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The New Flamenco

When should benefits arising following a breach of duty be brought into account when assessing loss?

In a much discussed judgment, the Supreme Court has overturned the Court of Appeal on the assessment of damages arising out of breach of a charterparty. Although a shipping case, the decision raises important principles of general application and some useful lessons in what is a difficult area (as illustrated by the fact that at each stage the decision of the immediately lower tribunal – starting with an arbitral award – was reversed).

In The New Flamenco [2017] UKSC 43[1] the Supreme Court considered whether a charterer who had breached a charterparty could claim that, in assessing the owner's loss, credit had to be given for proceeds of the ship's sale after the charterers' repudiatory breach of the charterparty in August 2007. That sale earned a much greater profit than that which would have been achieved had the owners sold the vessel after the expiry of the charterparty in November 2009. Overturning the Court of Appeal (who had overturned Popplewell J in the Chancery Division, in turn hearing an appeal of the arbitral proceedings), the Supreme Court held that the profits realised by the sale should not be taken into account in assessing damages for breach of the charterparty.

The background to the dispute was as follows: in June 2007 the defendants and the owner orally extended an existing charterparty for the New Flamenco, such that it would expire in November 2009. Following a dispute as to whether the extension had in fact been entered into, the owners treated the charterers as being in repudiatory breach and the charterers redelivered the vessel on 28 October 2007. Shortly before redelivery the owners sold the vessel for USD 23,765,000. In between then and the agreed date of expiry, the financial crisis intervened: and it was held that, had the ship been sold in November 2009, she would have been valued at only USD 7,000,000. The charterers argued that, in claiming damages for breach of the charterparty, the owners had to bring into account the higher sale price that had been achieved before the financial crisis. Accordingly, the charterers claimed a credit for the difference, which in fact exceeded the amounts payable under the remaining term of the charterparty.

The Supreme Court found that the key question was whether there was a causal link between the benefit that had arisen following the breach of duty and either the repudiatory breach of the charterparty itself or any successful act of mitigation by the owners thereafter. The Supreme Court held that, in this case, no such causal link existed. Under the terms of the charterparty there had been nothing to prevent the owners from selling the vessel (albeit subject to the charterparty) prior to the breach and before the financial crisis intervened. Nor had the premature termination of the charterparty made it necessary to sell the vessel. In the words of Lord Clarke, who gave the judgment of the Court, "the owners' interest in the capital value of the vessel had nothing to do with the interest injured by the charterers' repudiation of the charterparty". This was so, the Court

[1] Full name *Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain v Fulton Shipping Inc of Panama* [2017] UKSC 43

found, even if the breach of the charterparty had *occasioned* the sale of the vessel; in such circumstances, the breach would still not be the *legal* cause of the sale, nor was the sale an act of necessary mitigation because it was incapable of mitigating the loss of the income stream that the charterparty provided.

Assessing whether a party in breach of contractual or tortious duty should be given credit for a benefit received by the innocent party following the breach is notoriously difficult, being inherently fact specific, and difficult to analyse by reference to general principles. Nonetheless, it is possible to extract some useful lessons and reminders from the Court's judgement, including:

1. There is no requirement that the benefit must be of the same kind as the loss being claimed, but a difference in kind may be indicative of a lack of the necessary causal link between the benefit and the breach or the purported mitigation.

2. Where there exists an independent right, unfettered by an agreement, then the exercise of that right may be unlikely, without more, to constitute mitigation of a breach of the agreement.

3. The fact that that an event is an "effective cause" or occasion for a benefit arising does not necessarily mean that it is a *legal* cause such that credit must be given for the benefit in assessing the damages owed. This is particularly so where the event does not necessitate the benefit.

The full text of the judgment is available at https://www.supremecourt.uk/cases/uksc-2016-0026.html

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