

Update: benefitting from a breach – *The New Flamenco*



Halani Lloyd
Reed Smith

+852 2507 9818
hlloyd@reedsmith.com

The English Court of Appeal has issued its judgment in *The New Flamenco* regarding whether benefits obtained from a breach of contract should be taken into account when assessing damages. This article explores the case and what can be learned from it.

Introduction

In our January 2015 Defence *Special Edition*, we reported on the decision of the English Commercial Court in *The New Flamenco*¹, regarding mitigation of damages and the circumstances in which benefits obtained from a breach of contract are to be taken into account when assessing damages payable to the innocent party.

An appeal was filed by the charterer and, on 21 December 2015, the English Court of Appeal issued its judgment. The appeal was allowed, with the Court of Appeal finding – contrary to the Commercial Court – that benefits obtained by the owner in selling its ship by way of mitigation, following the time charterer's early redelivery of the ship, should be taken into account when assessing damages².

Background facts

- The charterer redelivered the ship early, in October 2007, rather than in November 2009. The owner considered the charterer to be in repudiatory breach as a result. Shortly before redelivery occurred, the owner entered into a memorandum of agreement for the sale of the ship.
- The tribunal (a sole arbitrator) found that the sale was directly caused by the charterer's early redelivery and was in reasonable mitigation of the owner's loss.
- Arbitration was commenced by the owner in 2008 but claim submissions

were not served until 2011. The owner claimed damages of about €7.6m, being its loss of profits for the balance of the charter period, less operating costs and expenses saved as a result of the sale.

- It was not disputed that there was no available market for a substitute charter for the ship at the time of the breach, or that the ship was sold for a reasonable price. However, by the time of the arbitration, it was apparent that the sale price achieved by the owner was in fact some €11.3m (\$16.8m) more than if she had been sold at the end of the charterparty, in November 2009.
- The charterer claimed that it was entitled to a credit reflecting the €11.3m 'benefit' obtained by the owner. The effect of this argument, if accepted, was that no damages would be payable by the charterer to the owner for the early (wrongful) redelivery.

The correct causation test

It was the Court of Appeal's view that one principle, deriving from the classic *British Westinghouse* case on mitigation³, was 'sufficient to guide the decision of the fact-finder in any particular case', namely that:

'...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

1 [2014] 2 Lloyd's Rep 230

2 [2016] 1 Lloyd's Rep 383

3 [1912] AC 673.

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brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant.'

No available market

The Court of Appeal also considered the cases concerning early redelivery under a time charter where there was no available market at the time of breach: cases such as *The Kildare*⁴ and *The Wren*⁵ which had been considered and relied upon by the tribunal, but not the Commercial Court.

Deciding to charter a ship in the spot market, where there was an available market for a replacement time charter on the day of the breach, would be an independent decision having no connection to the breach, pursuant to *The Elena D'Amico*⁶. However, where there was no available market, chartering the ship in the spot market could be the only form of mitigation available to the owner. Cases such as *The Kildare* made clear that, in these circumstances, additional losses or profits incurred by an owner in mitigating its losses following early redelivery, such as any earnings in the spot market, should be taken into account.

Equally, though more unusual, an owner may decide, where there is no available market, to mitigate its losses by selling the ship. The Court of Appeal saw no reason why the benefits secured by an owner on any such sale should not be taken into account, so long as the sale arose from the consequences of the early redelivery and was undertaken in mitigation of the owner's losses.

Conclusions

The tribunal had made a factual finding (not open to appeal) that the sale had been caused by the early redelivery of the ship and was in mitigation of the owner's losses. In effect, the tribunal had thus found that the sale had arisen 'out of the consequences of the breach and in the ordinary course of business'.

As such, the Court of Appeal considered that the charterer's appeal must be allowed and the tribunal's decision restored.

Comments

This case illustrates the challenges and questions that arise when assessing damages for early redelivery under a time charter, especially where there is no available market at the time of the breach.

If, for example, the minimum redelivery date under the charter has not yet passed by the time that damages are assessed by the tribunal/court, the full extent of the owner's mitigation efforts, and thus what losses the owner has actually suffered, will also likely not yet be clear. This can make the quantification of damages even more difficult.

Here, if the arbitration had not been commenced and progressed belatedly by the owner, the benefits obtained by the owner from selling the ship two years early might not have been apparent.

Where a ship has been sold by an owner following early redelivery, the timing of the sale could be relevant. The fundamental questions would, however, remain the same: whether the sale can be said to 'arise out of the consequences of the breach' and be 'in the ordinary course of business'.

It is understood that an appeal to the English Supreme Court has been lodged. In the meantime, the Court of Appeal judgment provides some helpful guidance on the law relating to mitigation – an area of law that can often be complex to navigate.

4 [2011] 2 Lloyd's Reps 360.

5 [2011] 2 Lloyd's Reps 370.

6 [1980] 1 Lloyd's Reps 75.