Two Recent English Cases on the Compensatory Principle in Contract Law

Introduction

The compensatory principle is a fundamental concept in contract law. It provides that parties claiming compensation for breach of contract can only recover their actual loss. However, while the principle is easy to state, its application in practice reveals several difficulties. This short piece examines two recent English decisions on the application of the compensatory principle and discusses how they might be applicable in Singapore.

**Bunge SA v Nidera BV**

In the first case, the UK Supreme Court in *Bunge SA v Nidera BV* (“*Bunge*”)1 unanimously reaffirmed that the compensatory principle requires the court to take into account events occurring after termination in assessing damages where those events might affect the loss actually suffered. This therefore reaffirms the majority holding in the earlier House of Lords case of *Golden Strait Corporation v Nippon Kubishika Kaisha (The Golden Victory)*,2 which has not been without criticism. The choice that the UK Supreme Court was faced with in *Bunge* was between commercial certainty (which would not have taken into account subsequent events) and a true application of the compensatory principle (which would have).

The facts of *Bunge* may be summarised for present purposes. There was a sale of 25,000 metric tonnes of Russian milling wheat crop from Bunge SA to Nidera BV. The shipment period was August 2010. Clause 13 of the GAFTA Form 49, which was adopted in this transaction, provided that the contract shall be cancelled if there were prohibition of export. As it turned out, Russia did in fact impose a legislative embargo on exports of wheat between 15 August and 31 December 2010. Bunge informed Nidera that they were treating the contract as cancelled on 9 August. However, Nidera treated Bunge as having acted prematurely, since there was a possibility on 9 August that the embargo slated to take effect on 15 August would not in fact happen. Nidera therefore treated Bunge as having repudiated the contract and sued for damages amounting to the difference between the contract price and market price at the date of the repudiation.

The issue before the UK Supreme Court was whether the fact that the embargo was actually effected after the purported repudiation on 9 August could be taken into account in the assessment of damages. If that fact could be considered, then Nidera would only be entitled to nominal damages, since Bunge would have been able to cancel the contract in any event.

On this point, the leading judgment in *Bunge*, delivered by Lord Sumption, ruled that subsequent events could indeed be taken into account. This made new law as *The Golden Victory* had taken into account of subsequent events with respect to an actual breach, whereas *Bunge* had concerned an anticipatory breach, given that the date for performance had not yet arrived at the time of the purported repudiation. In reaching this conclusion, Lord Sumption gave short shrift to the strong academic criticisms of *The Golden Victory*, namely (a) the failure to differentiate between different kinds of supervening events; (b) the failure to take into account collateral motives a party who repudiated a contract might have in coming to the decision to cancel the contract subsequently if the contract remained on foot; and (c)

1 [2015] UKSC 43.

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insufficient regard being paid to commercial certainty.\(^3\)

In a forthcoming case note in the *Journal of Business Law* (Yip Man & Goh Yihan, “The Compensatory Principle, A Golden Victory for a New Certainty”), it has been jointly argued that the significance of *Bunge* is that it has laid down a new certainty. While some might argue that the consideration of events subsequent to breach in the assessment of damages may lead to uncertainty, the reality is that *Bunge* has laid down a new certainty in that the compensatory principle will be applied even if there will be specific uncertainty in individual cases. Thus, the debate in English law is likely to shift from whether there are instances where the compensatory principle should not apply fully, to how it should be applied in specific cases, on the assumption that it will be fully applied. Practically, lawyers should therefore take into account the fact that subsequent events will inevitably be considered when advising their clients on their potential liability.

**Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV (“The MTM Hong Kong”)\(^4\)**

The English High Court decision of *The MTM Hong Kong* illustrates how the bare application of the compensatory principle should not obscure the other relevant principles in the computation of damages (see generally, Goh Yihan & Yip Man, “Unpacking the Compensatory Principle: Causation, Mitigation, Certainty of Loss and Remoteness”, forthcoming in the *Lloyd’s Maritime and Commercial Law Quarterly*). While the compensatory principle has been shown to be of fundamental importance by Lord Sumption’s judgment in *Bunge*, it should not be allowed to bypass the other critical elements in any contractual analysis.

The facts of *The MTM Hong Kong* may once again be simplified for present purposes. Due to the unexpected delay in getting a substitute charter after the original charterers had repudiated the charterparty, the owners claimed that they suffered loss because they lost the opportunity to put the vessel up for a profitable voyage after the original charterparty (if it had been performed). The reason for missing out of this voyage is because the cancellation of the original charterparty led the owners to (reasonably) take out a substitute voyage that delayed the vessel’s return to the port where it might have taken on the subsequent more profitable voyage. The controversy in this case was whether the traditional *Smith v M’Guire* measure of compensation\(^5\) should apply, which would restrict the owner to only the difference between what the vessel would have earned if the charter voyage had been performed, and what the vessel actually earned during the period of the repudiated charter voyage.

Males J held essentially that a robust application of the compensatory principle required a departure from the traditional measure. He agreed with the owners that they were entitled to damages flowing from their lost opportunity of taking on the subsequent more profitable voyage. He justified this result on the basis that the owners had suffered a different kind of loss from the loss of profit reached under the traditional *Smith v M’Guire* measure. However, the learned judge appeared to base his conclusion almost solely on the fact that a different kind of loss was suffered, without considering carefully the allied issues of mitigation, causation and remoteness, which might have yielded a different result.

For example, had the learned judge considered the question of remoteness, it might be questioned whether the charterers had – under English law – assumed responsibility for this different type of loss. Indeed, it is quite conceivable that

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\(^4\) [2015] EWHC 2505 (Comm).

\(^5\) The measure was developed based on *Smith v M’Guire* (1858) 3 H & N 554 and the ensuing line of authorities.
charterers may not have in mind the owners’ subsequent charters and may only have in mind the current charter, thereby justifying the straightforward application of the traditional Smith v M’Guire measure of damages.

**Significance in Singapore**

What then is the significance of these English decisions in Singapore? It is trite law that the compensatory principle applies in Singapore contract law. This has been acknowledged in, for instance, the Court of Appeal decision of Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd. However, the Singapore cases may not have addressed some of the issues raised in the English cases discussed above.

Firstly, insofar as Bunge is concerned, the High Court has in Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd acknowledged that The Golden Victory may apply in principle but declined to apply it in that case because it concerned a one-off sale and delivery. However, in Bunge, Lord Sumption indicated that the fact that a breach was one-off should not detract from the consideration of subsequent events in the assessment of damages. As a matter of principle, this seems correct. Indeed, a principled application of the compensatory principle would dictate such an outcome.

Secondly, if the Singapore courts do adopt a robust application of the compensatory principle, then, as alluded to earlier, lawyers would need to take this into account when advising their clients. There will undoubtedly be some uncertainty involved but if the courts are willing to accept other similar types of uncertainty, such as whether there is a right to terminate pursuant to the Hong Kong Fir approach, then it seems likely that the uncertainty resulting from the application of the compensatory principle will not pose a problem.

Thirdly, as the case of The MTM Hong Kong demonstrates, the compensatory principle cannot be applied to the exclusion of other relevant principles in the assessment of damages. Lawyers should take note of the potential applicability of these other principles that might play a significant role in the determination of the final outcome.

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6 [2004] 2 SLR(R) 494.  
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