London Arbitration 1/23

Charterparty - Late redelivery causing owners to lose repositioning fixture before drydocking - Whether damages extended to repositioning costs or limited to difference between charter and market rate of hire for overrun - Illegitimate last voyage orders - Causation - Remoteness

Disputes arose under two time charters, a head charter on an amended Asbatime 1981 form and a sub-charter on similar terms. Two separate arbitrations were commenced under the LMAA Terms and were heard concurrently by a tribunal of three LMAA Full Members. The tribunal produced a single set of reasons summarised here.

References to "owners", "charterers", and "charter" are to the relevant corresponding party and charter in each arbitration.

Charter terms

The period of both charters ended on 1 July 2021. The head charter was fixed for a duration of "about 3 (three) months up to a maximum 1st July 2021 ..." and the sub charter for "a Time Charter period of minimum 1st June 2021 up to maximum 1st July 2021 ...". It was thus common ground that, under both charters, the vessel had to be redelivered by 1 July 2021.

By line 108 the charterers were to "give Owners not less than 10/7/5 days' approximate and 3/2/1 days' definite notice of Vessel's redelivery date and port ...".

Clause 119 provided as follows:

"The Charterers warrant that they will not order the vessel to commence a voyage (including any preceding ballast voyage) which cannot reasonably be expected to be completed in time to allow redelivery of the vessel within the maximum period (on or before 1st July, 2021) stipulated in this charter party. If, nevertheless, such order is given, the Owners shall have the option:

(i) to refuse the order and require a substitute order allowing timely redelivery of the vessel,# or

(ii) to perform the order without prejudice to their right to claim damages, including consequential damages, for breach of charter in case of late redelivery of the vessel.

In any event, for the number of days by which the maximum period stipulated in this charter party is exceeded, the Charterers shall pay the prevailing market rate if this is higher than the hire rate agreed in this charter party."

Factual background

The charters were concluded in February 2021 at hire rates of US$14,000 and US$19,000 per day respectively.

On 7 May 2021 the owners sent a message through the broking channel reminding the charterers that the maximum charter duration was 1 July 2021. On 12 May 2021 the owners explained:

"... vessel's class certificates will expire on 6th July 2021 as vessel is due for her special survey and vessel needs to be drydocked before 6th July ... This is the reason why owners are insisting on not exceeding the maximum charter duration ..."

On 20 May 2021 the charterers gave their last voyage orders for the vessel to load a cargo of coal in bulk and to carry it to a port for discharge.

On 5 June 2021 the vessel arrived at the loading port and loaded her cargo. There were delays due to mechanical breakdowns with the terminal's equipment.

On 19 June 2021 the charterers sent the owners their "... approximate 10-day pre-redelivery notice". That estimated redelivery at the discharge port "on/about 28-29 June 2021 ... AGW WP UCAE". It went on to say that "[t]his notice is given in good faith basis on best available information at the time of tendering and does not consider any unforeseen circumstances, whatsoever ...".

On 23 June 2021 the charterers sent a revised redelivery notice estimating redelivery "on/about 1-2 July 2021 ... AGW WP UCAE ... in good faith basis on best available information ...".

On 25 June 2021 the head owners concluded a fixture under which the vessel was fixed for a single trip time charter with delivery at the discharge port where she was to be redelivered under the time charters and with redelivery at one of two ports in the charterers' option, both of which were close to the shipyard where she was due to drydock. Hire was payable at a rate of US$37,250 per day pro rata less 5 per cent commissions. The laycan was 1 to 4 July 2021 and the estimated duration (without guarantee) was 18 to 25 days.

The vessel arrived at the discharge port on 26 June 2021. Discharge into barges commenced on the following morning. However, there were frequent interruptions due to rain and delays with barge availability.

The charterers periodically sent updated redelivery notices. Seven- and five-day notices were sent on 28 and 29 June 2021, estimating redelivery on 4 to 5 July 2021. Those were followed by revised notices estimating redelivery on 6 to 7 July 2021, then 9 to 10 July 2021, then 12 July 2021, and finally 14 July 2021.

A class surveyor added a manuscript amendment to the vessel's class certificates on 1 July 2021 noting that their validity was extended by one month until 6 August 2021.

On 6 July 2021 the charterers in the repositioning fixture cancelled it on the basis that the vessel had not been delivered within the 1 to 4 July 2021 laycan.

Discharge was completed on 14 July 2021 and the vessel was redelivered on that day. She then proceeded to the shipyard, arriving on 22 July 2021 and drydocking shortly afterwards.

The claim

The owners claimed that the charterers were in breach of charter on the following grounds:

(a) the vessel was redelivered late;

(b) the charterers failed to comply with their undertakings in clause 119;

(c) the charterers breached an implied term that any notices of expected redelivery (i) would be given honestly and in good faith, and (ii) would be based on objectively reasonable grounds following proper inquiries made by the charterers.

The owners contended that, as a result of the charterers' breach of warranty and the failure to serve accurate redelivery notices, the vessel was redelivered late and they lost the repositioning fixture.

The charterers admitted that in breach of the charterparty the vessel was redelivered late. They also admitted that they had not given reasonable estimates in their voyage orders. They had not made proper enquiries as to the time required to complete the voyage and they ought reasonably to have allowed for a greater margin in the itinerary. They therefore admitted that their orders of 20 May 2021 were illegitimate and that they were in breach of the warranty in clause 119.

The charterers admitted that the owners were entitled to damages for late redelivery calculated on the basis of the difference between the market and the charter rate of hire for the 12.508 day overrun period between when the vessel should have been delivered (midnight on 1 July) and when she was actually delivered (12.12 GMT on 14 July). They pleaded that it was common ground that the available market rate was US$37,250/day. On this basis the charterers paid damages, which the tribunal calculated to have been in a sum of around US$290,818.

The owners' position was that additional damages were recoverable in the sum of US$306,617.19, comprising loss of hire or time valued at the repositioning fixture rate of US$37,250/day for 7.354 days and the cost of bunkers consumed during that period, both components being said to reflect the cost of the actual ballast voyage from the discharge port under the time charters to a place 10 hours from the drydock, being a mid-point between the two redelivery ports under the repositioning fixture.

Construction of clause 119

The owners argued that under clause 119 the parties agreed that they would be permitted to claim consequential losses and the paradigm example of such a loss was a follow-on fixture, which had been ruled as irrecoverable in Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] 2 Lloyd's Rep 275. It was exactly this type of loss which the parties intended to reinstate as recoverable by way of clause 119.

The owners argued that "consequential damages" should be construed broadly on its ordinary meaning to cover damages that would fall under both the first and second limb of Hadley v Baxendale (1854) 9 Exch 341. Modern authorities (such as Transocean Drilling UK Ltd v Providence Resources plc (The GSF Arctic III) [2016] 2 Lloyd's Rep 51 and Star Polaris LLC v HHIC-Phil Inc (The Star Polaris) [2017] 1 Lloyd's Rep 203) suggested that the historical meaning given to such wording should be secondary to the wording itself and the circumstances under which the words fell to be construed.

The charterers argued that "... consequential damages ... " in clause 119 meant damages arising under the second limb of Hadley v Baxendale. There had long been an understanding as to the meaning of the words "consequential losses" based on a line of authority and commentary set out in Lewison, The Interpretation of Contracts (7th Edition, 2020), paras 12.110 to 12.116 and O'Farrell J in 2 Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972 (TCC). Although these authorities were about exemption clauses, the modern approach was that words in exemption clauses were no longer treated differently. Further, where a party had used a particular formulation that had been authoritatively construed in a particular way, it would require clear words to justify a departure from this.

The charterers argued that on fixing the charter they were unaware of any follow-on fixture and the parties would reasonably have expected that if the vessel was redelivered at her maximum duration (ie 1 July 2021) she would proceed straight to dry dock and would not perform any remunerative employment between redelivery and dry-docking.

The owners' position was that, in the special circumstances where both parties knew that the vessel would be drydocked in July, it would have been reasonably foreseeable that they would maximise her profitability by fixing employment that would position her close to the selected drydock and avoid the wasted costs of a ballast voyage.

Held,

The charterers argued that it was necessary to see whether the damages claimed were too remote to be recoverable at common law and then whether clause 119 allowed damages that would not otherwise be recoverable at common law. This was an approach used in identifying the scope of an exclusion clause but clause 119 was not worded, and did not operate, as such a clause and neither party suggested it did.

A common law assessment of remoteness of contractual damages must be assessed against the contract the parties concluded and could not be done in abstract. In The Achilleas the majority in the House of Lords also emphasised that questions of remoteness depended on the parties' own contract and circumstances.

The better approach was to construe clause 119 against its wording and the factual background against which it was concluded. There was little dispute about the correct approach to construction (as summarised by Popplewell J in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune) [2018] 1 Lloyd's Rep 654, para 8). Taking account of the full passage but picking out one aspect, the court must consider the contract as a whole, and "consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant".

The tribunal considered that, in construing clause 119, there were two particularly significant aspects of the factual background against which the charter was concluded:

(a) knowledge that the vessel was due for drydock in July 2021 and her class certificates expired on 6 July 2021;

(b) market understanding of recoverable damages for claims for late delivery as authoritatively determined by the House of Lords in The Achilleas and the market's response to that decision.

It was common ground that at the time of fixing the parties were aware of the importance of redelivery by 1 July 2021 for drydocking. The parties would also have known that there was some flexibility on dates because the owners would have been able to obtain a short extension of the validity of the class certificates. In the tribunal's experience, this type of extension was routine. There was no basis to suggest that the extension was outside the parties' contemplation or that it was a break in the chain of causation.

The parties would have known that opportunities for the vessel's employment after redelivery were limited to a direct voyage to drydock or a repositioning fixture that would bring the vessel near to the chosen shipyard, so as to avoid a costly ballast voyage.

The charterers correctly asserted that the vessel's available market rate was common ground. They did not suggest that the repositioning fixture was extravagant or contrary to market levels, or that there was any failure to mitigate. They pleaded that its redelivery range was "idiosyncratically advantageous" to the owners. However, they presented no evidence for this or to support their argument that it was unusual. The owners could not be criticised for making a fixture with advantageous places of delivery and redelivery.

In circumstances where the charterers had accepted that market rates were at the same level as the repositioning fixture, it was not necessary for the owners to adduce market evidence to show that it was a market fixture or that there were other comparable market fixtures. While other market fixtures might not have offered as good a match on the place of delivery, they would have offered comparable savings of the same type.

The tribunal prefaced its analysis of the market understanding of recoverable damages by noting that case law and textbooks frequently justified taking account of market understanding of the law and that it was frequently addressed as part of the relevant factual matrix. It was particularly common in shipping disputes because market users were known to be sophisticated and likely to have an understanding of the legal and commercial context of their arrangements. In addition, English shipping law had always attempted to reflect the commercial priorities of those within the market, including their understanding of how contracts worked and the importance placed on consistency and certainty.

English law on the remoteness of damage for breach of charter (The Achilleas included) had placed reliance on market expectations. All sides also accepted that market understanding would be relevant to what the parties would reasonably have understood the charter terms to mean on contracting. Against this background, the tribunal tentatively drew conclusions on what the parties would reasonably have understood regarding recovery of damages for late redelivery.

The tribunal accepted the comment in Carver on Charterparties (2nd Edition, 2020) (at para 12-291) to the effect that while there might have been debate as to market understanding prior to The Achilleas, the ordinary measure of damages for late redelivery was now understood to be confined to the difference between the market and charter rate of hire for the period of overrun, and that market damages for the loss of a following fixture were too remote to be recoverable. Time Charters (5th Edition) suggested that the same rule applied "in most circumstances". These conclusions reflected the ordinary or default measure rather than a universal or absolute limit.

In summary, the charterers' approach gave no practical effect to clause 119. Their construction did not reflect the wording of the bespoke clause or the context against which it was concluded. The purpose of the clause, made against the background of the House of Lords' decision in The Achilleas, was to protect the owners and ensure that they could recover consequential losses where the charterers had given an illegitimate last voyage order. The term allowing recovery "including consequential losses" was not limited to damages within the second limb of Hadley v Baxendale. It would include losses on a follow-on fixture.

If that construction was wrong, the tribunal was satisfied that the owners' claim came within the second limb of Hadley v Baxendale and was recoverable on that basis under clause 119(ii).

The tribunal rejected the charterers' argument that clause 119(ii) was solely addressing damages for breach by way of illegitimate last voyage orders, whereas the last sentence was dealing with the separate breach of late redelivery. Looking at the ordinary meaning of the clause read as a whole, clause 119(ii) covered breach by way of late redelivery as well as by way of illegitimate last order causing late redelivery. It was inconsistent with this wording to suggest that it did not cover damages for late redelivery as a breach in itself. The purpose and ordinary meaning of clause 119(ii) and the last sentence was to ensure that the performance of the voyage would not prejudice the owners' right to claim damages for breach of charter in case of late redelivery.

The charterers' construction was effectively that the clause simply confirmed what would have been the position in its absence, and that the parties were confirming that performance of an order would not amount to a waiver of the right to damages. This was an unattractive and unlikely explanation for the parties' wording.

The charterers argued that the owners' construction would be to oust common law principles of remoteness (contrary to Total Transport Corporation v Arcadia Petroleum Ltd (The Eurus) [1996] 2 Lloyd's Rep 408) and would mean that the charterers could be liable for damages that were unquantifiable, unpredictable, uncontrollable and disproportionate. They emphasised that the fact that an owner might refuse an illegitimate last voyage order was a factor which pointed away from an unlimited assumption of responsibility on the part of the charterers.

There was nothing in the wording or purpose of clause 119 to suggest that the parties were attempting to contract out of English law principles of causation and remoteness, including the broader approach taken in The Achilleas. Both sides knew that the vessel would be entering drydock in around July 2021 because her class certificates would expire around that time, even if a short extension was granted. Potential liability for a follow-on fixture, or indeed for repositioning costs, would be limited by that timescale, and would not be unpredictable, unquantifiable, uncontrollable or disproportionate.

In most time charter situations the shipowner would be adequately protected from market losses by the ability to enter into the market (as commented on in The Achilleas). However, here the owners' ability to enter into the market to obtain remunerative employment was limited by the need to drydock within July. This meant that a fixture to reposition closer to the drydock would be the most likely employment. These facts could be distinguished from those that gave rise to the decision in The Achilleas.

The tribunal disagreed with the charterers' suggestion that the owners' construction would enable them to depart from the normal market/contract measure of loss. The owners' construction would not allow them to recover actual losses in excess of market rates. The standard approach to damages for breach of charter applied.

Remoteness

The owners argued that they were entitled to the damages claimed even if the charterers' construction of clause 119 was to be preferred. Their position was that the additional losses claimed were within the second limb of Hadley v Baxendale since the charterers were made aware that the vessel's certificates would expire on 6 July 2021 and that it was going to drydock during that month.

The charterers again argued that they had no knowledge of the repositioning fixture and would have expected the vessel to proceed directly to drydock. They said that there was no assumption of responsibility, as would be required by The Achilleas.

Held,

If (contrary to the tribunal's conclusions above), clause 119 only confirmed the owners' common law rights, including under the second limb of Hadley v Baxendale, then the damages claimed were recoverable as falling within that second limb. The need for drydocking was a special circumstance that the owners had brought to the charterers' attention. The parties' actual knowledge was to be distinguished from the situation in The Achilleas.

Causation

The owners argued that had the vessel been redelivered on 1 July 2021, the repositioning fixture would have been performed and the owners would not have had to pay the cost of ballasting the vessel from the redelivery port to the shipyard. Under clause 119, all that they had to show was that they suffered a loss as a result of complying with the charterers' illegitimate orders.

The charterers maintained that the giving of the last voyage orders was not the effective or legal cause of the damages that the owners claimed. At most those orders gave rise to an opportunity for loss. They noted that the vessel was already performing its last voyage orders when the owners concluded the repositioning fixture. They also asserted that the repositioning fixture was lost because the agreed laycan (1 to 4 July) was too tight.

Held,

The owners' claim was not solely for breach of warranty in giving illegitimate voyage orders, it was also for breach in making late redelivery. There was no doubt that the late redelivery on 14 July 2021 caused the loss of the repositioning fixture. The loss suffered was directly linked to the last voyage orders and the consequential late redelivery.

The owners had not claimed for loss of profits on a specific fixture but repositioning costs following the loss of the repositioning fixture, which was fixed at market rates. It represented a market fixture and the loss claimed was properly attributable to the charterers' breach.

There was no evidence to suggest that the loss of the fixture, and the consequential claim for the repositioning costs, was due to the laycan being unduly narrow.

Redelivery notice to be given in good faith and on reasonable grounds

The owners claimed independently of clause 119 that they had an alternative cause of action for the same damages on the basis of breach of an implied term that redelivery notices would be given in good faith and/or on reasonable grounds.

The charterers accepted that (whether as a matter of construction or implication) line 108 of the charter required any redelivery notice to be given honestly and in good faith, and on objectively reasonable grounds. However, they denied liability on grounds that the notices were expressly qualified as being given "agw" (all going well), "wp" or "ucae" (unforeseen circumstances always excepted) such that absent a lack of good faith, they would be non-actionable (IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The Zenovia) [2009] 2 Lloyd's Rep 139). They also argued that even if the notices had been accurate, the vessel would not have been delivered earlier and the repositioning fixture would still have been missed.

Held,

There was an implied term that any redelivery notice must be given in good faith and on reasonable grounds (as acknowledged in The Zenovia and Maestro Bulk Ltd v Cosco Bulk Carrier Co Ltd (The Great Creation) [2015] 1 Lloyd's Rep 315).

The reference to "wp" in the notices was to "weather permitting". Even if it must be construed as meaning "without prejudice", it was not being used to suggest that the contents of the statement could not be relied upon and did not negate the requirement that the notice be given on reasonable grounds.

Unlike in The Zenovia, the owners were not alleging that the charterers were bound by the notice but that they were in breach because they had no reasonable grounds for its contents. Accordingly, The Zenovia did not apply and the charterers would need to have used much clearer wording to make the notices wholly non-actionable.

The owners did not establish lack of good faith or honest grounds on the part of the charterers. The charterers' admission of breach did not give rise to an inference of bad faith or place the burden upon the charterers to show that they acted honestly and in good faith. However, the admission did show that they lacked reasonable grounds for their redelivery estimates and this would be enough to establish liability in principle.

However, the owners failed to show that the alleged breach caused the loss claimed. The tribunal accepted that if the charterers had given accurate notices, the vessel would not have been redelivered earlier. There was no evidence as to what would have happened if accurate notices had been given. No liability was proven. It was accordingly not necessary to consider whether the claim would have failed on grounds of remoteness.

For all these reasons, the owners' alternative claim was rejected.

Conclusion

The owners were entitled to recover the damages claimed under clause 119 and were entitled to an award in the amount of US$306,617.19.

Costs were reserved. Compound interest was awarded under section 49 of the Arbitration Act 1996 at the rate of 5 per cent from 1 August 2021 until the date of payment.