

Repudiation

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Damages

Damages for repudiation of a time charter assessed on the basis of general principle of restitutio in integrum, within the limits expressed in *Hadley v Baxendale*, (1854) 9 Exch. 341 and comparable with that of the law for sale of goods: where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver³².

In cases of the owners' wrongful repudiation a time charter, when there is at the time of the termination of the charter-party or shortly after³³ an available market for the chartering in of a substitute vessel, the normal measure of damages is the difference between the contract rate for the balance of the charterparty period and the market rate for the chartering in of a substitute vessel for that period³⁴.

The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction. *Dampskibsselskabet "Norden" A/S v Andre & CIE. S.A* [2003] EWHC 84 (Comm) (30 January 2003), per Toulson J at para 42.

The charters' right to damages is qualified by their obligation to mitigate their losses³⁵. When mitigating, the charterer, by analogy with the buyer of non-delivered goods, has to decide whether or not to charter in a substitute ship and if he decided not to charter, what he is fully entitled to do, he cannot visit the consequences of that decision upon the shipowner³⁶. Acceptance of the market rate at the date of breach is deemed to constitute reasonable mitigation³⁷.

³² Sale of Goods Act 1979, s51(3)

³³ *Woodstock Shipping Co. v Kyma Compania Naviera S.A. (The Wave)* [1981] 1 Lloyd's Rep 521 per Mustill J at p.532

³⁴ *Koch Marine Inc v D'Amica Societa Di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75, per Goff J at p.87 applying *Snia Societa di Navigazione Industriale et Commercio v Suzuki & Co.*, (1924) 18 Ll.L. Rep. 333, and *Goldberg Ltd. v Bjornstad & Broekhus*, (1921) 6 Ll.L. Rep. 73; (1921) 8 Ll.L. Rep. 7

³⁵ *Snia Societa di Navigazione Industria e Commercio v Suzuki & Co* (1924) 29 Com Cas 284, 18 Ll L Rep 333

³⁶ *Koch Marine Inc v D'Amica Societa Di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75, per Goff J at p.87, *Campbell Mostyn (Provisions) Ltd. v Barnett Trading Co.*, [1954] 1 Lloyd's Rep. 65, and *Jamal v Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175.

³⁷ *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd* [2010] EWHC 903 (Comm) at para 65, David Steel J

Although revival of the market is relevant for the purpose of establishing whether the owners' loss is self-induced and flows from his failure to mitigate it does not in itself provide the correct measure of damages⁴⁰.

Option to disregard repudiation

In recent decision of the Commercial Court in *Isabella Shipowner SA v Shagang Shipping Co Ltd (the Aquafaith)* [2012] EWHC 1077, the shipowners appealed from the arbitrator's award on the question of law, whether they were entitled to refuse early re-delivery of the vessel and affirm the charter, or whether they were bound in law to accept early re-delivery and merely entitled to sue for damages.

Under a charterparty on amended NYPE form dated 19 September 2006 (the charter), the vessel was chartered by the owners to the defendant charterers for a duration of 59-61 months. The charter also included an express warranty "that the vessel will not be re-delivered before the minimum period of 59 months". Charterers repudiated the charter and made it plain that they had no further use for the vessel for the balance of the minimum period of charter, i.e. 95 days. The owners refused such re-delivery and started arbitration, holding the charterers liable for hire for the balance of the minimum period. The court held that the owners were required to take re-delivery of the vessel, trade the vessel on the spot market by way of mitigation and claim damages in respect of their loss.

Cooke J in line with decision in *White & Carter (Councils) Ltd v McGregor* [1961] 3 All ER 1178, stated that the owners can rightfully claim hire from the charterers under this time charter without the need for the charterers to do anything under the charter, as long as the ship is available to the charterers for any order they wish to give. If owners elected to keep the contract alive, they do not need the charterers to do anything in order for them to complete their side of the bargain and thus be able to earn the hire in question. The earning of hire after purported redelivery was not dependent on any performance by the charterers of their obligations.

On proper analysis of preceding case law on the subject⁴¹ the judge concluded that this case is outside of any limitation on otherwise unfettered right of the injured party to elect to disregard repudiation and keep the contract in full effect, as it was held by majority of the House of Lords in *White & Carter (Councils) Ltd v McGregor* [1961] 3 All

⁴⁰ *Glory Wealth Shipping Pte Ltd. v Korea Line Corporation* [2011] EWHC 1819 (Comm) per Blair J at para 31

⁴¹ *White & Carter (Councils) Ltd v McGregor* [1961] 3 All ER 1178; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216; *Attica Sea Carriers Corporation v Ferrosstal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250; *The Odenfeld* [1978] 2 Lloyd's Rep 357; *The Alaskan Trader* [1984] 1 AER 129; *Stocznia Gdanska SA v Latvian Shipping Co* [1996] 2 Lloyd's Rep 132; *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] EWHC 1936 (Comm)