MR JUSTICE POPPLEWELL'S ELEVEN GUIDING PRINCIPLES

for determining when a party in breach of contract or duty may obtain credit for a benefit received by the innocent party following the breach[1]:

"***(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[2]*,* British Westinghouse[3]*,* The Elena D'Amico[4]*, and other authorities considered above.*

(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[5]*.*

(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[6]*,* Needler v Taber[7]*.*

(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[8]*.*

(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[9]*), in cases approached by a mitigation 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.*

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1 As formulated by Popplwell J in Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U (Formerly Travelplan S.A.U) (The New Flamenco) [2014] EWHC 1547 (Comm), at paragraph 64.

2 Bradburn v Great Western Railway Co (1874) LR 10 Ex 1.

3 British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2) [1912] AC 673.

4 Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena D'Amico) [1980] 1 Lloyd's Rep 75.

5 Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The Fanis) [1994] 1 Lloyd's Rep. 633.

6 Laverack v Woods of Colchester [1967] 1 QB 278.

7 Needler Financial Services Ltd v Taber [2002] 3 All ER 501.

8 Hussey v Eels [1990] 2 QB 227.

9 Palatine Graphic Arts Co Ltd v Liverpool City Council [1986] 1 QB 335.

(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 Elena D'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[10]*,* Nadreph v Willmett[11]*,* Hussey v Eels*,* The Elbrus[12]*, cf* The Yasin[13]*; 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 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[14]*.*

(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 has done or acquired for his own benefit:* Shearman v Folland[15]*,* Parry v Cleaver *and* Smoker's case[16]*."*

[10] Bellingham v. Dhillon [1973] QB 304.

[11] Nadreph Ltd v Willmett & Co [1978] 1 WLR 1537.

[12] Dalwood Marine Co v Nordana Line A/S (The Elbrus) [2010] 2 Lloyds Rep 315.

[13] The Yasin [1979] 2 Lloyds Rep 45.

[14] Parry v Cleaver [1970] AC 1.

[15] Shearman v Folland [1950] 2 KB 43.

[16] Smoker v London Fire and Civil Defence Authority [1991] 2 AC 502