

THE “NEW FLAMENCO” AND BENEFITS GAINED BY ASSET SALES FOLLOWING A BREACH OF CONTRACT

- ▶ The ‘duty to mitigate’ is a duty to minimise actionable loss.
- ▶ Collateral unrelated benefits distinguished from mitigation of loss.
- ▶ Commercial decisions taken following a breach are not always related.

What’s it about?

The cargo vessel “New Flamenco” was chartered by the claimants to the defendants for a period of 3 years. The defendants wrongly repudiated an agreement extending the charter for a further 2 years, bringing the charter prematurely to an end. Shortly afterwards the claimants sold the vessel for an amount significantly above that which they could have achieved, had they not been able to sell it before the end of the 2 year extension period, by which time the global market in container ships had collapsed. The claimants brought an arbitration against the charterers for net loss of profit from the charter-hire revenues.

The defendants argued that the additional gain made by having been able to sell the vessel early should be brought into account in mitigation of the loss of profits claim, and the arbitrator agreed. The shipowner’s appeal from the arbitrator was finally decided in June this year by the Supreme Court, which held that the decision to sell the “New Flamenco” was not caused by the breach, and so the benefit of the sale did not offset the damages owed to the claimants.

Why does it matter?

A party claiming damages for actionable wrong is said to be under a ‘duty’ to mitigate its loss. More simply, a claimant cannot recover in damages a loss which it could have avoided by taking reasonable steps to do so. However the Supreme Court made clear that a claimant suffering a revenue loss in respect of an asset is not required to mitigate that loss by realising the capital value of the asset by selling it. A sale that is not causally linked to the breach, even if it results from a commercial decision made or brought forward because of the breach, is to be disregarded.

Whether events that happen after actionable loss and damage are relevant to the measure of damages depends on the circumstances in each scenario. There are many questions that arise with regards to the claimant’s duty to mitigate including public policy considerations in relation to a defendant benefiting from its own wrong and also causation.

The decision needs to be read in the context of the difficulties it clearly presented the courts. Originally, the arbitrator decided in favour of the charterer; the Commercial Court then set aside the arbitrator’s award on the basis of error of law; the Court of Appeal then reinstated the award; finally followed by the Supreme Court reinstating the decision of the Commercial Court. The Supreme Court decision turned on causation: the sale was not an act of mitigation and there was deemed to be insufficient relationship between income derived from an asset and any movements in the market value of said asset.

What now?

An innocent party considering the sale of an asset following a breach should take note of this decision. However the decision is fact-specific and there are likely to be circumstances where the sale of an asset will be causally linked to the loss, so in the event of a dispute, any decision to sell a related asset should be carefully considered.

Who to contact

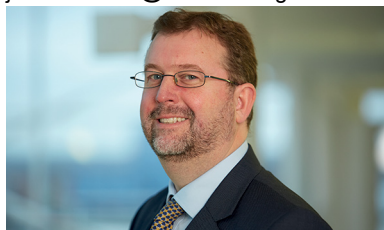
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