28 June 2017

PRESS SUMMARY

Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain (Respondent) v Fulton Shipping Inc of Panama (Appellant) [2017] UKSC 43
On appeal from [2015] EWCA Civ 1299

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

BACKGROUND TO THE APPEAL

On 4 March 2005, the appellant ("the owners") bought a cruise ship called the *New Flamenco* ("the vessel"). The vessel had been chartered to the respondent ("the charterers") by its previous owners by way of a time charterparty ("the charterparty"). By a novation agreement the appellant assumed the rights and liabilities of the previous owner under the charterparty effective as from 7 March 2005. In August 2005, the owners and the charterers concluded an agreement extending the charterparty for two years so that it was due to expire on 28 October 2007. At a meeting on 8 June 2007, the owners and charterers reached an oral agreement extending the charterparty for a further two years, expiring on 2 November 2009. The charterers disputed having made the agreement and maintained they were entitled to redeliver the vessel on 28 October 2007. The owners treated the charterers as in anticipatory repudiatory breach and accepted the breach as terminating the charterparty. The vessel was redelivered on 28 October 2007. Shortly before the redelivery the owners agreed to sell the vessel to a third party for US$23,765,000.

The owners commenced arbitration in London, as provided for by the charterparty, seeking damages for the charterers' repudiatory breach **[4]**. The arbitrator found that an oral contract to extend the charterparty had been made, the charterers were in repudiatory breach of that contract and therefore the owners were entitled to terminate the charterparty. This finding is unchallenged **[9-10]**. However, there was a significant difference between the value of the vessel when the owners sold it, and its value in November 2009 (found by arbitrator to be US$7,000,000), when the vessel would have been redelivered to the owners had the charterers not been in breach **[6]**. The arbitrator declared that the charterers were entitled to a credit for this difference in value, amounting to €11,251,677 (the equivalent of US$16,765,000), which could be discounted from any damages payable by the charterer to the owners from the loss of profit claim. The credit was more than the owner's loss of profit claim and would result in the owners recovering no damages **[7, 12]**.

The owners appealed to the High Court pursuant to section 69 of the Arbitration Act 1996 on a question of law, namely whether when assessing the owners' damages for loss of profits the charterers were entitled to take into account as diminishing the loss the drop in the capital value of the vessel **[14]**. Popplewell J held that they were not because the benefit accruing to the owners from the sale of the vessel in October 2007, instead of in November 2009, was not legally caused by the breach **[15]**. The charterers appealed to the Court of Appeal. The appeal was allowed on the basis that the owners took a decision to mitigate their loss by selling the vessel in October 2007 and there was no reason why the benefit secured by doing this should not be brought into account, in the same way that benefits secured by spot chartering a vessel during an unexpired term of charterparty would be **[28]**. The owners now appeal that judgment to the Supreme Court.

JUDGMENT

The Supreme Court allows the owners' appeal. The charterers are not entitled to a credit for the difference in the value of the vessel when sold in 2007, in comparison to its diminished value in 2009. Lord Clarke, with whom the other justices agree, gives the lead judgment.

REASONS FOR THE JUDGMENT

The fall in the value of the vessel is 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 **[29]**. This is not because the benefit must be the same kind as the loss caused by the wrongdoer, but because the benefit was not caused either by the breach of the charterparty or by a successful act of mitigation **[30]**. The repudiation resulted in a prospective loss of income for a period of about two years. However, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, at all or at any particular time. It could also have been sold during the term of the charterparty. When to sell the vessel was a commercial decision made at the owners' own risk **[32]**. The owners would not have been able to claim the difference in the market value of the vessel if the market value had risen between the sale in 2007 and the time the charterparty would have terminated in 2009. The premature termination of the charterparty was at most the occasion for selling the vessel, but it was not the legal cause of it. There is equally no reason to assume that the relevant comparator is a sale in November 2009; there is no reason that a sale would necessarily have followed the lawful redelivery at the end of the charterparty term **[33]**.

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. 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. The relevant mitigation in that context is the acquisition of an alternative income stream 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 **[34]**.

Popplewell J was therefore correct to hold that the arbitrator erred in principle. The Supreme Court prefers his conclusion to that of the Court of Appeal's. His order, setting aside the part of the arbitral award that 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, is therefore restored **[36]**.

References in square brackets are to paragraphs in the judgment