Neutral Citation Number: [2015] EWCA Civ. 1299

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION COMMERCIAL COURT
THE HONOURABLE MR JUSTICE POPPLEWELL

B e f o r e :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORETHE RIGHT HONOURABLE LORD JUSTICE CHRISTOPHER CLARKEandTHE RIGHT HONOURABLE LORD JUSTICE SALES

Between:

FULTON SHIPPING INC OF PANAMA	**Respondents/Owners**
- and -	
GLOBALIA BUSINESS TRAVEL S.A.U. (FORMERLY TRAVELPLAN S.A.U.)	**Appellants/ Charterers**

Mr Simon Croall QC & Mr Peter Ferrer (instructed by Clyde & Co LLP) for the Appellants
Mr Steven Gee QC & Mr Tom Whitehead (instructed by Gateley Plc) for the Respondents

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1 **Lord Justice Longmore: Introduction**

2 This is a case about measure of damages for early redelivery under a time charterparty when the charter still had two years to run. There was no available chartering market on redelivery in 2007 and the owners decided to sell the vessel. The price obtained was $23,765,000. If the vessel had been sold when the charter was due to come to an end in November 2009, her value would have been $7,000,000, a fall in value of $16,765,000. The question in this appeal is whether that difference constitutes a benefit, which, on principles of mitigation and avoidance of loss, should be brought into account in the owners' claim for the charterers' breach of contract by making an early redelivery. A very well respected maritime arbitrator has held that it should. Popplewell J [2015] 1 All E R Comm 1205 has held that it should not but gave permission to appeal to this court. I gratefully adopt the judge's account of the facts.

3 **The Facts**

4 The "NEW FLAMENCO" ("the Vessel") was a small cruise ship built in Genoa in 1972. By a time charterparty on the NYPE form dated 13th February 2004 she

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was chartered by her then owners to the defendants, a division of Spain's leading tourist group ("the Charterers"). At that time the Vessel was managed by the claimants ("the Owners"). The Owners bought the Vessel on 4th March 2005 and entered into a novation agreement dated 23rd March 2005 under which they assumed the rights and liabilities of the owners under the charterparty.

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6 In August 2005 the Owners and the Charterers concluded an agreement extending the charter for two years to 28th October 2007, with an option for a third year. The option was never exercised. The extension was recorded in Addendum A.

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8 At a meeting on 8th June 2007, the Owners and Charterers reached an oral agreement in terms subsequently recorded in Addendum B. The agreed terms extended the charterparty for a further two years so as to expire on 2nd November 2009.

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10 The Charterers disputed having made the agreement recorded by Addendum B and refused to sign it. They maintained an entitlement to redeliver the Vessel on 28th October 2007 in accordance with Addendum A. The Owners treated the Charterers as in anticipatory repudiatory breach and on 17th August 2007 accepted the breach as terminating the charterparty.

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12 The Vessel was redelivered on 28th October 2007. Shortly before that date, the Owners entered into a Memorandum of Agreement for **sale** of the Vessel for US$23,765,000.

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14 The charterparty was governed by English law and provided for London arbitration. The Owners commenced arbitration and a sole arbitrator was appointed on 4th March 2008. Claim submissions were served only on 23rd November 2011 and the hearing took place in May 2013. By the time of the hearing it was apparent that there was a significant difference in the value of the Vessel between October 2007, when the Owners sold it, and November 2009, when the Vessel would have been redelivered to Owners had the Charterers not been in breach of the charterparty. The collapse of Lehmann Brothers in September 2008 and the financial crisis had occurred in the meantime. The value of the Vessel when she would have been redelivered in accordance with Addendum B in November 2009 was, as the arbitrator subsequently found, US$7,000,000.

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16 The Owners advanced their claim for damages calculated by reference to the net loss of profits, which they alleged that they would have earned during the additional two year extension. Such profits were set out in a detailed schedule identifying the revenue which would have been earned under the charterparty, and giving credit for the costs and expenses which would have been incurred in operating the Vessel in providing the charterparty service for those two years, but which had been saved as a result of the **sale** of the Vessel. The amount claimed was €7,558,375. Ironically the Owners were, at this stage, prepared to give credit for what they called the "reduction in the re-**sale** value" of the vessel (said to be "for depreciation") between November 2007 and 2009 of $5,145,000.

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18 The Charterers argued that the Owners were bound to bring into account and

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give credit for the whole difference between the amount for which the Vessel had been sold in October 2007 (US$23,765,000) and her value in November 2009 (subsequently found by the arbitrator to be US$7,000,000). The Owners wished, however, to argue that the difference in value was legally irrelevant and did not fall to be taken into account. Because there was no agreement between the parties on the accounting figures in relation to the net profits which would have been earned for the two year period under the charter, the arbitrator made no findings on the quantum of the Owners' claim and left the figures to be agreed by the parties or referred back to him in the absence of agreement. But he declared that the Charterers were entitled to a credit of €11,251,677 (being the equivalent of US$16,765,000) in respect of the benefit that accrued to the Owners by selling the Vessel when worth more in October 2007 than it was at the end of the charter period in November 2009. This was more than the Owners' loss of profit claim and would result in the Owners recovering no damages for the Charterers' repudiation.

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20 Towards the end of the arbitration hearing the Owners had made an application to amend their submissions by deleting the conceded credit. That application was refused by the arbitrator but he allowed the point of principle (that no credit needed to be given) to be argued holding that, if the Owners were successful on the point, the amount of the conceded credit would have, nevertheless, to be brought into account. That remained the position before Popplewell J.

21 **The Award and the Judgment**

22 The arbitrator found that the **sale** of the Vessel by the Owners in October 2007 was caused by the Charterers' breach and was in reasonable mitigation of damage. The relevant findings were expressed in the following terms:-

23 "3: It was common ground between the parties that when the Charterers declared that they did not accept that a binding agreement for a two year extension had been agreed and that they were not going to perform it, there was no suitable timecharter employment for the vessel. The Owners therefore sold the Vessel in October 2007… 23: …the Charterers [had] accepted that there was no charterparty employment for the vessel at the time in question and that her **sale** was reasonable…60: It was common ground that when the "NEW FLAMENCO" was redelivered to the Owners on 28th October 2007, it would not have been possible for the Owners to conclude an alternative substitute two year time charterparty. The need to sell the vessel was clearly caused by the breach. It was common ground that the **sale** price achieved was reasonable…62: I was advised by counsel for the parties that there was no directly applicable authority on the point. That is perhaps not surprising because it would not be very often that the premature termination of a time charterparty would cause the **sale** of a vessel…70: As I have already commented, in this case it was clear that the necessity for the **sale** had been brought about by the refusal to perform the two year extension.72: …here, there was a benefit arising out of actions taken by the claimant to mitigate the loss that would otherwise have been suffered…"

24 The arbitrator (before whom the parties may perhaps have advanced less sophisticated arguments than those presented to the judge and to us) expressed his conclusions comparatively shortly in the light of the facts which he had found. He reminded himself of the well known principle laid down by Parke B in Robinson v Harman (1848) 1 Exch. 850 that a party who sustains loss by

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reason of a breach of contract is to be placed, so far as money can do it, in the same position as if the contract had been performed. He referred to The El ena D' Amic o [1980] 1 Lloyd's Rep 75 for the correct approach where there was an available market and to The Kildare [2011] 2 Lloyd's Rep 360 and The Wren [2011] 2 Lloyd's Rep 370 for the approach where there was no available market namely, that the loss was to be determined by reference to the actual trading of the vessel. He rejected the Owners' argument that before a benefit could be taken into account it had, as a matter of law, to be of the same nature as the claim (a decision with which in due course Popplewell J was to agree). The arbitrator then concluded:-

25 "73. I could see no reason, both in applying general principles and on the facts of this case, why the benefit that accrued to the Owners by the **sale** of the vessel should not be brought into account. Normally vessels will not reasonably need to be sold and would not be sold following the premature termination of a charterparty so that any movement in the capital value of a vessel will not crystallise and will not be relevant to a claim for a net loss of earnings. On the unusual facts of this case, where the Owners acted in reasonable mitigation of damages caused by a breach of a time charterparty by selling the vessel, there was no reason why capital savings could not and should not be brought into account in considering the net loss suffered by the Owners."

26 On 17th September 2013 Teare J, while accepting that the arbitrator's decision was not "obviously wrong", gave permission to appeal on this point of law:-

27 "When assessing shipowners' damages for loss of profits on earnings of hire under a time charter party which has been repudiated by the charterers and the repudiation accepted by the owners as terminating the contract, are the charterers entitled to have taken into account as diminishing the loss of earnings/hire sustained by the owner as a result of the accepted repudiation "a benefit" said to consist of avoidance of a drop in the capital value of the vessel because the vessel has been sold shortly after acceptance of the repudiation whereas if the vessel had been retained until after performance of the charter party, it would have had a lower capital value by reason of decline in the capital value of the vessel through market decline in ship **sale** values in that period?"

28 The appeal came before Popplewell J who set out the relevant principles relating to mitigation as set out in McGregor on Damages (now the 19th (2014) edition):-

29 "9-004 (1) The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss.9-005 (2) The second rule is the corollary of the first and is that, where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in do doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss.9-006 (3) The third rule is that, where the claimant does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the claimant's action and is liable only for the loss as lessened; this is so even

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though the claimant would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being ones which were required of him under the first rule. In addition, where the loss has been mitigated other than by steps taken by the claimant subsequent to the wrong, the claimant can again recover only for the loss as lessened, provided that the benefit gained is not to be regarded as collateral. Put shortly, the claimant cannot recover for avoided loss."It is the third of these principles that is of most relevance in this case.

30 The judge then considered a number of authorities from which he helpfully distilled the following principles:-

31 "(1) In order for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach of contract, it is generally speaking a necessary condition that the benefit is caused by the breach: Bradburn's case, British Westinghouse, The Elen a D'Amico. …(2) The causation test involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the benefit and loss, the manner in which they occurred and any pre-existing, intervening or collateral factors which played a part in their occurrence: The Fanis.(3) The test is whether the breach has caused the benefit; 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: The Elena D 'Amico . Nor is it sufficient merely that the benefit would not have been obtained but for the breach: Bradburn, Laverack v Woods, Needler v Taber.(4) In this respect it should make no difference whether the question is approached as one of mitigation of loss, or measure of damage; although they are logically distinct approaches, the factual and legal inquiry and conclusion should be the same: Hussey v Eels.(5) The fact that a mitigating step, by way of action or inaction may be a reasonable and sensible business decision with a view to reducing the impact of the breach, does not of itself render it one which is sufficiently caused by the breach. A step taken by the innocent party which is a reasonable response to the breach and designed to reduce losses caused thereby may be triggered by a breach but not legally caused by the breach: The Elena D'Amico.(6) Whilst a mitigation analysis requires a sufficient causal connection between the breach and the mitigating step, it is not sufficient merely to show in two stages 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 also for a direct causative connection between breach and benefit (Palatine), in cases approached by a mitigating analysis no less than in cases adopting a measure of loss approach: Hussey v Eels, The Fanis. Accordingly, 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.(7) Where, and to the extent that, 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 is suggestive that the breach is not sufficiently causative of the benefit: Laverack v Woods, The ElenaD'Amico. (8) There is no requirement that the benefit must be of the same kind as the loss being claimed or mitigated: Bellingham v Dhillon, Nadreph v Willmett, Hussey v Eels, The Elbrus, cf The Yasin; but such a difference in kind may be indicative that the benefit is not legally caused by the breach: Palatine.(9) Subject to these principles, whether a benefit is caused by a breach is a question of fact and

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degree which must be answered by considering all the relevant circumstances in order to form a commonsense overall judgment on the sufficiency of the causal nexus between breach and benefit: Hussey v Eels, Needler v Taber, The Fanis.(10) Although causation between breach and benefit is generally a necessary requirement, it is not always sufficient. Considerations of justice, fairness and public policy have a role to play and may preclude a defendant from reducing his liability by reference to some types of benefits or in some circumstances even where the causation test is satisfied: Palatine, Parry v Cleaver.(11) In particular, benefits do not fall to be taken into account, even where caused by the breach, where 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 had done or acquired for his own benefit: Shearman v Folland, Parry v Cleaver and Smoker's case."

32 Relying on these principles (principally the sixth, seventh and eleventh) the judge then decided (para 66) that the Owners' decision to sell an asset acquired before breach was not caused by the breach of the Charterers in delivering the vessel two years early; rather it was independent of the breach just as, in the converse case of owners' breach in The Elena D ' Amico, the charterers' decision not to charter in substitute tonnage was independent of, in that case, the owners' breach in failing to provide the vessel. His further reasons included:- the Owners were not obliged to sell the vessel in order to mitigate their loss (para 67);

33 i) the arbitrator's conclusion that the **sale** was, in fact, in reasonable mitigation of the loss could not be conclusive when the **sale** was not itself caused by the breach but by the independent decision of the Owners to realise the capital value of the vessel (para 68);ii) the loss which was being mitigated was a loss of income; the benefit gained by selling the vessel was a "different kind of loss"; that difference was "indicative" that the benefit was not caused by the breach (para 69);iii) the **sale** of the vessel was a transaction into which the Owners could enter at any time irrespective of the Charterers' breach; this was a "further indication" that the capital benefit received by the Owners was "not legally caused" by the breach (para 70);iv) if benefits accruing from the **sale** were to be taken into account, so (logically) should the use of the proceeds be taken into account; this would lead to an endless regression (para 71); andv) the Owners had taken the business risk of acquiring the vessel in 2005 and selling it in 2007; it would be contrary to public policy to allow the contract- breaking Charterers to appropriate the result of the Owners' business acumen (para 73).

34 If, therefore, the arbitrator had applied the correct principles, he could not have come to the conclusion he did which was "indicative" of an error of law. The judge (para 74) acknowledged the finding that the **sale** was caused by the Charterers' breach in reasonable mitigation of the Owners' loss but that was not "legally sufficient to establish the necessary causative link between breach and benefit". The arbitrator was also wrong to have failed to apply the policy considerations set out in (vi) above, even though the point may have not been advanced by the Charterers before him; that was because the point of law ordered by Teare J encompassed the point.

35 **The submissions**

36 Mr Simon Croall QC for the Charterers submitted that the judge had not given sufficient weight to the arbitrator's findings of fact that the benefit of the **sale** had been caused by the Charterers' breach and had been acquired by

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the Owners in mitigation of their loss. Once those findings had been made that should really have been the end of the matter. He said further:-

37 i) the judge had been over-influenced by Th e Elen a D' Amico in which, unlike this case, there had been an available market;ii) if there was no available market, the actual trading of the vessel was always taken into account and fluctuations in the chartering market would thus inevitably have to be taken into account; there was no reason to say that the **sale** of a vessel (if made in mitigation of loss) should be treated differently;iii) it was irrelevant that the Owners may not have been obliged to mitigate their loss, by selling the vessel. British Westinghouse [1974] A.C. 673 showed that if loss was mitigated and a resulting benefit was received, it should be credited;iv) the judge's 11 principles were over-complex in what was essentially a factual inquiry; principle (6) in particular was an over-legal elaboration of what should be a simple question which was primarily a question of fact; andv) however much a particular circumstance might be "indicative" that a benefit was not "legally caused" by the breach, such circumstances could not be sufficiently cogent for a judge to say that its presence mandated any particular result in law.

38 Mr Steven Gee QC for the Owners supported the judgment with 17 propositions of his own which included propositions that:-

39 i) fluctuations in capital assets should not be taken into account by way of mitigation; andii) (contrary to the decision of the judge) before any benefit could be brought into account by way of mitigation, it had to be of the same "kind" or "type" as the loss.**The correct approach**

40 It is notoriously difficult to lay down principles of law in the realm of mitigation of loss particularly when it is said that a benefit received by a claimant is to be brought into account as avoiding the loss. The judge is to be commended for having tried to do so but his use of the word "indicative" is itself indicative that hard and fast principles are difficult to enunciate. In appeals from an arbitrator's award a court has to be particularly respectful of the boundaries between fact and law which the parties, by their choice of tribunal, have created. The Owners, when seeking leave to appeal from the award on a point of law pursuant to section 69 of the Arbitration Act 1996 were correctly astute to formulate the question of law that fell to be decided; the judge has not answered the question directly and, speaking for myself, I am not sure how, in the light of his judgment, he would have answered it. In due course I will do my best to say what the correct answer is.

41 **Avoided loss**

42 The leading authority, called by Robert Goff J in The Elena D' Amico "the classic statement of the principle of mitigation" (page 88), is the decision of the House of Lords in British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] A.C. 673 in which London Underground sued British Westinghouse, from whom their predecessors in title had bought electric turbines, for damages for supplying turbines of insufficient power and economy in breach of contract. After using the turbines for some time, London Underground replaced them with turbines of a different make and design of a greater efficiency than the old turbines would have had even if they had complied with the contract. London Underground, by way of countering a claim for the price claimed the cost of the purchase and installation of the new (Parsons) turbines. The matter was referred to arbitration and the arbitrator found that the prima facie measure of damage was the cost of the extra

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coal consumption and the extra expense of labour and disposal of ash for the expected life of the machines (subject to certain deductions) but that the purchase of the new Parsons machines mitigated the loss that would have been recoverable if London Underground had continued using the defective machines. British Westinghouse claimed that the life of their machines expired when London Underground bought the new machines and that they were not liable for the cost of buying and installing the new machines. The arbitrator stated a special case and submitted two questions for the court's opinion: (1) whether British Westinghouse's contention was well-founded and (2) whether London Underground could recover the cost of purchase and installation of the new machines. The Divisional Court held (1) that the suppliers' contention was not well founded and (2) that London Underground could recover the cost of purchasing and installing the new machines. In the light of the Court's opinion (from which there was in law no appeal) the arbitrator awarded nothing to British Westinghouse on their claim for the balance of the price and £15,394 to London Underground on their counterclaim. British Westinghouse then applied to another Divisional Court to set aside or remit the award on the basis that the answers given by the first Divisional Court were wrong and that there was therefore an error on the face of the award. Not surprisingly perhaps, the second Divisional Court dismissed the application. On British Westinghouse's appeal to the House of Lords from the decision of the Court of Appeal dismissing the appeal from the second Divisional Court, Sir Alfred Cripps QC for British Westinghouse argued first that they were not liable for the cost of the Parsons machines because the purchase of the new machines was not the consequence of any defect in the original machines but was an independent decision to purchase better machines; and alternatively that the true cost for which they were liable was not the whole purchase price but that price "with all the counter-balancing power and greater economy", otherwise London Underground would make a profit out of the transaction which they were not entitled to do.

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44 It was this latter contention which was accepted by Viscount Haldane LC, with whom the other members of the House agreed. He said that London Underground had adopted a wise course in acquiring the more efficient machines; they had recovered compensation for their loss while they were still using the old machines but that thereafter, by purchasing the more powerful machines, all remaining loss "was thereby wiped out". (Page 688). He then explained the legal position saying first that the quantum of damage was a question of fact and that the only guidance the law could give was to lay down general principles "which afford at times but scanty assistance in dealing with particular cases". Subject to that, he said (page 689):-

45 "… there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.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 the plaintiff 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. In the words of James LJ in Dunkirk Colliery Co v Lever (1), "The person who has broken the contract is not to be exposed to additional cost

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by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."As James LJ indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."After citing Staniforth v Lyall (1830) 7 Bing. 169 he continued (page 690):-"… provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage.… The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business."He then distinguished the insurance case of Bradburn v Great Western Railway Co (1875) L.R. 10 Ex 1 as concerning a contract "wholly independent" of the relationship of the parties.

46 The important principle which emerges from these citations is that, if a claimant adopts by way of mitigation a measure which arises out of the consequences of the breach and is in the ordinary course of business and such measure benefits the claimant, that benefit is normally to be brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant. That should be a principle sufficient to guide the decision of the fact-finder in any particular case.

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48 An important question in this area of the law is whether there is an available market. That is a statutory consideration in assessing damages in **sale** of goods cases in which if (for example) a seller fails to deliver, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market price at the time when the goods ought to have been delivered. In The Elena D'Amico [1980] 1 Lloyd's Rep 75 Robert Goff J held that this was also the prima facie measure of damage in time charterparty cases. In that case it was the owner who repudiated the charter by taking early redelivery (the converse of the present case); there was an available market and the charterer was held to be confined to the difference between the contract and market rate of hire and unable to recover the profits he could have made for coastal Italian trading if the charterparty had continued. Robert Goff J asked himself why the normal rules of mitigation did not apply in available market cases. Reasoning from the analogy of **sale** of goods, he said that, even if a reasonable buyer would wait before buying in other goods on the available market, the resulting loss or gain was not caused by the defendant's breach of contract but by the independent decision of the innocent party not to take advantage of the available market. If the innocent party chooses to speculate as to the way in which the market is going to go, the result of such speculation is for his account not the account of the guilty party. In this connection he cited the first of Viscount Haldane LC's series of remarks cited in paragraph 22 above emphasising that, for the benefit of mitigation to be taken into account, the action taken to acquire that benefit must be one "arising out of the transaction".

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A decision to speculate on the market rather than buying in (or selling) at the date of the breach did not "arise" from the contract but from the innocent party's decision not to avail himself of the available market (page 89).

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50 This reasoning all depends on there being an available market which the innocent party decides for reasons of his own to ignore. That thinking cannot be automatically transposed to cases where there is no available market. In such cases the prima facie measure of loss in hire contracts is 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 prima facie measure if he is able to mitigate that loss by trading his vessel if opportunities to trade that vessel arise. If he does so trade the vessel, he may make additional losses or additional profits but, in either event, they should be taken into account. He 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 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 of contract.

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52 That is why the arbitrator relied on the first instance decisions in The Kildare and The Wren. In my opinion he was correct to do so.

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54 In Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare) [2011] 2 Lloyd's Rep 360 the owners sued for repudiation by the charterers of a 5 year consecutive voyage charter after only 13 months had expired. At the time owners accepted the repudiation (January 2009) there was no available market but an available market had revived by February 2010. The question was whether the shipowners were confined to their losses incurred by the actual trading (by spot fixtures) of the vessel for the duration of the consecutive voyage charter or whether they could take advantage (after February 2010) of the difference between the contract and the market rate. Steel J said that the spot fixtures for the period January 2009 – February 2010 were not the outcome of any "independent decision" since no alternative form of mitigation was available; he distinguished The Elen a D' Amico since there had been an available market. He then held that the owners could not take advantage of the revived market for the (shorter) balance of the charter period since the decision not to take advantage of the market at that late time was also not a decision "independent of the wrongful termination". It was only acceptance of the market rate at date of breach that was deemed to constitute reasonable mitigation.

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56 This decision was followed by Blair J in Glory Wealth **Shipping** Pte. Ltd v Korea line Corporation (The Wren) [2011] 2 Lloyd's Rep 370 who also pointed out that The Elena D ' Amico only concerned the principles to be applied where there was an available market. The arbitrators in The Wren (before the decision in The Kildare) had relied on The Ele na D' Amico to make a hybrid award in favour of the shipowners based on their actual loss up to the revival of the market and the difference between the contract and the market rate of hire thereafter. The judge said (para 30) that this was wrong and he pointed out that it was inconsistent with the principle that damages should be such as will put the injured party in the same financial position as if the contract had been

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performed, for which he cited both Golden Strait Cpn. V Nippon Yusen Kubisha Kaisha (The Golden Victory) [2007] 2 AC 353 and Tharros **Shipping** Co Ltd v Blue Shipping Ltd (The Griparion) (No.2) [1994] 1 Lloyd's Rep 533, 537 per Rix J.

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58 It can be seen from these authorities (as well as from the later decision of Popplewell J himself in Spar **Shipping** A/S v Grand China Logistics Holding (Group) Co Ltd [2015] 2 Lloyd's Rep. 407 paras 221-226) that compensation for actual loss is the underlying principle and that, in this connection, it is the available market rule that is a gloss on that underlying principle. Robert Goff J rationalised that gloss by saying in Elena D' Amico that the decision not to take advantage of the available market is an "independent decision" which does not "arise from" the breach. But it cannot follow that a decision to spot charter the vessel where there is no available market is an equally independent decision which does not arise from the breach. In reality as Steel J said in The Kildare (para 63) there may be no alternative form of mitigation available.

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60 The unusual facts of this case show, however, that as well as spot chartering the vessel, an owner may equally decide to mitigate its loss by selling the vessel. If so, it is not easy to see why the benefit (if any) which an owner secures by selling the vessel should not be brought into account just as much as benefits secured by spot chartering the vessel during the unexpired term of the time charterparty are, according to The Kildare and The Wren, 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. Mr Croall accepted that, if the **sale** market had risen substantially during that time, the Charterers would be liable for the Owners' inability to take advantage of that rise in the market, if the **sale** had arisen from the consequences of the breach of contract and been undertaken by way of mitigating the loss caused by that breach.

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62 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, pursuant to Dr McGregor's first principle, 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, see Bulkhaul Ltd v Rhodia Organique Fine Ltd [2009] 1 Lloyd's Rep 353.

63 **The judge's main criticism of the Award**

64 The reason why the judge came to the contrary conclusion appears to stem chiefly from his seventh principle 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 is suggestive that the breach is not sufficiently causative of the benefit. The authorities for that principle are said to be Lavarack v Woods and The Elena D' Amico.

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66 In Lavarack v Woods [1967] 1 QB 278 the wrongfully dismissed claimant bought shares in two companies after his dismissal. The value of the shares increased and the question was whether that increase in value should be brought

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into account in his claim against his employer. The increased value of the shares in the company by which he was employed after his dismissal did have to be brought into account but the increased value of the shares in the second company did not, because his purchase of those shares was not caused by his dismissal but "entirely collateral", according to Lord Denning MR at 290F-G with whom Diplock LJ agreed. Russell LJ said at 300D-G that it was simply a question of turning the employee's private money or credit to account. This authority certainly supports the judge's seventh principle but in that case there was no finding that the purchase of the shares in the second company was by way of mitigating his loss. Once it is found that the use of an asset, which is the subject-matter of the contract which was broken by the defendant, was in order to mitigate the loss, normal principles of mitigation should apply.

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68 In The Elen a D' Amico one reason why the charterer could not recover the extra profit he could have earned by using the vessel in Italian coastal waters rather than the difference between the contract and the market rate was, no doubt, (as stated by the judge in para 43) that the charterer could have chosen to pursue that opportunity with another vessel. But that was merely a reason why Robert Goff J there held that the prima facie market rate was applicable and not displaced by other circumstances. Where the market rate is displaced because there is no market, one is led back to British Westinghouse principles and one just has to decide whether the **sale** of the vessel arose "out of the consequences of the breach and in the ordinary course of business". Although the arbitrator did not use those precise words, the effect of his decision was that the **sale** did so arise and the consequential benefit should therefore be taken into account.

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70 There was some difference between counsel on the question whether the Owners could in fact have sold the vessel for their own account during the currency of the charterparty. If not, the judge's seventh principle would not be applicable in any event. The answer is that the Owners could in theory sell the vessel, always subject to the existing charterparty, but without the charterers' consent could not cease to provide the chartered services. To my mind that was somewhat of a side issue since the central questions must always be whether the actual **sale** was caused by the breach and was by way of mitigation.

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72 What the cases do show, however, is that there cannot be any universal rule that market fluctuations over the period of a time charter should never be taken into account. The fact that profits from spot charters are normally taken into account gives the lie to that proposition of Mr Gee since the spot charter rate may vary considerably over the unexpired period of a time charter.

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74 Neither do the cases support Mr Gee's other argument that it is only similar types of benefit to that contemplated by the contract that can be brought into account. I am content to say that in this respect I agree with the judge's eighth principle that there is no requirement that a benefit which is to be brought into account must be of the same kind as the loss being claimed or mitigated.

75 **Other criticisms by the judge of the award**(1) **Causation**

76 One of the reasons why the judge considered the arbitrator made an error of law was that he had not applied the sixth principle enunciated by the judge. This is

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that it is not enough for a defendant to show first that there is a causative nexus between the breach and the mitigating step and second that there is a causative nexus between the mitigating step and the benefit, because there must be a direct causative connection between breach and benefit. I do not consider it necessary for an arbitrator to spell out this somewhat elaborate principle of causation. Viscount Haldane's formulation in British Westinghouse was that the benefit must "arise from the consequences of the breach". This is a sufficient formulation of the causative link and was applied by Robert Goff J in The Elena D' Amico. Although the arbitrator did not use the precise words of Viscount Haldane, on a fair reading of his award, he considered that the breach by the Charterers was the (or at least an) effective cause of the benefit. As Leggatt J put it in Thai Airways International Public Co Ltd v KI Holdings Co Ltd [2015] EWHC 1250 (Comm) para 176:-

77 "When the defendant's breach of contract combines with another effective cause to result in loss to the claimant, the loss is recoverable … the same principle must apply to gains."(2) **Fairness and justice**

78 The judge also thought that the arbitrator had made an error of law by contravening his eleventh principle that it would be contrary to fairness and justice if the defendant were to be allowed to appropriate the relevant benefit when that benefit was the fruit of something which the innocent party has done or acquired for his own benefit. 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, see Bradburn v Great Western Railway and Parry v Cleaver [1970] AC 1. But it is hardly a principle of law which must be followed in all cases. British Westinghouse was held to be entitled to require the benefit of the more efficient electric turbines to be brought into account and could thus be said to have "appropriated the benefit" of that greater efficiency. The search for legal principle in this area is undoubtedly elusive and an arbitrator in my view is entitled to remind himself (as the arbitrator did) of Baron Parke B's even more fundamental principle that a claimant who sustains loss is, so far as money can do it, to be placed in the same situation as if the contract had been performed. 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.

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80 It also seems to me that this conclusion is consistent with the recent cases of the highest authority such as The Golden Victory [2007] 2 AC 353 and Bunge v Nidera [2015] UKSC 43; 3 All ER 1082 which have relied on Parke B's dictum and emphasised the importance of the compensation principle, see further Burrows, Remedies for Torts and Breach of Contract, 3rd ed. (2004) pages 33-38.

81 (3) **Endless regression?**

82 Once the vessel was sold, what the shipowners did with the proceeds was a matter for them. It was the vessel (not its proceeds) which was the subject-matter of the contract. There was in any event (rightly) no evidence of how the proceeds were used.

83 **Conclusion**

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84 In this difficult area of law the arbitrator reminded himself of Mance J's statement of principle in Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The Fanis):-

85 "The general issue is in my view appropriately stated as being whether any profit or loss arose out of or was sufficiently closely connected with a breach to require to be brought into account in assessing damages. Resolution of that issue involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the profit or loss, the manner in which it occurred and any intervening or collateral factors which played a part in its occurrence, in order to form a common sense overall judgment on the sufficiency of the casual nexus between breach and profit or loss."Following this the arbitrator made his own "common sense overall judgment" and I cannot see that he has made an error of law in so doing.

86 It is probably a good discipline for judges not merely to require the formulation of a question of law before giving leave to appeal from an arbitrator's award but also, if leave is given, to answer that question. Accepting that discipline I would answer the question of law set out in paragraph 13 above in the following way:-

87 "Yes, provided the acquisition of the benefit arose out of the consequences of the breach in the ordinary course of business and by way of mitigation of the claimant's loss."

88 I would therefore allow this appeal.

89 **Lord Justice Christopher Clarke:**

90 I agree. Because we are differing from the careful judgment of the learned judge I wish to add a few observations of my own.

91

92 Popplewell J's principle 6 is in two parts. It is insufficient to show (a) that there is a causative nexus between breach and mitigating step and (b) between mitigating step and benefit. Instead there must be a direct causative connection between breach and benefit. I find this principle, or, at least its application, elusive. My difficulty was not eased by the inability of the respondents to give any serviceable illustration of a benefit whose characteristics went beyond the insufficient combination of (a) and (b) and could be said to be directly caused by the breach. This is not surprising. The effect of most breaches is to cause loss. If nothing is done about them they are unlikely to cause benefit. It is the action which is taken to minimise the loss caused by the breach which is likely to do so.

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94 Viscount Haldane's formulation in British Westinghouse that the benefit must "*arise from the consequences of the breach*" remains, in my view, entirely apposite. The issue of mitigation arises when the breach has had harmful consequences which the injured party has taken steps to ameliorate. If Popplewell J's principle 6 were to govern in the manner that he applied it I find it difficult to see how the third rule set out in McGregor would retain much of a foothold on life.

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96 As my Lord has observed the finding of fact made by the arbitrator was in effect that the benefit did arise from the consequences of the breach.

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98 I see no tension between these principles and the *prima facie* rule laid down in The Elena D 'Amico in relation to time charters. If there is an available market,

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so that upon acceptance of a repudiatory breach the injured party can immediately obtain a substitute charter for the remainder of the unexpired portion of the charter, measure of damages and mitigation walk hand in hand. The innocent owner does not need to sell his vessel; nor does the law contemplate that he should or will. He can and should obtain a substitute charter immediately, and, when he does so, the additional cost of hiring the substitute vessel will be the *prima facie* measure of his damages. If he chooses not to take advantage of the substitute vessel, *ex hypothesi* available to him for the balance of the charter, or decides to sell her, he cannot expect to recover more than what the market value measure would give him.

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100 If there is no available market the position is different. The owner cannot obtain a substitute 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 vessel 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*.

101 **Lord Justice Sales:**

102 I agree with both judgments.

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