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SOUNDINGS

# Damages for repudiation of a charter: Fulton Shipping Inc v Globalia Business Travel [2015] EWCA Civ 1299 (The "NEW FLAMENCO").

This is the latest case to consider the assessment of damages arising from the early re-delivery of a ship by a charterer in breach of charterparty, in circumstances where there was no available market in which to re-fix the ship on an equivalent basis. The dispute arose from a rather unusual scenario as the ship was sold by her owner due to the charterer's early re-delivery. The Court of Appeal's judgment offers a useful recap on principles of mitigation and their applicability to 'no available market' cases.

### The facts

The NEW FLAMENCO was a cruise ship owned by the claimant, Fulton Shipping. At the relevant time she was on long term time charter to the defendant, Globalia Business Travel.

In June, 2007, the owner and the charterer orally agreed to extend the charter term for 2 years expiring in November, 2009. Subsequently, the charterer denied having reached that agreement and it re-delivered the ship to the owner in October, 2007.

The owner sold the ship to a third party in October, 2007 for $23.765 million. It then brought a claim against the charterer for breach of the charterparty. The claim was initially pursued through London arbitration, in which the owner claimed damages for the net loss of profits which it would have earned for the remaining 2 years of the charterparty. It framed the claim in this way because, as was common ground between the parties, there was no available market at that time in which the owner could re-employ the ship. Damages therefore fell to be assessed on a net loss basis.

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The arbitration was held in 2013 and by that time, the parties were aware that the value of the ship in November, 2009 (the time when the charterparty ought to have ended) would have been significantly lower than when she was actually sold in 2007. The charterer therefore argued that the owner had to give credit for the higher sale price it had achieved as a result of the early re-delivery. The arbitrators agreed, finding that the sale of the ship, and the benefit arising, was brought about by the charterer's breach. They also found that the value of the ship in November, 2009 would have been $7 million, meaning that the credit the owner was bound to give was $16.765 million. The owners appealed on this point to the High Court.

In his judgment Mr Justice Popplewell set out a lengthy summary of the principles of mitigation and concluded that the owner was not bound to give credit for the benefit it realised because there was no causative link between the charterer's breach and the benefit. The judge found that the sale of the ship was a result of the owner's independent decision to realise the capital value of the ship, and the benefit it produced was a "different kind of loss" to the loss being claimed. This all pointed to the fact that the benefit was not caused by the charterer's breach. The charterer appealed to the Court of Appeal.

### The Court of Appeal's judgment

The Court of Appeal allowed the charterer's appeal.

In his leading judgment, Lord Justice Longmore discussed the principles of mitigation and highlighted how difficult these can be in circumstances where the claimant has received a benefit. Criticising the High Court's overly elaborate guidelines, he endeavoured to reduce the test to a simple formula as follows:

> *"...if a claimant adopts by way of mitigation a measure which arises out of the consequences of the breach and is in the ordinary course of business and such measure benefits the claimant, that benefit is normally to be brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant."*

In approaching arguments on mitigation, therefore, the above test ought to be applied to the facts in each case.

Lord Justice Longmore went on to set out a helpful reminder of the distinction between 'no available market' and 'available market' cases when assessing damages. In particular, mitigation is to be taken into account in the former only. In such cases, the above test should be applied to determine what benefits and losses must be brought into account. This is essentially what the arbitrator had done in the original proceedings and the High Court was wrong to overturn that decision.

The judge discussed the leading recent 'no available market' authorities, which demonstrate that an owner must give credit to a charterer when assessing damages, for any benefit secured through mitigation such as by spot chartering a ship during the unexpired period of the charter. The Court of Appeal saw no reason why a benefit secured in selling the ship should not be brought into account in the same way, provided that the various elements in the above test were satisfied. As Lord Justice Clarke put it:

> *"If there is no available market…the owner cannot obtain a substitute immediately… It may be, as in this case, that, on account of unusual features of the market, the reasonable thing to do is to sell the ship. If so, there seems to me no sound reason not to take into account the benefit of a sale made at the top of a falling market when it is that very sale which was both the cause of the benefit and the act of mitigation."*

Accordingly, the Court of Appeal held that the benefit obtained by the owner from the higher sale price ought to be brought into account provided it arose from the consequences of the breach, in the ordinary course of business and was in mitigation of the owner's loss.

### Conclusion

**The case serves as a helpful reminder of the relevance of mitigation in assessing damages for repudiatory breaches of charterparties. Although confined here to a specific and perhaps unusual set of facts, it may assist in understanding how principles of mitigation are to be applied in a wider context.**

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