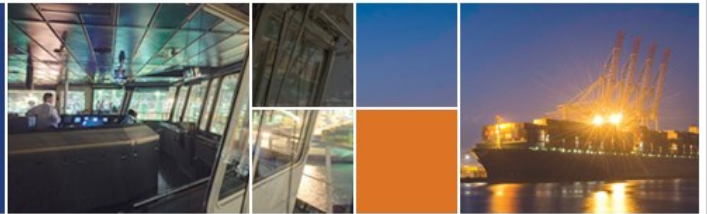




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The "New Flamenco" - Supreme Court Decision

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The Supreme Court has handed down its long awaited judgment in *Globalia Business Travel S.A.U (formerly TravelPlan S.A.U) of Spain v Fulton Shipping Inc of Panama, the New Flamenco*, concerning whether certain benefits obtained by the innocent party have to be accounted for when assessing the measure of damages.

The Supreme Court held that the benefit that arose from the sale of the vessel by owners should not be taken into account when assessing damages because the sale had not arisen from the consequences of the charterers' repudiation and was not a successful act of mitigation.

In doing so, the Supreme Court overturned the decision of the Court of Appeal, which was discussed in '[The "New Flamenco" - Court of Appeal Decision](#)'.



The Facts

In 2004, the "New Flamenco" was time chartered by her then owners, Cruise Elysia Inc, for a period of one year. In June 2007, her owners and charterers reached an oral agreement to extend the charterparty for a further two years, up to November 2009. In repudiation of the charterparty, the charterers redelivered the vessel early in October 2007. Shortly before redelivery, the owners agreed to sell the vessel for USD \$23,765,000. The owners commenced arbitration and claimed damages for loss of profit in the amount of €7,558,375.

Procedural Background

By the time of the hearing, it had become clear that there was a significant difference between the capital value of the vessel in October 2007, when it was sold, and in November 2009, when it would have been redelivered, following the global financial crisis. The charterers argued that the change in the capital value had to be taken into account when assessing damages.

The arbitrator found in the charterers' favour, declaring that the change in the capital value was a benefit that had accrued to the owners and that the charterers were entitled to a credit of €11,251,677 (US\$16,765,000), wiping out the owners' loss of profit claim.

The decision was overturned on appeal to the Commercial Court, with Popplewell J deciding that the owners were not required to give credit for any benefit in realising the capital value of the vessel in October 2007, by reference to its capital value in November 2009, "because it was not a benefit which was legally caused by the breach". It was held that: the fall in the capital value of the vessel was caused by the global financial crisis and not by the charterers' breach; the decision to sell the vessel was a commercial decision and was legally independent of the charterers' breach, which was "the trigger not the cause"; and to allow charterers to appropriate the proceeds of the sale would be unfair and unjust.

The judgment was overturned by the Court of Appeal, which upheld the decision of the arbitrator. It was held that, if by way of mitigation a measure is adopted 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 should be brought into account.

This matter has now been finally decided by the Supreme Court, which sided with Owners holding that Popplewell J had been correct.

The Supreme Court

In a relatively short judgment, Lord Clarke (with whom the other Justices agreed) held that the essential question is whether there is a sufficiently close causal link between the benefit and the loss, and not whether they are similar in nature, stating that "the benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation".

In this case, the benefit the owners enjoyed was the result of the global financial crisis. Similarly, the charterers' breach did not cause the fall in the capital value, rather it caused a loss of profits over the remainder of charter term.

There was nothing about the repudiation of the charterparty which made it necessary to sell the vessel and equally it would not have been necessary to sell the vessel at the end of the charter term. The owners could have taken the commercial decision to sell the vessel at any time or not at all.

The same reasoning would have applied equally if the owners had decided not sell the vessel and the market had in fact risen – the lack of a causal link would have prevented the owners claiming the difference in value from the charterers and they would have been left to rue their decision to sell the vessel earlier for a lower sum.

The analysis is also the same if the reason for selling the vessel was that absence of an available market which, at best, it can be said that the "premature termination is the occasion for selling the vessel. It is not the legal cause of it".

Finally, the sale of the vessel was not an act of mitigation because it was incapable of mitigating the actual loss, namely, the loss of profits.

Conclusion

This case highlights the difficulties that can arise when assessing damages and mitigation particularly where contracts are repudiated. This is emphasised by the fact that this matter was overturned by a unanimous decision of the Supreme Court, appealing a unanimous decision of the Court of Appeal.

As was highlighted earlier by Popplewell J, there is no single rule which determines when a wrongdoer obtains credit for a benefit received following their breach of contract. That being said, the Supreme Court has provided helpful guidance in this regard. The judgment highlights that not all benefits will be taken into account when calculating damages for repudiation of a charter and the key focus should be on the causal link between the benefit and the loss, not whether they are of the same type.

The judgment also makes clear that changes in the capital value of the vessel should not be relevant when assessing damages in the context of a time charter and members should be encouraged that, in such situations, their commercial acumen will not be prejudiced.

The article on the Club's Website discussing the decision of Popplewell J in the Commercial Court can be read at ['Keeping the Benefits of a Breach'](#).



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