substitute voyage ("SP"); times (c) the number of days that the original voyage would have lasted (N). As a formula it reads (CP-SP) x N.

This *prima facie* measure of damages reflects: (1) in the assumption there is an available market, the duty of the shipowner to mitigate his loss by finding alternative employment for his vessel; and (2) the difficulty in assessing the benefit obtained from mitigation by reference to the profit obtain over any longer period of time than when the original charterparty would have concluded. Consequently, it is understood that this measure most accurately reflects a shipowner's recoverable loss.

Mr Justice Males' Decision in the High Court

Reviewing the shipowner's loss, Mr Justice Males emphasised that:

- The fundamental principle in assessing damages is the compensatory principle, namely that the innocent party is, so far as possible, to be placed in the same financial position as if the contract had been performed; and
- The *Smith v M'Guire* measure is only the *prima facie* measure and, in appropriate circumstances, it may be necessary to depart from it in order to give full effect to the compensatory principle.

In considering the circumstances where the *Smith v M'Guire* measure may be departed from, Mr Justice Males relied on the dicta in *The Noel Bay* [1989] 1 Lloyd's Rep 361 and the principle applied in *The Elbrus* [2009] EWHC 3394 (Comm), 2010 2 Lloyd's Rep 315. In the latter case, it was held that the benefit a shipowner derived from the consequences of a termination had to be taken into account and credit had to be given when assessing the level of damages.

Mr Justice Males held that:

- Where a shipowner suffers a different kind of loss, there is no reason why that loss should not be recoverable in damages in addition to damages for loss of profit from performing the charter;
- This additional loss will be subject to the doctrines of causation, mitigation and remoteness; and
- The more complex the calculation, the less likely the claim is to succeed.

Mr Justice Males accepted that a different kind of loss could arise when a vessel is redelivered in an unfavourable location. This is because, as the shipping market is aware, the ability of a vessel to earn freight will depend on the vessel being positioned in a place where appropriate cargoes may be lifted and that cargoes from a specific location may command higher rates of freight than cargoes from another location.

Applying these principles, the High Court upheld the level of damages as US$1,212,316.50, a sum more than US$700,000 greater than the amount that would have been awarded had the *prima facie* measure of damages been followed.

Comment

English law has typically been conservative when it comes to awarding damages. It is understood that all losses flowing from a breach of contract cannot be claimed.

This belief can be found in the doctrine of remoteness which stipulates, in essence, that there are two types of loss: those flowing naturally from the breach and those that don't. When considering the type of loss, the question to be answered in each instance is whether, on the information available when the contract was made, the reasonable person in the position of the party in breach would have contemplated that such loss was sufficiently likely to result from the breach of contract so as to make it proper to hold that it flowed naturally from the breach.

This question as to whether positional loss is too remote was not part of the High Court's analysis. Mr Justice Males concluded that "there was no suggestion in the arbitration that the losses claimed were too remote, that is to say beyond the reasonable contemplation of the parties. However, I can see at any rate the possibility of an argument (I put it no higher) that a head of loss which was only suffered as a result of a wholly unexpected delay in obtaining substitute employment may have been beyond the reasonable contemplation of the parties." Arguably, it would appear Mr Justice Males was prevented from exploring whether the loss was factually too remote.

The undersigned authors are indeed surprised that positional loss was recoverable. In another arbitration in which the authors were involved, an esteemed panel of four LMAA arbitrators, which included a leading QC, held that positional loss was not recoverable because: (a) it was not a loss that was foreseeable at the time of contract; and (b) matters connected to a specific vessel's positioning is often information known only to the owner.

Further, a vessel being available does not necessarily mean that it will be fixed. Given the surplus of vessels in the current market, the percentage chance of fixing a specific vessel for a specific voyage may, depending on the volume of cargo and number of vessels operating in that particular region, be as low as 1%. Given the many factors at play, there is a real risk that positional loss falls in the realm of loss of chance, a generally problematic area.

Although the High Court judgment does clarify (a) that positional losses are recoverable; and (b) damages may be calculated to the conclusion of the substitute voyage, the judgment appears out of synch with general commercial belief that such a head of loss is not actually recoverable. In this case it appears the issues in connection with foreseeability and remoteness were not canvassed in the arbitration and Mr Justice Males was bound to address only the issues pleaded earlier.

This itself raises a separate issue altogether. In the interest of certainty and commercial regularity, it may be appropriate that in instances where leave of appeal has been granted and a court judgment arising from an arbitration award is made public, that powers be vested in the court to publish an arbitration award in full.

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