IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2008 HCV 05597

(NO. 2)

BETWEEN	WINSTON WALTERS	CLAIMANT
AND	JOSE CARTELLONE CONSTRUCCIONES CIVILES S.A.	DEFENDANT

IN CHAMBERS

Denise Senior Smith instructed by Oswest Senior Smith and Company for the claimant
Barrington Frankson instructed by Barrington Frankson and Company for the defendant

JANUARY 22, 23, 26, 27 and February 20, 2009

FREEZING ORDER - APPLICATION TO DISCHARGE FREEZING ORDER - DAMAGES FOR BREACH OF CONTRACT - REMOTENESS OF DAMAGE - DIFFERENCE IN MEASURE OF DAMAGES BETWEEN CONTRACT AND TORT - RULE IN HADLEY v BAXENDALE

SYKES J.

1. This is an inter partes hearing in order to determine whether Jose Cartellone Construccionnes Civiles S.A. ("Cartellone") should be restrained by a freezing order granted by this court on December 16, 2008 until trial from dealing with its assets. I discharged the freezing order on January 27 with costs to the defendants. These are my reasons.

2. Mr. Walters was granted a freezing order in the following terms:

    i. That the respondent/defendant Jose Cartellone Construcciones Civiles S.A. is restrained from removing from the jurisdiction assets located here and particularly assets

located at the National Commercial Bank Jamaica Limited (NCB) and the Republic Bank of Trinidad and Tobago Jamaica Limited (RBTT) amounting to twenty five million dollars, three hundred and five thousand five hundred dollars ($25,305,500.00) and the respondent/defendant is restrained from dealing with any assets located within the jurisdiction amounting to twenty five million, three hundred and five thousand, five hundred dollars ($25,305,500.00) for a period of 7 days.

ii. The claimant undertakes to abide by any order as to damages which this court may make.

iii. The inter partes hearing is set for 23rd December, 2008 at 12:00 for one (1) hour.

iv. Injunction granted to expire on the 23rd day of December 2008 unless further extended.

3. When the matter came on for inter partes hearing on December 23, 2008 (two days before Christmas) unsurprisingly, it was adjourned to January 19, 2009. On January 19, the matter was adjourned to January 22, 2009. The hearing began on January 22 and ended on January 27 when the order was discharged.

Freezing orders

4. It is now well established that the courts in Jamaica can grant a freezing order. The basis of this power is said to be section 49 (h) of the Judicature (Supreme Court) Act (see ***Betram Watkis v Simmons*** (1988) 25 J.L.R. 282). The applicant must meet one test with two components. The applicant must show that (i) he has a good arguable case but that does not mean that he has to establish that he has fifty percent probability of success and (ii) there is real risk that the defendant will dissipate the assets (see ***Jamaica Citizens Bank Ltd v Dalton Yap*** (1994) 31 J.L.R. 42).

5. The purpose of a freezing order is to prevent a defendant from frustrating the judgment of the court in the event that judgment is entered against him. It is not intended to give the claimant priority to any assets of the defendant (see ***Iraqi Ministry of Defence v Arcepey Shipping Co.***[1981[Q.B. 65). Also a freezing order cannot be granted solely on the basis that the claimant fears that the defendant may not have any assets on which to enforce his judgment. The injunction is not granted on the basis of the claimant's fears. If this were the case then every claimant could claim a freezing order (see ***Jackson v Sterling Industries Ltd*** 162 C.L.R. 612 per Wilson and Dawson JJ. at pp 617 - 618). The assessment of the risk of dissipation is objectively determined.

6. A freezing order was and still is regarded as a very draconian remedy. In this very case, Cartellones is complaining that the freezing of the assets has impaired its ability to pay salaries, purchase materials, place money for security for bonds and securities and to obtain loans to meet daily operations. I now turn to the claim itself.

The claim

7. Mr. Winston Walters is a trucker and marl pit operator. He is what could be called a self made man. In his capacity as a marl pit operator, he entered into a written contract, dated February 13, 2004, with Cartellone to provide Cartellones with marl for use on what is known as the North Coast Highway. This highway is an ambitious project undertaken by the Government of Jamaica. It runs along the entire north coast of Jamaica from Negril in the west (the haven for spring breakers from the United States of America) to Port Antonio in the east (the home of the famous Boston Jerk Pork).

8. Clause 4 governs restoration of the marl pit after the extraction of the marl and this restoration is said to be the responsibility of Cartellone. Clause 4 reads:

> *After the Contractor (sic) finish (sic) the extraction of marl, the Quarry will be left in a suitable condition. There will be no pits.*

9. It is alleged that the defendant completed the extraction of the marl in early 2005 but he failed to restore the marl pit. The precise date is not stated in the pleaded case. On the face of it, there was a breach of contract.

10. The marl pit to which this contract relates is located at Cranbrook in the parish of St. Ann. Mr. Walters' case is that Cartellones was to reclaim the mined out areas of the marl pit and the failure to do this was a breach of clause 4.

11. Mr. Walters claimed that this failure to reclaim the marl pit by Cartellone prevented him from being awarded another licence to operate another marl pit at Bengal in Trelawny. Mr. Walters further alleges that he applied for another quarry licence on July 13, 2005. This application was after the breach of contract alleged against Cartellone. Mr. Walters pleads that by letter dated November 4, 2008 from the Mines and Geology Division of the Ministry of Mining and Telecommunication, over the signature of Mr. Paul Henry, Inspector of Mines, he was told that needs to be a "complete restoration" of the Cranbrook marl pit before he would be considered for the grant of a marl pit licence at the proposed site at Bengal, Trelawny. This inability to secure a marl pit licence, the argument goes, prevented him from earning from specific lucrative contracts which came his way.

12. It was said by Mr. Walters that on or around July 2005, he received an order for three hundred and fifty thousand yards of marl from Mr. Gustavo Arroyo, Project Manager of the Bahia Principe Hotel. This order would have been filled from the Bengal marl pit but for Cartellones' failure to complete restoration of the Cranbrook marl pit. This contract was said to be worth JA$25,500,000.00. This figure is in the affidavit but the claim form actually claims $23,305,500.00.

13. An examination of the affidavit evidence before the court reveals that contrary to Mr. Walters' assertion that the contract from Bahia Principe was in July 2005, the actual document bearing the signature of Mr. Arroyo shows that the order was place in or around July 2006. If this date is correct (when this date was pointed out to counsel it

was not suggested that Mr. Arroyo's email had the incorrect date), what this means is that Mr. Walters did not have this contract at the time of the alleged breach of contract committed by Cartellones. This would suggest that Mr. Frankson's submission that this loss is too remote has fallen on fertile ground.

14. Before going on any further a number of things are very clear even at this stage of the claim and without a defence being filed. First, the alleged breach occurred before the application for the licence for the Bengal marl pit. Second, the Bahia Principe contract and other special contract were secured after the alleged breach. Third, there is no clear pleading that he had already secured the permit at the time he received these special contracts.

15. By way of claim form, filed on November 26, 2008, Mr. Walters sued Cartellones for JA$25,305,500.00. There This figure was arrived at by adding the claim for the Bahia Principle contract ($24,500,000.00) and the cost of restoring the quarry ($805,000.00). The total figure is claimed as special damages. This was the cause action used to ground an application for a freezing order against Cartellone.

16. The inter partes hearing is now before me. I should indicate that after the end of the first day of hearing and I indicated that it appears that the $24, 500,000.00 claimed for breach of contract was too remote to be recoverable, Mr. Walters filed an amended claim form on January 22, 209, in which he is claiming the specific sum of $25,305,00.00 at the commercial rate of 22% as well as damages for breach of contract. He also filed an amended particulars of claim in which he claims sums he said he would have earned under specific contracts. He states, for example, that he would have earned from a contract with W.G. Trucking and Construction Company Limited in which he was asked to supply twenty thousand (20,000) yards of marl. He also alleges that he had another contract to supply the same quantity of marl to Discovery Pointe Housing Development in Discovery Bay.

17. The particulars of claim do not state the date on which these contracts were entered into but the context makes it plain that they

were entered into after the alleged breach by Cartellone. I say this because the particulars say plead that "the claimant had other orders from his usual clients as well as his daily orders which could not be filled at the material time due to his failure to obtain a license arising form the Defendant's (sic) breach of contract" (see para 12 of amended particulars of claim). This amendment is designed to take advantage of Asquith L.J.'s statement in ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*** [1949] 2 K.B. 528, 543, that the laundry owner can "some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected". However this dictum was made in relation to a laundry that was in operation. It is doubtful in the extreme whether this dictum can, by analogy, be extended to the present case where there is no evidence before the court that in 2005 and onwards the claimant would have been awarded a licence had it not been for the non restoration of the Cranbrook marl pit. The letter indicating the reason for not granting the licence was sent to Mr. Walters in 2008. Also as Mr. Frankson pointed out, assuming that Mr. Walters knew of the reason for the non issue of the licence in respect of the Bengal marl pit from some time before, there is the duty of mitigation and there is no pleading of the specific time Mr. Walters expended the $805,500 dollars on the marl pit.

18. I go now to Mr. Frankson's main ground of opposition to the extension of the freezing order. Mr. Frankson submitted that in this claim, whether the one originally filed or the amended claim, Mr. Walters cannot recover the loss of the Bahia Principe contract because it is too remote.

19. The amended claim only claims the Bahia Principe contract and the sum allegedly spent on restoration of the Cranbrook marl pit as special damages and the reference to other contracts in the amended particulars are directed to a claim for general damages as per Asquith L.J. There is no indication from Mr. Walters what he says the general damages are likely to be. The combined effect of the remoteness of the Bahia Principe contract and the lack of indication of what the general damages are likely to be erodes the foundation of the

freezing order. Therefore, Mr. Frankson submitted, there is no good arguable case in respect of the specific amounts claimed which would justify the injunction remaining in place.

REMOTENESS OF DAMAGES IN CONTRACT

20. There is a marked difference between remoteness in tort and remoteness in contract. It is my view that Mrs. Senior-Smith did not keep this distinction sufficiently in mind when she submitted that the loss of profit arising from the inability to meet the Bahia Principe contract and other specific contracts was recoverable.

21. It is always helpful when dealing with a legal concept to examine its application in various factual circumstances by the courts, in order to get a sense of its meaning and scope, thereby enabling one to say what its application in any given context is likely to be. The concept of remoteness of damages is the classic example of this.

22. I shall begin with the well known case of ***Hadley v Baxendale*** 9 EX. 341. Hadley's case has been accepted in Jamaica as the foundation of the modern law on remoteness of damages in contract (see ***Gloucester House v Peskin*** (1961) 3 W.I.R.375 (an appeal from the Supreme Court of Jamaica to the Federal Supreme Court) and ***Farmers & Merchant Trust Co. Ltd v Chung*** (1970) 15 W.I.R. 366) (a decision of the Court of Appeal of Jamaica)).

23. It is important to examine the factual context in which Alderson B. laid down his famous formulation in ***Baxendale.*** The claimant operated a steam mill which he used to grind corn for sale to his customers. From the ground corn the claimant obtained flour, bran, sharps and cornmeal. It was these products he sold to his customers. A shaft at the mill was damaged and he gave it to the defendant to take to the engineer who was to remake an identical shaft. The engineer needed to have the broken shaft so that he could make the new shaft in such a manner that it would synchronise with the gears and groves of the other parts of the mill. The defendant delayed in taking the shaft which led to the mill being out of operation for a longer period of time than would have normally been the case, had the defendant acted promptly. The claimant sued the defendant.

24. It is important to look at how the claim was framed. The claimed sought compensation under two heads. First, he alleged that the delay of seven days by the defendant in taking the shaft after they were given the shaft caused the mill to be out of operation for five days longer than it would normally be. This delay, according to the claimant, forced him to purchase ground corn to meet his contractual obligations to his customers who would have purchased from his mill. In respect of the first head, the claimant sought three hundred pounds compensation. The defendant denied liability under this head on the basis that it was too remote.

25. The second head under which the claim was formulated was that the defendants undertook to deliver the shaft within a reasonable time but failed to do so. The defendant paid twenty five pounds into court; a sum which the defendant said was sufficient to meet his liability under the second head.

26. At the trial of ***Baxendale's*** case, the learned judge did not direct the jury that they should consider whether the damages claimed by the claimant in respect of the obligation to purchase meal to supply his customers was too remote. The defendant obtained a rule nisi for a new trial on the ground that the judge had misdirected the jury.

27. When the matter came before the Court of Exchequer the issue was whether the rule nisi should be made absolute and a new trial ordered. The court held that there should be a new trial. The court also gave directions on how the jury ought to be directed at the new trial. Thus as a matter of decision, the Court of Exchequer did not actually decide that the three hundred pounds claim was too remote; that was a matter for the jury to decide on a proper direction. However, the proposed directions have been accepted ever since as a correct statement of legal principle on the question of remoteness in contract law.

28. Alderson B. delivered his now famous dicta at page 354 - 355:

Now we think that the proper rule in such a case as the present is this: - Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the real multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to he guided in estimating the damages arising out of any breach of contract.

29. The court could have left the matter there, made the rule absolute, and ordered a new trial. Remoteness was treated as a question of fact for the jury.

30. The next passage I am about to cite was not necessary for the decision since the matter was to be retried. However, Alderson B. left no doubt about his view of the matter. The learned Baron continued at pages 355 - 356:

> *Now in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were that the article to be carried was the broken shaft of a mill and that the plaintiffs were the millers of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow.*

31. The suggestion here from Alderson B. is that since the only circumstance communicated to the defendant was that the claimant operated the mill, that knowledge on the part of the defendant, without more, could not translate into liability for losses other than what would arise generally. This analysis of the facts by Alderson B. has to be understood in the context of the actual remedy sought by

the claimant and the facts adduced at the trial. The claimant did not claim for loss of profit arising generally or losses arising from, for example, an increase in price which he could not take advantage of. He claimed for the cost of purchasing and supplying flour under particular contracts.

32. Alderson B. stated at page 356:

> *But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages.*

33. Mrs. Senior-Smith used this passage to say that in this case the freezing order ought to remain in place until trial because whether or not an items of damages is too remote is a question of fact and not law and so I ought not to make that determination at this point. She pointed to Alderson B.'s use of the phrase "great multitude of cases." According to counsel, this phrase of the Baron means that if there

was evidence at the trial of ***Baxendale*** that the events that followed the breach had actually occurred in the great multitude of cases then the claimant would have recovered. She added that by the time the case came before the Court of Exchequer, a trial had in fact taken place and so the facts were fully before the court and the retrial was to take place solely to enable the jury to assess the facts in light of the proper direction laid down by the Alderson B. In the present case, she submitted, no trial has taken place and so it cannot be said that what happened here (that is the non-issue of the licence with the consequential loss of contracts) does or does not occur in the great multitude of cases.

34. This is submission overlooks the fact that Alderson B., albeit obiter, had stated that the stoppage of the mill for the time alleged by the claimant would not have happened in the vast multitude of cases, and in the absence of evidence that the special circumstances were communicated to the defendant, the claimant could not recover the loss claimed by him. In effect, Alderson B. was saying that there was no evidential basis for a finding adverse to the defendant on the issue of remoteness.

35. The current state of the law makes it clear that losses under contracts of the type under consideration, in the instant case, are not recoverable unless they were brought to the attention of the defendant specifically, at the time the contract was made. It is true that from one point of view, it can be said that a claimant may lose specific contracts with third parties if the defendant is in breach of his contract with the claimant, but the law has never held that these losses are recoverable unless they were brought to the attention of the defendant at the time of the contract.

36. One may ask, if the loss of specific contracts is foreseeable as a possibility even if the defendant does not have specific knowledge of them, why are such losses regarded as too remote and therefore not recoverable in an action for breach contract unless they were brought to the attention of the contract breaker at the time of the contract? The answer begins in the judgment of Alderson B. in ***Baxendale*** at page 355:

For, had the special circumstances been known, the parties might have provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

37. The case of ***Koufos Appellant v. C. Czarnikow Ltd. Respondents (The Heron 11)*** [1967] 3 W.L.R. 1491 develops this aspect of ***Baxendale***. In that case, the charterers, by charterparty, hired a vessel to take sugar to Basrah in Iraq. The charterers were sugar sellers and it was known that there was a market for sugar in Basrah. The ship owners did not know that the charterers wanted to sell this specific cargo of sugar in Basrah. The vessel arrived several days late with the result that the sugar price fell. The charterers brought an action against the ship owners claiming the difference between the market price had the ship arrived on time and the price existing at the time the ship arrived. The ship owners said that the difference was not recoverable.

38. The House of Lords was unanimously of the view that the claim was not too remote. This decision is consistent with ***Baxendale***, in that the charterers did not claim losses under any specific contract. Had they done so, they would have failed. Instead, unlike the claimant in ***Baxendale***, the charterers claimed losses that arose generally from the fall in the market price. Lord Reid explained at pages 385 – 386:

In cases like Hadley v. Baxendale or the present case it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. It clearly was so caused in both. The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that

loss of that kind should have been within his contemplation. The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it and there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event. But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing. I have no doubt that today a tortfeasor would be held liable for a type of damage as unlikely as was the stoppage of Hadley's mill for lack of a crankshaft: to anyone with the knowledge the carrier had that may have seemed unlikely but the chance of it happening would have been seen to be far from negligible. But it does not at all follow that Hadley v. Baxendale would today be differently decided.

39. Lord Reid in this passage makes the distinction between remoteness in contract, and remoteness in tort. In the case of contract, the relationship is consensual, and it is only right, that if one party wishes the other to be liable for unusual losses, that he brings it to the attention of the other party, so that that other party can protect himself against that additional risk, if he so chooses. The party who may be liable for unusual risks, can either (a) decline to take the risk, or (b) negotiate clauses to manage the risk, such as demanding a

premium for this additional risk or (c) agree on a limitation of damages. In other words, in a contract, the party on whom liability beyond what is ordinarily expected is to be imposed, should be told specifically of the additional risk, so that he may decide whether he wishes to accept it, and if so, on what terms. In tort, on the other hand, there is no opportunity for the injured party to protect himself, and so, in the view of Lord Reid, it is only fair that the tortfeasor is exposed to greater liability, because his negligence has wreaked havoc on the claimant who could not have avoided the injury done to him. It should be observed, that in the passage cited from Lord Reid above, he felt that ***Baxendale*** would be decided the same way on the contractual aspect today.

40. I should point, that even though I have said that the party undertaking the risk should be told specifically of any additional risk, this only applies, if the risk is beyond what is ordinarily expected in the circumstances of the contract. What is ordinarily expected is taken to be within the contemplation of the parties and so need not be spelt out with specificity.

41. What this means is that when the parties contract, there is a factual matrix against which the agreement is concluded, and that factual matrix may be such, that in the event of a breach, then certain losses "would arise generally" because they would occur "in the great multitude of cases", and those losses would be recoverable even if the parties had not expressly spoken about it. The reason for this is, that the losses that resulted were so very obvious or so virtually certain, that it can be taken that the parties must have had these losses in mind at the time they contracted. Thus losses that arise from a general loss of business because of a breach of contract are virtually certain. There is no need to know of any specific contract whereas loss under a particularly lucrative contract cannot be known to the contract breaker unless he was told about the contract at the time he contracted with innocent party. This is the real basis of the decision in the ***Heron 11***. The House emphasised that the ship owner, while not knowing what the charterers had in mind, nonetheless know enough to knew that a delay in arriving may result in losses generally. He knew that the charterers were sugar sellers. He knew that there was a

market for sugar in Basrah. He knew that the charterers wanted to get there by a specific date. He knew that the price of sugar fluctuated in the Basrah market. Therefore he must have appreciated that delay may result in some loss.

42. From Lord Reid's speech in the ***Heron 11*** as well as the other speeches in that case, it is clear that their Lordships were anxious to make the point, that what is foreseeable in a contractual breach, is what is considered to be within the contemplation of the parties at the time the contract was made. What is within the contemplation of the parties is "a result which will happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility, would only happen in a small minority of cases should not be regarded as having been in their contemplation" (per Lord Reid at page 384). This is the modern restatement of Alderson B.'s "great multitude of cases" point. The results which were likely because "they would happen in the great majority of cases" were regarded as foreseeable for the purposes of deciding which damages the contract breaker would be liable for, and those "results which were unlikely because they would only happen in a small minority of cases" (and not because the result could not possibly occur) were not taken to be within the contemplation of the parties (per Lord Reid at page 384). Therefore the distinction made in the cases is not so much what is foreseeable in the sense that as a matter of ordinary thinking a result may follow from a particular breach but rather what is the likely result in the majority of cases, and whatever that result is, is taken to be within the contemplation of the parties. Conversely, although a result may be within the bounds of possibility, if it is not within the category of the great majority of cases then it is not foreseeable for the purposes of recovery of damages for breach of contract.

43. This explains why Lord Walker stated in ***Transfield Shipping Inc v. Mercator Shipping Inc (The "Achilleas")*** [2008] 2 Lloyd's Rep 275, that what is within the contemplation is not simply a question of probability; it is what is likely or unlikely to happen in the great multitude of cases.

44. It should be noted that what is within the contemplation of the parties, is objectively determined (per Lord Hoffman at paragraph 12 and Lord Walker at paragraph 78 in ***Transfield Shipping***). It may well be the case that the ***Heron 11*** is right on the boundary of what is foreseeable in a contract case, but nonetheless, the principle is clear.

45. From what has been said so far, it can be concluded, that had the mill operators in ***Baxendale*** claimed for loss of profit arising from a change in market prices generally, they might have recovered. It is equally clear, that the reasoning of the House in the ***Heron 11*** also makes it plain that the charterers in that case would have failed, had they sought to recover loss of sale under any specific contract not because the loss was not foreseeable as a matter of probability, but because such a loss would not be expected in the great majority of cases.

46. This latter point is supported by the case of ***Transfield Shipping***. The facts were, that the charterers returned the vessel to the ship owners later than expected with the result that the ship owners lost a very lucrative charter contract. The ship owners claimed against the charterers for this specific contract. The majority arbitrators made an award for this loss. They purported to apply the rule in ***Hadley v Baxendale***. The House reversed this decision of the majority arbitrators, on the basis that, although the specific contract was foreseeable as a matter of probability, in the sense that it was within the bounds of reason that the ship owners might have a specific charter that was to be undertaken after the chatterer's charter came to an end, the specific contract lost was not within the reasonable contemplation of the parties at the time the contract was made.

47. This decision is an important one because, in my view, it pulls the rug from under Mrs. Senior-Smith's case. Their Lordships noted that a ship owner who earns by chartering his vessels, by the very nature of his vocation, would always be looking for persons to whom he could lease his vessels. This is plain common sense, but that, in and of itself, did not make the specific charterparty that he lost recoverable. In the context of late return of a chartered vessel, the House made a

distinction between losses arising from a rise in the market price of charters (assuming that the market rate is higher than the charter rate which exists between the ship owner and the person who is returning the vessel late) and losses under a specific charter party. The House was unanimously of the view that what was recoverable was the loss arising from an increase in the market rate over and above the current rate which the person making the late return of the ship is paying. The specific contract was not recoverable.

48. I now refer to the case of ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*** [1949] 2 K.B. 528. Mrs. Senior-Smith relied heavily on this case to support the proposition that because remoteness is a question of fact, I am prevented from saying what is recoverable at this point, and this matter should go forward to trial on the question of whether the Bahia Principe contract and other specific contracts are recoverable. I agree that remoteness is a question of fact, or more accurately a mixed question of fact and law, but a trial judge cannot ignore the consistent outcome of cases when there is a claim for loss of profit under special contracts.

49. In ***Victoria Laundry*** the claimants sued for, inter alia, loss of profits from specific contracts. The losses it was said, arose because the defendants, a firm of engineers, delayed in delivering a new boiler to the claimant which was known to be in the dry cleaning business.

50. Asquith L.J. held that the specific lucrative contracts were not recoverable because the parties could not have contemplated that the contract breaker would have been liable for these contracts unless they were brought to the specific attention of the defendant. However, this did not mean that "the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected" (see page 543). Again, losses arising generally were recoverable.

51. This case clearly points to the way forward on this application. Indeed all the cases relied on by Mrs. Senior-Smith while stating the principle

on which she relies have all ended in favour of the defendant where there is a claim for a specific contract which was not brought to the attention of the defendant at the time of the contract.

52. I rely on this passage from Lord Hope in ***Transfied*** stated at paragraph 34 to reply to Mrs. Senior-Smith:

> *In this case it was within the parties' contemplation that an injury which would arise* ***generally*** *from late delivery would be loss of use at the market rate, as compared with the charter rate, during the relevant period. This is something that everybody who deals in the market knows about and can be expected to take into account. But the charterers could not be expected to know how, if - as was not unlikely - there was a subsequent fixture, the owners would deal with any new charterers. This was something over which they had no control and, at the time of entering into the contract, was completely unpredictable. Nothing was known at that time about the terms on which any subsequent fixture might be entered into - how short or long the period would be, for example, or what was to happen should the previous charter overrun and the owner be unable to meet the new commencement date. It is true that neither party had any control over the state of the market.* ***But in the ordinary course of things rates in the market will fluctuate. So it can be presumed that the party in breach has assumed responsibility for any loss caused by delay which can be measured by comparing the charter rate with the market rate during that period. There can be no such presumption where the loss claimed is not the product of the market itself, which can be contemplated, but results from arrangements entered into between the owners and the new charterers, which***

cannot. (my emphasis).

53. It is important to observe a number of factors that were important to Lord Hope in determining whether the ship owners could recover for the specific contract. First, it was accepted that late return of the ship would permit recovery for loss of profit that is measured by comparing the market rate with charter rate. Second, the charterers could not be held liable for the specific contract because they did not know of it or its terms and had no opportunity to protect themselves against this enhanced risk. Third, the relevant time to determine what was in the contemplation of the parties is the time the parties contracted. Fourth, only losses arising from fluctuation of market rates were recoverable because every one expects this, and so a contract breaker who does not perform according to the terms of contract, in a market which fluctuates, must be taken to know that he will be liable if losses arise from his breach provided the losses are flow out of market fluctuations as distinct from specific contracts.

54. If in cases where the special contract has already been entered into between the claimant and the third party, such losses are not recoverable unless the contract brought to the attention of the contract breaker at the time of the contract between the claimant and the contract breaker, then it must follow as a matter of logic, that contracts that were not in existence at the time of the contract between the claimant and the contract breaker, could not conceivably be within the contemplation of the parties, and thus are even more remote than third party contracts that existed at the time of the contract between the parties.

55. Therefore, since the Bahia Principe contract was entered into **after** the contract between the claimant and the defendant, then such a contract could not be within the contemplation of the parties at the time they contracted and so is not recoverable. It follows too, that the Bahia Principe contract could not have been brought to the attention of the defendant, because it simply did not exist at the time of contract between the parties. This same reasoning applies to all the special contracts alleged in this case. In effect, there is no possibility

of the claimant adducing evidence capable of meeting even the most generous interpretation of the law on the point.

56. There is no claim for loss of profit arising from a fluctuation in the market price of marl. If the claimant in ***Baxendale*** could not recover his costs incurred to meet his special contract, if the laundry owner in ***Victoria Laundry*** could not recover loss of specific contract, but only losses arising generally from the operation of the business, and if the ship owner in ***Transfield*** could not recover the loss of the special contract, it is difficult to see how Mr. Walters can recover for the loss of the Bahia Principe contract and the other special contracts which were entered into after the date of the contract between himself and Cartellone. This is what I mean when I said earlier in this judgment that it is helpful to look at how the law has been applied in different factual contexts in order to determine whether the claimant in this case has a good arguable case.

57. The claimant does not have a good arguable case in relation to these special contracts. If they are not recoverable then the major foundation of the order must go, unless there is some other reason for it to be maintained. It seems to be that there is no good reason for the order to be maintained. A freezing order is not granted merely because the defendant is a company from outside the jurisdiction.

Conclusion

58. Freezing order discharged with costs of $80,000.00 to the respondents, to be paid not later than February 3, 2009. Case Management Conference to take place on June 5, 2009, at 11:00am for an hour. Claimant's attorney to prepare, file and serve this order.