MITIGATION AND CAUSATION OF BENEFITS

Fulton v *Globalia (The New Flamenco)*

1. Introduction

In *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)*[1] the Supreme Court considered the circumstances in which benefits received by the claimant, arising from steps that the claimant would not have taken but for the defendant's breach of contract, must be taken into account in the assessment of damages. The result of the appeal was eagerly awaited by many observers, not least by the present authors because, in earlier issues of this journal,[2] we had expressed different views concerning the outcome in the Court of Appeal. As it transpired, however, the single judgment delivered by Lord Clarke[3] came as something of a let-down because it contains only seven paragraphs of discussion and no citation of authority apart from the cases referred to in reciting the lower Courts' reasoning. Our aim in this note is to supplement the Supreme Court's own short reasoning with a fuller analysis of how its approach differed from the Court of Appeal,[4] whose decision the Court reversed in favour of the decision and reasoning of Popplewell J in the High Court.[5]

The essential facts were as follows. The respondent charterers repudiated a two-year time charter of a small cruise ship, the *New Flamenco*. At the time there was no substitute two-year time charter available in the market. The owners immediately sold the ship for a price of $US23,765,000. Although this was a step that the owners could probably have taken at any time during the term of the charter, they did not appear to dispute that they would not in fact have sold the ship but for the breach.[6] They subsequently sought to recover the net loss of profits they would have earned (some €7.5m) if the charter had not been repudiated. However, since the value of the ship when the charter was due to end would have been a mere $7,000,000 — primarily because of the fall in the charter market brought about by the Lehman Brothers collapse — the charterers argued that the difference of $16,765,000 between this sum and the actual sale price must be brought into account, resulting in an award of nominal damages because this benefit exceeded the lost profits claimed. The arbitrator agreed, Popplewell J disagreed and, after being reversed by the Court of Appeal, Popplewell J's decision was reinstated by the Supreme Court.

As we both pointed out in our earlier notes, it would plainly be over-simplistic in a case such as this to rely on the letter of the compensatory principle to hold that the claimant can *never* be put in a better position (all things considered) than if the breach had not occurred. Indeed, neither the Court of Appeal nor the Supreme Court took this approach. But the difficult issue is then to specify the circumstances under which a benefit resulting from the claimant's own conduct will be ignored in assessing damages. Here, despite their differing conclusions, both the Court of Appeal and the Supreme Court correctly raised the issue of whether or not

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1 [2017] UKSC 43; [2017] 1 WLR 2581.
2 [2016] LMCLQ 202 and 459.
3 With whom Lord Neuberger, Lord Mance, Lord Sumption and Lord Hodge agreed.
4 [2015] EWCA Civ 1299; [2016] 1 WLR 2450; [2016] 1 Lloyd's Rep 383.
5 [2014] EWHC 1547 (Comm); [2014] 2 Lloyd's Rep 230.
6 See also *ibid* [12] (Popplewell J): 'The arbitrator made findings that the sale of the Vessel by the Owners in October 2007 was caused by the Charterers' breach…'. Regardless of whether this refers to factual or legal causation, it appears to entail that the arbitrator regarded the but for test as satisfied.

the claimant made a choice, or was "speculating", to adopt the terminology that is most familiar in this context. Where the Courts differed (implicitly) was in answer to the subtler question: choice *as to what*? Unfortunately, Lord Clarke's brief analysis failed to pinpoint this as the source of divergence from the Court of Appeal. We aim to clarify the issue by enumerating the various choices that may (or may not) have been open to the claimants on the present facts, together with their significance for the application of the compensatory principle.

2. A factual ambiguity

There is one important respect in which the facts of *The New Flamenco* were unclear. This concerns the range of viable options open to the claimants at the time of the repudiation. In particular, the arbitrator's findings were ambiguous as to whether there was no alternative employment available for the vessel at all (either on the spot market or pursuant to shorter term time charters), or whether there was merely no substitute *two-year* time charter available as a direct substitute for the outstanding term of the original charter. This distinction is potentially important. If no alternative employment was available, it looks as though the options open to the claimants were severely constrained. In the absence of any form of substitute hire being available, it seems plausible that the only viable option would have been to sell the vessel. But, if alternative employment *was* available, the sale would have taken place against the background that a decision to seek substitute hire could have been taken instead, albeit not in direct substitution for the original charter.

The arbitrator's reported findings[7] refer to both possibilities. Thus, he said that "there was no suitable time charter employment for the vessel", that "there was no charterparty employment for the vessel at the time in question",[8] and that the sale was a "necessity",[9] but he also referred to it not being "possible for the Owners to conclude an alternative *substitute two-year time charterparty*".[10] Neither the judgment of Popplewell J nor the judgments of the Court of Appeal shed any further light on this element of the facts, nor did they explicitly advert to potential importance of the ambiguity. In the Supreme Court, however, Lord Clarke appeared implicitly to assume that shorter charters were available in his conclusion that "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".[11]

3. Reasoning of the arbitrator, Popplewell J and the Court of Appeal

The arbitrator held that the difference between the price obtained from selling the ship after the repudiation and the value of the ship had the charter been performed was a benefit that should be brought into account since the sale was caused by the breach and was a reasonable step taken to mitigate the damage. In his view, "there was no reason why capital savings could not and should not be brought into account in considering the net loss suffered by the owners".[12]

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7 *Ibid*, [12].

8 This was also roughly the formulation adopted by the claimants in the narrative of facts presented on appeal to the Supreme Court.

9 [2014] EWHC 1547 (Comm); [2014] 2 Lloyd's Rep 230, [12] (paras 3, 23 and 70 of the award).

10 *Ibid* (para 60 of the award) (emphasis added).

11 [2017] UKSC 43; [2017] 1 WLR 2581, [34]. See further text following n 57 below.

12 [2014] EWHC 1547 (Comm); [2014] 2 Lloyd's Rep 230, [12].

Popplewell J disagreed, holding instead that the benefit of the sale was not "legally caused by the breach".[13] In order to bring the benefit into account in the assessment of damages, there had to be "a direct causative connection between breach and benefit"[14] whereas in this case the decision to sell, although triggered by the breach, was "legally independent"[15] therefrom. In particular, the reason why the sale of the vessel was independent of the breach was that the owners had a choice whether or not to realise the capital value of the ship at any time, including during the remaining period of the charter. Accordingly, whether they did so was a matter for their own "commercial judgment and involved a commercial risk taken for their own account".[16] The decision thus rested on the concept of "speculation" commonly invoked in relation to claimants' post-breach conduct.

Popplewell J gave several ancillary reasons for his decision. First, it made no difference that the arbitrator had found that the sale was a reasonable step to take in mitigation of loss. The loss that was mitigated was the loss of net profits from the charter. The sale achieved this by removing the costs involved in operating or laying up the ship. Secondly, although the difference in kind between the capital benefit derived from the sale of the ship and the claimed loss of rental income did not in itself justify a refusal to bring that benefit into account, it was "indicative that it was not a benefit which was legally caused by the breach, notwithstanding that it flowed from a step which was in reasonable mitigation of loss caused by the breach".[17] Thirdly, the situation before the Court was analogous to those cases in which it had been held that some post-breach benefits, such as donations from third parties and the proceeds of insurance and pension schemes paid for or contributed to by the claimant, should be ignored on policy grounds. When the owners purchased the ship they undertook "the risk of fluctuations in its capital value" and "[t]o 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 the vessel in a way which would be unfair and unjust".[18] Finally, the judge noted the lack of any authority directly supporting the charterers' argument, the logical corollary of which was that, if the market had actually risen and the vessel had doubled in value by the time the charter was due to end, the owners could have claimed the capital loss suffered. He clearly thought that such a claim would be unsustainable.[19]

Popplewell J's decision was reversed by a unanimous Court of Appeal. The judgments were delivered by Longmore and Christopher Clarke LJJ, Sales LJ agreeing with both judgments. Their decision essentially hinged on the fact that there was no available market for substitute charters at the time of the repudiation.[20] If a substitute charter had been available to the claimants, the correct measure of damages would have been the difference between the contract and substitute market rates of hire. As explained by Robert Goff J in the well-known case of *The Elena D'Amico*,[21] this is so regardless of whether the claimant actually goes into the market for substitute hire or not. Any subsequent gains or losses resulting from the choice not to seek substitute hire would be for the claimant's own account. Thus, if a gain is made, it will be the result of an independent decision not "arising out of the breach". In such a case,

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13 *Ibid*, [65].
14 *Ibid*, [64].
15 *Ibid*, [66].
16 *Ibid.*
17 *Ibid*, [69].
18 *Ibid*, [73].
19 *Ibid*, [77].
20 Although note the residual ambiguity latent in this premise: see text following n 7 above.
21 *Koch Marine Inc v D'Amica Societa di Navigazione ARL* [1980] 1 Lloyd's Rep 75.

"measure of damages and mitigation walk hand in hand".[22] Their Lordships thus accepted that, if there had been an available market for substitute hire in the present case, the owners' actual decision to sell the ship would have been ignored and they would have been entitled to recover damages measured by the difference between the contract and substitute market rates.

However, the Court of Appeal reasoned that since there was no such market, the present case fell to be decided according to the principle in the leading case of *British Westinghouse*,[23] 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 brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant".[24] Thus, in the absence of any "speculation" by the claimants then whatever steps are in fact taken by the claimants will be regarded as mitigation, such that their "consequences will 'arise', generally speaking, from the consequences of the breach of contract".[25] On the facts as the Court of Appeal took them, since the sale did not involve any speculation on the part of the claimants there was "no sound reason not to take into account the benefit of a sale made at the top of a falling market when it is that sale which was both the cause of the benefit and the act of mitigation — a circumstance which precludes it being treated as res inter alios acta".[26]

Three other aspects of their Lordships' reasoning should also be noted. First, they recognised that if the converse situation had arisen and, due to a rise in the sale market, the value of the ship at the end of the charter would have been substantially higher than the price obtained earlier, "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".[27] In other words, their conclusion cut both ways. Secondly, Popplewell J's "somewhat elaborate principle of causation" under which "there must be a direct causative connection between breach and benefit"[28] was rejected and his associated argument that the owners could have sold the ship at any time subject to the charter was dismissed as "somewhat of a side issue".[29] Instead, the Court of Appeal emphasised that the *British Westinghouse* test as to whether the benefit arose from the consequences of the breach and in the ordinary course of business was "a sufficient formulation of the causative link".[30] Thirdly, Popplewell J's argument that it would be unjust to require the benefit from the owners' capital investment in the ship to be brought into account was also rejected. While acknowledging that "[t]he search for legal principle in this area is undoubtedly elusive",[31] their Lordships did not regard the benefit as analogous to the likes of insurance or pension payments. The arbitrator was justified in applying the "even more fundamental" compensatory principle.[32] The owners "had made a considerable profit from the action they took by way of mitigating what would otherwise have been an undoubted loss" and

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22 [2015] EWCA Civ 1299; [2016] 1 Lloyd's Rep 383, [49] (Christopher Clarke LJ).
23 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.
24 [2015] EWCA Civ 1299; [2016] 1 Lloyd's Rep 383, [23] (Longmore LJ).
25 *Ibid*, [25].
26 *Ibid*, [50] (Christopher Clarke LJ).
27 *Ibid*, [30] (Longmore LJ).
28 *Ibid*. See also Christopher Clarke LJ at [46].
29 *Ibid*, [35].
30 *Ibid*, [38].
31 *Ibid*, [39].
32 *Ibid*.

"[t]hat profit arose from the consequences of the breach and should therefore be brought into account".[33] This conclusion was seen as consistent with the reiterations of the compensatory principle in *The Golden Victory*[34] and *Bunge SA v Nidera BV*.[35] Furthermore, the arbitrator had formed a "commonsense overall judgment" on the sufficiency of the causal nexus between the breach and the benefit and had not made an error of law in doing so.[36]

4. The Supreme Court's reasoning

The Supreme Court restored Popplewell J's decision and endorsed his reasoning in a single judgment delivered by Lord Clarke that, after setting out the facts and the reasoning of the lower Courts, contained very little in the way of original discussion. The reasoning was expressed in terms of both causation and mitigation, in that "[t]he benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation".[37] Lord Clarke concluded that the benefit of sale "was … not on the face of it caused by the repudiation of the charterparty".[38] In reaching this conclusion, his Lordship adopted Popplewell J's reasoning that, in selling the vessel, the owners were "making a commercial decision at their own risk".[39] Sadly for enthusiasts of causation and mitigation, but perhaps mercifully for casual observers of the field, the whole of Lord Clarke's own reasoning can be recounted by the citation of just three paragraphs.[40]

First, the reason why there was no causal connection on the facts was not, as the owners had argued, because "the benefit must be of the same kind as the loss caused by the wrongdoer",[41] but rather because:[42]

> "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."

Secondly, and in common with the reasoning of both Popplewell J and the Court of Appeal, Lord Clarke acknowledged that this causal reasoning cut both ways:[43]

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33 *Ibid*.
34 *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 AC 353.
35 [2015] UKSC 43; [2015] 2 Lloyd's Rep 469.
36 [2015] EWCA Civ 1299; [2016] 1 Lloyd's Rep 383, [42], citing *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The Fanis)* [1994] 1 Lloyd's Rep 633, 637 (Mance J).
37 [2017] UKSC 43; [2017] 1 WLR 2581, [30].
38 *Ibid*, [32].
39 *Ibid*.
40 Lord Clarke did add a further, and concluding, paragraph which it is unnecessary to discuss at any length. His Lordship tentatively suggested (at [35]) that "[i]f 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" which he then proceeded to outline briefly. Since his Lordship had already decided that the actual sale of the vessel should be ignored, it is difficult to see why a later sale should make any difference. Surely, unless there had been some material change in market conditions, that sale would be ignored for the same reason that the immediate sale was ignored.
41 *Ibid*, [30].
42 *Ibid*, [32].
43 *Ibid*, [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."

Thirdly, Lord Clarke thought that the same outcome could be expressed in terms of mitigation:[44]

> "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."

Curiously, the explanation adopted by Lord Clarke in his opening summary of the Court's decision appears largely detached from the key issues discussed in each of these three paragraphs. Instead his Lordship said in that summary that "the fall in value of the vessel was … 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".[45] On its face, this explanation looks rather more like the "difference in kind" reasoning that he went on explicitly to reject. In any event, it is not immediately obvious how this issue concerning the nature of the claimant's contractual interest relates to the causal reasoning that drove the rest of the Court's analysis. It may instead offer a third way (along with causation and mitigation) of interpreting the decision, but the point was left undeveloped.

5. Choice as to what? Applying "speculation" reasoning

Lord Clarke's reasoning depended crucially on the contention that "[i]f 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".[46] This idea — that the claimant made a choice and so should be responsible for the consequences, for better or worse — is a familiar feature within the cases on mitigation.[47] Indeed, the reasoning of the arbitrator and Court of Appeal also focused on precisely this issue, but it led them to the opposite conclusion: both held that the sale was a "necessity" and so not a matter of choice. It is very unfortunate that the Supreme

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44 *Ibid*, [34].

45 *Ibid*, [29].

46 *Ibid*, [32].

47 See, eg, *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC); *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 QB 459 (QB) 494; *Koch Marine Inc v D'Amica Societa di Navigazione ARL (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 (QB), 87–88; *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289 (CA), 317, 321; *Primavera v Allied Dunbar Assurance plc* [2002] EWCA Civ 1327; [2003] Lloyd's Rep PN 14, [40], [52].

Court did not explicitly address this difference of opinion. We suggest that the application of the choice (or speculation) principle requires closer attention to the question: choice *as to what*? In our view, the claimants are "speculating" at their own risk only if they make a choice not to put themselves as nearly as possible in the position that they would have been in if the breach had not occurred (what we call the "non-breach position").

To show how this analysis works, it is helpful to consider each of the three main possibilities that could have obtained at the time the repudiation was accepted: (a) a substitute two-year time charter was available to replace the entire outstanding term of the original charter, (b) alternative employment, either on the spot market or pursuant to shorter term time charters, was available collectively to replace the outstanding term, or (c) no charter work or other commercial use at all was available for the vessel. The first scenario was, of course, ruled out by the arbitrator's findings, but a consideration of it will help inform the correct legal approach to the two alternatives, as to which the findings of fact were ambiguous. We contend that both the Supreme Court and the Court of Appeal failed adequately to clarify how their respective understandings of the "speculation" or "choice" principle of causation would apply in each of these three scenarios. Insofar as both Courts did give some clues as to their favoured approach to each scenario, we also consider that neither Court's reasoning was entirely correct.

(a) A substitute two-year charter was available

Let us suppose that a substitute two-year time charter had been available in the market yet the owners chose not to take it because they had received a favourable offer to purchase the vessel. As discussed in the Court of Appeal, it is axiomatic that the benefit arising from the sale would not have affected recovery of the ordinary measure of damages of the difference between the contract rate of hire and the market rate. The existence of an available market would have enabled the owners to restore (as nearly as possible) the same position that they would have been in if the contract had not been breached, but their choice not to restore this "non-breach" position would have constituted an independent decision for which they were responsible, for better or worse. It would have been this decision, not the charterers' repudiation, that was the legal cause of the ensuing financial consequences, which turned out to be favourable but could equally have been unfavourable. In other words, any gain or loss from market fluctuations is irrelevant. The breach is merely the trigger or occasion for such gain or loss, not the cause thereof in law.

The Supreme Court, as we have seen, was in full agreement with the outcome that we have suggested in this scenario. Lord Clarke said that "[i]f 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".[48] But the reason given for treating the benefit arising from the sale as irrelevant is different. It was not that the presence of an available market gives the owners a choice whether or not to restore their non-breach position but, in effect, that, regardless of the state of the market at the time the repudiation was accepted, there is no causal connection between the termination of the charter and the sale. This is because the termination could not be said to have "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."[49] His Lordship would no doubt reconcile this with the arbitrator's finding that the sale was a "necessity" by saying

[48] [2017] UKSC 43; [2017] 1 WLR 2581, [34].
[49] *Ibid*, [32].

that it was not *legally* necessary for the above reason and that it "was not itself an act of mitigation because it was incapable of mitigating the loss of the income stream".[50]

As suggested earlier, the latter reason comes close to an application of the principle that the judge rejected, namely, that "the benefit must be of the same kind as the loss caused by the wrongdoer".[51] However, that aside, in our view, it cannot be decisive that the relevant post-breach conduct (here, sale of the vessel) could have occurred at any time, even before the breach. Take a very simple example of the sale of defective goods. If, after discovering the defect, the buyer goes into the market to buy replacement goods, it is uncontroversial that the consequences of these steps are taken into account in the assessment of damages. The defendant seller must pay damages for the cost of the replacement regardless of the fact that the buyer could have bought these other goods at any time. Accordingly, if Lord Clarke's point is decisive, it would have to follow that the purchase of replacement goods in our example has to be ignored, but that is obviously not the law. In our view, the question whether the conduct could have occurred at any time might sometimes provide a useful guide, but only insofar as it goes to show that the steps taken by the claimant were not part of any attempt to restore the non-breach position.

In summary, on this variation of the facts, the outcome supposed by the Court of Appeal and Supreme Court is the same, but in our view the Court of Appeal's reasoning (and not Lord Clarke's) is correct.

(b) Shorter charters or spot-hires were available

In the Court of Appeal, their Lordships appeared to think that it was irrelevant whether shorter charters were available in the market; the only relevant available market was one for a substitute *two-year* charter.[52] Only where there was a substitute two-year charter would the benefit from selling the vessel be caused, not by the breach, but by their independent decision not to take advantage of the market. Longmore LJ cited in support,[53] inter alia, *Spar Shipping A/S v Grand China Logistics Holding (Group) Co Ltd*[54] where Popplewell J ruled that an available market requires "a like-for-like replacement", for the following reasons:[55]

> "Where at the date of termination there is no market available for a replacement charter for the full length of the unexpired term, there is no 'available market'. This is because a time charter for a particular period reflects the appetite for risk which the owner and charterer are willing to take for that period … A six-month time charter represents a different bargain from a two-year charter because of the different nature of the risk each party is willing to run. If the unexpired term is two years and there is no appetite in the market to fix for longer than six months, the owner cannot replace what he has lost in specie. Four successive six-month charters are not a like-for-like replacement for a two-year charter."

We are not convinced, however, that the existence of an available market should be determined in such a binary manner. Even a substitute charter that matches the original in terms of length will never be a *perfect* substitute or replacement "in specie". Apart obviously from being with a different counterparty and for a different rate of hire, it is also likely that the substitute will

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50 *Ibid*, [34].
51 *Ibid*, [30].
52 See [2015] EWCA Civ 1299; [2016] 1 WLR 2450; [2016] 1 Lloyd's Rep 383, [29] and [30].
53 *Ibid*, [29].
54 [2015] EWHC 718 (Comm; [2015] 2 Lloyd's Rep 407, [221]–[226].
55 *Ibid*, [222].

contain different material terms relating to operational matters such as off-hire, permissible geographical limits etc. The underlying question must always be: what steps would restore the claimants *as nearly as possible* to the position that they would have been in but for the breach? In this respect, there will always be a continuum of possible substitutes, from the closest available (compared with the original contract) to more distant substitutes. Of course, a two-year charter is closer than a series of shorter charters or spot-hires but, in our view, it is wrong to think that these two possibilities are of a completely different kind. In determining whether shipowners are engaged in speculation following a repudiated charter, we should not be asking purely whether there was an available market for a perfect substitute, because there never is. Instead, the question is whether the owners made a choice not to avail themselves of the closest substitute that was available.

Applying this approach, we think that in *The New Flamenco*, if a series of shorter charters was indeed available but the owners chose to sell the vessel anyway, the Supreme Court were correct to conclude that the sale involved speculation for which the owners were responsible, for better or worse. In the absence of a substitute two-year charter, shorter charters were the closest substitute available and yet the owners chose not to take advantage of them. Of course, as we have already noted, this was not in fact Lord Clarke's reasoning.[56] However, his Lordship did incidentally appear to assume that shorter charters were available. This is because he said that "[i]n the absence of an available market [for a substitute two-year charter], 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".[57] This measure only makes sense on the assumption that shorter charters were available, otherwise assessment on this basis would be inappropriate for exactly the same reason as using the market rate for two-year charters was inappropriate, ie, there was no such rate because there was no available market.

A slightly more tricky variation would have arisen if shorter charters had not been available in *The New Flamenco*, but the owners could instead have spot-hired the vessel by converting it to use as a research ship, or chartered it for use as a floating hotel (which we understand is the actual use that the buyers eventually put it to). The answer can only be found by asking the central question: can it be said that by selling the vessel instead of, for example, chartering it as above for use as a floating hotel, the owners have *chosen* not to restore *as nearly as possible* the position that they would have been in but for the breach? Of course, there will come a point where none of the available options are really anything at all like the non-breach position, and at this point (but only then) the court may appropriately conclude that the owners' decision to sell must be taken into account in the assessment of damages, again for better or worse.

In summary, on this variation of the facts we disagree with the Court of Appeal's analysis and have more sympathy with the outcome endorsed by the Supreme Court, albeit for different reasons.

(c) No commercial use at all was available

Having decided that the benefit of the sale was to be ignored on the facts of *The New Flamenco*, Lord Clarke stated that "[t]he analysis is the same even if the owners' commercial reason for selling is that there is no work for the vessel".[58] In this respect, we think that the Supreme

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56 See further text following n 48 above.
57 [2017] UKSC 43; [2017] 1 WLR 2581, [34].
58 *Ibid*, [33].

Court's decision goes too far. If there really was no commercial use at all for the vessel in the hands of the owners, then the sale may appropriately be regarded as a "necessity" in line with the reasoning of the arbitrator and the Court of Appeal. The claimants would have, in all practical respects, no other choice but to sell the vessel. Since the sale would not then involve a choice not to restore the non-breach position as nearly as possible, we think that it would be incorrect to regard the sale as "speculation". Or to put it another way, in these circumstances the benefit obtained as a result of the early sale *is* legally caused by the repudiation because it would not have occurred but for the breach and there is no voluntary conduct on the part of the claimants that serves to break the chain of causation. Thus, the consequences should be taken into account in the assessment of damages, for better or worse.

A good example of these circumstances, and of the outcome that we propose on this hypothesis, was cited by the Court of Appeal in the present case.[59] In *Bulkhaul Ltd v Rhodia Organique Fine Ltd*,[60] Bulkhaul leased to Rhodia 18 bespoke tanks for the transport of highly corrosive chemicals at a daily rent of £18.50 per tank. The lease was for a term of 10 years, by which time the tanks would have had no remaining commercial use. Some five years into the term Rhodia repudiated the contract. Bulkhaul accepted the repudiation and claimed damages in the amount of the rent for the remainder of the term, there apparently being no chance of securing substitute leases. The Court of Appeal held that Bulkhaul, who had no remaining use for the tanks when they were redelivered, could have mitigated their loss by selling them. If they had done so, they would have been paid £360,000 (£20,000 per tank). Accordingly, it was held that this amount, less selling costs of £2,000 per tank, should be deducted from the damages claimed. Obviously, if Bulkhaul had in fact sold the tanks, the Court would have had no hesitation in holding that the net amount realised must be brought into account.

In summary, on this variation of the facts, we agree with the outcome supposed by the Court of Appeal, together with their reasoning that sale was a "necessity" and hence not a matter of speculation. In such circumstances, contrary to the Supreme Court's implication, we fail to see how a sale by the owners could be regarded as a "commercial decision at their own risk".

6. The result of the appeal

The Supreme Court's decision to allow the owners' appeal on the basis that the actual sale was "irrelevant" did not itself conclude the appropriate measure of damages. Whenever a court holds that it is appropriate to ignore what actually happened as a result of the breach, it must rest its assessment of the claimant's "breach position" on a counterfactual hypothesis instead. On this issue, Lord Clarke suggested (though not as part of his formal "disposal") that "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."[61] It is important to emphasise that on this measure, the Supreme Court's decision to ignore the actual sale does *not* result in the owners recovering the full loss of profits that they would have earned under the original charter. Instead, they recover only the difference between those profits and the profits that could alternatively have been earned by seeking shorter charters or spot hires.

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59 [2015] EWCA Civ 1299; [2016] 1 WLR 2450; [2016] 1 Lloyd's Rep 383, [31].

60 [2008] EWCA Civ 1452; [2009] 1 Lloyd's Rep 353.

61 [2017] UKSC 43; [2017] 1 WLR 2581, [34]. Here, the contract rate is the non-breach position, and the spot-hire rate is the (deemed) breach position.

In principle, where a claimant's actual post-breach conduct is ignored, we think that their breach position falls to be assessed on the counterfactual basis as if they had taken steps to restore their non-breach position as nearly as possible. Consequently, the measure of loss suggested by Lord Clarke is correct *if* it was the case in *The New Flamenco* that other shorter charters or spot-hires would have been available if the owners had not chosen to sell the vessel. But, as we have already highlighted, this point is unclear from the arbitrator's findings.[62] If, on the other hand, shorter charters or spot-hires were also unavailable, then the appropriate measure of loss must instead be the difference between the profits that the owners would have earned under the original charter and the profits that they could have earned under whatever was the next closest available substitute, such as refurbishment for hire under another use. Of course, if there was no other commercial use at all for the vessel, then the actual sale would appropriately be taken into account in the assessment of damages and so no counterfactual assessment of the claimant's breach position would be required.

In the Supreme Court's disposal of the appeal, a number of further issues remained to be resolved before a final assessment of damages could be made. These issues arose "at least in part by reasons of concessions made before the arbitrator".[63] In particular, in their original claim submissions (which the arbitrator refused to allow them to withdraw), the owners conceded that the charterers were entitled to a credit of US$5,145,000 in respect of various items of expenditure saved as a result of the sale and the "reduction in re-sale value between November 2007 and November 2009".[64] We can understand why the owners might have thought it tactically expedient to give this concession, so that the arbitrator might be tempted to find a halfway-house solution. However, if their case was that the actual sale should be ignored in the assessment of damages, we think that both elements of this concession were misconceived as a matter of law.

So far as the saved expenditure is concerned, if the owners' case was that the actual sale of the vessel should be ignored in assessing their damages, then it must be ignored for all purposes. In other words, the assessment of what we have called their breach position should be as if the vessel had been kept and chartered to other clients. On this hypothesis, there is no expenditure saved as a result of the breach. The expenditure under the breach position is the same as under the non-breach position because in both positions the owners are assumed to have been chartering out the vessel (and so incurring expenses in doing so). It is reasonable to assume that the expenses under the substitute shorter charters would have been roughly the same as under the original charter. Indeed, if anything, they might have been higher.

In relation to the "reduction in re-sale value", we surmise that the owners had in mind the ordinary depreciation that would have resulted from the additional age/wear and tear of the vessel if the charter had remained on foot, as distinct from the reduction attributable to the fall in the market (which is irrespective of the age/condition of the vessel). In our view, however, the assessment of damages does not permit claimants or defendants to cherry-pick one aspect of the relevant hypothetical world, but not another. In other words, either you take account of the actual sale (in which case neither the ordinary depreciation nor the market fall is suffered) or you assume that the owners retained the vessel, in which case both the ordinary depreciation

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62 See text following n 7 above.

63 *Ibid*, [37]. Lord Clarke proposed that the parties try to reach agreement on the issues that needed to be remitted to the arbitrator and that, failing such agreement, they should exchange submissions on the form the Court's order should take.

64 For further particulars, see the judgment of Popplewell J: [2014] EWHC 1547 (Comm); [2014] 2 Lloyd's Rep 230, [10]–[11].

and the market fall is suffered. There is no possible world in which the clock runs on, such that the ordinary depreciation is suffered, but in which the market fall is somehow not suffered over the same time period.

7. Conclusion

The New Flamenco can now be added to the list of cases where claimants have recovered compensatory damages greater than their factual loss evident at the date of trial. By ignoring the actual sale, the award of damages left the owners in a better position (all things considered) than if the breach had not occurred. In terms of result, the Supreme Court's decision thus serves to substantiate Popplewell J's remark that "[t]he answer to the question whether a claimant is bound to bring a benefit into account in calculating his damages is not to be found in a simple application of the compensatory principle."[65] It is a shame, however, that the Court's reasoning did not make any headway in clarifying the proper application of the compensatory principle, in all its complexity.

Our internet researches have revealed that the good ship *New Flamenco* had a somewhat chequered life after being sold in 2007.[66] The buyers, who it will be recalled paid a price of US$23,765,00, used it as a floating hotel for six months in New Caledonia but then went bankrupt. The ship was then seized and sold at auction for scrap for a mere $3.2m to a Singapore company. In 2012 the ship was saved from the scrapyard, renamed *Ocean Dream*, and began operating cruises, first between China and Vietnam, and later in the Gulf of Thailand. This operation ended when an inspection by the International Transport Workers Federation revealed shocking working conditions on board. After having been abandoned for a year without crew or maintenance, the ship finally sank a mere two miles from the coast of Thailand on 27 February 2016, with no-one on board. At last report it remained unsalvaged and, albeit only half submerged, a haven for divers.

It was our hope that the ship's legacy would be a worthwhile contribution to our understanding of the law of damages for breach of contract. Unfortunately, the brief and incomplete reasoning of the Supreme Court may result in the case sinking with even less trace than the ship itself. We have attempted to stave off this fate by taking the Court's key reasoning – that the owners' sale of the vessel was a "commercial decision at their own risk" – and drawing out its scope and implications by applying it to various circumstances similar to the one at hand. Given the frequency of litigation on issues of mitigation and causation of benefits in the recent past, it will surely not be long before one of these scenarios arises for consideration by the courts.

David McLauchlan[*]
Andrew Summers[*]

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65 *Ibid*, [17].

66 The vessel now has its own Wikipedia page: https://en.wikipedia.org/wiki/Ocean_Dream_(1972_ship) (accessed 30/08/2017).

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