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WORDS OF WISDOM FROM THE TCC
-
AN UPDATE ON DAMAGES

A talk to the TECBAR Annual Conference 2009
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I INTRODUCTION

1. I need to start by correcting a misapprehension that has arisen as a result of the advertised title for my talk. This talk does not (as you will not be surprised to learn) comprise of words of wisdom from me but rather words of wisdom which have emanated from the TCC in recent cases on the subject of calculating damages.

2. I have selected a handful of cases in which, if I may respectfully say so, the Court has helpfully set out the relevant principles to be applied to heads of claim which have, in the past, been the subject of some uncertainty.

II RELIANCE ON EXPERT EVIDENCE

3. Traditionally, for causes of action in tort and contract concerned with damage to property, damages were based on the diminution in the value of the property itself (see for example Jones v Gooday [1841] 8 M&W 146, 151 ER 985). However, more recently in an action against a contractor or professional for defective work, the appropriate measure of loss has been taken to be the cost of reinstatement/repair, because that was the foreseeable consequence of the defective work (see for example East Ham BC v Bernard Sunley & Sons Ltd [1996] AC 406; Darlington Borough Council v Wiltshier Northern Limited [1995] 1 WLR 68 at 79.)

4. However, *"where reinstatement is the appropriate basis for the assessment of damages, it must be both reasonable to reinstate and the amount awarded must be objectively fair as between the claimants and the defendants"* (*per* Clarke LJ in the Maersk Colombo [2001] 2 Lloyds Rep 275, 281).

5. The first issue I will consider is the relevance of a claimant's reliance on expert evidence in the context of assessment of damages for defective works.

6. We are all familiar with the case of The Board of Governors of the Hospitals for Sick Children & Anor v McLaughlin & Harvey Plc & Ors 19 Con LR 25. In that case the engineer's modifications to the piling design of a new wing of the hospital were negligent and resulted in the construction of inadequate foundations. Both sides agreed that remedial work was necessary as a result of that default. The issue was whether the defendant could criticise the particular remedial scheme that had been carried out on expert advice.

7. Judge Newey held that:-

   "The plaintiff who carries out either repair or reinstatement of his property must act reasonably. He can only recover as damages the cost which the defendant ought reasonably to have foreseen that he would incur and the defendant would not have foreseen unreasonable expenditure. Reasonable costs do not, however, mean the minimum amount which, with hindsight, it cold be held would have sufficed. When the nature of the repairs is such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take such advice and be influenced by it.

   ….

The independent cause may take the form of an event which breaks, that is to say, brings to an end, a chain of causation which he sustains after the event. The event may take the form of negligent advice upon which the plaintiff has acted. Another way of expressing the mater might be that the defendant could not reasonably have foreseen that the plaintiff would not act on negligent advice. Advice which is not negligent will not by itself break the chain.

….

If at the date of trial no remedial works have been carried out by the plaintiff, then the court has in order to assess damages decide what work should be done. The parties are entitled to put forward rival schemes and the court has to choose between them or variants of them …. The assessment has to be made on the basis of what the plaintiff can reasonably do.

Contrary to Mr. Potter QC's submissions, in my view where works have been carried out, it is not for the court to consider de novo what should have been done and what costs should have been incurred either as a check upon the reasonableness of the plaintiff's actions or otherwise. "

8. On the basis of this authority, it is said that there may be certain cases in which it is foreseeable that a claimant would decide which repair scheme to put in hand with the assistance of expert advice, and that it would be foreseeable that the claimant would take such advice and be influenced by it. In such circumstances, it has been said, that, prima facie, the claimant is entitled to the cost of the work carried out pursuant to that expert advice, even if, with hindsight, criticism could be made of the scheme that was put in hand. In such a case, in order for a defendant to open up the damages claim based on work actually carried out, the defendant must ordinarily demonstrate that the advice upon which the claimant relied upon was negligent. Such negligent advice would form an independent cause of damage which breaks the chain of causation.

9. Members of this association will be familiar with this proposition which is often referred to as the 'Great Ormond Street' principle.

10. In Skandia Property UK Limited v Thames Water Utilities Limited [1999] BLR 338 the claimant was advised by experts that a tanking system, called a 'Sika' system, was the only practical way to protect a building that had been damaged by a flood caused by the defendant. However, at the time that such advice was given and acted upon, the experts had been unaware of pressure grouting treatment which had been performed some time prior to the flood, which meant that the flood had not in fact damaged the integrity of the building. The Sika system that was put in as part of the remedial scheme was therefore shown to be unnecessary. In assessing the damages due from the defendant, the judge refused the claim for the cost of the Sika system, despite the absence of any suggestion of negligence on the part of the experts. The Court of Appeal upheld this view. Waller LJ said:-

"If there has been an escape of water that causes some physical damage then prima facie it is only the cost of reinstatement of that physical damage which is recoverable. If the claimant is to recover damages for something beyond the cost of reinstatement of physical damage then he must on any view show that it was reasonable to incur expenditure beyond that quantifiable figure… What should be emphasised is that it must be rare if ever that a plaintiff will be able to establish the reasonableness of any assumption of damage to something which is accessible and inspectable. Certainly, simple reliance by a plaintiff on an expert cannot be the test as to whether a plaintiff has acted reasonably in making an assumption, albeit, provided the plaintiff has provided the expert with all material facts and the expert has made all reasonable investigations, the advice will be a highly significant factor."

11. It is of note that Great Ormond Street does not appear to have been cited to the Court of Appeal in Skandia

12. The application of the Great Ormond Street principle and Skandia was considered by Mr. Justice Coulson in McGlinn v Waltham Contractors Limited & Others [2007] EWHC 149 (TCC).

13. Insofar as is relevant, the facts of this case were as follows:-

    13.1. The action concerned a house called 'Maison d'Or' that was built for the Claimant, Mr. McGlinn.

    13.2. The house took three years to build between January 1999 and December 2001.

    13.3. Following the departure of the building contractors in January 2002 when the house was substantially complete, it sat empty for the next three years whilst the alleged deficiencies in its design and construction were the subject of extensive investigation by a team of experts and contractors.

    13.4. In the early part of 2005, the house was completely demolished. It was never lived in. It had not, at the time of the proceedings, been rebuilt.

    13.5. Mr. McGlinn alleged that Maison d'Or was so badly designed and so badly built that he was entitled to demolish it and start again. He claimed damages for breach of contract and/or negligence against the building contractors, the architects, the structural and mechanical engineers and the quantity surveyors/project managers. The building contractors played no part in the trial because they were in administration.

    13.6. Mr. McGlinn's primary case on damages was that he was entitled to recover the actual cost of demolition and the estimated cost of rebuilding the whole house which was calculated (by the end of trial) at some £3.6 million. His alternative case was that he was entitled to the estimated cost of repairing the individual defects which was calculated at about £2.5million.

    13.7. Mr. McGlinn submitted that:-

        13.7.1. the decision to demolish Maison d'Or was taken on expert advice;

        13.7.2. it was not suggested that that expert advice was negligent;

        13.7.3. accordingly, he was entitled to the costs, or a proportion of the costs of demolition and rebuilding as against each of the defendants in accordance with the Great Ormond Street principle.

    13.8. The Defendants submitted that:-

        13.8.1. the decision in Great Ormond Street could be distinguished;

        13.8.2. Great Ormond Street is not authority for the wide proposition that the existence of expert advice to demolish and rebuild automatically means that, without more, the

defendants are liable for the costs of such work, and that all other considerations are essentially rendered irrelevant;

13.8.3. the only appropriate principle is that each defendant should only be liable for the damage for which that defendant is responsible and the overriding test is one of reasonableness;

13.8.4. in any event, if it should be necessary to decide the point, Great Ormond Street was wrongly decided;

13.8.5. accordingly, damages in respect of each defendant should be measured by reference to the cost of reinstating those individual defects for which each defendant is found to be liable, together with appropriate additions for on-costs and the like, but not for the (greater) costs of demolition and rebuilding.

14. Mr. Justice Coulson accepted the principal arguments put forward by the defendants. In summary, his reasons were as follows:-

14.1. The case could be distinguished from Great Ormond Street because there were a number of significant factors lying behind the decision to demolish Maison d'Or which were not directly connected to the breaches of contract on the part of the defendants namely:-

14.1.1. It was clear from the evidence that even leaving aside the alleged defects, Mr. McGlinn was always dissatisfied with Maison d'Or. In other words, whilst in Great Ormond Street the remedial works were only carried out because of the existence of defects, the same could not be said of the decision to demolish and rebuild Maison d'Or.

14.1.2. The evidence demonstrated that the starting position for Mr. McGlinn and/or his advisors was the demolition/rebuilding option, not repair. In view of that starting point and in light of the scale of the damage caused by the opening up works it was entirely unsurprising that, ultimately, those advising Mr. McGlinn came down against piecemeal repairs and in favour of a full replacement.

14.1.3. The defects in Maison d'Or affected all the main elements of the house but most of the criticisms could fairly be described as aesthetic; unlike Great Ormond Street, most were unconnected with the structural soundness of the building itself. This was an important feature of the case. Demolition was, on any view, an extreme course and if such a course of action could be justified at all, it would ordinarily be because the building was dangerous or structurally unsound. The fact that there were no structural concerns about the property made it a very different sort of case to Great Ormond Street.

14.1.4. The overall advice as to demolition was plainly dependent on the comparative costs which was not the case in Great Ormond Street. Further, that cost advice had also proved to be wrong because whilst at the time the decision was taken to demolish Mr. McGlinn had been advised that the cost of demolition and rebuilding was only slightly more, it had, by the end of the trial, been agreed that the difference between the cost of demolition and the cost of the remedial works was in excess of £1million.

14.1.5. Neither of Mr. McGlinn's experts had in fact advised Mr. McGlinn to demolish Maison d'Or. The advice had been given by contractors who had been called at trial to give factual but not expert evidence. It followed that the two principal elements of the advice (defects and quantum) that were said to have underpinned the recommendation to demolish were not the subject of evidence from Mr. McGlinn's experts.

14.1.6. The biggest and most significant difference between the decision in Great Ormond Street and the present case was the existence in the present case of a large number of separate items or claims against four different defendants of which only 3 appeared at the trial whereas in Great Ormond Street there was only one defendant. Whilst in Great Ormond Street the damages argument could be confined to the appropriate remedial work to rectify one defect, in the present case the advice to demolish and rebuilt was based on the cumulative effect of a whole series of unconnected items. Some of the items had been found not to be defects at all, some had not been claimed against the three defendants and no liability had been found in respect of other defects. This meant that in the absence of any evidence that certain items on there own were sufficient to justify demolition and rebuilding, Mr. McGlinn's case on this aspect of the claim had all the usual problems inherent in a cumulative exercise that essentially relied upon/assumed complete success on a large number of contentious items. This was not a problem in Great Ormond Street but was a very real difficulty in the present case.

14.1.7. In Great Ormond Street the remedial scheme which formed the basis of the plaintiff's claim for damages had already been carried out in full. By contrast, Mr. McGlinn had only carried out the relatively inexpensive demolition works and even though that work had been carried out two years previously he had not commenced the rebuilding and there was no sign that it was even imminent.

14.2. The decision in Great Ormond Street was authority for the relatively narrow proposition that, if two remedial schemes are proposed to rectify a defect which is the result of a defendant's default, and one scheme is put in hand on expert advice, the defendant is liable for the costs of that built scheme, unless it could be said that the expert advice was negligent. That narrow proposition was correct in law and the judgment in Great Ormond Street was not therefore

wrong but was subject to one potentially vital qualification. That vital qualification was (as outlined by Waller LJ in Skandia) that although reliance on an expert will always be a highly significant factor in any assessment of loss and damage, it will not on its own, be enough, in every case, to prove that the claimant has acted reasonably. Moreover, in Skandia, Waller LJ made it clear that to put in issue the reasonableness of a decision based on expert advice 'does not require proof of conduct amounting to professional negligence or something of that sort'

14.3. Mr. McGlinn's submission that his reliance on advice from contractors in 2004 was, on its own enough to mean that the court must take demolition and rebuilding costs as the measure of his loss in the present case, regardless of whether the items in the Scott Schedule were proved to be defects or not, and regardless of each Defendant's actual liability for the individual items alleged against them in that Schedule was wrong. The proposition was not supported by Great Ormond Street and offended practicality and common sense.

14.3.1. The decision in Great Ormond Street was based upon notions of foreseeability and causation. In the present case, the Mr. McGlinn's case based on the cost of demolition and rebuilding took no account of the defendant's different liabilities for the items which were said to justify the drastic decision to demolish and rebuild. If Mr. McGlinn's case was taken to its logical conclusion it would render a defendant liable for the costs of demolition and rebuilding (or at least some arbitrary allocation of such costs) if there were 100 defects which cumulatively gave rise to the advice to demolish and rebuild even though as a matter of law the defendant was liable for only one of the items. Such a situation would simply not be foreseeable. It follows that even if Mr. McGlinn had acted reasonably in deciding to demolish Maison d'Or because of the advice he had received as to the cumulative effect of all the defects, he could not recover the costs of demolition as damages against a particular defendant in circumstances where only a handful of those defects were the responsibility of that Defendant.

14.3.2. It offended practicalities and common sense because whilst the cost of repair for most items had been agreed or could be calculated there was no way of allocating the costs of the demolition and rebuilding to specific items. The only method proposed for allocating the costs of demolition and rebuilding was a percentage allocation based on the total value of items for which the defendants were originally said to be liable. In reality, Mr. McGlinn was therefore offering the Court a global claim and the suggestion of allocation and an alternative claim which had been carefully broken down and agreed. There was no part of Great Ormond Street (or any other authority) which would oblige the court to measure the loss by reference to the global claim.

14.3.3. The Court must award damages which are reasonable and objectively fair as between the claimants and the defendants. It would be unreasonable to award an arbitrary allocation of the costs of demolition and rebuilding instead of the agreed figures for cost of repair.

14.3.4. Whilst the effect of only awarding the costs of repair would mean that Mr. McGlinn would not recover the costs of demolishing Maison d'Or this was not an unfair result. Different considerations may have applied if the contractors had played a part in the proceedings because they may have been liable for more of the defects. However, the fact that the building contractor was insolvent was not a matter for which the defendant's could be held responsible.

15. The issue was also considered by Mr. Justice Akenhead in Axa Insurance UK Plc v Cunningham Lindsey United Kingdom [2007] EWHC 3023 (TCC) which concerned a claim by an insurer against loss adjusters for breach of contract and/or negligence in respect of the services they provided in respect of a claim for subsidence. He held that Mr. Justice Coulson's statement of the law (as summarised at paragraph 14.2 above) was correct and went on to state that:-

"As indicated above, whilst the advice of an expert may well (if not invariably) assist in establishing the reasonableness of a decision to adopt one remedial solution rather than another it will rarely, if ever, justify the recovery of the cost of remedial works relating to putting right a default or defect for which the defendant is not culpable."

16. The reader should also refer to the obiter comments of Mr. Justice Akenhead in Galliford Try Infrastructure Limited v Mott MacDonald Limited [2008] EWHC 1570 (TCC) on the question of whether the claimant had acted reasonably or at least not unreasonably in opting for a particular remedial solution. In that case the claimant had relied upon advice given by the defendant as to the remedial scheme to be adopted. It is therefore perhaps not surprising that in that case it was found that the claimant had not acted unreasonably! However, I think it is also of note that in that case the claimant had not 'rejected' the alternative scheme at the outset and at the time of the decision as to what remedial scheme to use was made there was a perceived advantage in the solution which was adopted and no one had any real idea that the adopted scheme would take as long, cause such delay or cost as much as proved to be the case.

III REASONABLE SETTLEMENT

17. The case of Biggin and Co. Ltd v Permanite Limited [1951] 2 KB 314 established that the amount payable under a settlement made between a claimant and a third party may be recoverable as damages from a defendant where the settlement was reasonable.

18. The issues relating to reasonable settlements have been considered by Mr. Justice Coulson in John F Hunt Demolition Ltd v ASME Engineering Ltd [2007] EWHC 1507 (TCC) and Mr. Justice Akenhead in AXA Insurance Plc v Cunningham Lindsey United Kingdom [2007] EWHC 3023 (TCC).

19. Mr. Justice Akenhead approved the decision of Mr. Justice Coulson and provided the following useful summary of the principles to be applied when a party is claiming a settlement as damages.

> *"(a) If there is no effective causal link between the breaches of the duty of the defendant and the need for the claimant to enter into the settlement with a third party or the payment of sums pursuant to the settlement agreement, there will be no liability to pay the settlement sums irrespective of whether the settlement was reasonable.*
>
> *(b) The onus of proof in establishing the reasonableness of the settlement is upon the claimant. Thus, there must be some reliable evidence for the court to conclude that it was a reasonable settlement.*
>
> *(c) The mere fact that the claimant is not liable for the third party either at all or for the sums payable pursuant to the settlement is not necessarily a bar to recovery or to the establishment of the reasonableness of the settlement. However, the fact that the claimant was not liable to the third party either at all or for anything approaching the sums payable may be a factor in determining that the settlement was unreasonable.*
>
> *(d) Where a settlement is not established as reasonable, it is still open to the claimant to recover from the culpable defendant elements of the sums paid pursuant to the settlement to the third party to the extent that it can be proved that there is an effective causal link between the payment of those sums and the established breaches of duty. In those circumstances, it is legitimate for the court to consider and establish what was likely to have been payable as a matter of fact and law to the third party as the foreseeable result of the defendant's breaches."*

IV MANAGEMENT TIME

20. In Aerospace Publishing Limited v Thames Water Utilities Limited 110 ConLR 1 the Court of Appeal had to consider the circumstances in which management costs could be recovered. In that case the claimant's property had suffered severe water damage when the defendant's water pipe had burst.

21. Pill LJ who gave the main judgment on this issue considered five authorities namely Tate & Lyle Food and Distribution Ltd v Greater London Council [1982] 1 WLR 149, Standard Chartered Bank v Pakistan National Shipping Corporation [2001] EWCA Civ 55, Horace Holman Group Ltd v Sherwood International Group Ltd [2001] All ER (D) 83 (Nov), Admiral Management Services Ltd v Para-Protect Europe Ltd [2002] 1 WLR 2722 and R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA [2006] EWHC 42 (comm.).

22. Pill LJ held that insofar as there was a difference between the decision of Burnton J in Admiral Management and Gloster J in R+V Versicherung the judgment of Gloster J was to be preferred.

23. Gloster J had held that:-

> *"In my judgment, as a matter of principle, such head of loss (i.e. the cost of wasted staff time spent on the investigation and/or mitigation of the tort) is recoverable notwithstanding that no additional expenditure "loss" or loss of revenue or profit can be shown. However, this is subject to the proviso that it has to be demonstrated with sufficient certainty that the wasted time was indeed spent on investigating and/or mitigating the relevant tort; i.e. that the expenditure was directly attributable to the tort …. This is perhaps simply another way of putting what Potter L.J. said in Standard Chartered, namely that to be able to recover one has to show some significant disruption to the business; in other words that staff have been significantly diverted from their usual activities. Otherwise, the alleged wasted expenditure on wages cannot be said to be "directly attributable" to the tort."*

24. Pill LJ then went on to hold that the five authorities to which he had referred established the following propositions:-

> *"(a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established.*
>
> *(b) The claimant also has to establish that the diversion caused significant disruption to its business.*
>
> *(c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."*

25. Applying those principles, Pill LJ did not allow the cost of the claimant's two freelancers because the evidence showed that most of their work related to the preparation of the claim rather than the attempted reconstitution of the claimant's business activity but did allow the costs of the other employees of the claimant. He held that the diversion of the time of the employees had been set out in detail and adequately established. He said that there could therefore be no sensible challenge to a conclusion that the claimant's business was thereby disrupted and the Court was entitled to draw the inference that the employees had been diverted away from revenue-generating activities. Accordingly, he upheld the Judge's allowance for the costs of the employees referable to the diversion.

26. The question of how to assess such management costs arose in Bridge UK.com Limited v Abbey Pynford Plc [2007] EWHC 728 (TCC). In that case the defendant specialist ground engineering company had admitted that it had acted negligently in failing to provide a suitable floor capable of supporting the claimant's printing press. One of the claims made by the claimant was for £7,680.00 for management time incurred by Mr. Ruck, the Claimant's new business development director.

27. In respect of that claim, Mr. Justice Ramsey adopted the approach of Gloster J in R+V Versicherung (even though it does not appear that he was referred to the Aerospace Publishing).

28. He found that there was sufficient evidence that Mr. Ruck, in respect of whose time a claim was being made, would, if he had not been dealing with, investigating and mitigating the effect of the problems caused by the defendant, had spent his time selling and marketing the claimant's business. Insofar as assessment of the costs of that time were concerned he said that:-

    28.1. Mr. Ruck had calculated that he was engaged for 128 hours in dealing with the problems caused by the defendant between 31 August 2002 and 30 April 2003.

    28.2. That assessment was based on Mr. Ruck's assessment of the time he had spent on various matters and was made retrospectively on the basis of the various documents which recorded what had happened.

28.3. The method of retrospective assessment was a valid method of calculation and in that respect he agreed with the decision of HHJ Bowsher QC in Holman Group where he had indicated that in the absence of records, evidence in the form of a reconstruction from memory was acceptable.

28.4. Such an assessment is an approximation of the hours spent and may over-estimate or under-estimate the actual time which would have been recorded at the time.

28.5. Some of the hours included in Mr. Ruck's assessment related to organising the outsourcing of printing work in August 2002 which had not been caused by the defendant's breach of contract.

28.6. A discount should be applied to allow for the inherent uncertainty in the retrospective method.

28.7. A discount of 20% was appropriate to allow for the hours wrongly included for the August 2002 outsourcing work and for the uncertainty arising from the retrospective assessment and he would therefore allow 100 hours.

28.8. He accepted that on the basis of the audited accounts, Mr. Ruck's income in the relevant period was £48.11 per hour and that accordingly £4,800 would be awarded to the claimant in respect of this head of loss.

V GENERAL DAMAGES

29. In AXA v Cunningham Lindsey, Mr. Justice Akenhead also had to consider the proper valuation of claims for distress, inconvenience and physical discomfort caused by breaches of contract.

30. His decision is useful in that he held that as at the end of 2007 the maximum for this type of general damages where there were no particular physical symptoms or illnesses would not generally exceed £2,500 per person. He also held that in many cases it might be less.

VI MEANWHILE, OVER IN THE HOUSE OF LORDS ....

31. Whilst the TCC has been issuing judgments making the position on damages clearer, the House of Lords has issued a judgment which, on its face, appears to rather complicate matters.

32. The decision to which I am referring is the decision in Transfield Shipping Inc v Mercator Shipping Inc. (The *Achilleas*) [2009] 1 AC 61.

33. The facts of the case were as follows:-

33.1. By a time charter dated 22 January 2003 the owners let the *Achilleas* to the charterers for about five to seven months at a daily hire rate of US$ 13,500.

33.2. By an addendum dated 12 September 2003, the parties fixed the vessel for a further five to seven months at a daily rate of US$16,750.

33.3. The latest date for redelivery was 2 May 2004.

33.4. By April 2004, the market rates had more than doubled when compared with the market rates in the previous September.

33.5. On 20 April 2004 the charterers gave notice of delivery between 30 April and 2 May 2004.

33.6. On the following day, the owners fixed the vessel for a new four to six month hire to another charterer, following on from the current charter, at a daily rate of US$ 39,500. The latest date for delivery to the new charterers, after which they were entitled to cancel, was 8 May 2004.

33.7. With less than a fortnight to run on the original charter, the charterers fixed the vessel under a sub-charter to carry coals across the Yellow Sea. If this voyage could not reasonably have been expected to allow redelivery by 2 May 2004, the owners could probably have refused to perform it. However, they made no such objection.

33.8. The vessel completed this additional voyage but was unfortunately delayed and was not redelivered to the owners until 11 May 2004, i.e. after the cancellation date of 8 May 2004.

33.9. By 5 May 2004, it had become clear to everyone that the vessel would not be available to the new charterers before the cancellation date. By that date rates had fallen again and so in return for an extension of the cancellation date to 11 May 2008, the owners agreed to reduce the rate for hire to US$31,500.

33.10. The owners claimed damages totalling US$1,364,584.37 for the loss of the difference between the original rate and the reduced rate over the period of the new charter.

33.11. The charterers said that the owners were not entitled to damages calculated by reference to their dealings with the new charterers and that they were only entitled to the difference between the market rate and the charter rate for the nine days during which they were deprived of the use of the ship which amounted to US$158,301.17.

34. The arbitrators, by a majority found for the owners. They said that the loss on the new fixture fell within the first rule of Hadley v Baxendale (1854) 9 Exch 341 as arising 'naturally, i.e. according to the usual course of things, from the breach of contract itself'. It fell within the rule because it was damage of a kind which the charterer when he made the contract, ought to have realised was not unlikely to result from a breach of contract by delay in redelivery (as per The *Heron II* [1969] 1 AC 350).

35. The dissenting arbitrator did not deny that a charterer would have known that the owners would very likely enter into a following fixture during the course of the charter and that late delivery might cause them to lose it. However, he said that a reasonable man in the position of the charterers would not have understood that he was assuming liability for the risk of the type of loss in question because the general understanding in the shipping market was that liability was restricted to the difference between the market rate and the charter rate for the overrun period. He said that any departure from this rule was likely to give

rise to a real risk of serious commercial uncertainty which the industry as a whole would regard as undesirable.

36. In this context it is worth noting that the majority arbitrators did not deny that the general understanding in the industry, i.e. amongst the shipping lawyers and the clubs, was that liability was so limited. However, they said that this was irrelevant. A broker in a 'commercial situation' would have said that the 'not unlikely' results arising from late delivery would include missing dates for a subsequent a subsequent fixture, a dry docking or the sale of the vessel. Therefore as a matter of law, damages for loss of these types was recoverable. The understanding of the shipping lawyers was wrong.

37. On appeal from the arbitrators, Christopher Clarke J and the Court of Appeal upheld the decision of the majority.

38. The House of Lord allowed the charterers' appeal. It is the different reasoning given by the Law Lords which is of interest and, in particular, the reasoning of Lord Hoffman.

39. Lord Hoffman referred back to his decision in SAAMCO [1997] AC 191 and held that the 'starting point' was not (as the owners had said) that damages were designed to put the innocent party, so far as it is possible, in the position as if the contract had been performed but that one must first decide:-

"whether the loss for which compensation is sought is of a "kind" or "type" for which the contract-breaker ought fairly to be taken to have accepted responsibility."

40. He held that:-

"What is true of an implied contractual duty (to take reasonable care in the valuation) is equally true of an express contractual duty (to redeliver the ship on the appointed day). In both cases, the consequences for which the party will be liable are those which "the law regards as best giving effect to the express obligations assumed" and "[not] extending them so as to impose on [the contracting party] a liability greater than he could reasonably have thought he was undertaking."

41. Lord Hoffman noted that it is generally accepted that a contracting party will be liable for damages for losses which are unforeseeably large, if loss of that type or kind fell within one or other of the rules in Hadley v Baxendale. However, he said that whilst that was generally an inclusive principle (because if losses of that type are foreseeable damages will include compensation for those losses however larger) the application of other cases (including SAAMCO) showed that it could be an exclusive principle and that a party may not be liable for foreseeable losses because they are not of the type or kind for which he can be treated as having assumed responsibility.

42. He concluded that:-

"If, therefore one considers what these parties, contracting against the background of market expectations found by the arbitrators, would reasonably have considered the extent of the liability they were undertaking, I think it is clear that they would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility. Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter a forward fixture, they would have no idea when that would be done or what its length or other terms would be. If it was clear to the owners that the last voyage was bound to overrun and put the following fixture at risk, it was open to them to refuse to undertake it. What this shows is that the purpose of the provision for timely redelivery in the charterparty

is to enable the ship to be at the full disposal of the owner from the redelivery date. If the charterer's orders, will defeat this right, the owner may reject them. If the orders are accepted and the last voyage overruns, the owner is entitled to be paid the overrun at the market rate. All this will be known to both parties. It does not require any knowledge of the owner's arrangements for the next charter....

In my opinion, the findings of the arbitrators and the commercial background to the agreement are sufficient to make it clear that that the charterer cannot reasonably be regarded as having assumed the risk of the owner's loss of profit on the following charter."

43. It seems to me that in effect Lord Hoffman was saying that it was insufficient just to ask whether the type of loss was in 'the usual course of things' (i.e. foreseeable) under the first limb of Hadley v Baxendale. The first limb went to the parties' presumed intention. Presumed in the great majority of cases but not in the case before him where the circumstances of the case showed that the charterers could not reasonably have been assuming responsibility for this (unquantifiable) type of loss. In other words, he was introducing into the law of contract the concept of the scope of duty.

44. Lord Hope held that:-

44.1. The differing approaches of the arbitrators shared a common starting point, namely that they asked what should fairly and reasonably be regarded as having been in the contemplation of the parties at the time when the contract was entered into.

44.2. It was not difficult to conclude that both parties must have had in contemplation when they entered into the contract that late delivery might occur and that late delivery would result in missing the date for a subsequent fixture.

44.3. The critical question was whether the parties must be assumed to have contracted with each other on the basis that the charterers were assuming responsibility for the consequences of the event.

44.4. Assumption of responsibility, which forms the basis of the law of remoteness of damage in contract is determined by more than what at the time of the contract was reasonably foreseeable.

44.5. The rule that applies in tort is quite different and imposes a wider liability than that which applies in contract. The defendant in tort will be liable for any type of loss and damage which is reasonably foreseeable as likely to result from the act or omission for which he is held liable. Reasonable foreseeability is the criterion by which the extent of that liability is to be judged, and it may result in his having to pay for something that, although reasonably foreseeable, was very unusual , not likely to occur and much greater in amount than he could anticipate.

44.6. In contract it is different. There is good reason for that difference because (as per Lord Reid in The *Heron II),* in contract if one party wishes to protect himself against a risk to which the other party would appear unusual, he can direct the other party's attention to it before the contract is made.

44.7. In the present case it was within the parties' contemplation that an injury which would arise generally from late delivery would be loss of use at the market rate, as compared with the charter rate, during the relevant period. This was something everybody who deals in the market would know about and could be expected to take into account. The charterers could not however know if – as was not unlikely – there was a subsequent fixture how the owners would deal with the new charterers. This was something over which they had no control and, at the time of entering the contract, was completely unpredictable.

44.8. Neither party had control over the state of the market. In the ordinary course of things the rate of the market would fluctuate so it could be presumed that the party in breach had assumed responsibility for any loss caused by the delay which could be measured by comparing the charter rate with the market rate during that period. There could not however be any presumption where the loss claimed is not the product of the market itself, which can be contemplated, but results from arrangements entered into between the owners and the new charterers, which could not.

44.9. In his opinion, a party could not be expected to assume responsibility for something that he cannot control and, because he does not know anything about it, cannot quantify. It is not enough for him to know in general and on open-ended terms that there is likely to be a follow-on fixture. What he needs is some information that will enable him to assess the extent of any liability.

44.10. The policy of the law is that effect should be given to the presumed intention of the parties. That is why the damages that are recoverable for breach of contract are limited to what happens in ordinary circumstances where an assumption of responsibility can be presumed or what arises from special circumstances known to or communicated to the party who is in breach at the time of entering into the contract which because he knew about he can be expected to provide for.

45. He seems therefore to have agreed with Lord Hoffman that the question was not only whether the parties must be taken to have had this type of loss within their contemplation when the contract was made, but also whether they must be taken to have had liability for this type of loss within their contemplation.

46. Following his review of Hadley v Baxendale and the subsequent authorities Lord Walker held:-

"Ultimately [the majority arbitrators] accepted and applied the owners' submission that "what mattered was that the type of loss claimed was foreseeable": para 18 of the majority reasons. That was in my opinion too crude a test, and it was an error of law to adopt it. What mattered was whether the common intention of reasonable parties to a charterparty of this sort would have been that in the event of a relatively short delay in re-delivery an extraordinary loss, measured over the whole term of renewed fixture, was, in Lord Reid's words, "sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within [the defaulting party's] contemplation". Lord Mustill's dictum in The Gregos *indicates that that would not have been the common intention of reasonable contracting parties, and I respectfully agree."*

47. In other words Lord Walker also found that it was insufficient just to ask whether the type of loss was foreseeable (first limb). For him, the question was whether it was the common intention of the parties that

the loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or was of the kind which should have been in the defaulting party's contemplation.

48. Lord Rodger (applying the principles set out in Hadley v Baxendale and the subsequent authorities and the shipping authorities which from which it could be derived that ordinarily the appropriate measure of damages for late delivery would be the difference between the charter rate and the market rate if the latter was higher) held that –

"... I am satisfied that, when they entered into the addendum in September 2003, neither party would reasonably have contemplated that an overrun of nine days would "in the ordinary course of things" cause the owners the kind of loss for which they claim damages. That loss was not the "ordinary consequence" of a breach of that kind. It occurred in this case only because of the extremely volatile market conditions which produced both the owners' initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture. Back in September 2003, this loss could not have been reasonably foreseen as being likely to arise out of the delay in question. It was, accordingly, too remote to give rise to a claim for damages for breach of contract."

49. He applied the test with which we are all more familiar and concluded that the loss was not foreseeable under the first limb. It is of note that he said he had not found it necessary to explore the issues concerning SAAMCO and assumption of responsibility but was nevertheless in substantial agreement with the reasons of Lord Hoffman and Lord Walker.

50. For her part, Baroness Hale stated that she was not immediately attracted to introducing the concept of scope of duty into the law of contract and held that if the appeal was to be allowed (as to which she had doubts) then she would prefer it to be allowed on the narrower ground identified by Lord Rodger, leaving the wider ground to be fully explored in another case and context.

51. The *Achilleas* does therefore seem to leave open the question whether there is now a new 'assumption of responsibility' or 'common intention' test which needs to be applied to the question of remoteness of damages in the context of a claim for breach of contract.

52. As far as I am aware, there has only been one case in which a party has attempted to rely on the decision in The *Achilleas*.

53. In AIMS Limited v TTMI Ltd (The *"Amer Energy"*) (2008) 759 LNLM 4 the charterers agreed to provide their sister company with a ship to carry gasoil (which the sister company had agreed to sell). The vessel was voyage-chartered but it arrived late to load so the buyers cancelled their order. The charterers were exposed to a loss of profit claim and claimed damages from the owners.

54. The arbitrators' award was published just after The *Achilleas* decision. The charterers were awarded some US$750,000 odd.

55. The owners applied to the High Court for permission to apply. They argued that that the arbitrators should have applied the new "assumption of responsibility" test for remoteness of damages in The *Achilleas* and asked the question whether the owners had assumed a responsibility for such a loss. Flaux J disagreed.

He held:-

55.1. There was no new test for remoteness of damages.

55.2. The assumption of responsibility test was only suggested by one judge. Lord Hope's analysis, why similar, applied established principles.

55.3. Lord Hoffman acknowledged that departure from the normal rules of foreseeability principles would be unusual.

55.4. Lord Hoffman may have said that in shipping, market expectations might more commonly limit the extent of liability but he did not say that the old remoteness of damages rule no longer applied in all shipping cases.

55.5. In any event, "an assumption of responsibility" would have been presumed on the facts. The losses and the matters giving rise to them were in the 'usual course of things'. They were not unlikely to result from the vessel's late arrival to load. The owners had actual knowledge of the special circumstances producing the losses (i.e. that the gasoil was being sold and the sister company would suffer loss if the vessel arrived late).

56. It seems to me that it is time for some more 'words of wisdom' from the TCC.

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