“NEW FLAMENCO”

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Essential facts

1. Time charterparty dated 13th February 2004 for a small cruise ship extended to 28th October 2007.

2. In June 2007 there was a meeting about a possible extension. The owners' case (which I upheld in my award) was that there had been an agreement to extend the charterparty to 2nd November 2009.

3. Both at the time and in the arbitration the charterers denied that there had been an agreed extension and they declared that they would redeliver the vessel with effect from 28th October 2007 and did so.

4. Shortly before redelivery, the owners sold the vessel for US$23,765,000.

5. The owners claimed net lost profits (after giving credit for expenses saved) of approximately €7.5 million.

6. If the vessel had been sold in November 2009 when she would have been redelivered, following the financial crisis triggered by the collapse of Lehman Brothers, she could only have been sold for US$7 million.

7. It was accepted that when they sold the vessel in October 2007, there was no market in which the owners could trade her so they had no alternative other than to sell the vessel.

The €7.5 million question

8. Did the owners have to bring into account the benefit that they obtained by the sale at a higher price? If they did, it would extinguish their claim for damages arising out of the breach of contract by making an early redelivery.

The record to date

(i) In my award I held that the benefit had to be brought into account.

(ii) Mr Justice Teare, whilst accepting that my decision was not "*obviously wrong*", gave permission to appeal on the point of law whether, in the circumstances of the case, the charterers are entitled to have the benefit of an avoided drop in the capital value of the vessel brought into account.

(iii) The appeal was heard by Mr Justice Popplewell. He quoted the relevant principles relating to mitigation set out in McGregor on Damages:-

- *"9-006 (3) The third rule is that, where the claimant does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the claimant's action and is liable only for the loss as lessened; this is so even though the claimant would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being ones which were required of him under the first rule. In addition, where the loss has been mitigated other than by steps taken by the claimant subsequent to the wrong, the claimant can again recover only for the loss as lessened, provided that the benefit gained is not to be regarded as collateral. Put shortly, the claimant cannot recover for avoided loss."*

- The judge then went on to review all the relevant authorities from which he extracted a number of principles:

- *"1. … it is generally speaking a necessary condition that the benefit is caused by the breach …*

- *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. …*

- *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 … 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 …*

- *8. There is no requirement that the benefit must be of the same kind as the loss being claimed or mitigated. …*

- *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 had done or acquired for his own benefit ..."*

- The Charterers appealed to the Court of Appeal. Lord Justice Longmore commented:-

- *"It is notoriously difficult to lay down principles of law in the realm of mitigation of loss particularly when it is said that a benefit received by a claimant is to be brought into account as avoiding the loss. The judge is to be commended for having tried to do so but his use of the word 'indicative' is itself indicative that hard and fast principles are difficult to enunciate …"*

- Lord Justice Longmore went on to say that the crucial question was whether or not there was an available market. He commented:-

- *"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 the benefit secured by spot chartering the vessel during the unexpired term of the time charterparty are, according to the <u>The Kildare</u> and the <u>The Wren</u> to be brought into account. …*

- *The doctrine of mitigation may, indeed, sometimes require an owner to sell the vessel he has hired out to a hirer or charterer if the relevant chattel is returned early; if that is the position, the owner will, pursuant to Dr McGregor's first principle [that a claimant cannot recover for avoidable loss], only recover the amount of hire after he has given credit for the sale price he could have obtained if he had sought to sell after the breach …"*

- He concluded:-

- *“In this difficult area of law the arbitrator reminded himself of Manse J’s statement of principle in The Fanis:-*

- *‘The general issue is in my view appropriately stated as being whether any profit or loss arose out of or was sufficiently closely connected with a breach to require to be brought into account in assessing damages. Resolution of that issue involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the profit or loss, the manner in which it occurred and any intervening or collateral factors which played a part in its occurrence, in order to form a common sense overall judgment on the sufficiency of the causal nexus between breach and profit or loss’.*

- *Following this the arbitrator made his own ‘common sense overall judgment’ and I cannot see that he has made an error of law in so doing.”*

- Lord Justice Christopher Clarke commented:-

- *"Popplewell J's principle 6 is in two parts. It is insufficient to show (a) that there is a causative nexus between breach and mitigated step and (b) between mitigating step and benefit. Instead there must be a direct causative connection between breach and benefit. I found this principle, or, at least its application, elusive. My difficulty was not eased by the inability of the respondents to give any serviceable illustration of a benefit whose characteristics went beyond the insufficient combination of (a) and (b) and could be said to be directly caused by the breach. This is not surprising. The effect of most breaches is to cause loss. If nothing is done about them they are unlikely to cause benefit. It is the action which is taken to minimise the loss caused by the breach which is likely to do so. …*

- *If Popplewell J's principle 6 were to govern in the manner that he applied it I find it difficult to see how the third rule set out in McGregor would retain much of a foothold on life."*

- And so the Court of Appeal unanimously reinstated my award and refused leave to appeal to the Supreme Court. Although of course I would say that, I was satisfied that justice had been done. But ……