

BENEFITING FROM BREACH - WHEN WILL DAMAGES BE REDUCED?

04 July 2017

In its judgment in Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U) of Spain (Respondent) v Fulton Shipping Inc of Panama (Appellant) [2017] UKSC 43, the Supreme Court considered when benefits obtained by a wronged party as a result of a breach of contract will be taken into account to reduce the damages payable by the party in breach. This was a rare case on mitigation of loss with potential ramifications outside of its immediate shipping context.

Background Facts

In 2005, the appellants (the "**Owners**") bought a cruise ship, which was chartered to the respondents (the "**Charterers**").

The parties subsequently extended the charterparty twice, first (in writing) to 2007, then (orally) to 2009.

The Charterers disputed the second oral extension, and claimed to be entitled to redeliver the vessel in 2007. The Owners treated this as an anticipatory repudiatory breach of the charterparty, and accepted the breach as terminating the charterparty.

The Charterers redelivered the vessel in 2007. Shortly before redelivery, the Owners agreed to sell the vessel to a third party.

The Owners then commenced arbitration (as provided for by the charterparty) seeking damages for the loss of profits as a result of the repudiation and early termination of the charterparty.

The arbitrator's findings

The arbitrator found that the parties had concluded an oral agreement to extend the charterparty to 2009, and that the charterparty had been terminated by the Owners in response to the Charterers' repudiatory breach.

Having considered expert evidence on the point, the arbitrator found there was a significant difference between the value of the vessel when it was actually sold in 2007 (approximately \$24m) and its expected value had it instead been sold at the anticipated end of the charterparty in 2009 (\$7m). He found that the Owners had therefore obtained a benefit by selling the vessel in 2007 rather than 2009 by avoiding this drop in value. The arbitrator gave the Charterers credit for this difference, to be deducted from any damages assessed to be payable. As this benefit outweighed the Owners' claim for loss of profits, the result was that the Owners would not in fact recover any damages.

The Owners appealed the decision to the High Court under s.69 Arbitration Act 1996 (which provides, unless the parties to the arbitration agree otherwise, for an appeal to the court on a point of law).

High Court

In the High Court, Popplewell J allowed the appeal from the arbitrator. He found that the benefit which accrued to the Owners by selling in 2007 rather than 2009 (thus securing a higher sale price) was not legally caused by the Charterers' breach. The fact that the value of the vessel would have dropped between 2007 and 2009 was caused instead by a decline in the market, which would have occurred irrespective of the Charterers' breach. The Charterers were therefore not entitled to credit for the difference in value of the vessel between 2007 and 2009. The Charterers appealed to the Court of Appeal.

Court of Appeal

The Court of Appeal took a different view: that the Owners decided to sell the vessel in 2007 to mitigate the loss caused by the breach and early termination of the charterparty. That loss could have been mitigated by finding an alternative charterer for period to 2009, but it was equally open to the Owners to mitigate it by selling the vessel. The benefit the owners secured in doing so should therefore be taken into account in reducing the damages payable by the Charterers. The Owners appealed.

Supreme Court

Giving the leading judgment, with which Neuberger, Mance, Sumption and Hodge LJJ agreed, Clarke LJ preferred the reasoning and conclusion of the judge in the High Court.

In order to be brought into account to reduce the damages payable, the benefit in question must have been caused either by the Charterers' breach of the charterparty, or by a successful act of mitigation by the Owners. The benefit obtained by the Owners by selling in 2007 rather than 2009 was not however legally caused by the breach of the charterparty, nor was it a successful act of mitigation:

- The Charterers' repudiation of the charterparty did not make it necessary for the Owners to sell the vessel. Likewise the Owners were free to sell the vessel in 2007 or at any other time during the subsistence of the charterparty, provided it was on terms which allowed the Charterers continued use.
- The court also questioned whether the posited comparator of a sale in 2009 was relevant - there was also no reason to assume that the Owners would in fact have sold the vessel in 2009 had the charterparty ended then.
- There was therefore no causal connection between the Charterers' breach and the sale of the vessel. It was simply the exercise of a proprietary right which the Owners enjoyed independent of the charterparty and independent of its termination.
- Further, the loss caused by the Charterers' breach and early termination was loss of income from the charterparty. Sale of the vessel was a capital transaction unrelated to the loss. Although the court expressly stated that the benefit need not be of the same kind as the loss in order to be taken into account, it nonetheless found on the facts that the capital sale was unrelated to, and incapable of mitigating the loss of the income stream from, the charterparty.

The appeal was allowed and the Charterers were not therefore entitled to credit for the fact that the Owners achieved a higher sale price in 2007 than they might have done in 2009. The court restored the order of Popplewell J, setting aside the part of the arbitrator's award which gave the Charterers credit for the benefit accrued to the Owners.

Key Points

This case highlights the issues which can arise where a breach provides an occasion for a wronged party to deal with an asset. There is then a question for the court whether any benefit gained or loss suffered as a result of that decision is attributable to the breach and

is to be taken into account when assessing damages, or if the wronged party's decision is independent of the breach and breaks the chain of legal causation.

In this case the court found that the drop in value of the vessel occurred in fact as a result of the financial crisis, and so similar fact patterns may well crop up in other industry contexts where assets were sold around this time.

The court's conclusions in this case were relatively brief. Although the trial judge (whose analysis the Supreme Court preferred) had given a review of the case law and attempted to distil some principles to be applied in such cases, the Supreme Court declined to give any comprehensive statement as to when a benefit will be taken into account. The key take-away points from the case are therefore as follows:

- In order to be taken into account to reduce damages payable, any benefit obtained by the wronged party must have been caused either by the breach or by a successful act of mitigation
- It is not necessary that the benefit be of the same kind as the loss, provided there is sufficient causal connection between the breach and the benefit

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Christopher Richards

PSL Principal Associate - [London](#)

 Email

christopher.richards@gowlingwlg.com

 Phone

+44 (0)20 3636 7842

 vCard

Christopher Richards