



LEGAL BRIEFING

After the event

Golden Straight Corporation v Nippon Yusen Kubishika Kaisha

House of Lords, Lords Bingham, Scott, Walker, Carswell and Brown [2007] UKHL

12

The Facts

This House of Lords decision concerns the assessment of damages to be awarded to an injured party to a contract that has been breached before the occurrence of an event which would give rise to a right to cancel (in this case, the Second Gulf War) and before the contract has been fully performed.

The contract in question was a ship's charterparty in respect of the Golden Victory an oil tanker. It was between the shipowner, Golden Straight Corporation, and Nippon Yusen Kubishika Kaisha as its charterer. The charter contract was entered into in 1998 and ran until December 2005. The contract was repudiated by the charterers in December 2001, when the charter contract had another four years to run. The owners claimed damages for breach of contract. Their claim was referred to arbitration.

Significantly, the contract contained a clause whereby both owners and charterers had the right to cancel the contract if war were to break out between a number of countries, including the UK, the USA and Iraq. The Second Gulf War began on 20 March 2003; after the contract had been repudiated, but before the end of the original charter period.

The arbitrator found the charterers liable. The arbitrator then had to decide whether to take the occurrence of the Second Gulf War into account when quantifying the damages payable by the charterer to the shipowner, i.e., whether or not to include the time between the outbreak of the Second Gulf War and the end of the charter period (December 2005). The charterers claimed that the damages should run only until the outbreak of the Second Gulf War, when they would definitely have cancelled the charter. The arbitrator found in favour of the charterers and ruled that damages were not recoverable for the period from 20 March 2003 onwards.

The owners appealed, arguing that in commercial transactions such as shipping charters, the pre-eminent requirement was for certainty, finality and ease of settlement of disputes. They further argued that the general rule that damages should be assessed at the date of the breach should not be affected by events after that date, unless that event could be seen to be inevitable (as opposed to merely possible) at the date of the breach.

The Issue

Whether the principle of measuring the loss at a date as near as practicable to the acceptance of repudiation applied where the contract contained a right to cancel which might affect the duration of the contract but where there was uncertainty as to whether or when it would operate.

The Decision

The owners' appeal was dismissed. The majority of the House of Lords held that the outbreak of war, which occurred before the damages fell to be considered in arbitration, could be taken into account and that the arbitrator had been correct to take it into account in assessing the owners' loss. They found that considerations of certainty and finality were overridden by the greater importance of achieving an accurate assessment of the damages based on the loss actually incurred. The damages could be assessed at the date of the repudiation by valuing the chance that the contingency would occur and that the charter would be cancelled.

Comment

Most commercial contracts contain a "force majeure" clause, which often allows parties to a contract to cancel should a war or extreme weather event occur which affects the performance of that contract. The actual effect of such clauses, particularly in this context where the contract was repudiated before the event in question occurred, is often overlooked. This case puts a "shot across the bow" of injured parties to a repudiated contract. It makes it clear that where a party who is in breach of contract has a clear right to cancel and such right would have been exercised notwithstanding that breach, the injured party may only be entitled to damages up to the date of the event which gave rise to the right to cancel.

Rebecca Saunders
July 2007
