A short voyage in contract law

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Introduction -a small corner of contract law

- Maritime law – wide range of legal principles - public international law to private law – have to be applied in many diverse situations
- Private law – contract law – at the heart of law which regulates the international sale and carriage of goods upon which we rely – modified by international Conventions/ agreements but contract remains central to network of contracts under which goods moved and sold
- Looking at how one small part of common law on assessing damages in contract has been considered and developed in cases
- Show how common law of contract and is refined

Repudiation assessing damages

- Problem of events/ contingencies occurring after breach accepted and contract cancelled by innocent party – are they relevant to damages claim?
- Basic position innocent party relieved of further performance when accepts repudiation
- Also basic approach calculate damages at time to breach
- Does that mean not relevant to arrive at damages
- Issue arises in many different situations -renunciation (anticipatory breach) or breach during performance

Introduction-repudiation - assessing damages

- Cases are under English law
- NZ Contract Remedies Act codifies common law on cancellation for breach whether before time for performance or during (s 7)
- Wide power to grant relief on cancellation (s9) but common law damages separately available and order under s9 will generally follow common law principles in assessing damages
- The general principles in these cases applicable in NZ in assessing damages or s9 relief

Some history/nostalgia and first case

The Mihilis Angelos [1971] 1 QB 164

- Voyage CP – charterer intending to ship cargo apatite – Haiphong to Europe
- Vessel said to be “ expected ready to load on 1 July 1965” by owner
- CP had cancelling clause if vessel not ready by 20 July 1965.

The Mihilis Angelos

- Owners wrong in saying “expected ready to load” no basis for this - breach
- Charterers had own problems – no cargo
- Charterers decided to cancel – said “force majeure” 17 July 2015 – that is before cancelling date under CP
- Owners said that this was a repudiation of the contract, accepted breach and claimed damages for breach.
- Arbitrators found as a fact that the charterers would have been able to cancel if had waited because the vessel would have missed its cancelling date

The Mihilis Angelos (continued)

- Court of Appeal held that charterers could cancel earlier under clause in CP but considered damages argument if wrong on this.
- It was submitted for owner that court could not consider that charterers would have committed no breach if the contract had run its course because once repudiation accepted what might have happened later was irrelevant. Owners entitled to substantial damages.
- All 3 judges rejected this and said only nominal damages available to owners. Judges expressed themselves in different ways.

The Mihilis Angelos (continued)

- Denning MR – “you must take into account all contingencies which might have reduced or extinguished the loss” – very general
- Edmund Davis LJ – because of factual finding that charterers would have beyond doubt have cancelled the charter party for ship missing cancelling date – nominal damages only.
- Megaw LJ – although accepted repudiation/ anticipatory breach means contract at an end – have to look to true value of contract rights – where events “ pre-destined” to happen after repudiation accepted would mean no loss – nominal damages

The Mihilis Angelos

- Concerned an event which was certain to happen
- What is the scope of the possible consideration of subsequent events or contingencies?
- Broader and narrower formulations in the statements from the judges

The Golden Victory [2007] 2 AC 353

- Case considered question of assessment of damages after acceptance of repudiatory breach in the context of charter party
- Ship on long term charter – charter contained a cancellation clause for war between US UK and Iraq (and others)
- Charterer repudiated and owner accepted the repudiation – brought contract to an end – sued for damages for the loss on the rest of the charter
- 4 years on charter to run when repudiation accepted – arbitrators found reasonably well informed person would have regarded the second Gulf War as a possibility but no higher

The Golden Victory

- By time of arbitration the Gulf War had occurred
- Could the charterer say that damages should be reduced essentially because assessing the value of the lost contract rights had to involve considering that charterer would have terminated charter under the war clause – arbitrator said so and this was affirmed in the courts – went to House of Lords
- On one side argument based on need for certainty – assess damages as at the time of acceptance of the repudiatory breach at which time the charter was marketable as having 4 years to go because event not likely - events later irrelevant– on the other side - compensation principle that damages had to be assessed to value lost contract rights as well as possible.

The Golden Victory (continued)

- Held 3:2 – can look at the fact that the war had happened in assessing damages making cancellation certain– any substitute charter at the time of repudiation would have contained the cancellation clause –
- Event in Mihilis Angelos certain to happen – here had happened
- How broadly does this apply?

The Golden Victory

- Case subject to criticism academic and practitioners on grounds that it created commercial uncertainty by making later events relevant
- But reflected “compensation principle” in contract law
- Question whether the approach should apply in other contract situations – for example “one – off” sale of goods where usual measure involved notional market transaction at time repudiation accepted
- Important to distinguish establishing liability for repudiatory breach for which future performance irrelevant and the exercise of assessing damages where on GO later events and contingencies might be relevant.

The Glory Wealth [2013] EWHC 3153

- Case did concern question whether party in repudiatory breach could say after repudiation accepted that possibility of future non performance by innocent party was relevant to assessing damages.
- COA – long term – coal cargoes – charterer did not declare laycans under contract end of 2009 and 2010 and 2011
- Owners accepted repudiatory breach – claimed loss of US$5mill plus – market for ships have collapsed after Lehmann Brothers
- Judge surveyed “difficult” cases on accepted repudiation and assumption that innocent party would perform future obligations save where inevitable contract would not have been performed.

The Glory Wealth (continued)

- Cases showed that innocent party did not have to show that it would perform in the future to establish its case on liability but cases generally not concerned with assessment of damages – no cases put plaintiff in better position than if contract had been performed
- Held that overriding principle of compensation in Golden Victory was applicable to repudiatory breach which was not anticipatory – the assessment of damages could involve a hypothetical exercise of what would have happened if the contract had not been ended for repudiatory breach – in contract no windfalls should be allowed – innocent party had to show would have performed obligations absent repudiation- otherwise there would be risk of windfall overcompensation.

Bunge SA v Nidera BV [2015] UKSC 43

- Come to our latest case – a “one off” sale of goods
- Nidera entered contract to buy 25OOO mt of Russian milling wheat from 2010 crop FOB Novorossiysk
- Shipment period August 2010 – narrowed by notice to 23-30 August 2010
- On GAFTA standard FOB terms- clause 13 cancellation for prohibition of export blockage or hostilities, clause 20 default clause provided for damages regime

Bunge SA v Nidera SA

- 5 August 2010 – Russian legislative embargo on wheat exports to begin on 15 August and go to 31 December 2010
- 9 August 2010 – sellers purported to cancel for “ force majeure”
- Buyers did not accept entitled to cancel – treated the purported cancellation as a repudiation and accepted it on 11 August 2010
- 12 August 2010 – sellers said would reinstate contract on same terms
- Buyer refused on basis had accrued right to damages under clause 20 for default – claimed US$3million plus on formula based on difference between contract and market price under clause 20

Bunge SA v Nidera BV

- Seller - they had been entitled to terminate the contract when ban was announced under clause 13 and the even if termination was premature and a breach of contract entitling buyer to cancel, fact that shipment under the contract would have been subject to ban meant that no loss had been suffered by buyers
- GAFTA arbitration held cancellation premature so seller had jumped the gun but buyer had suffered no loss because shipment would have been prevented by embargo – so seller would have cancelled.
- GAFTA Appeal Board - agreed seller in breach but upheld damages claim under clause 20 measure because clause 20 complete code applicable on breach

Bunge SA v Nidera SA

- Appeal Board considered clause 20 applied and also rejected argument that buyers had failed to mitigate their loss by accepting sellers offer day after cancellation to reinstate the original contract – buyer had a vested right to damages under the contract so acted reasonably in not accepting new contract which would have been defeated by embargo
- Leave to appeal to High Court – issues raised concerned whether GAFTA clause 20 excluded the common law principles for assessment of damages where there was an anticipatory repudiatory breach

Bunge SA v Nidera SA

- Is the overriding compensatory principle in The Golden Victory only applicable to long term instalment contracts?
- High Court and CA had held that clause 20 determined the measure of damages so that question on the application of The Golden Victory did not arise and doubted that the principle applied where there was a repudiation of a contract for the sale of a single cargo.
- Supreme Court held in leading judgments given by Lords Sumption and Tolson that awarding the right measure of compensation for the value of the contract rights which were removed was the guiding principle

Bunge SA v Nidera SA

- No reason not to apply normal approach to damages to an anticipatory breach where there was an accepted repudiation
- No need for a contingency to be certain or “ predestined” to be relevant to an assessment of the value of contract rights lost as a result of accepting repudiation
- The principle in The Golden Victory was not limited to contracts for supply over a period of time but could apply to a one- off sale.
- Commercial certainty could not justify awarding substantial damages to a party which had in fact suffered no loss

Bunge SA v Nidera SA

- Clause 20 did not deal with assessment where there were supervening events which operated to reduce or extinguish loss.
- No principled reason in law not to consider what would have happened if the repudiation had not occurred.
- Result was that the arbitrator at first instance was right
- So award of over US$3million on clause 20 replaced with nominal sum of US$5
- Result accorded according to Lord Toulson with what “ fair-minded observer” would conclude – no loss.

Development of common law

- Seen development of general principle at common law in these cases
- The “lodestar” in any situation where a repudiatory breach is accepted and contract brought to an end is the compensatory principle
- Means where challenged claimant has to prove it would have performed to recover substantial damages
- Exercise can involve factual assessment of later events or contingencies and their effect on the value of the lost contractual rights.

Home Port – final comments

- Cases show the way in which common law develops from a specific case to more general application.
- Show that the current approach to damages for repudiatory breach is driven primarily by the compensatory principle – arriving at the true value of the contract rights on the facts.
- This can create less certainty but that very important requirement for commercial law has to be subordinate in this area to the need to make a proper assessment of the damages which a plaintiff should receive