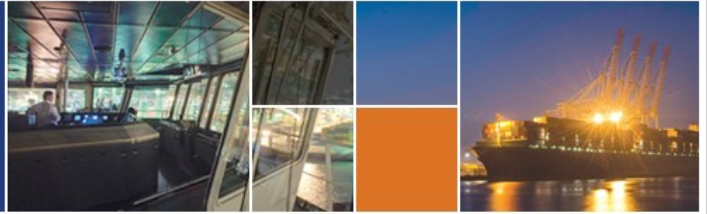




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The "New Flamenco" - Court of Appeal Decision

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In Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U (Formerly Travelplan S.A.U) (The "New Flamenco") the Court of Appeal considered whether the benefit derived by owners on the sale of their vessel should be taken into account when calculating damages for repudiatory breach by their time charterers in redelivering the vessel early.

The Facts

By way of recap, the vessel was a small cruise ship time chartered by her then owners in February 2004 to Travelplan (the "Charterers"). Fulton Shipping, who managed the vessel, purchased her in March 2005 and entered into a novation agreement under which they assumed the rights and liabilities as Owners under the Charterparty. In August 2005 the parties agreed to extend the charter for two years to 28 October 2007 (reflected in Addendum A), and in June 2007 orally agreed terms to extend the charter for a further two years to 2 November 2009 (reflected in Addendum B). The Charterers later disputed having made the agreement reflected in Addendum B and confirmed their intention to redeliver the vessel on 28 October 2007 in accordance with Addendum A. Owners accepted Charterers' anticipatory repudiatory breach as terminating the Charterparty. The vessel was redelivered on 28 October 2007 and, shortly before, Owners entered into a Memorandum of Agreement for the sale of the vessel for US\$23,765,000 due to the fact there was no available chartering market at that time.



Arbitration Award and Commercial Court Judgment

In arbitration, Owners claimed damages for net loss of profit they would have earned during the additional two year extension, giving credit for the costs and expenses which would have been incurred in operating the vessel but which were saved as a result of the sale of the vessel. Due to the financial crisis, the arbitrator considered that the vessel's value would have been US\$7,000,000 if sold in November 2009 when Owners say the vessel should have been redelivered. Charterers therefore argued Owners were bound to give credit for the benefit derived from the sale of the vessel in October 2007 in full. The arbitrator agreed with the Charterers who were, therefore, entitled to credit in the amount of US\$16,765,000 in respect of the benefit accrued to Owners by selling the vessel when worth more in October 2007.

The decision was appealed by Owners to the Commercial Court, [see [Keeping the Benefits of a Breach](#)], who agreed with Owners that Charterers were not entitled to benefit from the difference in value of the vessel as such benefit was not legally caused by the breach. Charterers took their case to the Court of Appeal.

Court of Appeal Decision

In summary, Charterers argued the following:-

1. The Commercial Court had not given sufficient weight to the arbitrator's findings of fact that the benefit of the sale had been caused by Charterers' breach and had been acquired by Owners in mitigation of their loss. This should have been the end of the matter.
2. The judge had been over-influenced by the *The Elena D'Amico* which considered whether there is an available market to assess damages for early redelivery.
3. If there was no available market, the actual trading of the vessel and market fluctuations would have been considered and the sale would have been included in this consideration.
4. It was irrelevant that Owners may not have been obliged to mitigate their loss by selling the vessel; *British Westinghouse* showed that if a loss was mitigated and a benefit received, it should be credited.

Owners, in response, contended that the Commercial Court judgment should be supported as fluctuations in capital assets should not be taken into account for mitigation purposes, and before benefit could be considered that benefit had to be of the same kind or type as the loss.

On 21 December 2015, the Court of Appeal handed down judgment allowing Charterers' appeal. Longmore LJ had the unenviable task of confirming the correct approach to be taken and his reasoning is summarised below.

- » Per *British Westinghouse*, if a claimant takes measures to mitigate losses arising from a breach and is in the ordinary course of business, that benefit is normally taken into account in assessing the claimant's losses unless the measure is wholly independent of the relationship of the claimant/defendant;
- » The question of an available market is well established as the measure of damages in time Charterparty cases (*The Elena D'Amico*). Where there is no available market, the measure of loss is prima facie the difference between the contractual hire and the cost of earning that hire but this cannot usually be claimed where the shipowner can mitigate losses – for example by trading the vessel, if opportunities arise. The arbitrator was therefore correct in applying the *The Kildare* and *The Wren* – both of which took into account benefits secured by spot chartering vessels following early redelivery. Further, there is no reason why the benefit should not be calculated by difference in the vessel's sale value and the value at the time the Charterparty was due to expire.
- » It was sufficient for the arbitrator to rely on the judgment of *British Westinghouse* in that the benefit must arise from the consequences of the breach. No further analysis

of causation was required.

- » Owners had sought to argue that the arbitrator had made an error of law as it would be contrary to fairness and justice for Charterers to derive benefit from action taken by Owners for their own benefit. Whilst an argument that is supported by some authorities this is not a principle that must be followed in all cases and was not accepted. In fact a further principle is a claimant who sustains loss should, so far as possible, be placed in the same situation as if the contract had been performed and, having considered the case as a whole the arbitrator had concluded that Owners had made a considerable profit from their mitigation which must be brought into account.

In conclusion, Longmore LJ did contend that this is a difficult area of law but that the arbitrator had made a "common sense overall judgment". This decision has provided further clarification of the correct measure of damages for early redelivery under a time Charterparty where there is no available market.

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