Freight, hire and happenstance - a decade of change?
Case commentary

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.

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 first look at (i) and then (iv), as many people think they are decisions along the same lines, though they are not.

The Golden Victory

This was the battle royal on whether events after a repudiatory breach can be considered in assessing damages. A narrow House of Lords' majority held that they can, and that upholding the compensatory principle outweighs long cherished notions of certainty and finality.

In familiar précis, a provision in a lengthy time charterparty allowed both sides to cancel if there was war between various countries. The Owners' large claim following the Charterers' wrongful redelivery succeeded on liability, but before damages could be assessed the Second Gulf War broke out.

The Charterers then said that if the charterparty had subsisted they *would have* invoked that clause and cancelled - at least a plausible position, if only as happily consistent with redelivery several years prematurely, but none can say for sure - so damages should be calculated on that supposed basis. The majority agreed that damages are usually assessed at the time of breach, but said that was not an absolute requirement, and in applying the compensatory principle a relevant contingency that *would have arisen* should be taken into account. The Owners thus lost a substantial amount due entirely to happenstance. At the time of redelivery, a reasonably well-informed person would have considered war only a possibility. It cannot credibly have been a motive power when the Charterers handed back the vessel. They sought simply to jettison as much liability as possible in an unfavourable market. Later, an unconnected event luckily cropped up during the procedural life of the claim. It allowed the Charterers a windfall gain, founded on what could only ever have been an assumption of what their position would *really* have been at the relevant time.

The New Flamenco

One can perhaps understand some comparison with the *Golden Victory*, as this recent case sought to set the very same cat among the mitigation pigeons.

The case is considered in more detail in the CJC Quarterly Update (September 2017) - http://www.cjclaw.com/site/news/quarterly-case-update.

In brief, the Owners sought unrecovered hire, less operating costs, after termination by acceptance of the Charterers' breach. But they sold the vessel soon after, getting more than (on what must have been

an assumed or somehow agreed basis) they would have done following performance of the fixture. As such, the Charterers claimed credit for a capital value differential which - arguably entirely theoretically - arose only from market movement afterwards and would have extinguished the Owners' claim.

This time the Supreme Court rejected the argument, highlighting causation:

"*The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. The benefit [in issue] must have been caused either by the breach ... or by a successful act of mitigation*."

The Owners' sale was not an act in mitigation, and the price difference was not caused by the Charterers' breach but by the Owners' decision to sell when they did, and by a later drop in the market.

The decision itself is straightforward, but it offers no clear, guiding rationale. It does however sound another warning of the difficulties that can emerge from market or other changes after a claim arises but before it has been finally determined. As here, such might offer a defendant a hindsight chance to attach a gain (here, reverse-engineering avoidance of a *loss*) to his own breach. Plainly even the most meritorious claimant must now take great care in whatever he does following breach of a term contract.

Glory Wealth

The 2013 transit of this case from tribunal to High Court reveals another tale of much the same stamp. Here the Charterers had defaulted under a COA, again due to market difficulties. However, they sought to argue that, although the Owners' acceptance of their repudiatory breach ended the contract, nevertheless they could validly counter that (due to similar financial troubles) *as things would have turned out* the Owners would not have been able to perform anyway. So, applying the compensatory principle, they should not recover. In reply, the Owners cited settled law that where a contract ends as it did here the innocent party is excused further performance.

The judge followed the *Golden Victory* in holding that Owners were required to prove that, if there had been no repudiation, they *would have been able to perform* when called upon.

This case is mentioned as a prelude to what followed, as probably the best example of challenge by reference to *what would have been* a counterparty's own position, and with the pointed caveat that, but for the tribunal finding that the Owners could have performed when necessary, the Charterers' argument would have succeeded.

Glory Wealth Shipping v. Flame SA

In 2016 the focus was again on what happened long after breach, but in a quite different way. This case likewise considered the compensatory principle, but this time with the boot very much on the other foot.

The Owners' financial difficulty, which had previously founded the Charterers' unsuccessful challenge to their ability to perform, continued. They became insolvent in 2009 and were described by the tribunal as "deeply insolvent" by 2011. Seeking to safeguard assets from creditors and avoid Rule B attachment

in New York, the Owners used two companies, owned by some of their own directors. These received all inward freight under the COA and paid any related outward sums.

Now assessing damages, and applying the compensatory principle, the tribunal decided that a monetary award would give the Owners an unjustifiable gain. The Charterers' breach had not occasioned any loss, because under the purposive arrangements that the Owners had made they would not have received any freight - it would simply never have been transferred to them by either of the companies - so the award was nil.

The tribunal also found that what the Owners had done amounted to turpitude. There was dishonest concealment from creditors, and also from the Singapore Court when it approved a Scheme of Compromise and Arrangement for the Charterers. However, as this was merely incidental to the Owners' performance of the COA the Charterers' case on illegality failed. There was no challenge to these findings, and it is perhaps surprising that naked fraud did not somehow wholly unravel the Owners' position.

On appeal the Owners argued that they had the right to receive the freight under the COA, and the Charterers' breach deprived them of that, hence they had suffered a loss readily quantifiable as the gross freight less the cost of earning it. The judge valued the net freight at about US$3m, and held that the Owners' rights included the right to dispose of the fruits of the right to receive the freight. The Owners had thus suffered a quantified loss and should be compensated.

It did not seem to matter that a structure whose sole rationale was to insulate these funds meant that the Owners could be duplicit in saying to creditors that they had never received them, yet claim them as a loss from the Charterers. Postulating, let alone pricing, entitlement *to dispose of the fruits of a right to receive freight* surely skates over the very thinnest logical ice when the whole idea was that the Owners would never acquire the cash - the only relevant subject of rights whose disposal was said to carry value. Furthermore, it is not usual to see a claim succeed against a background of turpitude and overt judicial lack of enthusiasm about unattractive arguments and dishonest concealment.

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