Assessing damages - what would the defaulter *really* have done?

Introduction

Under English law damages are (i) assessed at the date of the breach (ii) confined by what usually happens, or what (at the time of their bargain) the parties must reasonably have thought the probable result of the breach and (iii) to leave the claimant as if the fixture or other contract had been performed.

But sometimes (iii) trumps (i), so things that happened after the breach can come into it. As discussed in our December 2017 articles under "Freight, hire and happenstance - a decade of change?" following the "GOLDEN VICTORY" ([2007] UKHL 12) progressively more defendants have tried to argue that later events matter, and the courts increasingly listen.

This trend might one day operate in reverse, and as counter to a principle which is no more than an assumption, a generally held view is that it should be challenged whenever possible.

Alongside a novel point on charterparty time bar, **London Arbitration 3/18 [(2018) 995 LMLN 1]** offers a reminder of this when considering damages when a fixture was not performed.

Facts

A voyage charterparty for carriage to China included a wide choice of disport ranges at various freight rates and a common clause protecting Charterers from claims "*unless [they received] Owner's claim ... in writing, together with all supporting documents … within 90 days after completion of discharge at last discharging port.*"

The vessel arrived at the nominated loadport and tendered NOR, but no cargo appeared and a fortnight afterwards Charterers sought to cancel. Owners then accepted what Charterers had done as ending the fixture, later in mitigation securing a substitute lifting with net freight at $136,155.50.

Time bar

Amid unsuccessful points on NOR validity and affirmation, Charterers tried to argue that as no claims had been presented within the stipulated 90 days all were time-barred and waived.

This was also rejected, because the clause was based on the fixture having been performed, such that there was in fact a (last) disport. There was no reason to imply a term that a notional discharge location and completion date should be used, or to apply the clause to the substitute lifting.

The Tribunal contrasted the Hague/Hague-Visby Rules time limitation for cargo claims, which runs from when the cargo was delivered, or when it should have been, and thus applies where the contractual voyage is not completed. They observed that if Charterers had wanted to address time bar where there was no, or perhaps no concluded, voyage they could have.

Owners' claim for demurrage at $11,500 PDPR therefore succeeded and they recovered $145,209.35.

Damages

Owners compared their mitigation lifting to what they said would have happened under the contractual fixture, and claimed a net loss of ([A] $164,106.96 - [B] $136,155.50 =) $27,951.46.

However, where a defaulter can perform in several ways, the rule is to assume that he would have chosen what *would have proved* his most advantageous one. Oddly, this involves looking back (from the point of considering the claim) and seeing how the defendant would have structured things, and what choices he would have made, in order to yield the lowest damages payment when that came to be assessed.

Here Charterers had not finally exercised their disport option, and assuming the one that would have yielded the least freight produced a figure lower than B above, i.e. less than what Owners had achieved in mitigation. So they had suffered no loss and recovered nothing.

Discussion

The above assumption is a gratuitous favour, and in many cases there will be no possible justification for it.

Where a defendant can deploy post-breach events in seeking to reduce a claim, in an appropriate case a claimant should be allowed to (a) do likewise, and thus perhaps show that what we will call the cheapest damages route *could not* have been taken, so the claim must be assessed on another basis and/or (b) prove from prior dealings or perhaps disclosure that the defendant never took the option attributed to him or *would have* done something different.

Summary

This recent Award is a reminder always carefully to consider a charterparty time-bar provision. While by no means standard, wording could easily be crafted so as to operate where, for whatever reason, the fixture voyage does not happen or is not completed, and parties might then have to calculate time limitation in a different way.

Whether as claimant or defendant, parties should also be alive to challenge the cheapest damages route. It may sometimes be possible to argue that some other course would, or must, have been followed.

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