The Maritime Law Association of Singapore
Tea Talk
23 February 2011, Maxwell Chambers

Measuring and Mitigating Loss In cases of non-shipment

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Assume the following common scenario:
S, a trader, has a contract to sell goods to buyers in another jurisdiction.
S charters a vessel from D to transport the goods to their destination
D fails to tender a suitable vessel within the laycan specified in the charterparty.
S treats D as being in repudiatory breach.
Assume also (for the time being) that S is unable to charter a substitute vessel in time to meet his contractual obligations to deliver the goods to his existing purchasers and they cancel the contracts of sale and claim damages from him.
How does the Court go about measuring S's damages?
As in any case of breach of contract S's loss is the loss directly arising from the breach of charter.

In the "Kriti Rex" [1996] QB 171 Moore-Bick LJ said this:

"In the case of a contract for the carriage of goods by sea the natural and obvious consequence of the shipowner's failure to load and carry the cargo is that the owner of the goods is deprived of the benefit of having them at the agreed destination when they ought to have arrived. Prima facie therefore the loss he suffers is represented by the market value of the goods at that time and place...

He may be able to obtain substitute goods at the port of destination, in which case his loss will be measured by the cost of so doing, less the value of goods left at the port of loading and expenses saved in connection with their transport. That does not mean, however, that ... the sound arrived value of the goods does not remain the starting point for assessing damages, subject to the duty to mitigate."

If there is an alternative vessel to take the cargo to her destination then the quantification of loss is relatively straightforward. The basic measure of damages is the difference (if any) in the respective freight rates.

If the vessel is larger than the vessel that was originally chartered, P can also claim either the deadfreight or the freight he pays to carry extra cargo, after offsetting any profit he makes on the extra cargo.

If there is no alternative vessel, the correct measure is the difference between the cost of buying replacement goods at the port of delivery (i.e. the market value) and the value of the actual goods to S at the time and place of shipment: Nissho v Livanos (1941) 69 Ll L Rep 452; the "Kriti Rex" (supra) at 193; McGregor on Damages 27-050 to 27-053.

However, that does not mean that S can claim the loss of profits in respect of the cancelled contract with his original buyer, let alone the damages he has to pay:

Rodocanachi Sons v Milburn Brothers (1886) 18 QBD 67
The Arpad [1934] P 189
The "Pegase" [1981] 1 Lloyd's Rep 175

In this regard S is potentially worse off in a claim against a carrier by sea than he would be if his claim were against his own supplier, because the necessary knowledge to bring the loss of profits claim within the second limb of the rule in Hadley v Baxendale will not readily be imputed to a shipowner: see the observations of Maugham LJ in the Arpad at p.230, and Devlin J. in Heskell v Continental Express Ltd [1950] 1 All ER 1033 at 1048-9.

However, if he fails to establish that he can claim the loss of profits by this route, is he entitled to recover them by the back door?

That was what happened at first instance in "**The Asia Star**" [2009] SGHC 91.

The vessel was chartered to load a cargo of 21,500 mt palm oil products at Indonesian/Malaysian ports and deliver it in Turkey. The last date for shipment had been extended to 15 January and then to 21 January.

The charterer, P, was a trader. It had pre-sold palm oil products to a company named Agrima, in Turkey. The last date for shipment under the contract of sale was 15 January.

P had bought 24,500mt of palm oil products from three associated companies in Indonesia and Malaysia between Oct/Dec. They agreed to extend time for lifting the cargo until 21 January.

The vessel arrived on 19 January and failed a cargo tank inspection. P sent a message rejecting the vessel and suggesting that the owner, D, find a substitute.

D sent a message on the evening of 19 January which the Judge interpreted as evincing an intention not to proceed with the C/P.

P immediately served notice of termination.

The next day D back-pedalled. Having cleaned the tanks, D invited P to re-inspect and, when P declined, D purported to withdraw the vessel on 21 January.

There was a dispute between P and D as to whether P was entitled to treat D as in repudiatory breach on 19 January and as to when the contract was actually terminated. This, in turn had an impact on when the duty to mitigate arose (mitigation eventually became the main issue in the case when it reached the CA).

The trial judge resolved those issues as follows:

P was entitled to terminate the charterparty on 19 January
P did terminate on the evening of 19 January

The duty to mitigate arose on the morning of 20 January.

The Assistant Registrar held that P had failed to act reasonably in mitigation of their loss by failing to charter a larger vessel, the "Puma" (which had a laycan of 25-31 January) and that the

measure of damages was the difference between the cost to the Plaintiffs of chartering the m.v. “Puma” and the freight it would have had to pay under the “Asia Star” charterparty.

The Judge reversed that decision. She held that the ordinary measure of damages applied, namely the difference between the market value of the cargo at its destination, Turkey, at the time it ought to have arrived, less the value of the cargo to P at the time and place of shipment and any savings in expenses. Despite refusing P’s claim for loss of profits as special damages, the Judge then went on to take an average spot market price as the market price in Turkey, adding an element of supposed trading profit to the cif price, and used the actual price P had agreed to pay their supplier Indomas for the goods as the basis for valuing the cargo at the time and place of shipment.

There was nothing wrong with the Judge’s starting point (in paragraph 86 of the Judgment) that the ordinary measure of damage would be the difference between the market value of the cargo at its destination in Turkey at the time when it ought to have arrived there, less the value of the cargo to the Plaintiffs at the agreed time and place of shipment with appropriate deductions for expenses saved such as freight and cargo insurance premium.

The problems arose in the way in which the Judge set about evaluating each of these elements.

Although the decision was successfully appealed, the shipowners won on their first ground of appeal, which was that the Plaintiffs had failed to mitigate their loss by chartering a substitute vessel, and the Court of Appeal did not consider the issues arising on the correct approach to the quantification of loss in circumstances of this kind.

As to the first part of the calculation, the market value at the port of delivery, the Judge failed to apply the correct legal principles set out in the authorities in three key respects:

By considering the price at which S could have sold the goods in Turkey (para 89) rather than the cost to them of buying substitute goods on the date of the breach.

By taking an “average spot market” price on the date when the goods would have been delivered in Turkey, calculated on the basis of US$20 above the prices stated by S’s expert, Mr Ferhan, in the weeks commencing 10th and 17th February 2004, instead of the cif price.

By double counting in the calculation for a profit element that was already assumed in Mr Ferhan’s figures.

In the “Texaco Melbourne” [2001] 2 Lloyd’s Rep 1 Lord Goff indicated that in the case law there was a divergence of opinion whether, in cases where there is an available market for the goods, it is the buying price or selling price that is relevant.

He pointed out that a “market” presupposes that there are both buyers and sellers and that in practical terms it should make no more than a marginal difference which of them you take.

In that case it did make a difference because there was no market at the delivery port but substitute goods could have been bought in another country. However the House of Lords did not need to decide the point and therefore did not reach a final view.

McGregor comes down firmly in favour of the buying price, because that is what the injured party has to pay if he wishes to provide himself with substitute goods.

If, on the date of acceptance of the breach the Plaintiff can buy the goods on the forward market for delivery at the time when they would have been delivered under the original contract, the market price is the forward price, not the spot price: C Sharpe & Co Ltd v Nosawa [1917] 2 KB 814.

In that case the seller under a cif contract failed to ship 93 tons of Japanese peas in June for delivery in London in August. The goods were of a special quality that was not readily procurable, so there was no market for a cargo of that size at the time of the breach. Atkin J said, at p. 820 "*there is first the question could the buyers have gone into the market at the time when the contract ought to have been performed and bought goods cif June shipment. If so, the difference of price would be the measure of damages…*" Having answered that question in the negative, he added *"The damages are to be assessed on the basis of reasonable conduct on the part of the purchaser. In the circumstances of this case the reasonable thing for a merchant to do who could not buy goods coming forward would be to go into the market and buy goods on the spot.*" (emphasis added).

If there is an available market, the price that a buyer has already agreed to pay the Plaintiff is irrelevant, particularly if it is lower (Rodocanachi v Milburn (1887) 18 QBD 67.) However if there is no market at the port of delivery then the price at which a third party has agreed to buy the goods may be evidence of market value.

The Court will not use the actual price paid by the Plaintiff when it is clear that it is not truly evidence of the market value. For example, in the Arpad,[1934] P 189 where there was no market for the goods at the port of delivery, the CA rejected the price the Plaintiff paid (a forward sale price in August) as evidence of the market price in January, when the price of wheat was known to have fallen in the intervening period.

An alternative to that approach is to take the Plaintiff's cost price (the market price at the time and place of the delivery of the goods to the plaintiff), and add the costs of carriage plus a reasonable amount by way of profit: O'Hanlan v GW Railway (1865) 6 B& S 484.

In the "Asia Star", unlike C.Sharpe v Nosawa, there *was* a forward market for the goods when the Charterparty was repudiated. The Judge did not make a contrary finding. For the purposes of assessing damages it must be assumed that S would have bought substitute goods on the forward market on 20th January 2004, for delivery in Turkey in mid-February. A reasonable trader would not have sat on a rising market and waited until the goods would have arrived on the "Asia Star" before purchasing substitute goods on the spot market.

Where traders use published prices for a particular commodity to determine the market price, the court should regard those prices as best evidence of the market value: see e.g. Fazlur Rahman v Bombay Trading Co Pte Ltd [1993] 1 SLR 440; Minerais US Inc v M/V Moslavina 46 F 3d 401 at 503; C. Czarnikow Ltd v Partenreederei Juno ("the Juno") [1986] 1 Lloyd's Rep 190. The palm oil trade uses the Reuters published prices as the basis for determining the prevailing market prices. They are forward prices, not spot prices.

The next question that had to be addressed was, what was the value of the cargo to the Plaintiff at the port of shipment, since that had to be deducted from the market value at the place of delivery: see Stroms Bruks Aktiebolag v Hutchinson [1905] AC 515, Nissho v Livanos (1941) 69 Ll L Rep 452, and the "Kriti Rex" [1996] 2 Lloyd's Rep 171 and the discussion in McGregor, paragraph 27-050.

The Judge decided that the value was the actual cost of the goods to S (i.e. the price they had agreed to pay their supplier 3 months earlier and which, moreover, S never actually paid because they were able to cancel that supply contract). D submitted that the best evidence of the value of the cargo to S was its market value at the port of shipment on the date of breach, of which there was evidence. So long as there is a market, the measure of damages must be based on the market value, see the Arpad. This view is supported by the authors of the leading textbooks.

In Carver's Carriage By Sea, it is stated that "where there is no market for the goods in question at the port of loading their cost price may be taken as their value there" citing Watts v Mitsui [1917] AC 227. That was a case in which the value of the goods was taken to be the actual price paid by the Plaintiff.

In Scrutton on Charterparties and Bills of Lading (21st Edn, 2008) at footnote 89 on page 358, the authors queried whether the rule enunciated in Nissho v Livanos was consistently applied in Watts. They pointed out that the price at which the charterers had agreed to buy the goods in Watts was not necessarily the value of the goods at the port of shipment when the shipowners failed to provide the ship, and that there was no evidence of any market value of the goods at the port of shipment at the date of the shipowners' breach.

The author of McGregor on Damages, at paragraph 27-053, refers to a third possible measure of damages which applies in a case where neither reshipment nor replacement of the cargo is possible:

"*In such circumstances it would seem that the market selling price at the place of delivery less the market selling price at the place of loading would, after deducting freight and insurance, measure the damages. This will be very similar in most cases to the second measure".*
McGregor describes Watts v Mitsui as a "variation" of that measure.

In referring to the two reasons why the House of Lords took the value of the cargo at the port of shipment to be the price paid by the claimant to his supplier, McGregor characterises the second reason as "completely acceptable", namely that there was no evidence of the market price at breach and therefore the claimant's price could be taken as evidence thereof. However McGregor is critical of the first reason, namely, that "this gave the claimant's loss" and refers to his earlier commentary on sale of goods cases in Chapter 20, which points out time and again that as a general principle, *evidence of actual purchase and sale prices are not to be taken in preference to other evidence of market price where such evidence is available.*

Both Scrutton and McGregor explain the actual decision in Watts v Mitsui on the basis that there was no evidence of the market price on the date of breach. The actual cost of the goods is only to be taken as a measure of value if there is no market for the goods or if they have perished: see the discussion in McGregor at para 27-050 to 27-05.

The Judge's reasoning for refusing to adopt the market value, in paragraph 91, was that S's supplier Indomas had cancelled the contract of supply, so that S lost the benefit of the agreed contract purchase price for that 12,000 mt.

With respect, that reasoning is plainly wrong. The Judge had already disallowed the claim for lost profits on the actual purchases and sales as special damages, on the grounds of remoteness. There was no justification for bringing those prices back in by the back door, particularly since they were prices fixed three months before the breach. The cancellation of the

contract by Indomas, being outside the reasonable contemplation of the contracting parties, was irrelevant.

Unfortunately the CA never considered any of those points, and apart from hinting that they were sympathetic to the arguments of D, have left the unsatisfactory approach taken by the Judge to the measure of damages undisturbed.

It is contended that as with a sale of goods case, the actual profit and loss on actual trades is irrelevant to the basic measure of damages unless and except where it can serve as evidence of the market value at the relevant time: shipment, termination of the charter (if the sale is a forward sale) or delivery.

It is theoretically possible to claim actual losses as special damages but the normal rules of causation and remoteness will apply and it is rare for the necessary pre-contractual knowledge and intention to be established on the evidence in cases such as these.

In the "Asia Star" P was unable to establish the necessary foundation for a special damages claim.

What happens if there is a substitute vessel available to carry the cargo to her destination?

This has a bearing on the question of mitigation that was decided in the shipowners' favour by the Court of Appeal.

It is well established that the so-called "duty to mitigate" is simply a manifestation of the principle that the injured party cannot recover for avoidable loss.

The Plaintiff, therefore, only needs to act reasonably. The threshold is not set very high (since he is not the wrongdoer) and he need not "risk his money too far". He need not do anything that is not in the ordinary course of business.

If in the course of taking mitigating steps, P incurs expense that would be greater than the loss if he had done nothing, he can still recover the larger sum: "The World Beauty" [1970] 1 P 144 per Winn LJ. at 156D-E.

In the "Asia Star" there was only one suitable vessel available to pick up the cargo: the "Puma". It could have carried the goods to Turkey and although the delivery date would have been outside the dates specified in the sub-sale contract, the evidence suggested that Agrima would have extended time.

D argued that the reasonableness of P's behaviour on 20 January had to be evaluated in the light of their state of knowledge on that date, and the events leading up to it. The market for the goods was rising rapidly. If P could not fulfil their contracts with Agrima, (worth around US$11.7 million) they would be exposed to what the AR rightly described as "potentially ruinous" claims.

In the "Kriti Rex" [1996] 2 Lloyds' Rep. 171 at 194, Moore-Bick J. acknowledged that where a substitute vessel is available to carry the cargo to its destination it will *probably* be incumbent on the injured party to mitigate his loss by making use of it. In the "Asia Star" the Singapore CA agreed with this approach.

If no vessel of a similar size is available, the cost of chartering a larger vessel is in principle recoverable as damages whether the extra space is used or not: Carver, Carriage By Sea, para 2178, Mitchell v Kahl (1862) 2 F&F 709.

The defendant must be given the opportunity to use the extra space himself if the charterer is not going to do so (ibid).

If it is used, any profits earned on the extra cargo must be brought into account, see e.g. the "Mavro Vetrantic" [1985] 1 Lloyds' Rep. 580.

The CA decided on examination of the facts that the AR had been right to conclude that a reasonable shipper in P's position would have chartered the "Puma". But it went further to suggest that there should have been consultation with D before taking that decision. That was not a point that was argued by D's legal team and it has interesting ramifications for practitioners advising those who are representing the party said to be in breach of charter.

The CA decided on examination of the facts that the AR had been right to conclude that a reasonable shipper in P's position would have chartered the "Puma".

(1) The Judge had been wrong to decide that it would have cost P an unreasonable amount of money to put additional cargo on board, because P had already sufficient cargo readily available to make up the balance. The Judge had miscalculated the cost of any deadfreight and failed to compare it with P's likely loss if the goods were not shipped.
(2) Although P was entitled to negotiate with the owners of the Puma there came a point at which it was unreasonable for P to reject an offer to carry the cargo at a lower freight rate than under the "Asia Star" charterparty.

However the CA went further to suggest that there should have been consultation with D before taking that decision. That was not a point that was argued by D's legal team and it has interesting ramifications for practitioners advising those who are representing the party said to be in breach of charter.

Prior to the decision of the CA, the D would not be interested or involved in how P set about mitigating his loss.

Now it seems to be contemplated that D will be involved.

This creates potential difficulties particularly if (as in the "Asia Star" itself) D is protesting throughout that it was not in repudiatory breach and that the charter was wrongly brought to an end by P (therefore it is P who owes D damages and not vice versa).

Presumably any consequential action on the part of D in these circumstances must be taken under the express reservation of D's rights and without prejudice to its primary case.

IN CONCLUSION:

The law relating to computation of loss in a case where there is an available market has been left in a state of some confusion by reason of the decision by the Singapore CA not to disturb the trial judge's approach on that issue;

The case can be interpreted as running counter to the approach that so long as what P does is objectively reasonable, he will not be held to have failed to mitigate his loss. However, on proper analysis it is not heretical. The CA was simply interpreting the evidence differently from the judge and taking the view that her conclusion that the P had acted reasonably was flawed because in all the circumstances P had not.

Nevertheless the indication that the "wrongdoer" should be involved in the mitigation process is apparently novel and could give rise to some interesting problems for practitioners in the future.