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Owner's mitigation of Loss on breach of a charterparty by selling a vessel

In a recent case of *Fulton Shipping Inc of Panama v. Globalia Business Travel S.A.U.(New Flamenco)* [2015] EWCA Civ 1299, as a result of repudiation of a charterparty and accordingly the charterer in this case redelivered the vessel two years early. The Owners then claimed loss of profit and they failed as they had gained profit by selling the vessel two years earlier (at the top of the falling market for sale of second hand vessel) due to the fact that the Owners were unable to find a business for the vessel in the spot market. The Owners accordingly sold the vessel under their duty to mitigate their losses.

The Owners claimed damages from the Charterers for loss of profit for the remaining charter period of almost two years in the amount of €7,558,375. The Charterers argued that the Owners had in fact suffered no loss and they should be given credit for the Owners' 'gain' of USD16,765,000 (just over €11 million) as they had sold the vessel earlier rather than at the end of two years when the vessel would have been redelivered according to the charterparty. This credit would wipe out the Owners' claimed loss of profits.

The arbitrator found in favor of the Charterers and held that credit should be given. The Commercial Court found in favor of the Owners and held that no credit should be given since the benefit obtained by the Owners was not caused by the Charterers' breach. The case went all the way up to the Court of Appeal on a question of law.

The question of law before the Court of Appeal was *whether the difference in the price obtained for the vessel when sold, and the value of the vessel at the contractual redelivery date, constituted a benefit which, on the principles of mitigation and avoidance of loss should be brought into account in the Owners' claim for the Charterers' breach of contract by making early redelivery*.

The Court of Appeal decided that that this gain has to be accounted for when calculating loss of the ship owners, even though loss and gain are not of the same kind. The Court of Appeal found that the benefit acquired by the Owners from the sale of the vessel following the Charterers' breach did arise from the consequences of the breach and in course of ordinary business where they attempted to mitigate their losses.

ALCO's FDD department based in Shanghai advice to the Andrew Liu's clients is as follows:

a) Make a record when there is an available market in case of repudiation. This should be done by both charterers and owners.
b) Mitigation of loss on breach is an important duty and all records should be maintained.
c) Seek advice from FDD department of ALCO or your FDD Club immediately.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk