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Update

The "*Great Creation*": What can a shipowner recover when a charterer gives less than the agreed notice for redelivery?

In *Maestro Bulk Ltd v Cosco Bulk Carrier Ltd* (The "*Great Creation*") [2014] EWHC 3978 (Comm) the High Court has considered the approach to be adopted to the calculation of damages where charterers are in breach of charterparty by not giving sufficient notice of redelivery.

Facts

Under a time charterparty on an amended NYPE form, the claimant chartered the vessel "*Great Creation*" from her disponent owners for a period of four (maximum five) months, plus 15 days at charterers' option. Following redelivery the parties were unable to agree the balance of final hire due to owners because of a number of outstanding disputes. The disputes were arbitrated and it was from those proceedings that one issue was challenged by charterers on appeal to the High Court concerning the calculation of damages arising from charterer's failure to redeliver the vessel in accordance with Clause 60 of the charterparty. The clause stated:

"On redelivery charterers to tender 20/15/10/7 days approximate and 5/3/2/1 days definite notice."

The earliest date for redelivery under the charter was 29 March and the latest date was 14 May. Charterers submitted what claimed to be an approximate 20 day notice of redelivery on 13 April but then proceeded to redeliver the vessel on 19 April, just six days later.

The problem faced by charterers was that the voyage for which they had sub-chartered the vessel had been subject to delays and it had been unclear whether the vessel would complete that voyage in time to arrange a second fixture within the time charter period. By 13 April, discharge at the end of the first voyage had not been completed and was subject to continuing delay. It therefore became apparent that it would not be possible to fix a second laden voyage for completion by 14 May. Accordingly the notice of redelivery was served.

Following redelivery the owners managed to fix the vessel on 21 April but the best they could achieve given the short notice was a voyage charter that required a nine day ballast voyage, thus significantly reducing the effective daily rate.

The dispute

It was common ground between the parties that damages for charterers' breach (i.e. redelivery on 19 April on six days notice) should, under normal English law rules, put the owners back in the position they would have been in if there had been no breach. However, for this purpose the parties could not agree on the hypothetical "no breach" situation to be adopted.

Charterers said the "no breach" situation should be assessed by reference to a 20 day period starting from when the first contractual notice was given by charterers, namely 13 April. In this way the breach would be seen as premature redelivery; the loss would be measured by comparing what in fact happened following the giving of notice on 13 April with the position owners would have enjoyed if proper notices had been given and the charter had continued until 1-3 May, with hire payable until that date, less any hire earned in mitigation. On this basis damages would have been USD 216,450.

Owners argued that the "no-breach" situation should be assessed by reference to the date on which notice should have properly been given based on the actual redelivery on 19 April – in other words, the period starting on 31 March, 20 days beforehand. It was owners' case that a more profitable follow-on fixture would have been concluded by them between that date and 19 April

The arbitration decision

The Tribunal held in favour of owners and awarded damages based on a notional lost voyage which could have been carried out if owners had received contractual notice on 31 March. Relying on expert evidence regarding the state of the market (which suggested it would have been possible to obtain a fixture that did not require a ballast voyage) they awarded USD 306,693.58 to owners. Charterers appealed to the High Court under s.69 of the Arbitration Act 1996 on a question of law as follows:

"Where a time charter party provides for charterers to give notice of redelivery, what is the correct approach to damages when redelivery takes place with insufficient notice(s)?"

The High Court decision

When considering the nature of the breach, Cooke J acknowledged that different conclusions could be reached depending on the facts in any given case. If the situation had been that, as at 31 March, the charterers had intended to redeliver on 19 April but no notice was given until 13 April then the "no breach" situation could potentially be seen as one in which a notice should have been given on 31 March.

However, in this case, the Judge acknowledged that on 31 March, there was no intention on the part of the charterers to redeliver on 19 April. On the facts as found, if the charterer had given a 20 day notice of redelivery on 31 March then this would neither have been honest nor based on reasonable grounds; it would have been uncontractual and in itself a breach of charter. Cooke J noted:

"To posit a "non-breach" situation on the basis that a notice should have been given at a time when it, in itself, would be wrongful and represent a breach or anticipatory breach, would appear contrary to principle."

And:

"If charterers were properly to perform the contract on the facts found by the Arbitrators, they would have had to give the approximate 20 days' notice on 13th April for redelivery on 1st May (18 days later as held by the arbitrators) and keep the vessel on hire for that period. The true nature of the breach did not lie in a failure to give the approximate 20 day notice on 31st March but in a failure to give that notice as at 13th April."

On this basis, the effect of charterers' breach was to deprive the owners of the hire payable under the charter for the balance of the notice period between actual redelivery on 19 April and 1 May – a period of 12 days. Any earnings that owners had been able to achieve in mitigation during this period would fall to be offset against the hire. However, on the facts, when allowance was made for the ballast voyage needed to fulfil the vessel's next fixture, no such earnings had been achieved.

The Judge therefore upheld charterers' appeal and awarded damages based on 12 days loss of net charter hire; this being the sum which best represented the owners' loss as a result of the short notice.

Comment

Although the outcome of this case was partly dependent on its particular facts, it nevertheless provides a helpful and interesting example of the application of principles relevant to the assessment of damages.

As the Judge acknowledged, although the Tribunal had considered the appropriate tests as set out in the authorities, including those relating to remoteness of loss in *The Achilleas* [2008] 2 Lloyd's Rep 275 and *The Sylvia* [2010] 2 Lloyd's Rep 81, they had proceeded to apply them incorrectly given their erroneous characterisation of the loss as one relating to a notional voyage fixed on the basis of a failure to provide contractual notice on 31 March. This led to the Tribunal effectively awarding damages for a lost business opportunity prior to any breach. In reality, the claim was properly analogous to that of early redelivery under the charterparty, and it was on this basis that damages should have been assessed by the Tribunal.

Further information

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Further advice should be taken before relying on the contents of this summary.