

THE MARKET RULE AND LATE PERFORMANCE

Hapag-Lloyd AG v Skyros Maritime Corporation

Introduction

Bright J.’s decision in *Hapag-Lloyd AG v Skyros Maritime Corporation*¹ has sparked a flurry of academic commentary. This is the third note on the case in the pages of this Quarterly alone. It should come as little surprise that the case has garnered so much attention—its beguilingly simple facts raise issues which go to the heart of the law of damages. This note argues that the right result was reached although, with respect, perhaps not quite for the reasons which the judge gave.

Background

Hapag-Lloyd AG (the “Charterers”) entered into two charterparties. In breach of contract, both vessels were re-delivered late (although the Charterers continued to pay for each vessel at the contract rate during the period of overrun). The respective owners of the vessels (the “Owners”) brought claims against the Charterers seeking damages measured by the difference between the market rate and the contract rate for each vessel during the period of overrun (i.e., as if the Owners had chartered the vessels to a third party during that period rather than receiving the contract rate from the Charterers).

In fact, the Owners had each contracted to sell the vessels to third parties. As a result the Owners would not actually have re-chartered the vessels had they been re-delivered on time. Instead, the vessels would immediately have been delivered to the buyers. On that basis, the Charterers contended that the Owners were only entitled to nominal damages.

Following arbitration, the Owners were awarded substantial damages. The Charterers appealed pursuant to the Arbitration Act 1996, s. 69. Before Bright J., the Owners sought to defend the arbitrators’ conclusion on five bases: (i) quantum meruit; (ii) user damages; (iii) negotiating damages; (iv) the decision in *The Achilles*;⁴ and (v) the “market rule”.

¹ [2024] EWHC 3139 (hereafter “*Skyros*”).

⁴ [2008] UKHL 48.

Decision

Bright J. allowed the Charterers' appeal and accepted that the Owners were only entitled to nominal damages. He rejected the Owners' first four arguments in short order, and this note does not discuss them further.⁵

More complicated was the Owners' reliance on the so-called "market rule" of damages, viz., the rule that in contracts for the sale or carriage of goods (with which Bright J. considered charterparties to be analogous)¹² damages are often assessed by reference to the market value of the goods without taking into account any downstream contracts. Hence, in cases of non-delivery, damages are prima facie the difference between the contract price and the market price of the goods at the time for delivery;¹³ and, in cases of defective delivery, the prima facie measure is the difference between the market price of the goods received and conforming goods.¹⁴

The judge's reasoning proceeded in two stages. First, he accepted the Owners' argument that the "market rule" applied equally to cases involving late delivery as opposed to non-delivery or defective delivery.¹⁵ However, in a striking departure from orthodoxy, he then held that although the "market rule" precludes reliance on downstream contracts to *increase* the value of a claim (unless those contracts were within the defendant's reasonable contemplation), it does not operate where those contracts are being relied upon to *decrease* the claim.¹⁶ Such contracts should be taken into account whether contemplated or not. As the judge put it in relation to the facts of *Skyros* itself:¹⁷

At issue is what loss Owners have suffered. This falls to be assessed by comparing what would have happened if there had been no breach (the Vessels would not have been let on the charter market) with what actually happened (the Vessels were not let on the charter market). The comparison shows that have not lost the opportunity to let the vessels out, at the market rate.

The basis of the "market rule"

With respect, it is doubtful that the judge's conclusion that downstream contracts which decrease the value of a claim should always be taken into account was open to him. There is a

⁵ Although there is serious room to doubt whether Bright J. was correct to distinguish between "user damages" and "negotiating damages", and between "remoteness" in contract and "assumption of responsibility", space precludes developing these criticisms in more detail.

¹² *Skyros*, [75].

¹³ Sale of Goods Act 1979, s. 51(3).

¹⁴ Sale of Goods Act 1979, s. 53(3).

¹⁵ *Skyros*, [84].

¹⁶ *Skyros*, [118].

¹⁷ *Skyros*, [120].

considerable body of authority to the contrary which was binding on the judge.¹⁸ Indeed, a number of these cases were cited to Bright J.,¹⁹ and it is unclear on what basis he did not consider them dispositive of the issue.

Of course, this invites the question why the law permits claimants in these situations to recover more than they have actually lost. After all, it is often thought that it would be ‘against all justice... [to allow a claimant to] be compensated for a loss he never suffered’.²⁰ None of the prevailing explanations are entirely satisfactory²¹.

First, it is said that the market rule exists to promote commercial certainty.²² However, this fails to explain why the value of a claim can be *increased* by downstream contracts, provided they are not too remote. In any case, as Lord Scott remarked in *The Golden Victory*:²³ “certainty is a desideratum... it is not a principle and must give way to principle”.

Alternatively, it is thought that the market rule reflects the fact that the claimant could have chosen to obtain substitute goods on the market (and so incurred the costs of doing so)—what is sometimes referred to as a “deemed mitigation”.²⁴ But it is incoherent to assess the loss which a claimant *actually* suffered by reference to things which they could have done but did not actually do. It moreover strains ordinary language to invoke the “mitigation” of loss in order to *increase* the loss said to be recoverable.

More recently, Summers has argued that these cases are explicable on the basis that the gains resulting from downstream contracts are caused by the claimant’s choice to enter into those contracts. Therefore, he argues, such gains should be discounted in assessing what

¹⁸ E.g. *Mouat (JN) v Betts Motors* [1958] 2 Lloyd's Rep 321; *Mobil North Sea Ltd v PJ Pipe & Valve Co Ltd* [2001] EWCA Civ 741; [2001] 2 All ER (Comm) 289; and *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778; [2016] 2 Lloyd's Rep 432. At first instance see also *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1576, [194]–[209] and, albeit reluctantly, *Oxus Gold plc v Templeton Insurance Ltd* [2007] EWHC 770, [67]–[79] (hereafter “*Oxus*”).

¹⁹ E.g. *Rodocanachi, Sons & Co v Milburn Brothers* (1886) 18 QBD 67; *William Brothers v ED T Agius Ltd* [1914] AC 510 (hereafter “*Agius*”); and *Slater & Co v Hoyle & Smith Ltd* [1920] 2 KB 11

²⁰ *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, 308.

²¹ I leave to the side Stevens’ unorthodox claim that these awards value the infringement of the claimant’s rights (see Robert Stevens, ‘Damages and the right to performance: a Golden Victory or not?’ in Jason Neyers, Richard Bronaugh, and Stephen Pitel (eds), *Exploring Contract Law* (Hart 2009)), as well as the possibility that downstream contracts are discounted to increase damages when (and only when) too remote as the converse of the typical operation of remoteness rules.

²² See e.g. Michael Bridge, ‘Mitigation of damages in contract and the meaning of avoidable loss’ (1989) 105 LQR 398, 408–409.

²³ [2007] UKHL 12, [38].

²⁴ See e.g. *Hussey v Eels* [1990] 2 QB 227, 233 and *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14, [90]; similar explanations are given in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250, [34] and *Stanford International Bank Ltd v HSBC Bank plc* [2022] UKSC 34, [43].

consequences have been caused *by the defendant*.²⁵ The difficulty with this interesting argument is that it makes no sense to speak of the defendant having “caused” a loss which was never actually suffered, even if this is only due to the claimant’s choices. It is inherent in the language of causation that the outcome in question actually occurred.

The only satisfactory answer to the puzzle comes from abandoning the insistence that damages in these cases are quantified by the claimant’s loss—at least in a conventional sense. The better view is that these damages are a species of “cost of cure”.²⁶ In Lord Moulton’s words in *Agius*, the claimant “is entitled to recover the expense of putting himself into the position of having those goods”, i.e., the “cost... to put himself in the same position as if the contract had been fulfilled”.²⁷ Cost of cure awards are not readily explicable in terms of counterfactual loss, at least where the claimant has not expended money effecting cure and does not intend to do so²⁸ (importantly, cost of cure damages in English law do not require an intention to cure,²⁹ although there are some contrary suggestions,³⁰ and the same is true in other common law jurisdictions such as Australia,³¹ India,³² Malaysia,³³ and Singapore³⁴). This is why it is immaterial in “market rule” cases that the claimant’s loss has been diminished by downstream contracts: the claim is for lost performance, not for loss.³⁵

One important implication of this analysis is that Bright J. was mistaken to equate cases of late delivery with cases of non-delivery or defective delivery.³⁶ In the latter cases, the

²⁵ Andrew Summers, *Mitigation in the Law of Damages* (OUP 2025) ch6.

²⁶ See similarly David Winterton, *Money Awards in Contract Law* (Hart 2015).

²⁷ *Agius*, 531.

²⁸ See e.g. Solène Rowan, “Cost of cure damages and the relevance of the injured promisee’s intention to cure” (2017) 76 CLJ 616, 621–622.

²⁹ *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406, 434; *Dean v Ainley* [1987] 1 WLR 1729, 1737; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 359 (hereafter “*Ruxley*”); *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811, [263]; and *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Ltd* [2020] EWCA Civ 308, [62]. Many other cases could be cited.

³⁰ *Tito v Waddell (No. 2)* [1977] Ch 106, 332 and *Radford v De Froberville* [1977] 1 WLR 1262, 1273.

³¹ *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28, 30 and *Unique Building Pty Ltd v Brown* [2010] SASC 106, [94].

³² *Army Welfare Housing Organisation v Sumangal Services Lvt Ltd* (2004) 9 SCC 619, [129].

³³ *Teh Khem On v Yeoh & Wu Development Sdn Bhd* [1995] 2 MLJ 663, 673.

³⁴ *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2025] SGHC(A) 4.

³⁵ The orthodox view is that “cost of cure” is a species of loss (see *Ruxley*, 360), although English law did not always take this position: in *Joyner v Weeks* [1891] 2 QB 3, 37–38, Wright J. considered that an award of the cost of cure was ‘in effect... specific performance’.

³⁶ Notably, in *Oxus*, Langley J. concluded at [81] that the authorities showed that late delivery was distinct from non-delivery or defective delivery.

claimant has not received performance and so remains entitled to a substitute. In cases of late delivery, however, the claimant *has* (albeit belatedly) received performance. There is no room for any claim for “cure”, only for conventional loss. As Lord Dunedin explained in *Agius*, the claimant has “got the goods, and the only damage he had suffered was in delay”.³⁷ It is for this reason that Bright J. was right to hold that the Owners were only entitled to nominal damages in *Skyros*.

It is notable, from a comparative perspective, that this analysis essentially reflects the position in German law, which distinguishes between “damages in lieu of performance” (BGB §§249(2), 280(3)) and “damages for delay in performance” (BGB §280(2)).³⁸

Conclusion

In his concluding remarks, Bright J. observed that he was “sure that there are more academic articles”³⁹ which might have assisted the Court with the difficult issues with which it was confronted. It is safe to say that the decision undoubtedly stirred an outpouring of yet more scholarship on these questions. The forthcoming appeal, which is due to be heard later this year, will provide a welcome opportunity for the Court of Appeal to clarify this area of considerable confusion.

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³⁷ *Agius*, 522; see also 529 (Lord Atkinson).

³⁸ Similarly see *Zivilprozessordnung* §887, which recognises that a cost of cure award can be a *procedural* mechanic for enforcing an order for performance.³⁹ *Skyros*, [136].

³⁹ *Skyros*, [136].

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