

# Commercial Court has provided important guidance in relation to the law of mitigation

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In *Thai Airways International Public Company Ltd v KI Holdings Co Ltd [2015] EWHC 1250 (Comm)*, the court had to consider the appropriate measure of damages for breach of contract, in circumstances where the claimant incurred costs by taking steps to mitigate its loss, but also gained certain benefits from the mitigating actions.

*Geoff Steward, litigation partner, and Elliot Aron, Macfarlanes LLP*

## Speedread

Legatt J has held that, in assessing damages for breach of contract, credit must be given for any monetary benefit, whether chosen or not, which the claimant has received or will receive as a result of taking reasonable steps to mitigate loss. Accordingly, the principle that benefits must be brought into account applies even if the only action which the claimant could reasonably take to mitigate its loss results in an incidental and additional benefit which the claimant did not seek.

The claimant airline, Thai, had contracted with the defendant manufacturer, Koito, for the supply of economy class seats for some of its aircraft. However, in breach of contract, Koito delivered some of the seats late and others were not delivered at all. Thai, therefore, had to store some of its aircraft until alternative seats could be found. In order to mitigate its loss, Thai purchased alternative seats and leased some aircraft from a third party. Thai sought to recover the costs of taking those mitigating steps from Koito.

Koito alleged that any profits made by Thai from operating the leased aircraft had to be deducted from any damages award. It also argued that Thai should account for any savings made by using the alternative seats which were more expensive, but lighter, than the seats which Koito was to provide.

The judge held that it had been reasonable for Thai to mitigate its loss by leasing the relevant aircraft for a period of two years, but that any profits made from operating the aircraft had to be taken into account when assessing damages. In respect of some of the aircraft, Thai also had to account for any fuel saving that would arise from the use of the lighter seats over their economic life. However, the judge also held that Koito, as defendant, bore the burden of proving that Thai had derived any benefit from the steps taken in mitigation of loss. This meant that Koito had to prove that Thai had earned profits from the relevant leases and the amount by which those profits exceeded the profits Thai would have made if the contract had been performed.

This is a very important judgment as it provides useful clarification on the law of mitigation and on when it will be necessary to give credit for benefits arising from mitigating actions. Companies and individuals should consider these principles when considering what steps to take in response to being let down by suppliers. (*Thai Airways International Public Company Ltd v KI Holdings Co Ltd [2015] EWHC 1250 (Comm)*.)

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## Facts

Thai is the national airline of Thailand. In 2006 and 2008, Thai contracted with a Japanese seat manufacturer, Koito, for the delivery of economy class seats for some of its aircraft.

As a consequence of regulatory intervention, Koito was unable to deliver some of the seats. This resulted in Thai taking delivery of aircraft from a third party without economy class seats installed. The aircraft were stored for 18 months, until alternative seats could be sourced. To fill the gap in its fleet, Thai leased three aircraft from a third party (the Jet leases).

Thai also had to source seats from alternative suppliers for some of the aircraft.

Thai claimed the costs it had incurred in mitigating its loss. In particular, it claimed the costs of entering the Jet leases. It alleged that it was entitled to recover these costs without having to account for any benefits received from the Jet leases (mainly profits earned from operating the leased aircraft), because entering into the relevant leases was the only reasonable step which it could take to mitigate its loss. Any benefits were incidental and had not been chosen by Thai. Alternatively, if it did need to account for any benefits received, Koito bore the burden of proving that Thai had received any benefits, and their amount, by entering into the Jet leases.

Koito disagreed and considered that any benefits received by Thai had to be taken into account when calculating damages. It based its allegations on the House of Lords decision in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673*. This decision is authority for the proposition that benefits arising from mitigation action by the claimant are to be brought into account in assessing damages, even if the action was not one which the claimant was reasonably expected to take to mitigate its loss.

## Decision

Legatt J held that, in assessing damages for breach of contract, Thai had to give credit for any monetary benefit, whether chosen or not, which it had received, or will receive as a result of taking reasonable steps to mitigate loss. However, the judge also held that Koito, as defendant, bore the burden of proving that Thai had derived any benefit from the steps taken in mitigation of loss.

## The loss of profits

The cost of entering into the Jet leases for two years was \$US107 million. Koito conceded during the trial that it was reasonable mitigation for Thai to have leased the aircraft to cover the absent aircraft that had been due to enter Thai's fleet.

Thai's pleaded case was the recovery of its mitigation costs in entering into the Jet leases. Thai did not seek to recover its lost profits arising from Koito's breaches of contract.

Koito's position was that the appropriate measure of Thai's damages was its loss of profits, calculated by comparing its actual profits to the profits it would have made had the relevant aircraft entered Thai's fleet on time. Because Thai had not performed this calculation, Koito argued, Thai had not proved its loss and should not be entitled to damages.

Thai's position was that it was entitled to recover its mitigation costs as damages without having to establish its loss of profits. Thai accepted that, on a strict interpretation of *British Westinghouse*, if the profits generated from the Jet leases exceeded the profits it would have made had the aircraft entered service on time, the additional profit should be credited against its mitigation costs. However, to the extent that Koito believed that Thai had made greater profits from the Jet leases, the burden was on Koito to prove that. Both Thai and Koito acknowledged that, for a commercial airline operating on Thai's scale, the task of calculating what Thai's financial position would have been had the aircraft entered service on time was extremely complicated.

The judge concluded that Thai might be unable to prove the amount by which it was worse off financially as a result of Koito's breaches. Accordingly, to put Thai to proof would have the unjust effect of preventing Thai from recovering expenditure reasonably incurred in mitigating the damaging consequences of Koito's wrongdoing. Moreover, the burden was on Koito to prove that Thai derived a benefit from the Jet leases which should be set

off against the cost of the Jet leases. This was because it was Koito who relied on the profitability of the Jet leases in mitigation of the damage it caused.

As it so happened, late in the proceedings, Thai and Koito's expert accountants had sought to estimate Thai's loss of profits, producing a set of calculations which was accepted by all to be nothing more than a broad overview of the quantum of that loss. The Judge was nevertheless content to rely on those calculations as the best available evidence, but ultimately concluded from the calculations that Thai had not generated sufficient profits from the Jet leases to require an amount to be set off against its mitigation costs. Thai was, therefore, awarded the full cost of the Jet leases of \$US107 million.

## **Mitigation: betterment**

Thai was forced to find alternative seats in the market for some of its aircraft as a result of Koito's inability to supply the promised seats. The only choice of seats available to Thai at that time, were seats which were more expensive, but lighter, than the equivalent Koito models. In both cases, Thai had no other reasonable seat choice available to it, due to a general shortage of aircraft seats at that time.

Koito argued that Thai would receive a benefit from the lighter seats in the form of future fuel savings and that it should receive a credit for that benefit. Thai's position was that it had no choice but to order the more expensive, but lighter, seats since no other alternative was available, and in any event the benefit that may accrue to Thai would do so in the future and could not be accurately assessed.

Following a detailed examination of the case law, the judge concluded that the test for when credit must be given for the benefit of a mitigating step applies where that benefit is pecuniary, since money is entirely fungible. In so doing, the judge rejected the proposition that it would be unjust to require a party to give credit for a benefit which he had no choice but to receive. The judge also concluded that a party may need to give credit for a benefit which he has not yet realised and risks never doing so, provided that the benefit can be calculated with sufficient certainty.

For some of the aircraft, the parties had enough information to conservatively estimate the fuel saving that would arise from the use of the seats over their economic life, such that it was appropriate, in the judge's view, for Thai to give credit to Koito for that saving. However, as to some of the other aircraft, Koito had not provided the court with the weight information for that aircraft's seat model. In those circumstances, the judge was not prepared to speculate as to the weight differential between the Koito and the alternative seat models, and concluded that Koito had failed to prove the benefit to a sufficient degree of certainty.

## **Comment**

This is a very important judgment as it provides useful clarification on the law of mitigation and on when it will be necessary to give credit for benefits arising from mitigating actions. Companies and individuals should consider these principles when considering what steps to take in response to being let down by suppliers.

## **Case**

*Thai Airways International Public Company Ltd v KI Holdings Co Ltd and another* [2015] EWHC 1250 (Comm) (11 May 2015) (Baillii).