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Owners' damages arising from repudiation of a voyage charter: *MTM Hong Kong* [2015] All ER (D) 11 (Sep)

The recent High Court judgment is noteworthy as the Court considered the calculation of Owners' damages following repudiation of a voyage charter by Charterers in circumstances where the substitute employment of the vessel begins after the repudiated contract voyage would have begun and ends after the repudiated contract voyage would have ended. The question addressed by the Court was whether Owners' damages should be assessed by reference to the vessel's actual and hypothetical earnings up to the end of the repudiated contract voyage or by reference to earnings up to the end of the substitute employment.

The Court found that, on the facts of the dispute, Owners were entitled to recover damages arising from repudiation of the charter up to the date that the contract voyage would have ended and from that date onwards Owners were entitled to recover damages for loss of subsequent employment of the vessel on the spot market (that was in effect up to the end of the substituted employment). The main three factors which led to the Court's decision were: a) that under the circumstances Owners acted reasonably following repudiation of the charter in seeking substitute employment for the vessel; b) that the losses claimed by Owners were not too remote; and c) that, based on the facts of the dispute, it was possible for Charterers to predict the vessel's immediate future employment had the repudiated charter been performed. The Court, however, stressed that each case will turn on its own facts and as a consequence that there is no general rule regarding the application of the compensatory principle.

BACKGROUND

By a charterparty dated 6 January 2011 on amended Vegoil terms MT Maritime Management BV as owners (the "Owners") chartered the "MTM Hong Kong" (the "Vessel") to Louis Dreyfus Commodities Suisse SA as Charterers (the "Charterers") for the carriage of a cargo of crude vegoil from two safe ports/berths within the loading range of South American ports, to one safe berth at one to four safe ports in the Gibraltar-Rotterdam range.

The Vessel's last employment ended at Boma, Democratic Republic of Congo where she grounded. Due to the delay in the Vessel's schedule arising from the grounding and following exchanges between the parties Owners accepted Charterers' repudiation of the charterparty on 21 January 2011. Owners then claimed damages arising from Charterers' breach.

The finding of the appointed tribunal was that the Vessel had completed discharge at Boma and commenced the voyage to-

ward the charterparty loading range in South America on 19 January 2011. Charterers repudiated the charter on 21 January 2011 and thereafter the Vessel continued on her voyage to South America which appeared to be the most likely area in which substitute employment would be found. The Vessel arrived in Uruguay on 2 February 2011 and a substitute fixture was eventually entered into on 24 February 2011 when the Vessel was fixed to Glencore for a voyage from Argentina to Rotterdam.

If the repudiated voyage charter had been performed the contract voyage would have ended on 17 March 2011 and the Vessel would have then entered into new fixtures to carry cargo on a voyage basis from the Baltic to the United States and on the return voyage from the United States to Europe.

Owners claimed damages totalling US\$1,212,316.50 comprising of the difference between: a) the profit the Vessel would have earned if the contract voyage had been performed plus the profit that would have been earned had the next two prospective voyages from the Baltic Sea to the United States and back had been performed; less b) the profit actually earned on the substitute Glencore fixture from South America to Europe. Had the contract voyage been performed the Vessel would have been redelivered in north Europe earlier than she actually was under the substitute charter and would have subsequently entered the lucrative North Atlantic trade at a higher freight rate enabling her to perform another two voyages from Europe to the United States and back.

Charterers rejected Owners' calculation of damages arguing that it was wrong to calculate damages up to the end of the substitute fixture which ended after the repudiated contract voyage would have ended. Instead, Charterers contended that the correct calculation of damages was to apportion the earnings of the substitute fixture so as to reflect the amount earned up to the date that the repudiated voyage charter would have ended. Accordingly, Owners' losses ought to be limited to US\$478,386.80.

THE ARBITRATION AWARD

The arbitrators found for the Owners and held that the loss claimed by Owners had been suffered and that damages ought to be awarded in order to compensate Owners for that loss. Further, the tribunal held that there was no rule of law which prevented the full application of the compensatory principle by limiting damages by reference to the period when the repudiated voyage would have ended.

Although not expressly stated in the arbitration award, the tribunal in effect awarded Owners damages for the loss of the follow on fixtures which the Vessel would have undertaken



from North Europe to the United States and back. The Glen-core substitute charter delayed the Vessel's return to the lucrative North Europe market beyond the time that the Vessel would have been redelivered in the same area had the repudiated charter been performed. Accordingly, the tribunal held that Owners should be compensated for the loss suffered as a result of the delay in being able to earn higher rates in the North Atlantic market.

Charterers' appealed.

THE HIGH COURT JUDGMENT

The question of law considered by the High Court was: *"If a voyage charter is repudiated by charterers in circumstances where the substitute employment begins after the contract voyage would have begun, and ends after the contract voyage would have ended, should damages be assessed by reference to the vessel's (actual and hypothetical) earnings up to the end of the contract voyage, or such earnings up to the end of the substitute voyage?"*

Charterers relied on *Smith V M'Guire* as establishing the prima facie measure of damages for repudiation of a voyage charter. In accordance with *Smith V M'Guire* the starting point in ascertaining Owners' loss was the amount of freight which the Vessel would have earned had the charter been performed less the expenses which would have been incurred in earning the freight less any freight earned by the Vessel on a substitute voyage up to the end of the repudiated contract voyage period. The second principle relied on by Charterers was the need to keep loss and mitigation distinct.

The Court considered the leading authorities on the calculation of losses arising from repudiation of voyage charters, namely *Smith v M'Guire*, *The Noel Bay*, *The Concordia C* and *The Elbus* as well as the leading text books on the same topic. None of the authorities had dealt with the issue of whether losses extending beyond the date that the repudiated contract period would have ended ought to be awarded under the compensatory principle.

The Court found that under the facts, following repudiation of the charter Owners could have directed the Vessel from Boma to Europe on a ballast voyage which would have generated no earnings but that, instead, Owners directed the Vessel on a shorter ballast voyage to South America to perform the substitute voyage to Europe earning freight. Had the repudiated voyage been performed, the Vessel would have earned freight on the voyage from South America to Europe and would have been redelivered in Europe without delay enabling Owners to trade the Vessel at much higher rates in the North Atlantic trade. Accordingly, the consequences of Charterers' repudiation were twofold: a) Owners lost the repudiated charter freight and performed a substitute voyage at a lower rate; and b) the Vessel's repositioning in the lucrative North Atlantic market was delayed resulting in Owners losing the opportunity to perform two subsequent transatlantic voyages which the Vessel would have been able to perform in the same time as was taken

up by the performance of the substitute voyage.

There were, therefore, two losses for which Owners were entitled to compensation: a) losses arising from repudiation of the voyage charter; and b) losses stemming from the loss of opportunity to trade the Vessel in subsequent employment on the spot market. The Court held that losses arising from repudiation of the charter were to be calculated based on the *Smith V M'Guire* compensatory principle up to the date on which the repudiated contract voyage would have ended. From that date onwards Owners were entitled to damages for loss of opportunity to employ the Vessel in a more lucrative market.

The Court then considered whether the losses claimed by Owners were too remote and held that under the circumstances it was possible for the parties to predict the Vessel's subsequent employment following performance of the repudiated charter. As there was nothing in the arbitration award to suggest that the loss suffered was beyond the reasonable contemplation of the parties or that Charterers had not assumed responsibility for the loss of the kind suffered, Charterers were held liable to compensate Owners.

COMMENT

The judgment of the *MTM Hong Kong* is the first to consider whether Owners ought to be compensated for the loss of future employment of a vessel arising from repudiation of a charter by Charterers in circumstances where Owners have not agreed any subsequent fixtures. While the compensatory principle as set out in *Smith V M'Guire* remains good law, the *MTM Hong Kong* clarifies that Owners may claim for the loss of any immediate employment of the vessel starting from the date that the repudiated contract would have ended had it been performed. Whether such a claim will be successful will, however, largely depend on whether the loss of future employment is predictable (and not too remote).



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