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Freight, hire and happenstance - a decade of change?

During the last ten years much has been written on the disadvantageous state of the maritime industry, with low soft commodity and now also oil prices, poor freight and hire rates, and excess tonnage forcing newbuilds directly into lay-up. This has been a regular theme for legal analysts in setting the context of numerous decisions, especially those concerning time-based contracts, as tribunals and courts have grappled with frontier thinking and shrill challenge to perceived settled law. However, a noticeable by-product of the depressed market has received surprisingly little commentary, and this article addresses that.

Since 2007 four cases in particular, all with similar factual bases and resounding names, exemplify but by no means capture a detectable trend that goes far beyond mere putting to strict proof and nit-picking points on title to sue. It is nothing more - and nothing less - than juridical *jiu-jitsu* practised on the compensatory principle, that damages should make it as if the contract had been performed. It turns defence almost into attack by persistent focus on what happened, or supposedly *would have happened*, after breach, and seeking to take advantage of that.

Judging only from published commentary, three of these cases are very well-known and the other - the third in date order - slightly less so. They are (i) the *Golden Victory* [2007] UKHL 12 (ii) the *Glory Wealth* [2013] EWHC 3153 (iii) Glory Wealth Shipping v Flame SA [2016] EWHC 293 and most recently (iv) the *New Flamenco* [2017] UKSC 43. We do not propose to go into these cases for the purpose of this article but for reference you can find a brief commentary of all four cases here http://www.cjclaw.com/cms/documents/Freighthirehappenstance_Case_commentary.pdf; in addition to the recent article on the "*New Flamenco*" in the CJC Quarterly Case Update (September 2017) http://www.cjclaw.com/site/news/quarterly-case-update.

Commentary

Since 2007, and certainly 2008, the maritime market has been in difficulty. Some household names have disappeared, or are fast doing so, and many others are struggling. Increasingly one hears that, while peaks and troughs have come and gone, this time it is different, as there is no harbinger of recovery. Plainly this will give rise to continuing claims, in response to default or attempts to cut losses.

But another new feature is parties often seeking to engage hindsight in summoning the very spirit of the market that has caused them trouble, either arguing that all should be examined retrospectively in ways that none could have foreseen, or finding shelter behind devices, with the courts reacting sometimes with reluctance, but frequently with indulgence nevertheless.

Reference might be made at this point to Teare J.'s judgment in the *Elbrus* [2010] 2 LLR 315 - a decision which not only looked at the *Golden Victory* but was also referred to in the *New Flamenco*. All the other cases above involved to some extent or other an element of crystal ball gazing. Although the *Elbrus* appears on its facts to also involve some speculation – ie the reference to the Charterers' "permutations and schedules" – this was not, in reality, the case. The *Elbrus* – a case conducted successfully for Charterers by CJC Director, Carlo Sammarco - involved an early redelivery. The tribunal found that the early redelivery had conferred a benefit upon owners (ie being able to drydock

earlier than scheduled and thereafter be delivered under a more lucrative time charter with Navimed) and that this "benefit" should be factored in when assessing the losses claimed by the Owners for the breach. As the Navimed charter had been fixed prior to the breach (and may even have been a factor when the Charterers decided to redeliver earlier) the "permutations and schedules" did not involve much speculative assessment. Instead they focussed on how quickly the vessel could be ready for delivery to Navimed having completed the 2 week drydock required by the Navimed charter prior to delivery at the least cost to the Owners (ie by way of lost hire during the vessel's downtime). The exercise was straightforward and was very much based on actual facts and figures. The tribunal was able to make an informed decision that on any "permutation" the Owners had benefitted financially as a result of the breach.

The tribunal were aided by some "loaded dice" in the *Elbrus* – it was easier to see where the losses would fall. Unfortunately, the assessment of loss will not always be as straightforward, the facts of the *Elbrus* being the exception rather than the rule. Certainly, from the view of a legal adviser, the job of accurately assessing the likely damages arising from a breach remains difficult and a hazard of such an unpredictable maritime environment.

With one possible exception it is not suggested that any of the above decisions are *wrong*. Nor is there suggested a fault line in English jurisprudence. It does however seem that the present market conditions have brought new thinking and different tactics, such that acting and advising after breach of a term contract is now difficult as never before. Certainty and finality have to some extent been usurped by what is sometimes puzzling indifference to artifice and sophistry, and enthusiasm for unpicking straightforward claims according to what later happened, or is alleged would have. There are obvious dangers, here.

Hadley v Baxendale remains good law. Its second limb confines recoverable damages to the parties' reasonable contemplation when the contract was made. But steadily, almost imperceptibly and certainly ironically, its reach has been shortened by increasing hindsight analysis of matters that nobody thought of at that time, or for long after, but which handily arose following breach and offered opportunity. In general life one can sometimes confidently predict how things would have gone in different circumstances, but few can reliably soothsay the outcome if - the touchstone, here - there had been performance rather than a breach. One day a loud halt will be called.

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