What is the correct approach to mitigation of loss where there is a breach of contract following the Supreme Court's decision in the "New Flamenco" litigation?

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1. I am talking today on the correct approach to mitigation in the light of the decision of the Supreme Court in ***Fulton Shipping Inc v Globalia Business Travel SAU; The New Flamenco***[1] which raised very interesting issues relating to when a wrongdoer can obtain credit for a benefit received following his breach of contract or duty. As we will see, ***The New Flamenco*** was a case concerning the repudiation of a 2-year time charter by the charterer where there was no substitute market, the shipowner did not (or could not) spot trade his vessel, but instead chose to sell it after the repudiation.

2. In cases where there is a market, the claimant shipowner is deemed to have taken advantage of that market whether he has done so or not, and if, for example, he chooses not to go into the market and makes a consequential loss, that is treated as an independent business speculation and is not recoverable.[2] Equally, if he profits from his speculation outside the market, that sum is not used to mitigate his damages. But what is the position if at the time of acceptance of the repudiation there is no available market?

3. A time charter for a particular period (say 2 or 3 years) represents a different bargain from a six-month charter because of the different nature of the risk each party is willing to run. In the longer charter, each party takes the risk that the hire locked in for the fixed term will prove more beneficial or burdensome than would have been the case had they fixed for a shorter period. The length of the

[1] [2017] UKSC 43; [2017] 1 WLR 2581, [2017] 2 Lloyd's Rep. 177.
[2] See for example, the well-known decision of Robert Goff J in ***The Elena D'Amico*** [1980] 1 Lloyd's Rep. 75.

period for which each party is willing to take this risk is an essential element of the bargain. One element in determining the rate of hire will be a reflection of that risk. For these reasons, the length of charters available in the market is an essential element in determining whether there is an available market for a replacement charter. The owner cannot replace what he has lost *in specie*, as for example, four 6 month charters are not a like for like replacement for a two-year charter, and his lost contractual rights cannot therefore be valued by reference to a market in which he can replace them.[3] The shipping cases to date, where there is no available market, have proceeded on the basis that the recoverable loss is the loss of the contractual rate of hire, less the costs of earning that hire which the shipowner will no longer incur, but spot trades are normally brought into account as a credit. A number of recent cases have also dealt with the position where at the time of acceptance of the repudiation there is no available market and thereafter a recovering market emerges. I will kick off by looking at those cases before turning to ***The New Flamenco***.

4. In ***The Kildare***[4], the owners had sued in respect of the repudiation by the charterers of a 5-year consecutive voyage charter after only 13 months had expired. At the time of acceptance of the repudiation in early 2009, there was no available market, but it was common ground that one had revived by February 2010 for the then unexpired period of the charter. The owners argued that from February 2010, damages should thereafter be assessed by reference to that available market rate since any alternative employment would constitute independent speculation. The charterers argued that the later emergence of a market was only relevant if a reasonable owner would be bound by way of mitigation to fix on that market. David Steel J rejected the owners' argument, saying that where there is no available market at the time of breach, the measure applied in cases where there is a market does not and cannot arise.

[3] See Popplewell J in ***Spar Shipping A/S v Grand China Logistics Holding (Group) Co Ltd*** [2015] EWHC 718 (Comm), [220]; [2015] 2 Lloyd's Rep. 407 at 456.
[4] ***Zodiac Maritime Agencies Limited v Fortescue Metals Group Limited*** [2010] EWHC 903 (Comm); [2011] 2 Lloyd's Rep. 360.

5. He stated that the fact that a market later emerges for the outstanding balance of the charter period does not import with it the proposition that a decision not to take advantage of that market becomes a business decision independent of the wrongful termination. He went on that "*It is simply a matter of chance when the vessel completes any spot voyages after the termination date. Indeed they may overrun the emergence of an available market. In short I see no basis for requiring the owner to go back into the term market at the end of every spot voyage, or for that matter to disregard short time charters in case the market for longer charters emerges in the meantime*."

6. David Steel J then considered what income the owners had to give credit for. On the facts, two spot voyages were performed from January to July 2009 and thereafter the owners were able to nominate the vessel under a different charter (the Guofeng charter) which had been concluded before the *Kildare* charter and which had longer to run than the *Kildare* charter. The judge concluded that it was probable that the *Kildare* would continue to perform under the Guofeng charter until after the expiry date of the *Kildare* charter. The issue was whether the earnings from the Guofeng charter during this period should be taken into account in assessing the owners' loss or whether the relevant earnings would be those available on the market. He found that the cause of the renegotiation of the Guofeng charter was the termination of the *Kildare* charter, it was part of a continuous dealing with the situation in which the owners found themselves, and the income had to be brought into account.

7. On the expert evidence before him, having recognised that the assessment was not one that could be made with any great precision, the judge made an allowance for 10 days p.a. downtime (i.e. the non-trading period of the vessel allowing for heavy weather, dry docking, breakdown and port delays); and he then made a further allowance of 1.5% to take into account the accelerated receipt of income reflecting the three-year yield in US Treasury Bonds. Finally, he made a further discount of 1.5% to reflect contingent risks of future events

which would have brought the charter to an end prematurely, such as total loss, and bankruptcy.

8. The decision in ***The Kildare*** was followed by Blair J in ***The Wren***[5]. Prior to the decision in ***The Kildare***, the arbitrators in ***The Wren*** had made an award in favour of owners based on (a) their actual loss up to the revival of the market and (b) the difference between the contract and the market rate thereafter. Blair J held that the principle was that the owners were entitled to damages such as would put them in the same financial position as if the contract had been performed. Where at the date of termination, there was no market for the unexpired period of the charter, and a market only revived at a much later stage, it would constitute a departure from principle to assess damages from the date of the revival by reference to that later market rate rather than by reference to the owners' actual loss. However, Blair J went on that "*assessment of such damages is subject to the usual rules, including the principle that where the owner has unreasonably failed to mitigate its losses, it may not claim its self-induced loss. The revival of the market is obviously relevant in that regard. Mitigation apart, the revival of the market at a later date may be a factor to take into account in calculating future loss if damages fall to be assessed before the end of the contractual period, but the revival of a market for the then unexpired period of the charter does not in itself provide the correct measure.*"

9. The approach adopted by David Steel J and Blair J in no available market cases was also followed by Popplewell J in ***Spar Shipping A/S v Grand China Logistics Holding (Group) Co Ltd***.[6] On the facts of the case Popplewell J

[5] ***Glory Wealth Shipping Pte Ltd v Korea Line Corporation*** [2011] EWHC 1819 (Comm), [2011] 2 Lloyd's Rep. 370.

[6] (*Supra*). Popplewell J again emphasised that where there was no such available market, provided the course taken by the owner was reasonable, his actual earnings from the subsequent employment are legally caused by the breach, and the amount by which the actual earnings fall short of the hire which would have been earned under the broken charter is the measure of loss naturally arising out of the breach. This part of Popplewell J's judgment was not the subject of the appeal: see [2016] EWCA Civ 982.

concluded that it was not appropriate to apply the contingencies type discount and it is not clear from the judgment what discount he allowed for accelerated receipt of income.[7]

10. However, there is a possible argument which was raised in ***The New Flamenco*** and which is based on a line of non-shipping cases[8] (which do not appear to have been cited in ***The Kildare***, ***The Wren*** and ***Spar Shipping***) that if the market revives for the unexpired part of the charter, when the chartered vessel becomes free of any obligations which have been secured in reasonable mitigation, the owners then have a choice of what to do, namely either go into the market or not; and once there is such a choice, the loss caused by the breach should thereafter be finally crystallised by reference to the emerged market rate, and if the owners choose otherwise, that is an independent speculation. It may of course be difficult to say when the market has clearly emerged. In ***The New Flamenco***, the Supreme Court were asked to be consider whether the reviving market cases were correctly decided in the light of these non-shipping cases, but they did not do so.

11. Turning now to the ***New Flamenco,*** in that case, Charterers had agreed a two-year extension to a time charterparty on 8 June 2007 so that the charter was to expire on 2 November 2009. The charterers then disputed having made such an agreement, and maintained that the vessel was to be redelivered on 28 October 2007. The owners treated the charterers as being in anticipatory repudiatory breach and accepted the breach on 17 August 2007 as terminating the charter. The vessel was redelivered on 28 October 2007. Shortly before that date, the Owners entered into a MOA for the sale of the Vessel for the sum of US$23.765

[7] In a more recent case, London arbitrators, considering these types of discount, assessed the contingent risk factor at 4% to which would be added the seven-year US Treasury Bond Rate: see *London Arbitration* 29/16 (2016) 966 LMLN 3.
[8] Namely ***Hussey v Eels*** [1990] 2 QB 227; ***Downs v Chappell*** [1997] 1 WLR 426; ***Blue Circle Industries v Ministry of Defence*** [1999] Ch 289; and ***Primavera Ltd v Allied Dunbar Assurance PLC*** [2002] EWCA Civ 1327.

million. There was no available market in October 2007 for a time charter with two remaining years to run, and the Owners brought a claim in arbitration for damages calculated by reference to the net loss of profits which they alleged they would have earned in the two years between 2007 and 2009, but giving credit for expenditure saved.[9]

12. By the time of the arbitration hearing in May 2013, it had become apparent that as a result of the financial crash there was a significant difference in the sale value of the Vessel between October 2007 and November 2009; and the arbitrator found the vessel's sale value in November 2009 to be only US$7 million. The charterers argued that the owners were bound to bring into account and give credit for the difference between the sale price in 2007 and the sale value in November 2009.[10] The arbitrator found that the sale was caused by the charterers' breach, was in reasonable mitigation of loss, and he declared that the charterers were therefore entitled to a credit equivalent to the sum of US$16,765,000 which would have resulted in the owners recovering no damages for the repudiation. There was no inquiry or findings into what the owners did with the proceeds of the sale in 2007, nor into the effect of the crash on the owners.

13. Popplewell J allowed the appeal[11]. He stated that there was no single general rule which determined when a wrongdoer should obtain credit for a benefit received following his breach of contract or duty, but he considered that a number of principles could be deduced from the authorities, and he listed a total

[9] Originally in their Claim Submissions, the owners had included a credit of US$5,145,000 to reflect a reduction in the re-sale value that the vessel would have had on completion of the charter period (said to be "for depreciation"), but they then took the point that the drop in the market was *res inter alios acta* and irrelevant to assessment.

[10] The owners contended that the difference in value was legally irrelevant and did not fall to be taken into account because before a benefit could be taken into account it had, as a matter of law, to be of the same nature as the loss claimed which, on the facts of the case, was a loss of an income stream. Further, the doctrine of mitigation could not apply to the exercise, after breach, of rights which had been obtained by the innocent party for his own benefit prior to the breach. Alternatively, the benefit was not sufficiently causally linked to the breach to have been legally caused by the breach.

[11] [2014] EWHC 1547; [2014] 2 Lloyd's Rep. 230.

of eleven. The most important (and controversial) are (a) those relating to the required causal connection between breach, mitigating step and benefit; (b) whether credit need be given for an alleged benefit caused by the breach which is different in kind from the benefit which would have been received under the contract by the victim of the breach; (c) whether the breach can be sufficiently causative of the benefit, if the benefit arises from a transaction of a kind which the innocent party would have been able to undertake for his account irrespective of the breach; and (d) whether, even if the causation test is satisfied, it is fair and just for the wrongdoer to be allowed to be given credit for the benefit.

14. The judge, when considering sufficient causal connection between the breach and the benefit, emphasised that it is not sufficient merely to show 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 for a direct causative connection between breach and benefit in cases approached by a mitigation analysis no less than in cases adopting a measure of loss approach; and 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.[12] 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. Popplewell J decided, on the facts found by the arbitrator, that the owners were not required to give credit for any benefit in realising the capital value 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.

15. He emphasised that the owners 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; and there could be no question of the owners

[12] In this context, Popplewell J referred to the decision of the Court of Appeal in ***Palatine Graphic Arts Co Ltd v Liverpool City Council*** [1986] QB 335.

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.

16. The loss in question which was to be mitigated was the owners' **net loss of income** from the charterparty, and the sale in part 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 was no difficulty in treating the causal nexus between breach and that 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 did not satisfy the principle that benefits are only to be taken into account to the extent that they are caused by the breach. Popplewell J considered that the difference between the kind of loss and the kind of benefit 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 the loss caused by the breach. He also emphasised that the difference in the value of the vessel was caused by *the fall in the market* which occurred irrespective of the breach.

17. Further, the effect of the fall in the market on the owners was also not caused by the breach, it was caused by the owners' decision to sell the vessel, which was a decision based on the owners' own commercial judgment and involved a risk taken for their account. A sale of the vessel was the kind of transaction which it was open to the owners to enter into in any event and irrespective of the breach, and the authorities[13] indicated that one touchstone of whether a mitigating step was legally independent of the breach was whether it was one

[13] For example, ***Lavarack v Woods of Colchester Ltd*** [1967] 1 QB 278.

which was open to the innocent party in any event.[14] The breach had triggered the sale, but the breach had not caused the gain.

18. Additionally, the capital value of the vessel was a benefit which the owners had obtained for their own account when they bought it in 2005. They had invested 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 as to whether or when to sell. To allow the charterers to take the benefit of the owners' 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 which would be unfair and unjust. Popplewell J considered the position was analogous to the position of a person who received the proceeds of insurance or a pension following breach, and the policy rationale for ignoring such benefits articulated in the cases relating to such payments applied.[15] He stated that these types of benefits do not fall to be taken into account, even where caused by the breach, as 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.

[14] If the issue was approached as one of the measure of damage, Popplewell J considered that the answer was the same. The owners' contractual rights under the charter were rights to an income stream, to which attached the obligation to provide the charterers with the use of the vessel. So far as concerned the capital value of the vessel, the only potentially beneficial change in the owners' position caused by loss of those contractual rights and concomitant obligations might be a difference in value between a vessel which was charter free and one which was subject to the unexpired period of the charter. If it were assumed that it was the sale which crystallised the relevant loss and benefit from the change in contractual rights, the relevant benefit flowing from the lost contractual rights, in terms of capital value, would be the difference in value between the vessel being sold in October 2007 for immediate delivery and the vessel being sold at the same date in 2007 but for delivery in November 2009. The change in capital value consequent upon the drop in the market over the following two years had nothing to do with the contractual rights which the owners had lost as a result of the charterers' repudiation.

[15] See, for example, the decisions in ***Bradburn v Great Western Ry Co*** LR. 10 Ex 1; ***Shearman v Folland*** [1950] 2 KB 43, ***Parry v Cleaver*** [1970] AC 1; and ***Smoker v London Fire and Civil Defence Authority*** [1991] AC 502; ***Longden v British Coal Corporation*** [1998] AC 653 and ***Cantwell v Criminal Injuries Compensation Board*** [2002] SC (HL) 1.

19. However, the Court of Appeal upheld the arbitrator's decision and allowed the appeal.[16] Longmore LJ considered that Popplewell J's decision had stemmed chiefly from the application of his so-called seventh principle, namely that where 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 was suggestive that the breach was not sufficiently causative of the benefit. However, Longmore LJ cited various passages from the judgment of Viscount Haldane in ***British Westinghouse Electric and Manufacturing Co Ltd v Underground Railways Co of London Ltd***[17] and concluded that the important principle which emerged was 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 loss unless the measure is wholly independent of the relationship of the claimant and the defendant*." Longmore LJ went on "*That should be a principle sufficient to guide the decision of the fact-finder in any particular case.*" Longmore LJ also considered that this was a sufficient formulation of the causative link and he did not consider it necessary for the arbitrator to spell out the "*somewhat elaborate principle of causation"* which Popplewell J had set out.[18]

20. Longmore LJ went on to state that an important question in this area of the law was whether there was an available market or not. In a case involving a hire contract, where there was no available market, the *prima facie* measure of loss for the innocent shipowner was 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 shipowner to claim that measure if he is able to mitigate that loss by trading his vessel if opportunities arise. If he does so trade, he may

[16] [2015] EWCA Civ 1299, [2016] 1 Lloyd's Rep. 383; [2016] 1 WLR 2450.
[17] [1912] A.C. 673.
[18] Longmore LJ had in fact described Popplewell J's treatment of causation as an "illuminating analysis" in the earlier decision of the Court of Appeal in ***Swynson Ltd v Lowick Rose LLP*** [2015] EWCA Civ 629, [17]; [2016] 1 WLR 1045, 1052.

make additional losses or additional profits but, in either event, they should be taken into account. The owner is not speculating on the market, as he would be if there was an available market of which he chooses not to avail himself. He stated that the owner "*is just bringing into account the consequences of his decision to mitigate his loss and those consequences will "arise", generally speaking, from the consequences of the breach. That is why the arbitrator relied on the first instance decisions in* ***The Kildare*** *and* ***The Wren****."*

21. Longmore LJ went on (again in the context of cases where there is no available market) that as well as spot chartering a vessel, an owner may equally decide to mitigate his loss by selling the vessel. He stated: "*If so, it is not difficult to see why the benefit (if any) which an owner secures by selling … should not be brought into account just as much as benefits secured by spot chartering the vessel during the unexpired term of the time charter are … 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. … The doctrine of mitigation may, indeed sometimes require an owner to sell the vessel he has hired out to a hirer or a charterer if the relevant chattel is returned early; if that is the position, the owner will … 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.* (In this respect, it should be noted that Longmore LJ was unable to give an example of a case where the owner of a time chartered vessel was required on an early redelivery to sell the vessel in reasonable mitigation.[19])

22. In his judgment, Christopher Clarke LJ agreed that in a case where there was an available market, the innocent owner does not need to sell his vessel, nor does

[19] He referred to ***Bulkhead Ltd v Rhodia Organique Fine Ltd*** [2008] EWCA Civ 1452; [2009] 1 Lloyd's Rep. 353 which related to a repudiated lease of containers storing corrosive chemicals which would have been scrap at the end of the term, and the issue was what the claimant should have done on acceptance of the repudiation and whether it was unreasonable not to have sold them.

the law contemplate that he should or will. But if there is no available market, the position is different, and Christopher Clarke LJ went on that "*The owner cannot secure a substitute charter immediately. The measure of his continuing loss as a result of being deprived of the vessel will depend on a number of factors of which the availability of a substitute charter from time to time will be one. It may be, as in this case, that, on account of unusual features of the market, the reasonable thing to do is to sell the ship. If so, there seems to me 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 very 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."*

23. Finally, Longmore LJ commented on the issues of fairness and justice which had been considered by Popplewell J and stated "*It is true that this thinking underlies some of the authorities. For example, a defendant is not entitled to require insurance payments or pension payments, to which an employee has contributed to be taken into account … But it is hardly a principle of law which must be followed in all cases. … It was, in the end, considerations of fairness and justice that persuaded the arbitrator that, when he looked at the case as a whole, the Owners had made a considerable profit from the action they took by way of mitigating what would otherwise have been an undoubted loss. That profit arose from the consequences of the breach and should therefore be brought into account. It also seems to me that this conclusion is consistent with the recent cases of the highest authority such as* ***The Golden Victory***[20] *and* ***Bunge v Nidera***[21] *… which have … emphasised the importance of the compensation principle …*"

24. It should be noted that if the decision of the Court of Appeal was correct, and if the sale/purchase market had in fact *risen* after October 2007, the charterers

[20] ***Golden Strait Corp v Nippon Yusen Kubishka Kaisha*** [2007] UKHL 12; [2007] 2 AC 353; [2007] 2 Lloyd's Rep. 164
[21] ***Bunge SA v Nidera BV*** [2015] UKSC 43; [2015] 2 Lloyd's Rep. 469

(facing a claim where the actual loss prior to mitigation was a loss of two years' charter revenue) would have instead found themselves liable for the owners' inability to take advantage of that rise in the capital value of the ship. Most charterers in October 2007 who were considering termination of a time charterparty would not have envisaged such financial exposure as being a likely outcome of their breach, nor, I think, would most shipowners at that date!

25. The Supreme Court gave its judgment on 28 June 2017[22], and found in the shipowner's favour. Lord Clarke (with whom Lord Neuberger, Lord Mance, Lord Sumption and Lord Hodge agreed) preferred the reasoning of Popplewell J, and concluded that on the facts 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. This was not because the benefit must be of the same kind as the loss caused by the wrongdoer, but rather the essential question was whether there was a sufficiently close link between the loss and the benefit and not whether they were similar in nature. The relevant link was causation and the benefit must have been caused either by the breach or by a successful act of mitigation. Lord Clarke considered that difference in kind was too vague and potentially too arbitrary a test, but he agreed with Popplewell J that such a difference in kind may be indicative that the benefit is not legally caused by the breach.

26. The Supreme Court concluded that the alleged benefit (the alleged avoided loss) was not caused by the repudiation of the charterparty. The repudiation resulted in a prospective loss of income for a period of about two years. The vessel could have been sold during the term of the charterparty, and if the owners decided to sell, whether before or after termination of the charterparty, they were 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. The analysis was the same even if the owners'

[22] [2017] UKSC 43; [2017] 1 WLR 2581; [2017] 2 Lloyd's Rep.177

commercial reason for selling was that there was no work. At the most that meant that the premature termination was the occasion for selling the vessel: it was not the legal cause of it. There was equally no reason to assume that the relevant comparator was a sale in November 2009 as a sale would not have followed from the lawful redelivery at the end of the term, any more than it followed from the premature termination in 2007. As Lord Clarke stated, "*the causal link failed at both ends of the transaction*"; and the absence of the relevant causal link was the reason why the owners could not have claimed for a difference in the value if the value had risen between the time of the sale in 2007 and November 2009.

27. Neither was the sale of the vessel an act of successful mitigation. If there had been a market, the loss would have been the difference between the charterparty rate and the assumed substitute contract rate, and the sale of the vessel would have been irrelevant. In the absence of a market, the measure of the loss was the difference between the contract rate and what was or ought reasonably to have been earned from employment under shorter charterparties. The relevant mitigation in that context is the acquisition of an income stream alternative to the income stream under the charterparty. The sale was not an act of mitigation because it was incapable of mitigating the loss of the income stream.

28. However, Lord Clarke in a somewhat unclear *obiter* passage did accept that the sale of the vessel might be of relevance for some purposes. For example, he said, if the vessel had been sold one year into the two-year period when it would have been employed under the repudiated charterparty, that 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. This is difficult to understand: if the sale is irrelevant for purposes of mitigation as Lord Clarke had found, why should it assume some relevance if it happens later down the line? The loss of income under the two-year balance of the charter should remain the same whenever it is sold.

29. Lord Clarke went on that 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, (i.e. the second year) the difference might be recoverable on the basis that the effect of the sale would be to capitalise the value of a year's hire payments. He appears to be saying that if the owners could show that they would have sold the vessel under charter and would have realised more for it than they did by selling it outside the charter, then that loss is recoverable, subject to issues of remoteness. But Lord Clarke again concluded that none of these 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 enjoyed independent of the charterparty and independent of its termination. If that is right, then query the relevance of this point as well to the loss calculation [23]

Conclusion:

30. The decision of the Supreme Court makes it clear that causation is the key, the essential question is whether there is a sufficiently close link between the loss and the alleged benefit and not whether they are similar in nature, and the alleged benefit must have been caused either by the breach or by a successful act of mitigation. In wrongful termination of charter cases, the relevant act of mitigation is the acquisition of an income stream. In this regard, it appears that the starting point is to consider the actual loss in question, then consider the benefit and identify whether the benefit is an alternative to that which was to be provided under the contract. If it is, then the indicators are that it will probably need to be taken as a credit against the loss. A difference in kind, however, may be indicative that the benefit is not legally caused by the breach.

[23] In considering the decision in the Supreme Court and in my Conclusion section, I have been particularly assisted by a talk on the topic presented by William Hooper of St Philips Stone who was one of the juniors for the successful shipowner in ***The New Flamenco*** in the Supreme Court.

31. However, the decision also leaves a number of questions unanswered, in particular, the extent to which a benefit of different kind can ever mitigate a loss; and whether considerations of justice, fairness and public policy have a role to play and may preclude a defendant from reducing his liability even where causation is established.

32. Finally, it should be noted that there may be a potential argument in future cases involving a sale of a vessel in similar circumstances that the sale price itself includes a figure reflective of the estimated income earning capacity of the ship until the end of its working life, including the next 2 years of income earning capacity, and if that 2 year figure can be reasonably calculated/estimated by means of expert forensic accounting or other evidence, it may be possible for a charterer to show that a part of the sale price received has in fact taken into account the next 2 years of income earning capacity following the sale, and a credit should therefore be given for at least that part of the sale price, albeit not the whole sale price. In the ***New Flamenco*** that point does not appear to have been argued but that may be because the shipowner had already allowed some form of credit as set out in footnote 9 above

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Elizabeth Blackburn QC has been in practice as a specialist shipping and maritime barrister at the Commercial and Admiralty Bar since 1980 and took silk in 1998. She is one of the most experienced and respected QCs at the Bar in the field of large scale casualty and collision work where there are related conflict of laws and jurisdictional issues, and complex expert issues relating to naval architecture, hydrography, geo-technology and meteorology.

She also has particular expertise in off-shore work and was invited to prepare a paper for the prestigious Ninth Annual International Colloquium of the Institute of International Shipping Trade Law (which related to Off Shore Contracts and Liabilities) on the topic of "Wilful Misconduct and Gross Negligence in "Knock for Knock" Provisions in Offshore Contracts". The paper was published in "Offshore Contracts and Liabilities" [2014] Informa Publishing.

Her range of work covers arbitration, shipping and the international carriage of goods; international trade and associated finance; surety, guarantee and performance bond disputes; marine insurance; P&I Club issues; marine pollution; collision, salvage and towage disputes; shipbuilding, particularly superyacht construction where Elizabeth has particular expertise; damage to marine/off shore installations; maritime limitation of liability; maritime International Law and Treaty Obligations; and maritime heritage and wreck law.

She was part of the UK Delegation at the May 2003 IOPC Supplementary Fund Diplomatic Conference, and was also involved in the finalising and implementation of the Nairobi Wreck Removal Convention 2007. She was also the legal member of the Department of Culture's Advisory Committee on Historic Wreck Sites.

Elizabeth Blackburn also has a significant practice as an ICC Arbitrator, specialising in commercial contracts, such as large scale supply contracts in the energy section, shipbuilding contracts and international trade disputes. She has been appointed as both Chairman and sole Arbitrator in a number of such disputes by the ICC International Court of Arbitration on the recommendation of the UK National Committee. She is a panel member of the Kuala Lumpur Regional Centre for Arbitration (KLRCA), Singapore International Arbitration Centre (SIAC), the Singapore Chamber of Maritime Arbitration (SCMA), Hong Kong International Arbitration Centre (HKIAC), the Pacific International Arbitration Centre (PIAC) and the Panel of Experts of the International Malaysian Society of Maritime Lawyer. She sits in SIAC arbitrations as an arbitrator. She has been a LOF Salvage Arbitrator since 2009. She is also on the panel of the Electricity Arbitration Association.

Elizabeth is a Member of the Baltic Exchange, the Executive Committee of the British Maritime Law Association and chairs the Pollution Law Sub Committee; a member of the Commercial Bar Association; and a Supporting Member of the London Maritime Arbitrators' Association. Elizabeth Blackburn is a Bencher of the Middle Temple and is also actively involved in the London Shipping Law Centre and is a member of the Steering Committee.

In June 2013 Elizabeth was named best in Shipping & Maritime at the LMG Euromoney Europe Women in Business Law Award. She is recommended as a leading silk in both The Legal 500 and Chambers & Partners UK Bar and Global Guide:

> "An experienced and highly regarded silk with specialist expertise in wet shipping disputes." (Chambers & Partners UK Bar 2018)
>
> "She considers the case from every conceivable angle, and has unparalleled experience." (Legal 500 2017)
>
> "She is on top of the detail." "She is very good at setting up from the outset where the case needs to go, she will prepare a very comprehensive strategy." (Chambers & Partners UK Bar 2017)
>
> "She provides thorough advice and leads a case from the front line." (Legal 500 2016)

"A highly praised specialist shipping and maritime barrister who is particularly noted for her admiralty expertise." (Chambers & Partners UK Bar 2016)

"Excellent on cases with jurisdictional aspects to them." (Chambers & Partners UK Bar 2016)

"She has sharp and in-depth knowledge of very specialist maritime law." (Legal 500 2015)

"She is a first-rate commercial barrister, who is approachable and very practical in the advice she gives." (Chambers & Partners UK Bar 2015) (Chambers & Partners Global 2015)

"She is very detailed and very knowledgeable." (Chambers & Partners UK Bar 2015) (Chambers & Partners Global 2015)

"Very reliable and thorough, and her turnaround of work is extremely quick." (Legal 500 2014)

"A recognised shipping barrister who has built an enviable reputation for limitation of liability work... 'She is very thorough and has an easy-going client-facing manner.' ...'Her work turnaround time is very good, and she always accommodates tight deadlines.'" (Chambers & Partners UK Bar 2014)

"Elizabeth Blackburn QC is 'fantastic on pollution-related cases." (Legal 500 2013)

"Elizabeth Blackburn QC is lauded by commentators as 'excellent for pollution and jurisdictional matters' although peers concede that she is strong across the board, noting that there are no perceptible gaps in her broad shipping and commodities expertise. She advised on the complex commercial and salvage issues which stemmed from the grounding of the 'MSC Chitra' in Mumbai." (Chambers & Partners 2013)

"Utterly dedicated and with a detailed knowledge of the law, she is everything a QC should be." (Chambers & Partners 2011)

"Elizabeth Blackburn QC is 'a heroine in the pollution cases sector', and is 'proactive and creative in her advice, always responds very quickly and is a delight to deal with." (Legal 500 2011)

"'An exceedingly experienced and accomplished admiralty practitioner,' who is 'a fantastic and very pleasant silk to work with.' Blackburn once again demonstrated her 'genuine knowledge of the operation and handling of ships' when undertaking the 'A Turtle' case, concerning the loss of a semi-submersible drilling platform in the South Atlantic." (Chambers & Partners 2010)

"Beloved by solicitors for 'always having the facts at her fingertips,' she is also an expert on marine cultural heritage issues." (Chambers & Partners 2009)

Practice Areas

- Arbitration:

  International maritime and commercial arbitration

  Lloyds Form Salvage Arbitration

  ICC arbitration

  Electricity Arbitration Association
- International Trade & Finance:

  FOB/CIF sale contracts

  Documentary credits & associated finance.

  Surety, guarantee and performance bond disputes.
- Insurance and Reinsurance:

  Disputes as to coverage and non-disclosure

Construction of policies

P&I Club issues

- Shipping:

  Charterparty and bill of lading disputes, unseaworthiness claims; unsafe port disputes

  General Average

  Collision, Salvage, Towage disputes

  The Law of Wreck

  Shipbuilding and shiprepair disputes, in particular delay and disruption claims

  Ship sale and ship mortgage

- Offshore Contracts:

  Damage to marine/offshore installations

  Marine limitation of Liability

  EC Shipping Law

- Marine Pollution:

  CLC and IOPC Fund Compensation and Supplementary Compensation Fund

  Bunker Liability

  Hazardous and Noxious Substances

  Intervention Convention 1969 and the 1973 Protocol

- Conflict of Laws /Jurisdiction:

  International Law: United Nations Convention on the Law of the Sea 1982

- Maritime Heritage:

  European Convention on the Protection of the Archaeological Heritage (Valletta Convention, and the UNESCO Convention on Underwater Cultural Heritage 2001

  Protection of Wrecks Act 1973, Ancient Monuments and Archaeological Areas Act 1979; and Protection of Military Remains Act 1986

Recent Cases of Importance:

The NORDLAKE: INS VINDHYAGIRI (ongoing): advising the Owners of the Nordlake in this major maritime casualty in India involving multi-ship liability, and appearing for them in the Admiralty Court collision action: [2015] EWHC 3605.

The *** (ongoing) acting for respondents in an unsafe port commercial arbitration, leading James Shirley. Claims in excess of US$50 million and involving complex expert issues.

The *** (2016) acted as LOF arbitrator in a salvage case which raised fundamental privity issues

The KOTA KADO (ongoing) acting for the Ship Respondents in this very large scale salvage case.

The *** (ongoing): acting for claimants in commercial arbitration concerning the carriage of wet process phosphoric acid, and involving complicated corrosion expert evidence.

The YUSHO REGULUS/COAL HUNTER (ongoing): acting for the owners of YR in this case concerning the interaction between the wash

of COALHUNTER at a berth in Brazil. Claims in excess of US$50 million and involving complex hydrodynamic expert issues.

The MOL COMFORT (ongoing): instructed in this very large scale marine casualty involving a laden container ship which split in two off Socotra in June 2013.

The *** (2015): acted as LOF arbitrator in a very large scale salvage case lasting 5 days and involving numerous issues for decision. This was one of the most complicated salvage cases in recent times.

The *** (2010 to 2013): acting for the Purchaser of a multi-million euro mega yacht in a major and long running shipbuilding arbitration with disputes involving contractual interpretation; alleged costs over runs; time delays; and disputes relating to alleged modifications and redelivered condition.

The Corvus J/Baltic Ace (2014): appeared in the Isle of Man Courts on a jurisdictional challenge arising out of this major collision in the North Sea.

The *** (2014): acting for the owner of a superyacht in a defects and redelivered condition dispute.

The *** (2014): acting for the lending bank in another superyacht case relating to a loan and sale dispute.

The RENATE SCHULTE /MARTI PRINCESS (2013): acting for the owners of RS in this tri-partite collision action.

The "***" (2013): advising on various commercial issues, including withdrawal, arising from a long term charterparty, with very substantial sums involved.

The BARELI (2012 and ongoing): advising on various issues arising out of this very large scale grounding casualty in China.

The FLASH (2012 and ongoing): continuing to advise on various charterparty issues arising out of the grounding off Tunisia.

The MSC CHITRA (2011): advising the Owners of the MSC Chitra in this major maritime casualty in India.

The OLIVA (2011): advising the Owners in a major environmental casualty leading from a grounding in St Helena.

The KAMINESAN: HYUNDAI NO 105: MAMITSA (2004-2014): advised the owners of the VLCC KAMINESAN in this major tri-partite collision in the Singapore Strait with claims in excess of US$100 million and associated ongoing limitation action in Singapore brought under the 1957 Limitation Convention. This was the largest casualty worldwide in 2004 leading to major litigation in Singapore.

*** v *** (2011): chairing ICC arbitration arising out of the supply of an off-gas treatment plant in one of the Baltic States.

The ROCKNES (2009 to 2011): complicated salvage case dealing with the valuation of a rock dumping vessel and the assignment of an Article 13 award to a SCOPIC insurer.

The *** (2010): advising in relation to various insurance and contractual issues arising out of a collision with an offshore FPSO Vessel leading to substantial losses of production.

Micoperi 30 (2008): substantial Commercial Court dispute relating to the pulling over of an offshore structure during installation in the Turkish Akcakoca Fields, acting for the owners and operators of the field. Expert evidence was wide ranging, including offshore engineering and construction issues, the safe working practices of the offshore industry and the insurances available in the market to cover offshore construction projects and well drilling.

Superyacht dispute (2008): advising builders on and preparing for a mediation relating to delay, change of specification and alleged breach of confidentiality issues in Superyacht dispute during Spring 2008.

A Turtle [2008] EWHC 3034; [2009] 1 Lloyd's Rep 177: acting for Tugowners in this key decision on "knock for knock" clauses.

The Sea Angel; Tasman Spirit [2007] 2 Lloyd's Rep 517 (2003 to 2007): alleged frustration of time charterparty arising out of the salvage of this large scale pollution casualty in Pakistan, acting for the successful owners of the SEA ANGEL at first instance and in the Court of Appeal.

The Cristoforo Colombo (2004 to 2007): acting for shipowners in this major grounding casaulty in the Sakhalin area of Russia. Complex expert issues relating to naval architecture, hydrography, meteorology and geo-technology.

Grenco BV v J&E Hall Limited, Jackstone Froster Limited (2005/7): substantial Commercial Court claim for breach of contract and/or negligence concerning amongst other things the design and supply of aluminium freezer plates. Numerous points arising for consideration and advice in relation to expert issues of plate susceptibility to corrosion, corrosion inhibitors, design and integrity of marine freezer systems, weld procedures and general causation.

The Tricolor and Kariba (2003): major maritime casualty and wreck removal in English Channel, involving jurisdictional and worldwide limitation issues, acting for Owners of KARIBA, claims in excess of US$100 million.

Princesca Oceanica v Merrion Insurance (2003): Commercial Court trial concerning a series of performance bonds and reinsurance cut through endorsements; worldwide freezing orders leading to committal and sequestration of directors' assets.

The Palvia (2003): advising on potential claims for breach of Article 10EC via European Commission in relation to national state breaches of recent EC Directives and Regulations on maritime safety within the EC.

The Ievoli Sun (2000 to 2003): total loss of chemical carrier in the English Channel, carrying bunkers, hazardous and noxious substances. Acting for Shipowners.

The Gudermes and the St Jacques II: [2003] 1 Lloyd's Rep 203: collision and limitation action involving laden tanker in English Channel in April 2001. First case in which a claim to limit under the 1976 Limitation Convention was allowed to proceed to trial.

The Nakhodka (1997 to 2002): total loss of laden tanker, leading to major maritime disaster in Japan, acting for shipowners. Claim by the IOPC Fund in excess of £189 million; involved litigation in both Japan and UK. Along with the PRESTIGE and ERIKA (in which Elizabeth has also advised), the NAKHODKA is one of the largest oil pollution cases ever dealt with by the IOPC Fund. Also raised issues on the international law of the Sea, treaty obligations, carriage of goods and marine insurance.

Education

City of London School for Girls

University of Manchester