The guiding Star Polaris

At first blush the 17 November 2016 High Court decision in the "STAR POLARIS" [2016] EWHC 2941 (Comm) is a frontier case on interpretation of a standard form contract and recoverability of damages. But it is neither. Instead, it is another reminder that contract wording is key.

Parties exclude and limit whenever possible, so the meaning of terms and the resulting ambit of exposure are common legal theatre, with remoteness, consequential loss and the rule in *Hadley v Baxendale* regular players.

In one of those judgments that many more people cite than have read, that famous 1854 road carriage case confines contract damages to matters that either arise naturally, in the usual way, from the breach, or are such as, when the contract was made, the parties must reasonably have considered the probable outcome of the breach. These two limbs, as they are known, have been under contractual surgery almost ever since. The "STAR POLARIS" does not so much concern the common attempt to amputate one of them as perhaps an endeavour to graft on a third.

Following delivery the vessel suffered a serious engine failure, which the Tribunal found was due to the yard's breach, though loss attributable to some crew negligence was not recoverable. Commensurately, the buyers were awarded the repair cost, but their claims for towage, agency and survey fees and off-hire and related bunkers failed as excluded by a provision, under the subheading "Extent of BUILDER's Liability", that "the [yard] shall have no liability or responsibility whatsoever or howsoever arising for or in connection with any *consequential or special losses, damages or expenses* .." (our italics.)

On appeal the buyers urged that:

(a) though some doubt has been expressed more recently, when the contract was made it was settled law that the italicised words meant losses under the second limb of *Hadley v Baxendale*, and that this exclusion does not cover loss under the first, i.e. that which arises naturally, or normally happens, following the breach;

(b) the parties must be taken to have contracted against this legal background - in effect, it must be assumed that when negotiating they had all this in mind; so

(c) the losses that the Tribunal refused, as excluded, all normally happen following such a breach, so they are recoverable under the first limb of *Hadley v Baxendale*, which had not been excluded; also

(d) the contract was a variant of the standard SAJ form, with the exclusion of damages for loss of use (significantly) deleted.

The parties agreed that the relevant part of the contract was a complete code on liability, so instead of looking only at exclusion, one had to ascertain what was undertaken, and the yard countered that:

1. the whole contract shows that the parties did not intend any such decided meaning of the italicised words, so prior cases on that are irrelevant, and the yard's liability was limited to the cost of replacement and repair of physical damage;

2. as finally cast, the terms were very different to the standard SAJ form, so no valid inference could be drawn from similarities and deletions, and the wording must be construed as it stood.

The Judge agreed with the yard, and also with the Tribunal that, while the italicised words do usually mean losses under only the second limb of *Hadley v Baxendale*, unless a previous case had already determined what specific terms mean, they were not bound by earlier decisions. An exclusion clause had then to be considered on its own wording, within the contract as a whole and in its particular context, and the Judge ruled that "consequential or special losses, damages or expenses" was not here confined as the buyers argued, but had a far wider meaning, so liability was limited as the yard contended.

The Judge therefore upheld the Tribunal's emphasis on analysis of the whole wording actually used, rather than the notion that the parties must be taken to have contracted against the background of a settled meaning of the particular words in issue.

This decision is thus a reminder that, while there is still authority that certain commonly-used wordings limit liability only in one particular way, such that all else might be recoverable, and that it could in many cases be argued that in effect the parties negotiated in the light of that, the courts will always look first - and sometimes only - at the words actually used. Care should therefore be taken, and if appropriate early advice sought, such that as far as possible the wording captures each eventuality and covers all requirements.

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