

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Golden Strait Corporation (Appellants)
v.
Nippon Yusen Kubishka Kaisha (Respondents)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Nicholas Hamblen QC
David Allen
(Instructed by Reed Smith Richards Butler
LLP)

Respondents:
Timothy Young QC
Henry Byam-Cook
(Instructed by More Fisher Brown)

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HOUSE OF LORDS

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IN THE CAUSE**

**Golden Strait Corporation (Appellants) v. Nippon Yusen Kubishka
Kaisha (Respondents)**

[2007] UKHL 12

LORD BINGHAM OF CORNHILL

My Lords,

1. The issue in this appeal concerns the assessment of damages for loss of charter hire recoverable by a shipowner where a charterer repudiates a time charter of a vessel during its currency and he accepts that repudiation, there being an available market in which the shipowner can, at or shortly after the date of acceptance of repudiation, charter out the vessel for the balance of the charter term. The dispute between the parties turns on the date at which the quantification of damages is to be made. The shipowners contend that the quantification should be made when, the repudiation having been made and accepted, they charter out (or may reasonably be expected to charter out) the vessel. Events occurring later, not affecting the value of the contractual right which the owner has lost at that time, are irrelevant. The charterers contend that the quantification should be made as of the date on which the damages actually fall to be assessed, taking account of any event which has by then occurred which affects the value of what the owners lost as a result of his repudiation. The maritime arbitrator who was the original decision-maker in this case (Mr Robert Gaisford) would have preferred to accept the owners' contention, but felt constrained by first instance authority to accept the charterers'. His decision was upheld by Langley J in the Commercial Court ([2005] EWHC 161 (Comm), [2005] 1 All ER (Comm) 467) and by Auld and Tuckey LJJ and Lord Mance in the Court of Appeal ([2005] EWCA Civ 1190, [2006] 1 WLR 533). A majority of my noble and learned friends also agree with that decision. I have the misfortune to differ. I give my reasons for doing so, unauthoritative though they must be, since in my respectful opinion the existing decision undermines the quality of certainty which is a traditional strength and major selling point of English commercial law, and involves an unfortunate departure from principle.

The facts

2. By a time charterparty on an amended Shelltime 4 form dated 10 July 1998 Golden Strait Corporation, a Liberian company, as owners chartered their tanker *Golden Victory* to Nippon Yusen Kubishika Kaisha of Tokyo as charterers for a period of 7 years with one month more or less in charterers' option. The charterparty provided for payment of a minimum guaranteed base charter hire rate per day, increasing over the 7 years of the charter, but subject to a specified reduction if market rates should fall to a certain level. The owners were also to receive a share of operating profits earned by the charterers during the term of the charter above the base charter rate. The charterparty provided (in clause 33) that both owners and charterers should have the right to cancel the charter if war or hostilities were to break out between any two or more of a number of countries including the United States, the United Kingdom and Iraq. The charter was subject to English law and jurisdiction and there was an arbitration clause.

3. On 14 December 2001 the charterers repudiated the charter by redelivering the vessel to the owners. The owners accepted the repudiation three days later, on 17 December, when the charter had nearly four years to run. The owners claimed damages. The charterers did not accept the claim. The matter was referred to arbitration and the arbitrator was asked to decide whether (and if so when) the charterers had repudiated the charter, whether (and if so when) the owners had accepted the repudiation, and what was the earliest date on which the vessel could be redelivered under the charter. By an Interim Declaratory Award dated 16 September 2002 the arbitrator resolved the first two issues in the owners' favour, as summarised above. He found 6 December 2005 to be the earliest date for contractual redelivery of the vessel. This date was significant as the terminal date of the owners' claim for damages.

4. The charterers sought unsuccessfully to challenge this Award on appeal, and negotiations then followed for redelivery of the vessel to the charterers on the same terms (so far as material) as before, with settlement of damages for the period between the accepted repudiation and the redelivery. The charterers made an offer to that effect on 7 February 2003. At that stage the owners, according to evidence recited by the arbitrator in the Reasons for his Second Declaratory Arbitration Award (para 8), had received legal advice that if they proceeded to arbitration of their damages claim the arbitrator would

ignore a later event of war and the charterers' option to cancel and would award the owners damages for the entire four year period between 17 December 2001 and 6 December 2005. The owners' consultant considered that an event 15 months after the repudiation was irrelevant and that (para 10) "it would be sheer stupidity and not mitigation for us to enter into a charter well below the current market with a clause which entitled the charterer to cancel if there was a war, which seemed to be about to happen". The owners rejected the charterers' offer.

5. The matter then returned to the arbitrator, who was asked to decide three further questions. The first was whether the owners had failed to mitigate their loss by not accepting the charterers' offer of 7 February 2003 to take the vessel back on charter on the same terms as before. In his Second Declaratory Arbitration Award dated 27 October 2004 he held that they had not. There is no appeal against this ruling. The second issue was that which gives rise to this appeal. It was whether the events (described as the outbreak of the Second Gulf War) in March 2003 placed a temporal limit on the damages recoverable by the owners for the charterers' repudiation of the charterparty such that no damages were recoverable for the period from 21 March 2003 onwards. This issue the arbitrator reluctantly decided in the charterers' favour. The owners say that he was wrong to do so. The third issue was not explored in the reference and is irrelevant for present purposes.

6. In his reasons for deciding the first of these issues as he did, the arbitrator correctly summarised the law on mitigation of damage where there is an available market, as it was agreed, and the arbitrator found, was the case here.

7. In his reasons for deciding the second issue as he did, the arbitrator concluded that the Second Gulf War, which effectively began on 20 March 2003, fell within clause 33, as it plainly did. He then considered the likelihood of the Second Gulf War occurring when judged from mid-December 2001 by a reasonably well-informed person. This was an issue on which both sides called expert evidence. He judged (para 59) that at 17 December 2001 such a person would have considered war or large-scale hostilities between the United States or the United Kingdom and Iraq to be not inevitable or even probable but merely a possibility. But by the date of the Award, the war had occurred and the judge accepted the charterers' evidence that if the charterparty had still been in force on 20 March 2003 they would have exercised their right to cancel under clause 33. He had to decide whether that

conclusion put a limit on the period of the owners' recoverable loss or whether, as he put it, "the question is what was the value of the contract that the Owners lost on the date it was lost". He observed (para 55) that

"if the Second Gulf War was no more than a possibility on 17 December 2001, it cannot be doubted that what the Owners lost at that date was a charterparty with slightly less than four years to run. For example, had the Charterers not repudiated the Charterparty but the Owners had sold the vessel with her charter on that day, the value they would have received would surely have been calculated on that basis."

He favoured the owners' position (para 56)

"since it seems to me to be the more orthodox approach and supported by cogent reasons for maintaining it. In essence, it does not seem to me that it can be right that the value of that which the Owners have lost (and which is calculable on the date of breach in the then prevailing circumstances) should thereafter vary according to when a determination is made in proceedings to enforce their rights and in perhaps quite different circumstances."

But (para 56) he felt constrained to follow Timothy Walker J's decision in *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) ("The Seaflower")* [2000] 2 Lloyd's Rep 37 which he found to be in point and indistinguishable.

Principle

8. The repudiation of a contract by one party ("the repudiator"), if accepted by the other ("the injured party"), brings the contract to an end and releases both parties from their primary obligations under the contract. The injured party is thereupon entitled to recover damages against the repudiator to compensate him for such financial loss as the repudiator's breach has caused him to suffer. This is elementary law.

9. The damages recoverable by the injured party are such sum as will put him in the same financial position as if the contract had been performed. This is the compensatory principle which has long been recognised as the governing principle in contract. Counsel for the charterers cited certain classical authorities to make good this proposition, but it has been enunciated and applied times without number and is not in doubt. It does not, however, resolve the question whether the injured party's loss is to be assessed as of the date when he suffers the loss, or shortly thereafter, in the light of what is then known, or at a later date when the assessment happens to be made, in the light of such later events as may then be known.

10. An injured party such as the owners may not, generally speaking, recover damages against a repudiator such as the charterers for loss which he could reasonably have avoided by taking reasonable commercial steps to mitigate his loss. Thus where, as here, there is an available market for the chartering of vessels, the injured party's loss will be calculated on the assumption that he has, on or within a reasonable time of accepting the repudiation, taken reasonable commercial steps to obtain alternative employment for the vessel for the best consideration reasonably obtainable. This is the ordinary rule whether in fact the injured party acts in that way or, for whatever reason, does not. The actual facts are ordinarily irrelevant. The rationale of the rule is one of simple commercial fairness. The injured party owes no duty to the repudiator, but fairness requires that he should not ordinarily be permitted to rely on his own unreasonable and uncommercial conduct to increase the loss falling on the repudiator. I take this summary to reflect the ruling of Robert Goff J in *Koch Marine Inc v D'Amica Società di Navigazione ARL (The "Elena D'Amico")* [1980] 1 Lloyd's Rep 75. That case concerned the measure of damages recoverable by a charterer for breach of a time charter during its currency by an owner. While taking care to avoid laying down an inflexible or invariable rule, the judge held (p 89, col 2) that if, at the date of breach, there is an available market, the normal measure of damages will be the difference between the contract rate and the market rate for chartering in a substitute ship for the balance of the charter period. An analogy was drawn with section 51(3) of the Sale of Goods Act 1893. Neither party challenged this decision, which has always been regarded as authoritative. It does however assume that the injured party knows, or can ascertain, what the balance of the charter period is.

11. It is a general, but not an invariable, rule of English law that damages for breach of contract are assessed as at the date of breach. Authority for this familiar proposition may be found in *Jamal v Moolla*

Dawood Sons & Co [1916] AC 175, 179; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 468; *Johnson v Agnew* [1980] AC 367, 400-401; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433, 450-451, 454-455, 457; *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916, 925-926; *Chitty on Contracts*, 29th ed (2004), vol 1, para 26-057; Professor S M Waddams, "The Date for the Assessment of Damages", (1981) 97 LQR 445, 446. The Sale of Goods Acts of 1893 and 1979 both give effect to this prima facie rule in section 51(3) of the respective Acts in the case of refusal or neglect by a seller to deliver goods to a buyer where there is an available market.

The argument

12. While not, I think, challenging the general correctness of the principles last stated, the charterers dispute their applicability to the present case. Their first ground for doing so is in reliance on what, from the name of the case in which this principle has been most clearly articulated, has sometimes been called "the *Bwlfa* principle". It is that where the court making an assessment of damages has knowledge of what actually happened it need not speculate about what might have happened but should base itself on the known facts. In non-judicial discourse the point has been made that you need not gaze into the crystal ball when you can read the book. I have, for my part, no doubt that this is in many contexts a sound approach in law as in life, and it is true that the principle has been judicially invoked in a number of cases. But these cases bear little, if any, resemblance to the present. In *Bwlfa and Merthyr Dare Steam Collieries (1891) Limited v Pontypridd Waterworks Company* [1903] AC 426 a coalowner claimed statutory compensation against a water undertaking which had, pursuant to statutory authority, prevented him mining his coal over a period during which the price of coal had risen. The question was whether the coal should be valued as at the beginning of the period or at its value during the currency of the period. The coalowner was entitled to "full compensation" and the House upheld the latter measure. In doing so, it was at pains to distinguish the case from one of sale or property transfer: see Lord Halsbury LC, pp 428-429; Lord Macnaghten, p 431; Lord Robertson, p 432. In *re Bradberry* [1943] Ch 35, where the principle was invoked, concerned the valuation of an annuity in the course of administering an estate. The claim in *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292 was a claim by shipowners for loss of time during repairs of damage caused by a collision. After the collision the ship had suffered heavy weather damage, which required the ship to be detained for repair of that

damage. It was common ground that the ship would have been detained for the same period if the collision had never occurred (p 313). In *In Re Thoars Deceased* ([2002] EWHC 2416(Ch), unreported, 15 November 2002) the principle was invoked in the course of deciding whether a policy of life insurance had been transferred at an undervalue within the meaning of section 339 of the Insolvency Act 1986. The principle was again invoked in *McKinnon v E Survey Ltd* ([2003] EWHC 475 (Ch), unreported, 14 January 2003), a claim against negligent surveyors in which the court was asked to assume, for purposes of a preliminary issue, that the property had not been the subject of movement at the date of valuation and had not been subject to movement since, but that it would not have been possible to establish these facts until after the purchase of the property. In *Aitchison v Gordon Durham & Company Limited* (unreported, 30 June 1995) the Court of Appeal applied the principle where a joint venture agreement to develop land had been broken and the court took account of what actually happened to decide what the claimant's profit would have been. I do not think it necessary to discuss these cases, since it is clear that in some contexts the court may properly take account of later events. None of these cases involved repudiation of a commercial contract where there was an available market.

13. The charterers further submit that even if, as a general rule, damages for breach of contract (or tort, often treated as falling within the same rule) are assessed as at the date of the breach or the tort, the court has shown itself willing to depart from this rule where it judges it necessary or just to do so in order to give effect to the compensatory principle. I accept that this is so. But it is necessary to consider the cases in which the court departs from the general rule. Some are personal injury claims, of which *Curwen v James* [1963] 1 WLR 748 and *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023 may serve as examples. *Dudarec v Andrews* [2006] EWCA Civ 256, [2006] 1 WLR 3002 was in form a negligence claim against solicitors, but damages were sought for the loss of a chance of success in a personal injuries action struck out for want of prosecution seven years earlier, and the issue was similar to that in a personal injuries action. It is unnecessary to consider the extent to which, in the light of *Baker v Willoughby* [1970] AC 467 and *Jobling v Associated Dairies Ltd* [1982] AC 794, the breach date principle applies to the assessment of personal injury damages in tort. The court has also departed from the general rule in cases where, on particular facts, it was held to be reasonable for the injured party to defer taking steps to mitigate his loss and so reasonable to defer the assessment of damage. *Radford v De Froberville* [1977] 1 WLR 1262 and *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 are examples. In both cases the general rule

was acknowledged and reasons given for departing from it. *County Personnel (Employment Agency) Ltd v Alan Pulver & Co* [1987] 1 WLR 916 was a claim against solicitors whose negligent advice had saddled the plaintiffs with a ruinous underlease, from which the plaintiffs had had to buy themselves out. The ordinary diminution in value measure of damage was held to be wholly inapt on the particular facts. Again, reasons were given for departing from the normal rule. In *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 the effect of inflation led the House to sanction a departure from the rule that losses sustained in a foreign currency must be converted into sterling at the date of breach. The plaintiff in *Re-Source America International Ltd v Platt Site Services Ltd* [2005] EWCA Civ 97, [2005] 2 Lloyd's Rep 50 was bailee of spools used to carry optic fibre cables which it was to refurbish. The spools were destroyed by fire. It was held to be entitled to recover the cost of replacing the spools, subject to a deduction based on the saved cost of refurbishment. The Court of Appeal took account of what happened after the fire. It was expressly found (para 5) that there was no available market in used spools, so the plaintiff could not have mitigated its loss by replacing them. *Sally Wertheim v Chicoutimi Pulp Company* [1911] AC 301, cited by the charterers, was not a case of non-delivery or refusal to deliver, but of delayed delivery. The goods, although delivered late, were received and there was no accepted repudiation. The case would not have fallen under section 51(3) of the 1893 Act. The buyer made a claim for damages, based on the difference between the market price at the place of delivery when the goods should have been delivered and the market price there when the goods were in fact delivered. It was apparent on the figures that this claim, if successful, would have yielded the plaintiff a much larger profit than if the contract had not been broken, and he was compensated for his actual loss. None of these cases, as is evident, involves the accepted repudiation of a commercial contract such as a charterparty. It is necessary to consider some cases more similar to the present case to which the House was referred.

14. Considerable attention has been paid to the decision of the Court of Appeal (Lord Denning MR, Edmund Davies and Megaw LJ) in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH* (“*The Mihalis Angelos*”) [1971] 1 QB 164. The case concerned a voyage charterparty by which the ship was fixed to sail to Haiphong and there load a cargo for delivery in Europe. In the charterparty dated 25 May 1965 the owners stated that the ship was “expected ready to load under this charter about July 1, 1965”. The charterparty also provided, in the first sentence of the cancelling clause, “Should the vessel not be ready to load (whether in berth or not) on or before July 20, 1965, charterers have the option of cancelling this contract, such option to be declared, if

demanding, at least 48 hours before vessel's expected arrival at port of loading". On 17 July 1965 the ship was at Hong Kong still discharging cargo from her previous voyage. It was physically impossible for her to finish discharging and reach Haiphong by 20 July. The charterers gave notice cancelling the charter. The owners treated this as a repudiation and claimed damages, which were the subject of arbitration and of an appeal to Mocatta J. On further appeal, there were three issues. The first was whether the "expected readiness" clause was a condition of which the owners were in breach, entitling the charterers to terminate the charter contract. All three members of the court decided this issue in favour of the charterers and against the owners. The second issue was whether (if the answer to the first issue was wrong) the charterers had repudiated the contract by cancelling on 17 July, three days before the specified 20 July deadline. Lord Denning held that they had not, but Edmund Davies and Megaw LJ held that they had. The third issue was as to the damage suffered by the owners, on the assumption that the charterers' premature cancellation had been a repudiation. Lord Denning, in agreement with the arbitrators, who were themselves agreed, held that they had suffered no damage (p 197):

"Seeing that the charterers would, beyond doubt, have cancelled, I am clearly of opinion that the shipowners suffered no loss: and would be entitled at most to nominal damages."

Edmund Davies LJ agreed (p 202):

"One must look at the contract as a whole, and if it is clear that the innocent party has lost nothing, he should recover no more than nominal damages for the loss of his right to have the whole contract completed."

Megaw LJ (at pp 209-210) stated:

"In my view, where there is an anticipatory breach of contract, the breach is the repudiation once it has been accepted, and the other party is entitled to recover by way of damages the true value of the contractual rights which he has thereby lost; subject to his duty to mitigate. If the contractual rights which he has lost were capable by the terms of the contract of being rendered either less valuable

or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.”

It is evident that all members of the court were viewing the case as from the date of acceptance of the repudiation (although only Megaw LJ said so in terms). They were not taking account of later events. They were recognising, as was obvious on the facts as found, that the value of the contractual right which the owners had lost, as of the date of acceptance of the repudiation, was nil because the charter was bound to be lawfully cancelled three days later.

15. If, as I think, the Court of Appeal’s decision on the third issue in the *Mihalis Angelos* was entirely orthodox, so was the decision of Mustill J in *Woodstock Shipping Co v Kyma Compania Naviera SA* (“*The Wave*”) [1981] 1 Lloyd’s Rep 521. This concerned a time charter for 24 months, 3 months more or less at charterers’ option. The owners repudiated the charter and the charterers accepted their repudiation on 2 August 1979. In assessing the charterers’ loss, and allowing for their ability to obtain a substitute fixture in the available market shortly after the date of the accepted repudiation, in accordance with the ruling in the *Elena D’Amico*, above, the judge compared the charterparty rate with the market rate in the early days of September 1979, declining to speculate whether market rates in September 1981 would induce the charterers to exercise their three month option one way or the other.

16. *SIB International SRL v Metallgesellschaft Corporation* (“*The Noel Bay*”) [1989] 1 Lloyd’s Rep 361 concerned a voyage charterparty. The charterers repudiated the charterparty and the owners accepted the repudiation on 3 June 1987. On appeal to the Court of Appeal, Staughton LJ accepted (p 364, col 2) the submission of counsel that the value of the contract which the owners lost “must be assessed as at June 3, the date when repudiation was accepted”. He went on to quote, with approval, the passage from the judgment of Megaw LJ in the *Mihalis Angelos* which I have set out in para 14 above.

17. *Kaines (UK) Ltd v Osterreichische Warrenhandels-gesellschaft Austrowaren Gesellschaft m.b.H.* [1993] 2 Lloyd’s Rep 1 concerned not a charterparty but a contract for the sale and purchase of crude oil. The

sellers repudiated and at 17.28 hours on 18 June 1987 the buyers accepted the repudiation. Steyn J held that the buyers should have replaced the oil in the market by, at latest, 19 June, and their damages were assessed accordingly. It was an anticipatory repudiation. Both the judge and the Court of Appeal in dismissing the appeal cited with approval (pp 7, 10) a passage in Treitel, *The Law of Contract*, 7th ed (1987), p 742:

“Under this [mitigation] rule, the injured party may, and if there is a market generally will, be required to make a substitute contract; and his damages will be assessed by reference to the time when the contract should have been made. This will usually be the time of acceptance of the breach (or such reasonable time thereafter as may be allowed under the rules stated above) ...”

The Court of Appeal observed (p 11) that the judge’s finding on the date when the buyers should have bought in a substitute cargo “fixes the level of the plaintiffs’ damages on the facts of this case irrespective of what the plaintiffs did or failed to do at the time” and (p 13) “crystallises the position so far as the basis of a capital award of damages is concerned”.

18. The buyers in *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd’s Rep 483 repudiated an oil purchase agreement and the sellers accepted their repudiation. The sellers could not, however, show that they would have been able to obtain the oil to sell, and the Court of Appeal accordingly held that they were not entitled to substantial damages. In reaching this conclusion the court cited and applied part of Megaw LJ’s statement in the *Mihalis Angelos* which I have quoted in para 14 above.

19. *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (“The Seaflower”)* [2000] 2 Lloyd’s Rep 37 concerned a time charterparty dated 20 October 1997 for a period of 11 months, maximum 12 months at charterers’ option. The charterparty referred to various major oil company approvals including that of Mobil all on the point of expiring and provided that if during the charter term the owners lost one of these approvals they should reinstate the same within 30 days failing which the charterers would be at liberty to cancel the charterparty. It also contained a guarantee by the owners to obtain an approval from Exxon within 60 days of the charter date. The vessel was duly delivered but

the owners had not obtained an Exxon approval from Exxon and did not do so within 60 days from the charter date. On 30 December 1997 the charterers fixed the vessel to load a cargo of Exxon products. On the same date the charterers asked the owners if they had obtained the Exxon approval and gave notice requiring the owners to obtain it by 5 January 1998. The owners replied that the vessel would be ready for Exxon inspection by late January or early February. The charterers responded by terminating the charter and redelivering the vessel. At an initial hearing Aikens J held that the 60-day guarantee was an innominate term, not a condition. Thus the charterers were not entitled to terminate, and had repudiated the charterparty, which the owners had accepted. In proceedings initiated by the charterers, the owners counterclaimed for damages for wrongful termination of the charter, quantified as the difference between the daily hire rates in the charter and the alternative employment found for the vessel for the rest of the charter period. The charterers met this claim by contending that the owners would have lost their Mobil approval on 27 January 1998 and would not have been able to regain it within 30 days, namely 26 February: therefore the charterers would be contractually entitled to cancel, and the owners' damages should end then. Timothy Walker J discerned a difference between the three judgments in the *Mihalis Angelos*, discounting Megaw LJ's formulation as that of a minority, but found on the facts, as established at 30 December 1997, that the owners would have lost the Mobil approval on 27 January 1998. This conclusion he found to be supported by evidence of what actually happened after 30 December. He concluded that it was inevitable that the charter would have come to an end on 26 February, and limited the owners' damages accordingly. This was, as I read the judgment, a conclusion he regarded as inevitable on 30 December. It does not appear that there was argument about the permissibility of relying on evidence of what happened later, and the judge cannot have supposed that he was deciding any issue of principle. The result of this case was perhaps less obvious than that on the third issue in the *Mihalis Angelos*, but it was a judgment, on different facts, to very much the same effect. It was quite unlike the present case, because early termination was very clearly predictable on the date when the repudiation was accepted, and the judge only relied on evidence of later events to fortify his conclusion on that point. I do not think he would have reached a different conclusion had he not received that evidence.

20. *Dampskibsselskabet "Norden" A/S v Andre & Cie SA* [2003] EWHC 84 (Comm), [2003] 1 Lloyd's Rep 287 is a recent example of the application of the general rule. A forward freight swap agreement was treated as terminated because of the defendants' breach of solvency guarantees. It was common ground by the end of the trial that the

injured party's loss was to be measured by the difference between the contract rate and the market rate after the date of termination. Toulson J recorded this agreement, observing (p 292, col 2) that "The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction". This is what the general rule is intended to achieve.

21. In support of their argument that damages should be assessed as of the date of actual assessment, the charterers contend that their claim attributable to loss of profit share would in any event have to be deferred. Neither the arbitrator nor the judge mentioned this point, from which it seems safe to infer that the point was not at that stage relied on. But Lord Mance, giving the leading judgment in the Court of Appeal, did refer to it (para 25), and counsel for the owners accepted in argument that the assessment of the profit share loss would have had to be deferred. I am far from convinced that counsel was right to accept this. It would of course be very difficult to calculate loss of profit prospectively over a four year period, but an injured party can recover damages for the loss of a chance of obtaining a benefit (see Treitel, 11th ed, (2003), pp 955-957) and the difficulty of accurate calculation is not a bar to recovery. Even if counsel is right on this point and I am wrong, this would not in my view be sufficient to displace the general rule in this context.

Conclusion

22. The thrust of the charterers' argument was that the owners would be unfairly over-compensated if they were to recover as damages sums which, with the benefit of hindsight, it is now known that they would not have received had there been no accepted repudiation by the charterers. There are, in my opinion, several answers to this. The first is that contracts are made to be performed, not broken. It may prove disadvantageous to break a contract instead of performing it. The second is that if, on their repudiation being accepted, the charterers had promptly honoured their secondary obligation to pay damages, the transaction would have been settled well before the Second Gulf War became a reality. The third is that the owners were, as the arbitrator held (see para 7 above), entitled to be compensated for the value of what they had lost on the date it was lost, and it could not be doubted that what the owners lost at that date was a charterparty with slightly less than four years to run. This was a clear and, in my opinion, crucial finding, but it was not mentioned in either of the judgments below, nor is it mentioned by any of my noble and learned friends in the majority.

On the arbitrator's finding, it was marketable on that basis. I can readily accept that the value of a contract in the market may be reduced if terminable on an event which the market judges to be likely but not certain, but that was not what the arbitrator found to be the fact in this case. There is, with respect to those who think otherwise, nothing artificial in this approach. If a party is compensated for the value of what he has lost at the time when he loses it, and its value is at that time for any reason depressed, he is fairly compensated. That does not cease to be so because adventitious later events reveal that the market at that time was depressed by the apprehension of risks that did not eventuate. A party is not, after all, obliged to accept a repudiation: he can, if he chooses, keep the contract alive, for better or worse. By describing the prospect of war in December 2001 as "merely a possibility", the expression twice used by the arbitrator in paragraph 59 of his reasons, the arbitrator can only have meant that it was seen as an outside chance, not affecting the marketable value of the charter at that time.

23. There is, however, a further answer which I, in common with the arbitrator, consider to be of great importance. He acknowledged the force of arguments advanced by the owners based on certainty ("generally important in commercial affairs"), finality ("the alternative being a running assessment of the state of play so far as the likelihood of some interruption to the contract is concerned"), settlement ("otherwise the position will remain fluid"), consistency ("the idea that a party's accrued rights can be changed by subsequent events is objectionable in principle") and coherence ("the date of repudiation is the date on which rights and damages are assessed"). The judge was not greatly impressed by the charterers' argument along these lines, observing (paras 13, 35) that although certainty is a real and beneficial target, it is not easily achieved, and the charterparty contained within it the commercial uncertainty of the war clause. Lord Mance similarly said (para 24):

"Certainty, finality and ease of settlement are all of course important general considerations. But the element of uncertainty, resulting from the war clause, meant that the owners were never entitled to absolute confidence that the charter would run for its full seven-year period. They never had an asset which they could bank or sell on that basis. There is no reason why the transmutation of their claims to performance of the charter into claims for damages for non-performance of the charter should improve their position in this respect."

I cannot, with respect, accept this reasoning. The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield CJ in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153), and has been strongly asserted in recent years in cases such as *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* (“*The Scaptrade*”) [1983] QB 529, 540-541, [1983] 2 AC 694, 703-704; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 AC 715, 738; *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* (“*The Jordan II*”) [2004] UKHL 49, [2005] 1 WLR 1363, 1370. Professor Sir Guenter Treitel QC read the Court of Appeal’s judgment as appearing to impair this quality of certainty (“*Assessment of Damages for Wrongful Repudiation*”, (2007) 123 LQR 9-18) and I respectfully share his concern.

24. On my reading of *The Seaflower* (see para 19 above), I do not think the arbitrator was bound by that decision to reach the conclusion he did. If he was, I respectfully think the judge was wrong to analyse the *Mihalis Angelos* as he did in that case. But on the facts Timothy Walker J was entitled to value the owners’ charter in that case at two months’ purchase as of the repudiation acceptance date. In the present case, by contrast, the arbitrator found four years’ purchase (less a few days) as the true market value of the charterparty on the repudiation acceptance date.

25. For these reasons and those given by my noble and learned friend Lord Walker of Gestingthorpe, with which I wholly agree, I would, for my part, have allowed the owners’ appeal.

LORD SCOTT OF FOSCOTE

My Lords,

26. The facts of this case have been fully and clearly set out in the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Carswell, both of which I have had the advantage of reading in advance. It will suffice for me to state in summary form what I take to be the salient features of the facts that have led to this litigation and to the appeal to your Lordships.

27. The charterparty of 10 July 1998 whereby the appellants (the Owners) and the respondents (the Charterers) agreed on a charter of the vessel, Golden Victory, for a period ending on 6 December 2005 contained a provision (clause 33) enabling either party to cancel the charter if war or hostilities should break out between any two or more of a number of named countries. The named countries included the USA, the UK and Iraq. The Charterers in breach of contract repudiated the charter on 14 December 2001 when the charter had nearly four years still to run (but subject, of course, to the clause 33 possibilities of cancellation). The Owners accepted the repudiation on 17 December 2001 and claimed damages for the Charterers' breach of contract. The Owners' claim went to arbitration and, after various issues had been determined by the arbitrator, all in the Owners' favour, but before the arbitrator had assessed the quantum of the damages payable by the Charterers, the outbreak, in March 2003, of the Second Gulf War occurred. The Charterers said that if the charterparty had still been on foot when the Second Gulf War began they would have exercised their clause 33 right to bring the charter to an end. They submitted, therefore, that the Owners' damages for their (the Charterers') breach of contract should be assessed by reference to the period from 17 December 2001, when the contract came to an end on the Owners' acceptance of their repudiation, to March 2003, when the contract would have come to an end if it had still been on foot. The Owners disagreed. They said the damages should be assessed by reference to the value of their rights under the charterparty as at 17 December 2001. That assessment could properly take account of the chance, assessed as at 17 December 2001, that a clause 33 event enabling one or other party to terminate the contract might occur, but should not take account of the actual occurrence of any event subsequent to 17 December 2001. The question was put to the arbitrator for decision. As your Lordships know, the arbitrator decided the question in favour of the Charterers. Langley J did likewise and the Court of Appeal agreed. The question is now before your Lordships for a final decision.

28. Two important matters that have, or may have, a bearing on the answer to the question are now common ground. First, it is common ground that, if the charterparty had still been on foot when, in March 2003, hostilities between the USA and the UK on one side and Iraq on the other side began, the Charterers would have exercised their clause 33 right to terminate the charterparty. Second, it is common ground that as at 17 December 2001 the chance that any hostilities triggering the clause 33 right of termination would break out was no more than a possibility and certainly not a probability.

29. My Lords, the answer to the question at issue must depend on principles of the law of contract. It is true that the context in this case is a charterparty, a commercial contract. But the contractual principles of the common law relating to the assessment of damages are no different for charterparties, or for commercial contracts in general, than for contracts which do not bear that description. The fundamental principle governing the quantum of damages for breach of contract is long established and not in dispute. The damages should compensate the victim of the breach for the loss of his contractual bargain. The principle was succinctly stated by Parke B in *Robinson v. Harman* 1 Ex 850 at 855 and remains as valid now as it was then.

“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 respect to damages, as if the contract had been performed.”

If the contract is a contract for performance over a period, whether for the performance of personal services, or for supply of goods, or, as here, a time charter, the assessment of damages for breach must proceed on the same principle, namely, the victim of the breach should be placed, so far as damages can do it, in the position he would have been in had the contract been performed.

30. If a contract for performance over a period has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must, it is agreed, be taken into account in an assessment of the damages payable for the breach. And if it is certain that the event will happen, the damages must be assessed on that footing. In *The Mihalis Angelos* [1971] 1 QB 164, Megaw LJ referred to events “predestined to happen”. He said, at p.210, that:

“... if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then ... the damages which [the claimant] can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.”

Another way of putting the point being made by Megaw LJ is that the claimant is entitled to the benefit, expressed in money, of the contractual rights he has lost, but not to the benefit of more valuable contractual rights than those he has lost. In *Wertheim v. Chicoutimi Pulp Co.* [1911] AC 301, Lord Atkinson referred, at 307, to:

“... the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed”

and, in relation to a claim by a purchaser for damages for late delivery of goods where the purchaser had, after the late delivery, sold the goods for a higher price than that prevailing in the market on the date of delivery, observed, at 308, that:

“... the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position.”

31. The result contended for by the appellant in the present case is, to my mind, similar to that contemplated by Lord Atkinson in the passage last cited. If the charterparty had not been repudiated and had remained on foot, it would have been terminated by the Charterers in or shortly after March 2003 when the Second Gulf War triggered the clause 33 termination option. But the Owners are claiming damages up to 6 December 2005 on the footing, now known to be false, that the charterparty would have continued until then. It is contended that because the Charterers’ repudiation and its acceptance by the Owners preceded the March 2003 event, the rule requiring damages for breach of contract to be assessed at the date of breach requires that event to be ignored.

32. That contention, in my opinion, attributes to the assessment of damages at the date of breach rule an inflexibility which is inconsistent both with principle and with the authorities. The underlying principle is

that the victim of a breach of contract is entitled to damages representing the value of the contractual benefit to which he was entitled but of which he has been deprived. He is entitled to be put in the same position, so far as money can do it, as if the contract had been performed. The assessment at the date of breach rule can usually achieve that result. But not always. In *Miliangos v Frank (Textiles) Ltd* [1976] AC 443 Lord Wilberforce at 468 referred to “the general rule” that damages for breach of contract are assessed as at the date of breach but went on to observe that:

“... It is for the courts, or for arbitrators, to work out a solution in each case best adapted to giving the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered...”

and, when considering the date at which a foreign money obligation should be converted into sterling, chose the date that “gets nearest to securing to the creditor exactly what he bargained for”. If a money award of damages for breach of contract provides to the creditor a lesser or a greater benefit than the creditor bargained for, the award fails, in either case, to provide a just result.

33. In *Dodd Properties v Canterbury City Council* [1980] 1 WLR 433, Megaw LJ, commenting on the “general rule” to which Lord Wilberforce had referred in the *Miliangos* case, said, at 451, that it was “clear” that the general rule was “subject to many exceptions and qualifications”. In *County Personnel Ltd v. Alan R Pulver & Co.* [1987] 1 WLR 916, Bingham LJ, as my noble and learned friend then was, said at 926 that the general rule that damages were assessed at the date of the breach “should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule.” In *Lavarack v. Woods of Colchester Ltd* [1967] 1 QB 278, the Court of Appeal held that damages for wrongful dismissal could not confer on an employee extra benefits that the contract did not oblige the employer to confer and Diplock LJ (as he then was) said at 294, that:

“... the first task of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money’s worth if the defendant had fulfilled his legal obligations and had done no more. Where there is an anticipatory breach by wrongful repudiation, this can at

best be an estimate, whatever the date of the hearing. It involves assuming that what has not occurred and never will occur has occurred or will occur, i.e. that the defendant has since the breach performed his legal obligations under the contract and, if the estimate is made before the contract would otherwise have come to an end, that he will continue to perform his legal obligations thereunder until the due date of its termination. But the assumption to be made is that the defendant has performed or will perform his legal obligations under his contract with the plaintiff and nothing more.”

This passage was cited and applied by Waller LJ in giving his judgment, concurred in by Roch and Ward LJJ, in *North Sea Energy Holdings NV v. Petroleum Authority of Thailand* [1999] 1 Lloyd’s Rep 483 at 494/5.

34. The assessment at the date of breach rule is particularly apt to cater for cases where a contract for the sale of goods in respect of which there is a market has been repudiated. The loss caused by the breach to the seller or the buyer, as the case may be, can be measured by the difference between the contract price and the market price at the time of the breach. The seller can re-sell his goods in the market. The buyer can buy substitute goods in the market. Thereby the loss caused by the breach can be fixed. But even here some period must usually be allowed to enable the necessary arrangements for the substitute sale or purchase to be made (see e.g. *Kaines v. Österreichische* [1993] 2 Lloyd’s Rep 1). The relevant market price for the purpose of assessing the quantum of the recoverable loss will be the market price at the expiration of that period.

35. In cases, however, where the contract for sale of goods is not simply a contract for a one-off sale, but is a contract for the supply of goods over some specified period, the application of the general rule may not be in the least apt. Take the case of a three year contract for the supply of goods and a repudiatory breach of the contract at the end of the first year. The breach is accepted and damages are claimed but before the assessment of the damages an event occurs that, if it had occurred while the contract was still on foot, would have been a frustrating event terminating the contract, e.g. legislation prohibiting any sale of the goods. The contractual benefit of which the victim of the breach of contract had been deprived by the breach would not have extended beyond the date of the frustrating event. So on what principled basis could the victim claim compensation attributable to a loss of

contractual benefit after that date? Any rule that required damages attributable to that period to be paid would be inconsistent with the overriding compensatory principle on which awards of contractual damages ought to be based.

36. The same would, in my opinion, be true of any anticipatory breach the acceptance of which had terminated an executory contract. The contractual benefit for the loss of which the victim of the breach can seek compensation cannot escape the uncertainties of the future. If, at the time the assessment of damages takes place, there were nothing to suggest that the expected benefit of the executory contract would not, if the contract had remained on foot, have duly accrued, then the quantum of damages would be unaffected by uncertainties that would be no more than conceptual. If there were a real possibility that an event would happen terminating the contract, or in some way reducing the contractual benefit to which the damages claimant would, if the contract had remained on foot, have become entitled, then the quantum of damages might need, in order to reflect the extent of the chance that that possibility might materialize, to be reduced proportionately. The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more. But if a terminating event had happened, speculation would not be needed, an estimate of the extent of the chance of such a happening would no longer be necessary and, in relation to the period during which the contract would have remained executory had it not been for the terminating event, it would be apparent that the earlier anticipatory breach of contract had deprived the victim of the breach of nothing. In the *Bwllfa* case [1903] AC 426, Lord Halsbury at 429 rejected the proposition that “because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it, because you could not have guessed it then” and Lord Robertson said at 432, that “estimate and conjecture are superseded by facts as the proper *media concludendi*” and, at 433, that “as in this instance facts are available, they are not to be shut out”. Their Lordships were not dealing with a contractual, or tortious, damages issue but with the quantum of compensation to be paid under the Waterworks Clauses Act 1847. Their approach, however, is to my mind as apt for our purposes on this appeal as to theirs on that appeal.

37. My noble and learned friend Lord Bingham, in what has been rightly described as a strong dissent, has referred (in para 9) to the overriding compensatory principle that the injured party is entitled to such damages as will put him in the same financial position as if the contract had been performed. On the facts of the present case, however,

the contract contained clause 33 and would not have required any performance by the Charterers after March 2003. It should follow that, in principle, the owners, the injured party, are not entitled to any damages in respect of the period thereafter. As at the date of the Owners' acceptance of the Charterers' repudiation of the charterparty, the proposition that what at that date the Owners had lost was a charterparty with slightly less than four years to run requires qualification. The charterparty contained clause 33. The Owners had lost a charterparty which contained a provision that would enable the Charterers to terminate the charterparty if a certain event happened. The event did happen. It happened before the damages had been assessed. It was accepted in argument before your Lordships that the Owners' charterparty rights would not, in practice, have been marketable for a capital sum. The contractual benefit of the charterparty to the Owners, the benefit of which they were deprived by the repudiatory breach, was the right to receive the hire rate during the currency of the charterparty. The termination of the charterparty under clause 33 would necessarily have brought to an end that right.

38. The arguments of the Owners offend the compensatory principle. They are seeking compensation exceeding the value of the contractual benefits of which they were deprived. Their case requires the assessor to speculate about what might happen over the period 17 December 2001 to 6 December 2005 regarding the occurrence of a clause 33 event and to shut his eyes to the actual happening of a clause 33 event in March 2003. The argued justification for thus offending the compensatory principle is that priority should be given to the so-called principle of certainty. My Lords there is, in my opinion, no such principle. Certainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle. Otherwise incoherence of principle is the likely result. The achievement of certainty in relation to commercial contracts depends, I would suggest, on firm and settled principles of the law of contract rather than on the tailoring of principle in order to frustrate tactics of delay to which many litigants in many areas of litigation are wont to resort. Be that as it may, the compensatory principle that must underlie awards of contractual damages is, in my opinion, clear and requires the appeal in the case to be dismissed. I wish also to express my agreement with the reasons given by my noble and learned friends Lord Carswell and Lord Brown of Eaton-under-Heywood for coming to the same conclusion.

LORD WALKER OF GESTINGTHORPE

My Lords,

39. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. His opinion clearly sets out the principles of law applicable in this area, including the importance of certainty in commercial transactions. His survey of the authorities demonstrates, to my mind conclusively, the essential uniformity of reported decisions on charterparties and similar commercial contracts. In particular, none of the judgments in *The Mihalis Angelos* [1971] 1 QB 164 supports the respondents' case (Megaw LJ was not expressing a minority view, although he expressed his view more plainly than Lord Denning MR and Edmund-Davies LJ). The decision of Mustill J in *The Wave* [1981] 1 Lloyd's Rep 521 was entirely orthodox.

40. The decision of Timothy Walker J in *The Seaflower* [2000] 2 Lloyd's Rep 37 was rather less clear, but (in agreement with Lord Bingham) I consider that the judge took a view of the facts as they were at 30 December 1997 (the date of the charterers' notice of termination which was held to be unjustified) although he did (at p 44) refer to later events as a confirmation of what was inevitable on 30 December 1997. In that case, at p 44, Timothy Walker J seems to have drawn a distinction between what was "inevitable" and what was "predestined" (the expression used by Megaw LJ in *The Mihalis Angelos* at p 210). The word "predestined" carries theological implications (a point made by the arbitrator in para 52 of his second declaratory award) but I agree with the arbitrator that Megaw LJ must have been using the word metaphorically. He cannot possibly have meant anything other than "inevitable", in the sense of an event which is predictable with total confidence. In that case the vessel was still unloading in Hong Kong on 17 July 1965 and on that date it was simply impossible that she should be in Haiphong, ready to load, three days later. Timothy Walker J instructed himself (following Lord Denning MR in *The Mihalis Angelos* at p 196) that he should "take into account all contingencies which might have reduced or extinguished the loss," but he then correctly concluded that there was, at 30 December 1997, only one possible outcome.

41. Cases concerned with the assessment of damages in tort for personal injuries are in a quite different category. They are not

concerned with economic loss as between traders operating in the marketplace, but with assessing monetary compensation (so far as money can ever provide compensation) for bodily injuries whose long-term effects may be very difficult to predict. In those cases (and especially in cases of very serious injury) it is well understood that the final assessment of damages should be made only on the basis of full and up to date medical evidence. That does not bear on the assessment of damages for breach of a commercial contract in cases where there is an available market.

42. For all the reasons given by Lord Bingham I would allow the appeal, and I am not sure that I can usefully say more. I would simply add that this seems to me to be a case in which a new point, not in either party's mind at (or soon after) the date of breach, has taken on a life of its own as the litigation has been prolonged, both at first instance and on appeal. This appears from the full and clear findings of fact made by the arbitrator (Mr Robert Gaisford), including his findings about later negotiations which the charterers relied on in alleging that the owners had failed to mitigate their loss.

43. These matters are covered in the early paragraphs of Lord Bingham's opinion but I draw attention to some salient dates. The repudiation by redelivery occurred on 14 December 2001. The original dispute between the parties was as to the effect of a memorandum of agreement dated 17 July 1998 (a few days after the charterparty) which provided for the charterers to have an option for a charter back to the owners' parent company. This dispute (arising out of subsequent changes in the structure of the owners' corporate group) went to arbitration, resulting in a first declaratory award dated 16 September 2002. This declared that the earliest date on which the vessel could have been redelivered under the charterparty was 6 December 2005. The charterers appealed from that award to the Commercial Court, in which Morison J dismissed the appeal on 17 January 2003 ([2003] 2 Lloyd's Rep 572). There were then negotiations between the parties (described in detail in paras 7-16 of the second declaratory award) as to the charterers accepting redelivery of the vessel on the same terms (with an amendment not relating to the war clause). But on 9 January 2003 (when Morison J was still considering his judgment) Mr Martin Benny, acting on behalf of the owners, realised the significance of the war clause (clause 33 of the charterparty), if included (in its amended form) in the proposed new charterparty. The arbitrator described this as follows (para 8):

“However, when the negotiations were close to fruition, Mr Martin Benny . . . was going through the Charterparty line-by-line when he came across clause 33. His evidence was that as soon as he saw it he thought that the Charterers might try to use the clause in the new Charterparty to throw it up virtually as soon as it was agreed. He felt at that time that war between Iraq and the United States was looking increasingly likely.”

44. The outcome was that the owners rejected an offer which the charterers made on 7 February 2003 (after Morison J had delivered judgment) and the negotiations broke down (but that did not, as the arbitrator held, amount to a failure on the part of the owners to mitigate their loss). So the possible significance of the war clause was first raised by the owners, in the context of the proposed new charter, more than a year after the original repudiation, and at a time when the prospect of war in the Gulf was emerging as a real threat (hostilities began on 20 March 2003).

45. The arbitrator made a finding of fact (para 59) that at 17 December 2001 a reasonably well-informed person would have considered war or large-scale hostilities between the United States (and/or the United Kingdom) and Iraq as “merely a possibility.” I do not read that as meaning “less than a 50% prospect.” The whole thrust of the arbitrator’s findings, after hearing a good deal of evidence, is that it was at the date of repudiation the sort of outside possibility which would, in the commercial world, be severely discounted (or even entirely disregarded). That is strikingly confirmed, I think, by the fact that the war clause does not seem to have received even a passing mention in the first part of the arbitration and the consequent appeal to the Commercial Court. The issue in those proceedings was of course different; but if the charterers had seen the war clause as even a potentially live issue, their lawyers could have been expected to put down a marker as to the need to qualify the arbitrator’s unequivocal declaration, upheld in the Commercial Court, that the earliest date for redelivery would have been 6 December 2005.

46. In my opinion the arbitrator erred only in not following his own instinct (para 56) towards the owners’ “more orthodox” approach. He concluded, wrongly in my view, that *The Seaflower* required him to look at later events as a guide to what was inevitable, rather than looking at the position (and weighing contingencies in an appropriate case) as at the date of breach. In this case an objective and well-informed observer,

looking at the matter in December 2001, would have thought, not only that the prospect of the war clause option becoming exercisable was not inevitable (in the sense of being predictable with confidence equal, or closely approximating, to 100%) but that it was a mere possibility carrying little or no weight in commercial terms.

47. I would therefore allow this appeal.

LORD CARSWELL

My Lords,

48. The appellants chartered a ship to the respondents by a period time charterparty dated 10 July 1998, by whose terms the earliest contractual date for termination would have been 6 December 2005. The respondents repudiated the charter, however, by purporting on 14 December 2001 to redeliver the vessel to the appellants, who on 17 December 2001 accepted the repudiation. An arbitration was held in which, following some earlier skirmishes, damages for breach fell to be measured. By the time they came to be considered by the arbitrator the second Gulf War had broken out, which would have entitled the charterers to cancel the charter, if it had still been current. The question, which was decided by the arbitrator as a preliminary issue, was whether the damages sustained by the appellants should be measured by reference to the full term of the charter or only up to the date on which such cancellation would have taken place. This issue, on which there is no definitive previous authority, has come before the House as an appeal on the question of law involved.

49. By the charterparty, which was on an amended Shelltime 4 form and was subject to two memoranda dated 17 July 1998, the appellant shipowners, Golden Strait Corporation of Monrovia, Liberia, chartered the vessel *Golden Victory* to the respondents Nippon Yusen Kubishika Kaisha of Tokyo, Japan, for a period of seven years “with one month more or less in Charterers’ option”. The rate of hire, contained in an agreed memorandum, consisted of, first, a minimum guaranteed base charter rate starting at US\$31,500 per day and increasing from year to year, and, secondly, a share in operating profit over and above the base charter rate.

50. The war clause contained in the printed Shelltime 4 form was amended by the addition of several countries and a rider, and as amended read:

“33. If war or hostilities break out between any two or more of the following countries: USA, former USSR, PRC, UK, Netherlands, Liberia, Japan, Iran, Kuwait, Saudi Arabia, Qatar, Iraq, both Owners and Charterers shall have the right to cancel this charter. Either party, however, shall not be entitled to terminate this charter on account of minor and/or local military operation or economic warfare anywhere which will not interfere with the vessel’s trade.”

51. Following the redelivery of the vessel to the appellants and their acceptance of the repudiation of the charter, they made a claim for damages against the respondents, who denied liability. The parties referred the dispute to the arbitration in London of a sole arbitrator Mr Robert Gaisford. He found against the charterers on the issue of liability by an interim declaratory award given on 16 September 2002, an appeal from which was dismissed by Morison J, sitting in the Queen’s Bench Division (Commercial Court), on 17 January 2003.

52. The parties then entered into the issue of damages and asked the arbitrator to determine three further preliminary issues, of which the question before the House was one. Following the dismissal of their appeal on liability, the respondents had made an offer to take the vessel back on charter and entered into negotiations on the measure of damages. When the appellants appreciated that it was apparent that the charter would be terminated under clause 33 of the charterparty on the outbreak of war, which was then increasingly likely to happen, they declined to accept the offer except on terms that excluded clause 33. The arbitrator held that the appellants did not by their refusal to accept the offer made by the respondents fail to mitigate their loss.

53. The arbitrator then focused on the issue which is now before the House, whether the outbreak of the second Gulf War on 20 March 2003 placed a temporal limit on the period in respect of which damages fell to be awarded for the breach of the terms of the charterparty. It was not in dispute, and was so found by the arbitrator, that there was an available market for the chartering of such vessels as the *Golden Victory*, though the appellants claimed that a new fixture could only have commenced

earning, following negotiation, on 1 April 2002. The appellants' contention, which they have maintained throughout the sequence of appeals, was that the proper measure of damages was the basic hire which they would have received until the earliest contractual date of termination on 6 December 2005, plus the profit share to which they would, but for the breach, have become entitled in that period, less the amounts which the vessel could have earned in the available market. The respondents claimed, on the other hand, that the damages should run only until the outbreak of the war, when they would, as the arbitrator found, have cancelled the charter.

54. The arbitrator received evidence from experts of opposing views as to the likelihood, seen in December 2001, of the occurrence of war between the United States and Iraq. He concluded in paragraph 59 of the reasons given for his second declaratory award made on 27 October 2004:

“On the evidence, I have concluded that at 17 December 2001, a reasonably well-informed person would have considered war (or large-scale hostilities) between the United States/United Kingdom and Iraq merely a possibility. I do not consider that such a person would have considered it inevitable or even probable but merely a possibility, although I do accept that the degree of probability would have been higher had that person known as much about the prevailing circumstances then as we do today.”

He considered the parties' contentions about the period for calculation of the damages and his conclusion, following, not without some reluctance, the decision in *BS & N Ltd (BVI) v Micado Shipping (Malta) (The Seaflower)* [2000] 2 Lloyd's Rep 37, was that the respondents' contention was correct and that the outbreak of war in March 2003 placed a temporal limit on the damages, none being recoverable for the period from 20 March 2003 onwards.

55. The appellants appealed on a point of law to the High Court and in a written judgment given on 15 February 2005 Langley J dismissed their appeal. He examined a number of cases, but was unable to derive direct authority from them on the issue the subject of the parties' contentions. He rejected the appellants' submission founded on statements contained in the judgments in *Maredelanto Cia Naviera SA v*

Bergbau-Handel GmbH (The Mihalis Angelos) [1971] 1 QB 164, and expressed his conclusions in paragraph 35 of his judgment:

“In my judgment the arbitrator was right in his conclusion despite his reluctance to reach it. Essentially and in summary I think: (i) the conclusion accords with the basic compensatory rule for the assessment of damages in that had the charterparty not been repudiated but been performed it would have come to an end upon the outbreak of the second Gulf War; (ii) I can see no sound reason why the ordinary principles requiring a claimant to prove his loss and that it was caused by the impugned conduct of the defendant should not apply in this case nor why the ‘normal’ approach to assessment of loss derived from the normal approach to mitigation should dictate another result; (iii) I also see no sound reason why there should be an ‘exception’ to the rule for which Mr Hamblen contends limited only to a case where at the time of repudiation the loss is predestined to end at a date earlier than the expiry of the charter period; (iv) the desirability of certainty and crystallisation is accepted but, I think, no more obviously achievable with than without Mr Hamblen’s rule and its supposed exception. The fact is that the charterparty itself contained the uncertainty of the war clause. That was what GSC lost. If Mr Hamblen were right GSC would recover more than the charterparty was worth to it and do so without in fact incurring any greater loss.”

56. The appellants appealed to the Court of Appeal (Auld and Tuckey LJ and Lord Mance), which on 18 October 2005 dismissed their appeal. Lord Mance, with whose judgment the other members of the court agreed, also declined to accept the appellants’ argument based on *The Mihalis Angelos* and the emphasis placed by their counsel on the paramountcy of certainty and finality in charter transactions. He expressed the view, first, that it was correct in principle to take into account the subsequent event of the second Gulf War and, secondly, that considerations of certainty and finality

“would have, so far as necessary, to yield to the greater importance of achieving an assessment of damages and compensation which more accurately reflects the actual loss which the owners can, at whatever is the date of

assessment, now be seen to have suffered as a result of the charterers' repudiation.”

57. Damages for breach of contract are a compensation to the claimant for the loss of his bargain: *McGregor on Damages*, 17th ed, (2003), para 2-002. He is entitled to be placed, as far as money can do it, in the position which he would have occupied if the contract had been performed: *Sally Wertheim v Chicoutini Pulp Co* [1911] AC 301, 307, per Lord Atkinson. They should ordinarily be assessed as at the date when the cause of action arose, that is to say, the date of breach: see *Chitty on Contracts*, 29th ed (2004), vol 1, para 26-057; and cf *Johnson v Agnew* [1980] AC 367, 400-1, per Lord Wilberforce and the other cases cited by my noble and learned friend Lord Bingham of Cornhill in paragraph 11 of his opinion. The basic rule in the case of repudiation of a charterparty, where there is an available market, is that the loss is measured as at the date of acceptance of the repudiation. The calculation is made on the basis that the injured party can mitigate his loss by going into the market and obtaining a replacement charter as soon as reasonably possible on the best terms available for the balance of the charter period: see *Koch Marine Inc v D'Amica Società di Navigazione ARL (The Elena D'Amico)*, per Robert Goff J. His loss will then be calculated by reference to the extent to which he is worse off in consequence. This will normally be the extra cost of chartering a substitute vessel, if the owner has repudiated the original charter, and any reduction in charter rates if the repudiation was by the charterer. In either case the loss is ordinarily assessed over the remainder of the duration of the original charter.

58. At the centre of the appellants' printed case and the persuasive oral argument presented to the House by their counsel Mr Hamblen QC was the proposition that in commercial transactions such as shipping charters the pre-eminent requirement is for certainty, finality and ease of settlement of disputes. There are many judicial statements, going back to Lord Mansfield CJ in *Vallejo v Wheeler* (1774) 1 Cowp 143, underlining the high importance of certainty in commercial transactions, a number of which have been cited by Lord Bingham in paragraph 23 of his opinion. I do not propose to set these out again, since the principle is so well known and established. Mr Hamblen took as his starting point the rule that where there is an available market the loss is measured at (or close to) the date of acceptance of the repudiation. Applying to that the requirement of certainty, he reasoned that events subsequent to that date are irrelevant in the assessment of the damages, since the loss is crystallised at the date of repudiation and an arbitrator or court should not look at such events in making the assessment. The only exception to

this rule was where the subsequent event could be seen at the crystallisation date to be inevitable or “predestined” (the term used by Megaw LJ in *The Mihalos Angelos*, to which I shall return). In such a case, but not otherwise, it could be shown that at that date the effect of the events which were inevitably going to take place had rendered less valuable the contractual rights lost by the injured party.

59. Mr Young QC for the respondents submitted that whereas the appellants’ proposition might be regarded as sound in respect of the rate at which the loss is to be calculated, it was incorrect in respect of the duration of that loss. He drew that distinction because on the occurrence of the repudiation the injured party has the opportunity to mitigate his loss by going into the market and making new arrangements as soon as reasonably possible, so that at that point the loss becomes crystallised and one can calculate it over the remainder of the charter period. Where there is a suspensive condition such as a war clause, however, the duration of the charter was always uncertain, depending on a contingency of the occurrence of an event which was by definition within the contemplation of the parties. As Lord Mance said in the Court of Appeal (para 23), the charter always had inherent in it the uncertainty involved in the war clause.

60. The cases cited by Lord Bingham in paragraphs 15 to 17 of his opinion are in complete accord with the principle of measuring the loss at a date as near as practicable to the acceptance of the repudiation. In none of these cases was there any suspensive condition which might come into operation, and they each reaffirm the standard rule of crystallisation, which is undoubtedly correct. The issue before the House arises where such a condition may affect the duration of the charter but it cannot be forecast with any certainty whether or when it will operate. Mr Hamblen recognised that an exception may be allowed to permit the occurrence of certain subsequent events to affect the calculation of the injured party’s loss, but he argued that the ambit of the exception is limited in the manner which I have set out. In so submitting he relied strongly on a statement by Megaw LJ in *The Mihalos Angelos*, a decision to which I must now turn.

61. Lord Bingham has set out the facts and issues in that case in some detail in paragraph 14 of his opinion and I gratefully adopt his account to avoid unnecessary repetition. The passage from Megaw LJ’s judgment on which Mr Hamblen relies is at page 210:

“If the contractual rights which he [the injured party] has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.”

It is in my opinion important to read this statement in the context of the case which the Court of Appeal was deciding. It was completely certain, or predestined, that the contingency on which the charterers were entitled to cancel the contract would occur, since it was physically impossible for the ship to reach Haiphong by 20 July, the date on which she was to be ready to load at that port and the date on which the charterers could cancel if she was not so ready. Megaw LJ’s statement was entirely correct, for the event was predestined to happen and the consequence which he set out in the passage which I have quoted had to be regarded as following. It might be doubted whether Megaw LJ intended to enunciate a general rule limiting consideration of subsequent events to those predestined to happen, seen from the date of acceptance of repudiation, and it may be observed that neither Lord Denning MR nor Edmund Davies LJ went so far as to tie the consideration of subsequent events to those which could be seen at the date of repudiation as certain to happen. If, however, the meaning to be taken from Megaw LJ’s statement is that only events predestined to happen will qualify to bring the exception into operation, then I must decline to accept that as correct, for the reasons which I shall set out.

62. The decision in *The Seaflower* has some similarity to that in *The Mihalos Angelos*. Lord Bingham has set out the facts of this case in paragraph 19, and again I would adopt them and need not repeat them. Timothy Walker J found that it was inevitable that the charter would have come to an end on 26 February 1998, since the Mobil approval could not have been regained by that date and the charterers would have been entitled to cancel. He said specifically at page 44 of the report that he must follow the view expressed by the majority of the court in *The Mihalos Angelos* and that he could see no reason why in the case before him “the approach should be constrained in the way suggested by Lord Justice Megaw”. He went on in the next sentence:

“If the contract would inevitably have come to an end earlier than its due date anyway, it is right that the

damages should be limited accordingly, regardless of whether or not the event was predestined at the date of repudiation.”

It appears accordingly that the judge did not hold that it could be said at the date of repudiation that it was inevitable or predestined that the owners would be unable to regain the Mobil approval, which was necessary if the charterers were not to have the right to cancel on that date. It became inevitable at some later date, but it was not so found at the date of repudiation (although no doubt it was highly likely). If it had been, one would have expected the judge to hold that on either test the damages were limited to the period up to 27 February 1998. The arbitrator considered, I think rightly, that Timothy Walker J in *The Seaflower* took the view which I have attributed to him and that the supervening event was capable of limiting the measure of damages.

63. The point at issue in this appeal has never been considered by your Lordships’ House and remains open for decision. Lord Bingham has placed strong emphasis in paragraph 23 of his opinion on the importance of certainty in commercial transactions. I do not wish to cast any doubt upon that, but I have come to the conclusion that Langley J and the Court of Appeal were right in holding that the contingency of the outbreak of war, which had occurred before the damages fell to be considered in the arbitration, could be taken into account. I find myself in agreement with Lord Mance when he said that considerations of certainty and finality have in this case to yield to the greater importance of achieving an accurate assessment of the damages based on the loss actually incurred.

64. The duration of the charter may in a case such as the present be affected by the contingency of the occurrence of an event which is in the contemplation of the parties and catered for in the terms of the charterparty. While the rate at which the hypothetical new charter is arranged on repudiation of the original one is for good reasons taken to be fixed at the time when the injured party could go into the market to negotiate a replacement, the same considerations do not apply to determination of the duration. The damages can be assessed at the date of repudiation by valuing the chance that the contingency would occur and that the charter would be cancelled, an approach accepted by Lord Mance at paragraph 23 of his judgment. That value might lie anywhere on the scale between extreme unlikelihood, which would give the deduction a minimal value, to virtual certainty, which would mean that it would be assessed at a figure very close to that which would be

reached if one made the definite assumption that the contingency would occur. This approach is well known and recognised in other areas of the law. It is commonplace in the assessment of damages for personal injuries to award a sum which reflects the chance that a condition such as osteoarthritis may set in. A clear example of the technique may be found in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, where in a claim against solicitors for damages for professional negligence in failing to bring an action on for trial the court awarded the plaintiff a sum representing her prospects of success in the action, being a proportion of the damages which she would have received if one could have been certain that it would have been successful: see also the abundant examples discussed in *McGregor on Damages*, 17th ed (2003), paras 8-024 et seq.

65. This is where the principle exemplified by *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 operates. The respondent waterworks company in that case exercised its statutory power by notice dated 15 October 1898 to prevent the appellant colliery company from proceeding with its intention to work a seam of coal, notified by the appellant in September 1898 under section 22 of the Waterworks Clauses Act 1847. The coal in the protected area would have been reached in or about June 1900 and would have been worked out in about two years from that date. The appellant sought statutory compensation for this loss and the matter went to an arbitration, which concluded in February 1901, the arbitrator giving his award on 26 April 1901 in the form of a special case. The issue between the parties was whether the compensation was to be assessed, not on the basis of the value of coalfield or the coal in question in October 1898, but on the basis of the amount which the appellant could have made from mining the coal. The House rejected the respondent's contention that the coal should have been valued as if on a sale at the date of the appellant's notice in October 1898 and accepted that the proper basis was the profit which the appellant could have made from mining the coal. That being so, if the arbitration had been held soon after October 1898, the arbitrator could have calculated that by estimating the possible rise or fall in the price of coal over the period in which it would have been mined. As it was not held until a later date, he had available up-to-date evidence of the rise in price over the period. It was held that it was wrong to require him to disregard this, for, as Lord Macnaghten said in characteristic style at page 431:

“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?"

66. If the second Gulf War had not broken out by the time the arbitration was held, the arbitrator would have had to estimate the prospect that it might do so and factor into his calculation of the appellants' loss the chance that the charter would be cancelled at some future date under Clause 33. The loss which would have been sustained over the full period of the charter would then have been discounted to an extent which would have reflected the chance, estimated at the time of the assessment, that it would be so terminated. As events happened, however, the arbitrator did not come to assess damages until after the outbreak of war, when, as he found, the respondents would have cancelled the charter. The outbreak of the second Gulf War was then an accomplished fact, which was highly relevant to the amount of damages, and in my opinion the arbitrator was correct to take it into account in assessing the appellants' loss. As Lord Robertson put it in the *Bwllfa* case at page 432, "estimate and conjecture are superseded by facts." A striking example of the artificiality of failing to have regard to this principle may be seen in paragraph 84 of the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood.

67. Two features relating to this conclusion are worthy of mention. First, it is a necessary assumption in estimating the damages that the hypothetical new charterparty taken to have been negotiated by the appellants in early 2002 would have contained terms which corresponded as closely as possible to those of the original charterparty, including the cancellation provision in Clause 33. Mr Hamblen accepted in argument that one should regard it as containing such a clause and Lord Mance recorded in paragraph 27 of his judgment that the court was told that bilateral war clauses were invariable in time charters for tankers likely to visit the Gulf. Secondly, Mr Hamblen expressed concern that repudiating parties in future cases might attempt to delay the assessment of damages in order to see if such a suspensive condition might come into operation. I recognise that a risk of that nature may exist, but courts and arbitrators have the ability to prevent such abuse if application is made to them to proceed with dispatch.

68. For these reasons and also for those contained in the opinions of my noble and learned friends Lord Scott of Foscote and Lord Brown, I agree with the conclusion reached by Langley J and the Court of Appeal and would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

69. The basic facts of this case could hardly be simpler. On 17 December 2001 the appellant owners accepted the respondent charterers' repudiation of a charterparty which nominally still had nearly four years to run—to 6 December 2005. I say “nominally” because by clause 33 of the charterparty the charterers were entitled to cancel it in the event of war or hostilities breaking out between any two or more of a number of countries including the USA, the UK and Iraq. On 20 March 2003, such a war (the Second Gulf War, hereafter ‘the War’) did indeed break out and the arbitrator has found as a fact that the charterers would in any event then have cancelled the charterparty.

70. Indisputably the owners are entitled to damages for having been deprived of the value of this charterparty for the fifteen months or so up to the outbreak of the War. Are they, however, entitled, as they claim, to be compensated on the basis that the charterparty would have continued for the whole length of its nominal term?

71. The owners advance their argument by reference to the familiar principle that damages for breach of contract ordinarily fall to be assessed as at the date of the breach (the breach date rule as it was called in argument). They submit that that principle is applicable here and that the assessment of damages must accordingly ignore the outbreak of the War. That, it is argued, is a subsequent event of no relevance to the proper assessment of the owner's loss in December 2001. Indeed, even had there existed in December 2001 a very substantial risk of imminent war in the Gulf, the owner's principal argument would require it to be ignored: only if it could be shown that by that date war was inevitable—“pre-destined to happen” in the words of Megaw LJ in *The Mihalis Angelos* [1971] 1 QB 164 (in the passage cited by my noble and learned friend Lord Bingham of Cornhill at para 14)—could it be brought into account to ensure that “the damages which [the owners] can recover are not more than the true value, if any, of the rights which [they have] lost, having regard to those pre-destined events” (again the words of Megaw LJ in the same passage). The charterers submit to the contrary that, whilst certainly (given the availability of a market for the vessel's period chartering) the breach date rule would operate in this case to fix the daily net differential base charter rate, it should not

determine either the period for which that loss was suffered or the date for assessing that period.

72. A single issue has been formulated by the parties for your Lordships' determination on the appeal:

“Where damages for an accepted repudiation of a contract are claimed, in what circumstances can the party in breach rely on subsequent events to show that the contractual rights which have been lost would have been rendered either less valuable or valueless?”

73. It is convenient at this point to notice the way this issue was dealt with by the arbitrator in his Second Declaratory Arbitration Award. His main conclusion—to which he felt reluctantly driven by Timothy Walker J's decision in *The Seaflower* [2000] 2 Lloyd's Rep 37—was that the outbreak of war “did place a temporal limit on the recoverability of damages ... and that no damages are recoverable for the period from 21 March 2003 onwards.” But his award considered also what the position would have been if (contrary to his main conclusion) damages had had to be assessed as at December 2001. The owners (relying on *The Mihalis Angelos*) argued that in that event the charterers would have had to show that as at that date war was inevitable; the charterers submitted to the contrary that all they would have needed to establish was that war was probable. Expert evidence on this issue was adduced respectively from a professor of peace studies and a professor of war studies, one saying that war had been inevitable, the other (as recorded in para 35 of the award) that “its level of probability was not above 50%, as of mid-December 2001.” The arbitrator expressed his conclusion at para 59:

“On the evidence, I have concluded that at 17 December 2001, a reasonably well-informed person would have considered war (or large-scale hostilities) between the United States/United Kingdom and Iraq merely a possibility. I do not consider that such a person would have considered it inevitable or even probable but merely a possibility, although I do accept that the degree of probability would have been higher had that person known as much about the prevailing circumstances then as we do today. In view of this finding it is unnecessary for me to consider whether the relevant degree of likelihood is that

war was inevitable or that it was likely to occur on the balance of probabilities, although it appears that I am bound by the decision in *The Seaflower* and that the relevant degree of likelihood required is ‘inevitable’.”

74. Having regard to his main conclusion, of course, this secondary issue was not in any event capable of influencing the result: that was to be determined by the known outcome of events, not some notional earlier forecast. It seems to me, however, important to consider its implications. There was in this charterparty (as my noble and learned friend Lord Carswell points out at para 59 of his opinion) a suspensive condition, clause 33, recognised by the parties to be capable of bringing this contract to a premature end. Could it really be the position that only were cancellation under clause 33 inevitable could it properly be brought into account in calculating the value of this repudiated contract? What, indeed, in this context does inevitability connote? At what point in the remaining four years of the nominal term of this charterparty did its premature cancellation have to be inevitable? It would be one thing if war were adjudged likely to have broken out within a month, quite another if that was not to be for a further three years—and so forth. For my part, I have found *The Mihalis Angelos* of little assistance on this appeal. The position that arose there could hardly have been more different. It concerned a single voyage charterparty. Once it was recognised that the charterers would have been bound in any event to have cancelled the charterparty before ever it took effect, the owners could establish no loss. It was an all or nothing case. The voyage either would or would not have taken place. Not so here: the question rather was whether and if so when the charterparty would have been ended under clause 33 before the completion of its nominal term. Even had war not broken out by the time damages came to be assessed I can see no reason why that question should not have been addressed in the conventional way, i.e. by making the best possible assessment of the likely course of future events as at the date of assessment. As Lord Denning MR said in *The Mihalis Angelos*, at p 196: “You must take into account all contingencies which might have reduced or extinguished the loss.” It was hardly a novel proposition.

75. I realise, of course, that I have yet to address the central question arising for your Lordships’ decision: the date by reference to which the overall damages assessment falls to be made. It seems to me, however, essential first to appreciate just what is the exercise the tribunal assessing damages would be embarking upon.

76. Not only do I reject the owners' contention that the tribunal would be concerned with contingencies only if, at the relevant date, they were *inevitable*, but I reject too the charterers' concession, apparently implicit in their competing submission to the arbitrator, that only contingencies which are *probable* need be brought into account. It seems to me that before the arbitrator everyone was mesmerised by *The Mihalis Angelos*, a case which, as I have already suggested, affords very little assistance in the very different circumstances arising here. And, indeed, despite their apparent approval of Megaw LJ's formulation of the test in *The Mihalis Angelos*, I understand both Lord Bingham and my noble and learned friend Lord Walker of Gestingthorpe to accept that account should properly be taken of a contingency which would reduce the value of the contract lost even were the chance of it happening less than 50% (provided always that it was of some real and not just minimal significance)—see particularly para 22 of Lord Bingham's opinion and para 46 of Lord Walker's.

77. In this connection I respectfully disagree with Lord Walker's interpretation (in para 45 of his opinion) of the arbitrator's findings. Unlike him, I understand the arbitrator's characterisation (in para 59 of his award) of the prospect of war as at 17 December 2001 as "merely a possibility" to mean precisely "less than a 50% prospect." On the arguments addressed to him, the only issue was whether the correct test was one of probability or inevitability. Once he decided on the facts that neither of those tests was satisfied here, it was unnecessary for him to say more. The expression "merely a possibility" was used simply in contradistinction to both the rival situations being contended for, probability and inevitability. Para 59 was, indeed, an acceptance of Professor Freedman's view, expressed at para 35, "that war was clearly neither pre-destined nor inevitable and, indeed, its level of probability was not above 50%, as of mid-December 2001." Not even Professor Freedman was suggesting that the prospect of war was only an outside possibility, of no real significance whatever. His evidence was no more extreme than that the prospect "was not above 50%." Assuming this were so, whether the prospect was 5% or 45% was, on the arguments addressed to the arbitrator, immaterial.

78. In the end, I should add, nothing to my mind turns on this difference between Lord Walker and myself. My more fundamental conclusion, as I shall shortly explain, is that the breach date rule does not require contingencies—such as the likely effect of a suspensive condition—to be judged prior to the date when damages finally come to be assessed. All I am presently concerned to demonstrate is that, whatever the appropriate date by reference to which the assessment must

be made, the taking into account of a contingency is likely to be an altogether more complex exercise than it was in *The Mihalis Angelos* and that it will not generally be possible, as it was there, simply to decide one way or the other (in that case it mattered not whether at the point of breach or later) whether or not the whole contract was inevitably doomed to fail. The point is sufficiently made if the arbitrator here *might* have found, say, a 30% or 40% prospect of war as at December 2001. The next question would have been: war when? Could it really be thought in the interests of certainty to address these questions as of some date prior to that on which damages are in fact being assessed? To my mind, not. Must the judge really shut his eyes to the known facts and speculate how matters might have looked at some earlier date? Again, not without compelling reason and none appears to me. Lord Bingham (at para 12) and Lord Carswell (at para 65) have already explained the “*Bwllfa* principle”: *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426. There is no need to repeat it. Suffice it to say that I see no good reason to depart from it here.

79. It is time finally to address the breach date rule directly. Its most obvious manifestation is to be found in section 51(3) of the Sale of Goods Act 1893:

“Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

But the rule is by no means confined to the sale of goods context and, as Lord Bingham explains, has been applied by analogy to a variety of other situations. Essentially it applies whenever there is an available market for whatever has been lost and its explanation is that the injured party should ordinarily go out into that market to make a substitute contract to mitigate (and generally thereby crystallise) his loss. Market prices move, both up and down. If the injured party delays unjustifiably in re-entering the market, he does so at his own risk: future speculation is to his account—“the buyer’s decision is (in the vernacular) down to him” (Bingham LJ, as he then was, in *Kaines (UK) Ltd v Osterreichische* [1993] 2 Lloyd’s Reports 1, 11).

80. The rule is easy to apply where, for example, goods or shares are traded: if it is the seller who is injured by non-acceptance, he must as soon as possible re-sell the goods or shares at the then available market price; if the buyer, he must similarly buy in substitute goods or shares. But undoubtedly the rule can be applied in more complex situations, for example, to building or repairing contracts and, most relevantly for present purposes, to breached charterparties—see particularly *The Mihalis Angelos*, *The Elena d’Amico* [1980] 1 Lloyd’s Rep 75, *The Wave* [1981] 1 Lloyd’s Rep 521, *The Noel Bay* [1989] 1 Lloyd’s Rep 361 and *The Seaflower* [2000] 2 Lloyd’s Rep 37. Where goods or shares are sold, the breach date rule is at its strictest. In other cases, however, time may well be needed before the injured party can reasonably be required to re-enter the market. *Radford v De Froberville* [1977] 1 WLR 1262 concerned a defendant’s contractual failure to build a wall on the plaintiff’s land. In a much quoted judgment Oliver J at p 1285 said this:

“It is sometimes said that the ordinary rule is that damages for breach of contract fall to be assessed at the date of the breach. That, however, is not a universal principle and the rationale behind it appears to me to lie in the inquiry—at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to performance of the contractual obligation?”

Or take *Dodd Properties (Kent) Ltd v Canterbury City Council* [1981] 1 WLR 433, a case of contractual liability for serious structural damage, where Megaw LJ (at p 451) said this:

“The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages. That rule conforms with the broad and fundamental principle as to damages, as stated in Lord Blackburn’s speech in *Livingston v Rawyards Coal Co* (1880) 5 App Cas.25, 39, where he said that the measure of damages is:

‘ ... that sum of money which will 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

for which he is now getting his compensation or reparation.’

In any case of doubt, it is desirable that the judge, having decided provisionally as to the amount of damages, should, before finally deciding, consider whether the amount conforms with the requirement of Lord Blackburn’s fundamental principle.”

A little later, Megaw LJ (at p 453) added:

“I agree with the observations of Oliver J in *Radford v De Froberville* ... as to the relationship between the duty to mitigate and the measure, or amount, of damages in relation to a question such as the question with which we are here concerned.”

81. Take, indeed, this very case. Whilst it was not disputed before the arbitrator that an available market existed for the chartering of this vessel, the owners contend that a new fixture could only have commenced earning on 1 April 2002 and in the result claim for loss on the spot (rather than the period charter) market for the three and a half months between 17 December 2001 and 1 April 2002. In this case, as in *Dodd Properties*, therefore, account must necessarily be taken of post-breach events. Why then ignore the outbreak of the War? Say that this had started a year earlier, on 20 March 2002, before a substitute charterparty could have commenced earning? Would the damages assessment really have had to ignore it? Nor, indeed, is the lapse of some three and a half months before a substitute charterparty could have commenced earning the only, or even the main, post-breach event necessarily to be taken into account here. As my Lords have observed, the rate of hire of the *Golden Victory* consisted only partly of the base charter rate; it consisted also of a share in the charterers’ operating profit over and above that rate and this latter element of the claimed loss, as Lord Mance pointed out, would require any court or arbitrator to take account of actual market rates during the relevant period over which the loss is claimed. Yet on the owners’ argument that part of the claim too would continue throughout the remaining four years of this charterparty, the intervention of the War notwithstanding.

82. None of the earlier charterparty cases to my mind addresses or determines the particular problem arising here. In none of them, as Lord Carswell has observed, was there a suspensive condition which could

(and which we know in the event would) have operated to bring the contract to an early end. Any substitute contract here—albeit, as the arbitrator found, for the 4 year balance of the original 7 year term—would have been subject to the self-same conditions as the repudiated contract. And it can be assumed that the hypothetical substitute charterers would similarly have cancelled their contract on the outbreak of the War. The arbitrator surmised that had the owners in December 2001 sold the vessel with a substitute 4 year charter “the value they would have received would surely have been calculated on that basis” i.e. the basis of a 4 year charterparty with war “no more than a possibility.” Even were that so, however, no one has ever suggested that the breach date rule operated here so as to require the owners to go out into the market not only to obtain a substitute charter but also then to sell the vessel. The measure of loss did not fall to be crystallised on this basis.

83. In my opinion the owners’ argument here seeks to extend the effect of the available market rule well beyond its proper scope and to do so, moreover, at the plain expense of Lord Blackburn’s fundamental principle: to restore the injured party to the same position he would have been in but for the breach, not substantially to improve upon it. It is one thing to say that the injured party, mitigating his loss as the breach date rule requires him to do, thereby takes any future market movement out of the equation and to that extent crystallises the measure of his loss; it is quite another to say, as the owners do here, that it requires the arbitrator or court when finally determining the damages to ignore subsequent events (save where the defendants can demonstrate that at the date of breach some suspensive condition would inevitably—and immediately—have operated to cancel the contract). There is no warrant for giving the rule so extended an application.

84. There is a final point to be made. Shift the facts here and assume that the arbitrator had found, as at December 2001, a probability (or even merely a significant possibility) of (perhaps imminent) war breaking out in the Gulf, but that in fact, by the time damages finally came to be assessed, not only had war not broken out but all risk of it had disappeared—or, indeed, the assessment might not have taken place until the whole nominal term of the charterparty had expired. On the view taken by the minority of your Lordships, the damages award would have had to reflect a risk which never in fact eventuated a conclusion in the circumstances, greatly to the owner’s disadvantage, yet that inescapably is the logic of the minority’s approach. Is such a result compelled in the interests of “certainty” or “finality” or “consistency” or “predictability” (the interests identified by Lord Bingham at para 23 of

his opinion), or so that the charterers could have “promptly honoured their secondary obligation to pay damages” (Lord Bingham at para 22)? In my judgment it is not. When market movement can be eliminated from the assessment of damages (as here with regard to the charterparty rate) it should be (by the breach date rule). But not history; the Court need not shut its mind to that.

85. In short, I find myself in full agreement with the judgments of Langley J at first instance in the Commercial Court and Lord Mance in the Court of Appeal, and the opinions of Lord Scott of Foscote and Lord Carswell in your Lordships’ House. I too would dismiss this third appeal from the arbitrator’s decision.