Trinity Term
[2017] UKSC 43
On appeal from: [2015] EWCA Civ 1299

JUDGMENT

Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain (Respondent) *v* Fulton Shipping Inc of Panama (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge

JUDGMENT GIVEN ON

28 June 2017

Heard on 21, 22, 23 and 24 November 2016

Appellant	*Respondent*
Steven Gee QC Tom Whitehead Daniel McCarthy William Hooper (Instructed by Gateley Plc)	Simon Croall QC Peter Ferrer Ben Gardner (Instructed by Clyde & Co LLP)

LORD CLARKE: (with whom Lord Neuberger, Lord Mance, Lord Sumption and Lord Hodge agree)

Introduction and the facts

1. This appeal concerns the assessment of damages arising out of the repudiation of a charterparty by charterers of a cruise ship called *New Flamenco* ("the vessel"). I can take the facts from the judgment of Longmore LJ (with whom Christopher Clarke and Sales LJJ agreed) in the Court of Appeal. He had in turn taken the facts from the judgment of Popplewell J ("the judge") on appeal from the First Final Arbitration Award, dated 3 June 2013, ("the award") made by Mark Hamsher as sole arbitrator. The arbitrator gave detailed reasons which formed part of the award.

2. By a time charterparty on the NYPE '93 form dated 13 February 2004 ("the charterparty") the vessel was chartered by her then owners, Cruise Elysia Inc to the defendants ("the charterers") for a period of one year. At that time the vessel was managed by the claimants ("the owners"), who bought the vessel on 4 March 2005 and entered into a novation agreement dated 23 March 2005 under which they assumed the rights and liabilities of the owners under the charterparty effective as from 7 March 2005. In August 2005 the owners and the charterers concluded an agreement extending the charter for two years expiring on 28 October 2007, with an option for a third year. The option was never exercised. The extension was recorded in addendum A.

3. At a meeting on 8 June 2007, the owners and charterers reached an oral agreement in terms subsequently recorded in addendum B. The agreed terms extended the charterparty for a further two years expiring on 2 November 2009. The charterers disputed having made the agreement recorded by addendum B and refused to sign it. They maintained an entitlement to redeliver the vessel on 28 October 2007 in accordance with addendum A. The owners treated the charterers as in anticipatory repudiatory breach and on 17 August 2007 accepted the breach as terminating the charterparty. The vessel was redelivered on 28 October 2007. Shortly before redelivery the owners entered into a memorandum of agreement for sale of the vessel for US$23,765,000.

4. The charterparty was governed by English law and provided for London arbitration. The owners commenced arbitration on 11 September 2007 and Mr Hamsher was appointed sole arbitrator on 4 March 2008. The charterers denied liability, claim submissions were served only on 23 November 2011 and the hearing

took place in May 2013. By the time of the hearing it was apparent that there was a significant difference between the value of the vessel in October 2007, when the owners sold her, and in November 2009, when the vessel would have been redelivered to the owners had the charterers not been in breach of the charterparty. The collapse of Lehman Brothers in September 2008 and the financial crisis had occurred in the meantime. The value of the vessel when she would have been redelivered in accordance with addendum B in November 2009 was, as the arbitrator subsequently found, US$7,000,000. That finding was based on expert evidence of valuers as between a willing seller and a willing buyer.

5. The owners advanced their claim for damages calculated by reference to the net loss of profits which they alleged that they would have earned during the additional two-year extension. Such profits were set out in a detailed schedule identifying the revenue which would have been earned under the charterparty, and giving credit for the costs and expenses which would have been incurred in operating the vessel in providing the charterparty service for the two years, but which had been saved as a result of the sale of the vessel. The amount claimed was €7,558,375. As Longmore LJ put it, ironically the owners were, at this stage, prepared to give credit for what they called the "reduction in the re-sale value" of the vessel (said to be "for depreciation") between October 2007 and November 2009 of US$5,145,000.

6. The charterers argued that the owners were bound to bring into account and give credit for the whole difference between the amount for which the vessel had been sold in October 2007 (US$23,765,000) and her value in November 2009 (subsequently found by the arbitrator to be US$7,000,000). The owners wished, however, to argue that the difference in value was legally irrelevant and did not fall to be taken into account.

7. Because there was no agreement between the parties on the accounting figures in relation to the net profits which would have been earned for the two-year period under the charter, the arbitrator made no findings on the quantum of the owners' claim and left the figures to be agreed by the parties or referred back to him in the absence of agreement. But he declared that the charterers were entitled to a credit of €11,251,677 (being the equivalent of US$16,765,000) in respect of the benefit that accrued to the owners by selling the vessel when worth more in October 2007 than it was at the end of the charter period in November 2009. This was more than the owners' loss of profit claim and would result in the owners recovering no damages for the charterers' repudiation.

8. As Longmore LJ observed in para 10, towards the end of the arbitration hearing the owners had made an application to amend their submissions by deleting the conceded credit. That application was refused by the arbitrator but he allowed the point of principle (that no credit needed to be given) to be argued holding that,

if the owners were successful on the point, the amount of the conceded credit would have, nevertheless, to be brought into account. That remained the position before the judge.

The award and the judgment

9. There were two issues before the arbitrator: (1) whether the owners had been entitled to terminate the charterparty; and (2) if so, whether they had to give credit for any benefit that they had received by selling the vessel.

10. On the first issue, the arbitrator found that the parties had concluded an oral agreement on the terms of addendum B and that the charterparty had been terminated by the owners in response to the charterers' repudiatory breach. There has been no challenge to that finding.

11. The second issue was the only issue of quantum which was argued before the arbitrator (apart from the valuation issue referred to in para 4 above). As I understand it, the parties agreed that, depending upon the circumstances, subject to the way in which the specific issue was decided, any other quantum issues would be the subject of directions and a further hearing. The issue for determination by the arbitrator was recorded in para 3 of his reasons in this way:

> "… there was a fundamental difference between [the parties] as to whether any difference between the October 2007 sale and the putative November 2009 sale price had to be taken into account as a benefit that had accrued to the Owners. The Owners argued that it was totally irrelevant in considering their claim for loss of profit. The Charterers argued that it was a benefit that could and should be taken into account to establish the true net damages suffered by the Owners. This was far from being an arid, legal dispute of little practical importance. If the Charterers were correct both as to the extent of the alleged benefit that had accrued to the Owners and the fact that it had to be taken into account, then even if the Owners succeeded on liability, they could recover nothing because the benefit could exceed by a considerable margin the claim for loss of profits."

12. On this second issue, the arbitrator made a declaration in his award that, when damages fell to be assessed, the charterers were entitled to a credit of €11,251,677 in respect of the benefit that accrued to the owners when they sold the vessel in

October 2007 as opposed to November 2009, which was the earliest time when they could have sold the vessel if addendum B had been performed.

13. The arbitrator added, consistently with the above, that since the parties had not agreed the other accounting figures between them, it was appropriate for him merely to declare the credit to which the charterers were entitled, leaving it to the parties either to refer the balance of their disputes to him or to resolve matters amicably. Finally he reserved the right to make such further award or awards as might be appropriate including on costs.

14. The owners sought permission to appeal to the High Court pursuant to section 69 of the Arbitration Act 1996 on a question of law which was formulated in this way:

> "When assessing shipowners' damages for loss of profits on earnings of hire under a time charterparty which has been repudiated by the charterers and the repudiation accepted by the owners as terminating the contract, are the charterers entitled to have taken into account as diminishing the loss of earnings/hire sustained by the owner as a result of the accepted repudiation 'a benefit' said to consist of avoidance of a drop in the capital value of the vessel because the vessel has been sold shortly after acceptance of the repudiation whereas, if the vessel had been retained until after performance of the charterparty, it would have had a lower capital value by reason of decline in the capital value of the vessel through market decline in ship sale values in that period?"

Permission to appeal was granted by Teare J on 17 September 2013. He considered the question to be one of general public importance and that the arbitrator's decision was "at least open to serious doubt".

15. The appeal was argued before Popplewell J on 30 April and 1 May 2014 and judgment was given by the judge, allowing the appeal, on 21 May 2014. In a judgment reported in [2014] 2 Lloyd's Rep 230 he held in para 65 that, on the facts found by the arbitrator, the application of the principles of law which he had identified did not require the owners 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." The charterers appealed to the Court of Appeal, which allowed the appeal.

16. Before considering the reasoning of the Court of Appeal, it is appropriate to consider the reasoning of the judge. Having set out the submissions of counsel in some detail between paras 13 and 62, he summarised his conclusions on legal principle in paras 63 and 64 as follows[1]:

> "63. The search for a single general rule which determines when a wrongdoer obtains credit for a benefit received following his breach of contract or duty is elusive. In *Parry v Cleaver* Lord Wilberforce said at [1970] AC 1, at pp 41H to 42B:
>
> > 'As the learned justices in the High Court are careful to state, it is impossible to devise a principle so general as to be capable of covering the great variety of benefits from one source or another which may come to an injured man after, or because, he has met with an accident. Nor, as was said by Dixon CJ in *Espagne's* case (1961) 105 CLR 569, is much assistance to be drawn from intuitive feelings as to what it is just that the wrongdoer should pay. Moreover, I regret that I cannot agree that it is easy to reason from one type of benefit to another.'
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> 64. Nevertheless a number of principles emerge from the authorities considered above which I would endeavour to summarise as follows:
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> > (1) In order for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach of contract, it is generally speaking a necessary condition that the benefit is caused by the breach: *Bradburn, British Westinghouse, The Elena D'Amico,* and other authorities considered above.

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[1] Case references as previously inserted in the judgment: *Parry v Cleaver* [1970] AC 1, *Bradburn v Great Western Railway* (1874) LR 10 Exch 1, *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co of London Ltd* [1912] AC 673, *The Elena D'Amico* [1980] 1 Lloyd's Rep 75, *Coles v Hetherton* [2015] 1 WLR 160, *The Fanis* [1994] 1 Lloyd's Rep 633, *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501, *Hussey v Eels* [1990] 2 QB 227, *Palatine Graphic Arts Co Ltd v Liverpool City Council* [1986] QB 335, *Bellingham v Dhillon* [1973] QB 304, *Nadreph Ltd v Willmett & Co* [1978] 1 WLR 1537, *The Elbrus* [2010] 2 Lloyds Rep 315, *The Yasin* [1979] 2 Lloyd's Rep 45, *Shearman v Folland* [1950] 2 KB 43 and *Smoker v London Fire and Civil Defence Authority* [1991] AC 502.

(2) The causation test involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the benefit and loss, the manner in which they occurred and any pre-existing, intervening or collateral factors which played a part in their occurrence: *The Fanis.*

(3) The test is whether the breach has caused the benefit; it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit, or merely triggered his doing so: *The Elena D'Amico.* Nor is it sufficient merely that the benefit would not have been obtained but for the breach: *Bradburn, Lavarack v Woods, Needler v Taber.*

(4) In this respect it should make no difference whether the question is approached as one of mitigation of loss, or measure of damage; although they are logically distinct approaches, the factual and legal inquiry and conclusion should be the same: *Hussey v Eels.*

(5) The fact that a mitigating step, by way of action or inaction, may be a reasonable and sensible business decision with a view to reducing the impact of the breach, does not of itself render it one which is sufficiently caused by the breach. A step taken by the innocent party which is a reasonable response to the breach and designed to reduce losses caused thereby may be triggered by a breach but not legally caused by the breach: *The Elena D'Amico.*

(6) Whilst a mitigation analysis requires a sufficient causal connection between the breach and the mitigating step, it is not sufficient merely to show in two stages that there is: (a) a causative nexus between breach and mitigating step; and (b) a causative nexus between mitigating step and benefit. The inquiry is also for a direct causative connection between breach and benefit *(Palatine),* in cases approached by a mitigation analysis no less than in cases adopting a measure of loss approach: *Hussey v Eels, The Fanis.* Accordingly, benefits flowing from a step taken in reasonable

mitigation of loss are to be taken into account only if and to the extent that they are caused by the breach.

(7) Where, and to the extent that, the benefit arises from a transaction of a kind which the innocent party would have been able to undertake for his own account irrespective of the breach, that is suggestive that the breach is not sufficiently causative of the benefit: *Lavarack v Woods, The Elena D'Amico.*

(8) There is no requirement that the benefit must be of the same kind as the loss being claimed or mitigated: *Bellingham v Dhillon*, *Nadreph v Willmett*, *Hussey v Eels*, *The Elbrus*, cf *The Yasin;* but such a difference in kind may be indicative that the benefit is not legally caused by the breach: *Palatine.*

(9) Subject to these principles, whether a benefit is caused by a breach is a question of fact and degree which must be answered by considering all the relevant circumstances in order to form a commonsense overall judgment on the sufficiency of the causal nexus between breach and benefit: *Hussey v Eels*, *Needler v Taber*, *The Fanis.*

(10) Although causation between breach and benefit is generally a necessary requirement, it is not always sufficient. Considerations of justice, fairness and public policy have a role to play and may preclude a defendant from reducing his liability by reference to some types of benefits or in some circumstances even where the causation test is satisfied: *Palatine*, *Parry v Cleaver.*

(11) In particular, benefits do not fall to be taken into account, even where caused by the breach, where it would be contrary to fairness and justice for the defendant wrongdoer to be allowed to appropriate them for his benefit because they are the fruits of something the innocent party has done or acquired for his own benefit: *Shearman v Folland, Parry v Cleaver* and *Smoker*."

17. As stated above, the judge held in para 65 that, on the facts found by the arbitrator, the application of those principles did not require the owners 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.

18. The judge gave his reasons for reaching those conclusions in his paras 66 to 72. Whether his reasoning is correct is critical to the resolution in this appeal. It may be summarised as follows. He noted in para 66 that the vessel was an asset purchased by the owners in 2005 which the owners could have sold at any time thereafter at the prevailing market rate. When they sold it in October 2007 it was worth US$23,765,000. The judge held that the fact that it would have been worth only US$7m two years later was a result of the fall in the market flowing from the financial crisis. The difference in the value of the vessel was not, he said, caused by the charterers' breach of the charter; it was caused "by the fall in the market which occurred irrespective of such breach". He added that the effect of the fall in the market was also not caused by the charterers' breach. It was caused by the owners' decision to sell the vessel.

19. He added in para 66 that it was caused thus. "At the moment of the breach, the owners had a choice whether or not to sell the vessel, as they had at any stage over the unexpired period of the charterparty. If and when they chose to sell, market fluctuations in the vessel's value thereafter would no longer affect them, for good or ill. If the market subsequently rose, the decision to sell might with hindsight seem a poor one; if the market fell it would prove to be a wise one. That was a matter for the owners' commercial judgment and involved a commercial risk taken for their own account. That is none the less so because it was reasonable for them to sell when faced with the charterers' breach. The decision to sell was legally independent of the breach, so far as concerns movements in the capital value of the vessel, just as was the decision of charterers not to charter in substitute tonnage in *The Elena D'Amico.* The breach merely provided the context or occasion for the owners to realise the capital value of the vessel. It was the trigger not the cause."

20. The judge made a similar point in para 67. The owners, he said, were not obliged to sell the vessel, as a matter of fact or law. The arbitrator did not find that a failure to do so would have been a failure reasonably to mitigate loss. There can be no question of the owners being obliged to realise the capital value of the vessel by selling it on breach, however reasonable such a course was from a business point of view.

21. Then in para 68 the judge concluded that the issue of causation was not concluded by the arbitrator's finding that the sale was in reasonable mitigation of

loss. The true question was whether the owners suffered a net loss in income from the charterparty. The judge added:

> "The sale of the vessel mitigated this loss because it reduced the continuing costs of operating or laying up the vessel. To the extent that the benefits flowing from the sale comprised such cost savings, there is no difficulty in treating the causal nexus between breach and benefit as established through the mitigating step of selling the vessel. But insofar as the sale gave rise to a capital benefit, it was not caused by the breach, but by the independent decision of the owners to realise the capital value of their asset. Although that was a benefit which flowed from the mitigating step of selling the vessel, it does not satisfy the principle that benefits are only to be taken into account to the extent that they are caused by the breach."

22. In short, the judge concluded in para 69 that a capital loss of this kind is different from the only relevant loss, which was a loss of income, not a loss of capital. The judge further observed in para 70 that a further indication that the capital benefit to the owners derived from selling the vessel in 2007 rather than 2009 was not legally caused by the breach is to be found in the fact that a sale of the vessel was the kind of transaction which it was open to the owners to enter into irrespective of the charterers' breach of charterparty. Whilst the charter was on foot, the owners might have sold the vessel subject to charter, provided that they did so on terms which required the new owner to perform the charterparty so that they were not putting it out of their power to perform. The judge considered this aspect of the case further in the remainder of para 70 and in para 71. In para 72 the judge explained that the same result is reached if the issue is approached as one of the measure of damage rather than mitigation; the application of the causation test leads to the same conclusion. In summary, he concluded that the change in capital value of the vessel consequent upon the drop in the market over the two years between the vessel being sold in November 2009 for immediate delivery and the vessel being sold in October 2007 had nothing to do with the contractual rights which the owners lost as a result of the charterers' repudiation.

23. In his para 73 the judge added that the same result was dictated by the policy grounds which inform *Bradburn* and its extension in *Parry v Cleaver* and *Smoker.* His reasoning was similar to that under the heading of causation. He said this in para 73 after referring to those cases:

> "The capital value of the vessel was a benefit which the owners had obtained for their own account prior to the breach when they bought the vessel in 2005. They invested their money (or

> that which they borrowed) in an asset, taking upon themselves the risk of fluctuations in its capital value which would inevitably be affected by the sale and purchase market. They took the risk of having invested in the vessel, and of the financial consequences of a decision of whether and when to sell her. To allow the charterers to take the benefit of their decision to sell at what turned out to be an opportune moment in market conditions would be to allow the charterers to appropriate the fruits of the owners' investment in a way that would be unfair and unjust. In this respect the position is properly analogous to the position of a person who receives the proceeds of insurance or a pension following breach, and the policy rationale for ignoring such benefits articulated in *Shearman v Folland, Parry v Cleaver* and *Smoker* applies."

24. In paras 74 and 75 the judge considered a submission made to him on behalf of the charterers that questions of causation raised issues of fact which were matters for the arbitrator and not matters for the court on an appeal limited to issues of law. The judge correctly accepted that his jurisdiction was limited to issues of law. However, while recognising the deference and respect due to the very experienced arbitrator, there is considerable force in the points made at the end of para 74 as follows:

> "I have nevertheless reached the conclusion that had the arbitrator applied the correct principles he could not have reached the conclusion to which he came, which is indicative of an error of law either in failing to identify the correct principles of law or in failing to apply them. The arbitrator appears to have treated the issue as determined by: (a) the compensatory principle (award, paras 63 and 67); (b) his rejection of owners' argument that the benefit had to be of the same kind as the loss mitigated (paras 67 and 68); and (c) his finding that the sale of the vessel was caused by the charterers' breach and in reasonable mitigation of loss (para 73). The finding that the sale of the vessel was caused by the charterers' breach and in reasonable mitigation of loss was not legally sufficient to establish the necessary causative link between breach and benefit."

The Court of Appeal

25. The Court of Appeal took a different view from the judge. Giving the leading judgment, Longmore LJ set out the conclusions of the judge as I have sought to do. Having referred to the authorities in some detail, he said this in para 23:

> "The important principle which emerges from these citations is 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 brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant. That should be a principle sufficient to guide the decision of the fact-finder in any particular case."

26. In para 24 Longmore LJ said that an important question is whether there is an available market. He referred in detail to the judgment of Robert Goff J in *The Elena d'Amico*, where he asked himself why the normal rules of mitigation did not apply in available market cases. The reason was that, by analogy with sale of goods cases, even if a reasonable buyer would wait before buying in other goods on the available market, the resulting loss or gain was not caused by the defendant's breach of contract but by the independent decision of the innocent party not to take advantage of the available market. If the innocent party chooses to speculate as to the way in which the market is going to go, the result of such speculation is for his account not the account of the guilty party. Longmore LJ added that in this connection Robert Goff J cited the statement of Viscount Haldane LC in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2)* [1912] AC 673 at 689, where Robert Goff J noted that he emphasised that, for the benefit of mitigation to be taken into account, the action taken to acquire that benefit must be one "arising out of the transaction". Longmore LJ concluded thus at the end of para 24, in reliance upon the statement of Robert Goff J at p 89:

> "A decision to speculate on the market rather than buying in (or selling) at the date of the breach did not 'arise' from the contract but from the innocent party's decision not to avail himself of the available market."

27. He added in para 25 that that reasoning all depends on there being an available market which the innocent party decides for reasons of his own to ignore. That thinking cannot be automatically transposed to cases where there is no

available market. In such cases the prima facie measure of loss in hire contracts is the difference between the contractual hire and the cost of earning that hire (crew wages, cost of fuel, etc). But it will not usually be reasonable for the owners to claim that prima facie measure if they are able to mitigate that loss by trading their vessel if opportunities to trade that vessel arise. If they do so trade the vessel they may make additional losses or additional profits but, in either event, they should be taken into account. Longmore LJ further noted that in such a case the owners are not speculating on the market as they would be if there was an available market of which they choose not to avail themselves; they are just bringing into account the consequences of their decision to mitigate their loss and those consequences will "arise", generally speaking, from the consequences of the breach of contract. Then, between paras 26 and 29, Longmore LJ referred to a number of cases which made that proposition good.

28. As I see it, the critical para of Longmore LJ's judgment is para 30, which is in these terms:

> "The unusual facts of this case show, however, that as well as spot chartering the vessel an owner may equally decide to mitigate its loss by selling the vessel. If so, it is not easy to see why the benefit (if any) which an owner secures by selling the vessel should not be brought into account just as much as benefits secured by spot chartering the vessel during the unexpired term of the time charterparty are, according to the decisions in *The Kildare* and *The Wren*, to be brought into account. Nor is there any reason why the value of that benefit should not be calculated by reference to the difference between the value of the vessel at the time of sale and its value at the time when (in a falling market) the charterparty was due to expire. Mr Croall [counsel for the charterers] accepted that, if the sale market had risen substantially during that time, the charterers would be liable for the owners' inability to take advantage of that rise in the market, if the sale had arisen from the consequences of the breach of contract and been undertaken by way of mitigating the loss caused by that breach."

Christopher Clarke LJ said much the same in his judgment agreeing with Longmore LJ. Sales LJ agreed with both judgments. I have reached a different conclusion and prefer the reasoning of the judge.

Conclusions

29. Viewed as a question of principle, most damages issues arise from the default rules which the law devises to give effect to the principle of compensation, while recognising that there may be special facts which show that the default rules will not have that effect in particular cases. On the facts here the fall in value of the vessel was in my opinion irrelevant because 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.

30. This was not because the benefit must be of the same kind as the loss caused by the wrongdoer. In this regard I agree in particular with the eighth proposition identified by the judge in his para 63 and quoted in para 16 above. As I see it, difference in kind is too vague and potentially too arbitrary a test. The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. 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.

31. On the facts found by the arbitrator, the benefit that the charterers are seeking to have brought into account is the benefit of having avoided a loss of just under about US$17m by selling the vessel in October 2007 for US$23,765,000 by comparison with the value of the vessel in November 2009, namely (as the arbitrator found) US$7m.

32. That difference or loss was, in my opinion, not on the face of it caused by the repudiation of the charterparty. The repudiation resulted in a prospective loss of income for a period of about two years. Yet, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time. Indeed, it could have been sold during the term of the charterparty. If the owners decide to sell the vessel, whether before or after termination of the charterparty, they are making a commercial decision at their own risk about the disposal of an interest in the vessel which was no part of the subject matter of the charterparty and had nothing to do with the charterers.

33. As I see it, the absence of a relevant causal link is the reason why they could not have claimed the difference in the market value of the vessel if the market value would have risen between the time of the sale in 2007 and the time when the charterparty would have terminated in November 2009. For the same reason, the owners cannot be required to bring into account the benefit gained by the fall in value. The analysis is the same even if the owners' commercial reason for selling is that there is no work for the vessel. At the most, that means that the premature

termination is the occasion for selling the vessel. It is not the legal cause of it. There is equally no reason to assume that the relevant comparator is a sale in November 2009. A sale would not have followed from the lawful redelivery at the end of the charterparty term, any more than it followed from the premature termination in 2007. The causal link fails at both ends of the transaction.

34. For the same reasons the sale of the ship was not on the face of it an act of successful mitigation. If there had been an available charter market, the loss would have been the difference between the actual charterparty rate and the assumed substitute contract rate. The sale of the vessel would have been irrelevant. In the absence of an available market, the measure of the loss is the difference between the contract rate and what was or ought reasonably to have been earned from employment of the vessel under shorter charterparties, as for example on the spot market. The relevant mitigation in that context is the acquisition of an income stream alternative to the income stream under the original charterparty. The sale of the vessel was not itself an act of mitigation because it was incapable of mitigating the loss of the income stream.

35. If the vessel were sold, say, a year into the two year period when it would have been employed under the repudiated charterparty, the sale of the vessel would or might be relevant for some purposes as follows. It would shorten the period during which the owners could claim to have lost the income stream under the old charterparty and therefore the period during which there was a lost income stream to mitigate. If it could be shown that the owners received less for the vessel than they could have done by selling it with the benefit of what remained of the old charterparty, the difference might also be recoverable on the basis that the effect of the sale would be to capitalise the value of a year's hire payments. But none of those considerations would make the sale of the vessel itself an act of mitigation. It would simply be the exercise of the owners' proprietary right which they enjoy independent of the charterparty and independent of its termination.

Disposal

36. For these reasons I would hold that the judge was correct to hold that the arbitrator erred in principle. I would therefore answer the question formulated for the purposes of section 69 of the Arbitration Act 1996 (and set out in para 14 above) in the negative. I would accordingly allow the appeal and restore the order of the judge, dated 21 May 2014, in which, inter alia, he allowed the appeal and set aside paragraph 7A of the award, in which the arbitrator declared that the charterers were entitled to a credit of €11,251,677 in respect of the benefit that accrued to the owners when they sold the vessel in October 2007 as opposed to November 2009, the earliest time they could have sold the vessel if Addendum B had been performed. The arbitrator reserved such other issues to himself as may be necessary.

37. There remain a number of issues between the parties which fall for decision by the arbitrator, arising at least in part by reasons of concessions made before the arbitrator. It appears to me that the most sensible course is for the remaining issues to be identified and formulated in the order of this Court and then remitted for determination by the arbitrator in the light of the answers set out above. The parties should try to agree the remaining issues to be remitted and submit them to the Court. In the absence of agreement, the parties should exchange submissions on the form of the order and costs and submit them to the Court within 28 days of the judgment being handed down.