Capita Selecta

The case of *The New Flamenco*: A merry dance?

1. Compensatory Damages

Commercial entities seek commercial success; it is a primary concern of business. In the absence of this, and if they can show that responsibility lies elsewhere, they seek compensation; a very important secondary concern. Failed and high value commercial agreements encourage arbitration and, or, litigation and there has been a great deal of both in recent years with some important English judicial deliberation and decision.

"Compensation", on brief examination seems to be a straightforward concept but upon closer analysis it is not. It raises several questions. When is it to be calculated? How calculated? Is the compensation related to the market in the underlying goods or services? Alternatively is it related to the value of the contract and measured in some other way? If the former is the answer, what if the market changes, (as markets do)? What if there is a "falling" market? If so what if the market recovers? What if there is no market at all? What of the issue of mitigation? There are too many questions for us to deal with in this article and so we will limit our analysis to the last point; mitigation. This is itself a substantial point.[1] A recently decided case is concerned particularly with mitigation, *Fulton Shipping Inc of Panama v. Globalia Business Travel SAU (Formerly Travelplan SAU) of Spain (The New Flamenco)*.[2]

Before looking closely at mitigation, we should set it in context.

When there is a breach of contract one party may have suffered loss and looks to the other party for recompense. Lawyers might prefer to use the expression, "damages". English lawyers in particular are likely to see these damages in terms of financial compensation, in other words a financial resetting of a metaphorical balance. This is a long-standing principle of English law. Notable judges have played their part in setting it out.

1 For those interested in the falling market analysis argument, cases on the point include, *The Elena d'Amico* [1980] 1 Lloyd's Rep 75, *The Kildare* [2011] 2 Lloyd's Rep 360 and *The Wren* [2011] 2 Lloyd's Rep 370.

2 We will follow the common accepted practice and refer to the case by the name of the vessel, hence: *The New Flamenco* [2017] 2 Lloyd's Rep 177.

Parke B. in *Robinson v. Harman*[3]:

> *"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it to be placed in the same situation, with regard to damages as if the contract had been performed."*

In 1850, two years after this statement that influential Admiralty judge, Dr Stephen Lushington, in *The Clarence*[4] looked at the issue from the point of view of calculation of the compensation:

> *"The question which I have to determine is not the rate at which such a vessel as the "Clarence" might be hired, but how much the company have actually lost by her detention whist under repair… In order to entitle a party to be indemnified for what is termed in this Court as a consequential loss… two things are absolutely necessary- actual loss, and reasonable proof of the amount."*

Lord Blackburn in *Livingstone v. Rawyards Coal Co.*[5], referred to the general rule that compensatory damages should as nearly as possible:

> *"…put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong…"*

Robinson v. Harman and *Livingstone v. Rawyards Coal Co* are particularly frequently used as authority when compensation is in issue.
Indeed so much so that Sir Thomas Bingham M.R. in the Court of Appeal case of *Banque Bruxelles Lambert v. Eagle Star Insurance Co*[6] (commonly known as the SAAMCO case, a reference to the acronym of one of the parties to the action) could say:

> *"These unimpeachable statements of principle are the necessary point of departure in considering any novel issue of damages in contract or tort not involving fraud or intentional wrongdoing…"*

However, Lord Hoffmann, when that case was appealed to the House of Lords[7], referred to the expression, "necessary point of departure" and said:

3 *Robinson v. Harman* (1848) 1 Exch. 850 (154 E.R. 363) 855.
4 *The Clarence*, 1850 3 Wm Robinson 283, 162 ER 968.
5 *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25, 39.
6 *Banque Bruxelles Lambert v. Eagle Star Insurance Co* [1995] QB 375.
7 *Banque Bruxelles Lambert v. Eagle Star Insurance Co* [1997] AC 191 at 211A.

> *"I think that this was the wrong place to begin. Before we can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation."*

His Lordship went on to explain further:

> *"A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by Caparo Industries Plc. v. Dickman".*

Caparo Industries is a leading case on this point.[8]

2. What factors are relevant in assessing damages?

This line of reasoning compels us to look around at the relevant factors; one such factor is to look at the nature of the loss. If the loss is connected to time i.e. to the duration of loss then how should that be calculated?
A leading case on this is that of *The Golden Victory*[9].
Here the ship owner and the charterer had concluded a seven-year time charter. In December 2001, approximately three years into the charter, the charterer repudiated it. The dispute that followed was heard at arbitration but before this was concluded the Second Gulf War started (in March 2003). Did this have any effect upon the dispute? The answer is arguably, yes. This is because the charter contained a war cancellation clause. If the charterer had not repudiated the charter in 2001 it might have cancelled it in 2003. This raised the issue of the calculation of damages. It seems that there were two possibilities as to how this could be done:
Firstly, they could be calculated at the date of acceptance of the repudiation i.e. 2001, which would leave approximately four years' worth of hire to be the basis of damages.
Secondly, since damages in contract are based upon "compensation". Then they should be limited to losses caused by "the breach", making the cancellation clause relevant and the duration of damages limited to the outbreak of war in

8 *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605.
9 *The Golden Victory* [2007] 2Lloyd's Rep 167

2003, leading to damages for loss of hire to be limited to 2003 i.e. to a period of just over one year.
There was a lack of unanimity in the House of Lords leading to a split decision with two of the five Law Lords favouring the first analysis but with the three others favouring the second.
The minority of judges were persuaded by the need for "certainty". The majority were more persuaded by the idea that compensation was for the loss sustained under the contractual bargain. Lord Scott, who voted with the majority said that if the contract was ended by one party's repudiation but that it might, if it had not been so repudiated, have been:

> *"…terminated early on occurrence of a particular event, the chance of that happening must, it is agreed, be taken into account in an assessment. And if it is certain that the event will happen, the damages must be assessed on that footing."*

Consequently it matters if this "event" happens before or after assessment of the damages is made. If before, then it is to be taken into account if it might arise afterwards then an estimate of likelihood and if appropriate some credit given. In this regard their Lordships referred to the statement of Lord Macnaughten in his House of Lords judgment in *Bwllfa and Merthyr Dare Steam Collieries (1891) V. The Pontypridd Waterworks Co.*[10]

> *"… the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"*

The decision by the House of Lords in *The Golden Victory* has recently been taken into account by the Supreme Court in its decision in the case of *Bunge v. Nidera*.[11]
The facts of the case were that in June 2010 Bunge agreed to sell to Nidera Russian wheat fob Novorossiysk with the contract specifically incorporating GAFTA 49 (a standard term contract produced by GAFTA, the Grain and Feed Trade Association). Delivery was to be between the 23rd and 30th of August 2010.

[10] *Bwllfa and Merthyr Dare Steam Collieries (1891) V. The Pontypridd Waterworks Co* [1903] AC426
[11] *Bunge v. Nidera* [2015] 2 Lloyd's Rep 469.

On the 5th of August 2010 the buyer nominated a vessel but on the same day the Russian Government banned the export of wheat for the period of 15th of August to the 31st of December 2010.

On the 9th of August 2010 the seller notified the buyer of the embargo and said that it relied upon the cancellation clause in GAFTA 49 and declared that the contract was cancelled.

The buyer did not accept this and said that it was treating this purported cancellation as a repudiation of the contact, which it accepted.[12] This opened up the prospect of a claim in damages, which was subsequently made in the sum of over US$3 million. The claim was heard under the GAFTA arbitration scheme and then appealed to the GAFTA Appeal Board.

The Appeal Board considered *The Golden Victory* but distinguished it on the basis that it was only concerned with sales on an instalment basis and that the present case was the sale of a single cargo. Consequently it applied GAFTA rules and in particular Clause 20 of GAFTA 49, which is described in the form as a "default" clause, (and incidentally since a redrafting of the form since 1st of September 2018 the default clause is to be found in clause 18 of GAFTA 49) and found in favour of the buyer. The case was appealed to the High Court and then to the Court of Appeal – both of which upheld the Appeal Board of GAFTA. However, on final appeal, the Supreme Court found in favour of the seller.

Lord Sumption directly addressed the suggestion that there was a legal difference between the situation of a number of deliveries and a single cargo. Referring to the judgment of Lord Scott in *The Golden Victory* he said:

> *"I do not think that Lord Scott was suggesting that the underlying principle was any different in the case of a one-off sale. Where the only question is the relevant date for taking the market price, the financial consequences of the breach may be said to "crystallise" at that date. But where, after that date, some supervening event occurs which shows that neither the original contract (had it continued) nor the notional substitute contract at the market price would ever have been performed, the concept of "crystallising" the assessment of damages at that price is unhelpful. The occurrence of the supervening event would have reduced the value of performance, possibly to noth-*

12 Incidentally, in this case Lord Sumption gives us a useful explanation of the terminology: *"anticipatory breach of contract, probably more accurately referred to as "renunciation", is a concept which can be traced back to the earliest years of the common law but was first coherently formulated in terms of legal principle in Hochster v De la Tour (1853) 2 E & B 678 in England and Howie v Anderson (1848) 10 D 355 in Scotland. In its modern form it is a response to the pragmatic concern of Victorian judges to avoid the waste of economic resources implicit in any inflexible rule which required the parties to go through the motions of performing a contract which was for practical purposes dead".*

> *ing, even if the contract had not been wrongfully terminated and whatever the relevant market price. The nature of that problem does not differ according to whether the contract provides for a single act of performance or several successive ones. Nor, as it seems to me, is there any principled reason why the majority's solution should be any different in the two cases."*

Earlier in his judgment Lord Sumption had disposed of the substantial issue i.e. when should the amount of damages be assessed and what factors should be taken into account:

> *"The reasoning has to some extent been obscured by the focus on the implications of the so-called "breach-date rule" and on the competing demands of certainty and compensation. The real difference between the majority and the minority turned on the question what was being valued for the purpose assessing damages. The majority were valuing the chartered service that would actually have been performed if the charterparty had not been wrongfully brought to a premature end. On that footing, the notional substitute contract, whenever it was made and at whatever market rate, would have made no difference because it would have been subject to the same war clause as the original contract: see Lord Scott of Foscote at para 37, and Lord Brown of Eaton-under-Heywood at paras 76-78 and 82. The minority on the other hand considered that one should value not the chartered service which would actually have been performed, but the charterparty itself, assessed at the time that it was terminated, by reference to the terms of a notional substitute concluded as soon as possible after the termination of the original. That would vary, not according to the actual outcome, but according to the outcomes which were perceived as possible or probable at the time that the notional substitute contract was made. The possibility or probability of war would then be factored into the price agreed in the substitute contract: see Lord Bingham of Cornhill at paras 22 and Lord Walker of Gestingthorpe at paras 45-46. I think that the majority's view on this point was correct. Sections 50 and 51 of the Sale of Goods Act, like the corresponding principles of the common law, are concerned with the price of the goods or services which would have been delivered under the contract. They are not concerned with the value of the contract as an article of commerce in itself."*

3. Mitigation

This brings us up to date on the principles used to assess compensatory damages but what then of mitigation?

For generations of English law students the leading case on mitigation of loss was *British Westinghouse Electric and Manufacturing Co v. Underground Railway Co of London Ltd*.[13] Recently the principles in that case have been again considered in *The New Flamenco*.[14]

The leading practitioner textbook on damages in England and Wales is without doubt, *McGregor on Damages*. Now in its twentieth edition it says that there are various meanings of mitigation but that there is one principal meaning, which in turn can be reduced to three "rules". In short these are:

1. The claimant must take all reasonable steps to mitigate his/her/its loss consequent upon the defendant's wrong and can not recover damages for any loss which through unreasonable action or inaction has not been avoided – the claimant cannot recover for reasonably avoided loss.
2. The claimant can recover for loss incurred in reasonable attempts to avoid loss.
3. Where the claimant does take reasonably necessary steps to mitigate the loss the defendant is entitled to the benefit arising from the claimant's action and is liable only for the loss as lessened – the claimant generally cannot recover for avoided loss.

Mitigation is a common expression but it is open to differences of interpretation, some would accept it as a concept but minimise its reach.[15]

In order to examine mitigation in more detail we should consider the language we use; it is commonly said that there is a "duty" to mitigate. This is not so, there is no legal "duty":

Lord Justice Pearson in *Darbishire v. Warran*[16] makes that clear when he says:

> *"…it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "duty to minimise the damage." The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so*

13 *British Westinghouse Electric and Manufacturing Co v. Underground Railway Co of London Ltd* [1912] AC 673.

14 *The New Flamenco* [2017] 2 Lloyd's Rep177, this is the reference for the Supreme Court decision in the case.

15 In this regard see an interesting article by Professor Victor Goldberg of the Columbia Law School, *From British Westinghouse to The New Flamenco: misunderstanding mitigation,* The Journal of International Maritime Law 22 (2016) 5, 370-378.

16 *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 at p. 1075.

> *and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant."*[17]

This point has also been confirmed in other common law countries e.g. albeit in a dissenting judgments by McLachlin C.J. in the Supreme Court of Canada in *Southcott Estates Inc. v. Toronto Catholic District School Board*:

> *"A plaintiff is not contractually obliged to mitigate, and in this sense the term "duty to mitigate" is misleading. However, if the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced."*[18]

No "duty" then but an obligation not to financially disadvantage the defendant.

> *"Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss which could be avoided by reasonable efforts or to continue an activity unreasonably so as to increase the loss."*[19]

This assertion from McGregor finds judicial articulation by Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co v. Underground Railway Co of London Ltd*[20] [1912] AC 673, where he says:

> *"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."*

We have already pointed out that the use of the word "duty" has more recently been considered in *Darbishire v. Warran*[21] and there are other aspect of *British Westinghouse* which might lead us to conclude that it is does not provide undis-

[17] This view has been endorsed in the Supreme Court by Lord Toulson in *Bunge v. Nidera* [2015] UKSC 43 " the so-called duty to mitigate is not a duty in the sense that the innocent party owes an obligation to the guilty party to do so."
[18] *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675.
[19] McGregor On Damages twentieth edition 9-014.
[20] *British Westinghouse Electric and Manufacturing Co v. Underground Railway Co of London Ltd* [1912] AC 673.
[21] *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 at p. 1075.

puted answers to all questions concerning mitigation. One example might be that the facts of *British Westinghouse* concerned a loss and a direct gain, which reduced that loss whereas in other cases the loss and the benefit are of a different nature.

A case on this point is that of *The New Flamenco*.[22]

4. The New Flamenco

The facts of the case are that a cruise ship, the New Flamenco was let on a NYPE form, a very popular time charter form, for the period from 13th February 2004 to 2nd November 2009. However, charterers redelivered the vessel early to the owners on 28th October 2007. Owners treated this as being an anticipatory repudiatory breach. The arbitrator found that there was no substitute two- year time charter available in the market. In October 2007 owners sold the vessel for US$ 23,765,000. The timing predates the global financial crisis and the crash in ship values that followed. It was agreed that the vessel would have achieved only US$ 7,000,000 had the charter continued its anticipated duration and been returned to owners in November 2009 i.e. following the financial crash. Owners claimed in damages US$ 7,558,375, a sum representing the net loss of profits for the period from breach to the end of the charter. In response the charterers argued that the owners were obliged to mitigate and should give credit for the difference between the actual sale price achieved and the vessel's likely value in November 2009, which would discharge the sum being claimed. Owners argued that this should not be taken into account.

As the case progressed the decision of the tribunal oscillated between the parties; firstly the arbitrator found for the charterers and then the High Court found for the owners. The bare facts are set out in the High Court and adopted by the Court of Appeal but we might have wished for more information, particularly with regard to the courses of action available to the owners following the breach. Popplewell J in the High Court quotes from the findings of the arbitrator:

> *"(2) Paragraph 23: ... the Charterers [had] accepted that there was no charterparty employment for the vessel at the time in question ..."*
>
> *(3) Paragraph 60: "It was common ground that when the 'NEW FLAMENCO' was redelivered to the Owners on 28 October 2007,*

[22] *The New Flamenco* [2014] 2 Lloyd's Rep 230. This is the High Court case. It was later heard on appeal in both the Court of Appeal at [2016] Lloyd's Rep 1 383 and the Supreme Court at [2017] 2 Lloyd's Rep 177.

> *it would not have been possible to conclude an alternative substitute two-year time charterparty."*

The statements made in paragraphs 23 and 60 indicate a possible difference; was it the case that there was no employment available at all or merely that there was no "two-year" substitute available? If the former then perhaps the only option open to owners was to sell the vessel, if the latter and perhaps there were shorter-term charters available then owners have made a commercial choice in how to operate their vessel. Does this have a bearing upon mitigation? Lord Clarke in the Supreme Court, (which found for the owners) says it does:

> *"On the facts found by the arbitrator, the benefit that the charterers are seeking to have brought into account is the benefit of having avoided a loss of just under US$17 million by selling the vessel in November 2007 for US$ 23,765,000 by comparison with the value of the vessel in November 2009, namely (as the arbitrator found) US$7million.*
>
> *That difference or loss was, in my opinion, not on the face of it caused by the repudiation of the charterparty. The repudiation resulted in a prospective loss of income for a period of about two years. Yet, 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."*

Here Lord Clarke bases his decision upon the need for there to be a "causal link":

> *"… 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 owner 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…".*

He says further:

> *"…The relevant mitigation… 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."*

Lord Clarke's comments were relatively brief and were limited to approximately one page in the law report. Popplewell J in the High Court had looked at the legal principles in greater detail and Longmore LJ did likewise in the Court of Appeal, although coming to a different outcome and based upon a different analysis.

Popplewell J, looking into the question of benefit to be given to a wrongdoer following the breach and what should be taken into account in allowing benefit, came to the view that there was no general rule but that an examination of the legal authorities led him to the opinion that there were eleven principles. In summary these are:

1) Generally, the benefit claimed must be caused by the breach.
2) The "causation test" requires that all circumstances be taken into account including the nature and effects of the breach and the nature of the benefit and loss.
3) The test is whether the breach caused the benefit. It is not enough that the breach gave the opportunity to trigger the benefit.
4) It does not matter if the question is seen as one of mitigation or of the measure of damages.
5) The fact that a mitigating step, (either by an action or by inaction) may be a sensible business decision with a view to reducing the impact of the breach does not of itself make it one that is sufficiently caused by the breach.
6) For there to be mitigation there must be a sufficient causal connection between the breach and the mitigating step but it is not enough to just show that there is a two-step process, (i.e. a causal link between breach and mitigation and between mitigation and benefit) there must also be a direct link between breach and benefit.
7) Where benefit comes about from a transaction that the non- breaching party could have made irrespective of the breach – this suggests that that the breach is not sufficiently causative of the benefit.
8) While there is no requirement for the benefit to be of the same kind as the

loss claimed or mitigated such a difference might indicate that the benefit is not caused by the breach.

9) As well as the above principles when deciding if the benefit follows the breach common sense should prevail.
10) Although a causal link between breach and benefit is generally necessary this may not be enough, there must also be consideration of justice, fairness and public policy.
11) A particular example of a breach of fairness and justice would be if the wrongdoer was allowed to appropriate for its benefit something which the non-breaching party has done for its own benefit, e.g. an insurance policy or a pension. Popplewell J used as authority for this the case of *Parry v. Cleaver*[23].

Although Popplewell J provides eleven principles it might be argued that some overlap and amount to the same thing, particularly nine, ten and eleven. In the Court of Appeal Longmore LJ says that much of the decision of the High Court was based upon the sixth, seventh and eleventh principles although the main focus was upon the seventh; that where the benefit comes about because of a transaction made by the non-wrongdoer which it would have been able to carry out regardless of any breach then this suggests that there was not a sufficient causal link between the breach and the benefit. His Lordship however, places emphasis upon Lord Haldane's judgment in *British Westinghouse* and he said that if a claimant does something 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."*

His Lordship continues in the judgment to discuss the situation within the context of the existence or otherwise of an available market. As we have previ-

[23] *Parry v. Cleaver* [1969] 1 Lloyd's Rep 183, 187 where Lord Reid says when considering what and what should not be taken into account when assessing damages,
"*Then it is said that instead of getting a pension he may get sick pay for a time during his disablement – perhaps his whole wage. That would not be deductible, so why should a pension be different? But a man's wage for a particular week is not related to the amount of work which he does during that week. Wages for the period of a man's holiday do not differ in kind from wages paid to him during the rest of the year. And neither does sick pay; it is still wages. So during the period when he receives sick pay he has lost nothing. …*
A pension is intrinsically of a different kind from wages. ….wages are a reward for contemporaneous work but that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind."

ously noted there is an unfortunate absence of information as to the nature of such a market. We are told that there was no market for a continuous two- year charter but, albeit that there is a suggestion by Lord Clarke of a market for shorter charters in his reference to “the spot market”, no conclusive statement as to whether they existed and if they did whether they formed sufficient “substitution”. It might be argued that the decisions at the various levels in this case were made upon differing assumptions about the existence of an available market.

5. In Conclusion

The New Flamenco was heard firstly by an arbitrator and concluded in the Supreme Court. In the course of its progress decisions were made in favour of one party then on appeal for the appellant then the first party again and finally for the first appellant. In the High Court and the Court of Appeal attempts were made to work through the legal principles.

Is all now finally resolved? The facts presented the tribunals with an unusual argument that the proceeds of a voluntary sale of the vessel should be given to the credit of the party breaching a time charter – incidentally, we are frankly a little surprised that a vessel which at approximately 35 years old was no spring chicken, (having been built in 1972, and originally registered by P and O as *The Spirit of London)* and which could find no takers on the basis of time charter was nonetheless able to find a purchaser and at quite a high price for a small elderly cruise ship albeit that she was initially used as a floating hotel. Nonetheless she was sold. And the question arose, were the sale proceeds relevant to mitigation? Two courts considered the issues and the precedents in detail and finally we had a decision from the highest court in the land. Have we been led a merry dance? No, since strictly speaking a merry dance implies a deliberate and mischievous intention to mislead. There is a lack of unanimity amongst the tribunals but all acted in good faith; there was no mischievous intention to waste time and effort.

However, because of the brevity of the judgment in the Supreme Court we are left with some anxiety that this is not the end and that there will undoubtedly be more cases on the nature and extent of mitigation and so the dance goes on.

Anthony Rogers
Senior Lecturer The City Law School, City, University of London