Trinity Term
[2015] UKSC 43
On appeal from: [2013] EWCA Civ 1628

JUDGMENT

Bunge SA (Appellant) *v* Nidera BV (formerly known as Nidera Handelscompagnie BV) (Respondent)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

1 July 2015

Heard on 27 and 28 April 2015

<table>
<tr><td>Appellant
Simon Rainey QC
Mark Stiggelbout
(Instructed by Reed Smith)</td><td>Respondent
Philip Edey QC
Leonora Sagan
(Instructed by Hill Dickinson)</td></tr>
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LORD SUMPTION: (with whom Lord Neuberger, Lord Mance and Lord Clarke agree)

Introduction

1. This appeal concerns the effect of the default clause in a standard form of contract which is widely used in the grain trade. On 10 June 2010 the respondents, Nidera BV, whom I shall call "the buyers", entered into a contract with the appellants, Bunge SA ("the sellers"), to buy 25,000 metric tonnes (+/- 10% in buyer's option) of Russian milling wheat crop 2010, FOB Novorossiysk. The shipment period was August 2010, but there were provisions for narrowing that period by notice. In the event it was narrowed to 23-30 August 2010. The contract incorporated GAFTA Form 49 (as in effect from 1 January 2006), which is the standard form of FOB sale contract of the Grain and Feed Trade Association, for goods delivered from central or Eastern Europe in bulk or bags.

2. Clauses 13 and 20 of GAFTA 49 are the main provisions relevant to the present dispute. They provided:

> "13. **PROHIBITION** - In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin of the goods, or of the country from which the goods are to be shipped, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to·apply to this contract and to the extent of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract or any unfulfilled portion thereof shall be cancelled. Sellers shall advise buyers without delay with the reasons therefor and, if required, Sellers must produce proof to justify the cancellation."

> "20. **DEFAULT -** In default of fulfilment of contract by either party, the following provisions shall apply:
>
> > (a) The party other than the defaulter shall, at their discretion have the right, after serving notice on the defaulter, to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.

> (b) If either party be dissatisfied with such default price or if the right at (a) above is not exercised·and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.
>
> (c) The damages payable shall be based on, but not limited to the difference between·the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods on the date of default established under (b) above.
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> (d) In all cases the damages shall, in addition, include any proven additional expenses which would directly and naturally result in the ordinary course of events from the defaulter's breach of contract, but shall in no case include loss of profit on any sub-contracts made by the party defaulted against or others unless the arbitrator(s) or board of appeal, having regard to special circumstances, shall in his/their sole and absolute discretion think fit.
>
> (e) Damages, if any, shall be computed on the quantity called for, but if no such quantity has been declared then on the mean contract quantity and any option available to either party shall be deemed to have been exercised accordingly in favour of the mean contract quantity."

3. On 5 August 2010 Russia introduced a legislative embargo on exports of wheat from its territory, which was to run from 15 August to 31 December 2010. On 9 August 2010, the sellers notified the buyers of the embargo and purported to declare the contract cancelled. The buyers did not accept that the sellers were entitled to cancel the contract at that stage. They treated the purported cancellation as a repudiation, which they accepted on 11 August 2010. On the following day, the sellers offered to reinstate the contract on the same terms, but the buyers would not agree. Instead, they began arbitration proceedings under the GAFTA rules, in support of a claim for damages of US$3,062,500.

The proceedings below

4. At the hearing of the arbitration, there was a measure of common ground about the basis for assessing damages. It was agreed (i) that clause 20 applied to anticipatory repudiation, (ii) that the buyers had not bought against the sellers

pursuant to sub-clause (a); (iii) that the date of default for the purpose of clause 20(c) was 11 August 2010, when the sellers' repudiation was accepted, and (iv) that the difference between the contract and the market price at that date was US$3,062,500. The sellers' case was that they had been entitled to terminate the contract under clause 13 upon the announcement of the export ban, and that even if the termination was premature, the fact that shipment under the contract would have been subject to the ban when the time for shipment came meant that no loss had been suffered.

5. GAFTA's first tier arbitration tribunal issued its award on 1 November 2011. It held that the sellers had repudiated the contract because their notice of cancellation was premature. The embargo might have been lifted in time to permit shipment within the laycan period. It was therefore impossible to say, as at the date when the sellers cancelled, that shipment would necessarily be prevented by the embargo. But the tribunal declined to award substantial damages. They held, in agreement with the sellers, that none had been suffered because in fact the embargo was not lifted. It followed that the contract would have been cancelled in any event when the time came for delivery.

6. Both parties appealed to the GAFTA Appeal Board, which issued its own award on 22 June 2012. The Board agreed with the first tier tribunal that the sellers had repudiated the contract by cancelling too early. It accepted that if the contract had not been repudiated on 9 August 2010 it would have been cancelled because of the embargo. But it awarded damages of US$3,062,500, representing the difference between the contract and the market price on 11 August 2010, the date that the repudiation was accepted. In the Appeal Board's view, such an award was required by clause 20(c) of GAFTA 49.

7. The sellers' argument, as summarised in the Appeal Board's award, was that at common law it was necessary to take account of events occurring after the breach which showed that the same loss would have been suffered even without the repudiation. They relied on *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164, and *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 535. The issues were (i) whether that was indeed the position at common law in the case of a contract of this kind; and (ii) if so, whether the common law principle had any application to a contract containing clause 20.

8. The Appeal Board doubted whether at common law subsequent events would be relevant to the assessment of damages under a contract for the sale of a single cargo, as opposed to a contract for delivery by instalments. But they considered that the issue on damages turned wholly on the effect of clause 20 as that clause was "commonly understood in the trade". They concluded that sub-clause (c) was intended to produce an "easily understood and readily applied" formula for

computing damages in a case where agreement was not reached under sub-clauses (a) and (b). That formula might produce a figure more or less than the actual loss. Proceeding from the common ground that the default date for the purpose of sub-clause (c) was 11 August 2010 and from the parties' agreement on figures, they awarded the full amount of the buyers' claim.

9. This conclusion was also determinative, in the view of the Appeal Board, of the sellers' further argument that the buyers had failed to mitigate their loss by accepting the sellers offer to reinstate the contract on the same terms. As the Appeal Board saw it, the buyers acted reasonably in rejecting the offer, because at the time it was made they had a vested right to a large sum by way of damages and acceptance of the offer would have substituted a right to delivery that would probably have been defeated by the embargo.

10. On 10 October 2012, Andrew Smith J gave permission to appeal against the award under section 69 of the Arbitration Act 1996, limited to the following issues:

> "2.1. Is the application of the GAFTA prohibition clause limited to a case where it can be seen after the event that performance of the contract has in fact been prevented by the prohibition in question?
>
> 2.2. Does the GAFTA default clause exclude common law principles for the assessment of damages for anticipatory repudiatory breach and in particular (i) the principle of mitigation and/or (ii) the compensation principle identified in *The Golden Victory* [2007] 2 AC 353?
>
> 2.3. Is the 'overriding compensatory principle' established by *The Golden Victory* limited to instalment contracts?
>
> 2.4. Was the board wrong in law to conclude that the buyers' rejection of the sellers' offer to reinstate the contract did not constitute a failure to mitigate on the ground that the sellers did not offer to reinstate the contract on different and more favourable terms than contained in the original contract?"

11. Hamblen J, who heard the appeal in the Commercial Court, dismissed the appeal on issues 2.1, 2.2 and 2.4: [2013] EWHC 84 (Comm); [2013] 1 Lloyd's Rep 621. Since he agreed with the Appeal Board that clause 20 determined the measure of damages whether or not it produced a result corresponding to the common law, he held that issue 2.3 did not arise. But he shared the doubts of the Appeal Board about the application of *The Golden Victory* to a contract for a single cargo,

observing that this was "very much an open question". In the Court of Appeal, the sellers abandoned their arguments on mitigation (issues 2.2(i) and 2.4). On the remaining issues, the Court of Appeal (Moore-Bick, Floyd and Clarke LJJ) affirmed the decision of Hamblen J: [2013] EWCA Civ 1628; [2014] 1 Lloyd's Rep 404.

The common law

12. Anticipatory breach of contract, probably more accurately referred to as "renunciation", is a concept which can be traced back to the earliest years of the common law but was first coherently formulated in terms of legal principle in *Hochster v De la Tour* (1853) 2 E & B 678 in England and *Howie v Anderson* (1848) 10 D 355 in Scotland. In its modern form it is a response to the pragmatic concern of Victorian judges to avoid the waste of economic resources implicit in any inflexible rule which required the parties to go through the motions of performing a contract which was for practical purposes dead. The same concern informs much of the law of contract, notably in the area of frustration and remedies. The early rules of pleading, reflecting the terms of the contract, had required the plaintiff in an action for damages to plead that he had tendered performance of any obligation to be performed by him as a condition precedent to the defaulting party's obligation. But as Lord Campbell explained in *Hochster v De la Tour*, the effect of the renunciation of a contract in advance of the time agreed for performance was (i) to confer on the injured party an option to accept the renunciation as bringing the contract to an end and to treat himself as discharged from that time onward from further performance; (ii) to enable the injured party to deal with the financial consequences by suing for damages at once, without waiting for the time fixed for performance; and (iii) to bring forward the injured party's duty to mitigate to the time when the renunciation was accepted.

13. An accepted renunciation gives rise to particular problems of legal analysis when it comes to the assessment of damages. As Lord Mustill observed in a characteristically sardonic comment on recent case-law:

> "there is every reason to be wary about applying the ordinary rules of damages for breach of contract to this special type of 'breach' … unlike the position regarding actual breach I do not see how damages for an 'anticipatory' breach can be awarded with any semblance of intellectual rigour without at least an attempt to inquire into what was the breach to which the damages are attached, and what kind of breach it was which could be committed before there was any present obligation to perform. … the common law has never succeeded in finding a solution which is both theoretically sound and capable of producing sensible results in practice. The attempt was, to all intents and purposes, given up a long time ago, and the courts have been

> content to employ that powerful but dangerous weapon of the common law, a fiction. … in the field of anticipatory repudiation, a breach was simply assumed to have occurred when the repudiatory conduct took place, and at least where there was an available market for the goods or services in question those responsible for assessing damages were content to look directly to a comparison between the current market prices or rates and those prescribed by the contract, without any inquiry into why this comparison was being made."

M Mustill, "*The Golden Victory – Some Reflections*" (2008) 124 LQR 569, 571-572.

14. The fundamental principle of the common law of damages is the compensatory principle, which requires that the injured party 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": *Robinson v Harman* (1848) 1 Exch 850, 855 (Parke B). In a contract of sale where there is an available market, this is ordinarily achieved by comparing the contract price with the price that would have been agreed under a notional substitute contract assumed to have been entered into in its place at the market rate but otherwise on the same terms.

15. Section 51 of the Sale of Goods Act 1979 provides:

> "51. Damages for non-delivery
>
> (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
>
> (3) 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."

Section 50 contains corresponding provisions for non-acceptance by the buyer.

16. Sections 50 and 51 reproduce the corresponding provisions of the Sale of Goods Act 1893, and reflect common law principles which had already been established at the time of the earlier Act. Section 51(2) states the compensatory principle in the context of a seller's non-delivery. Subsection (3) states the prima facie measure of damages where there is an available market, but it is not so much a rule as a technique which is prima facie to be treated as satisfying the general principle expressed in subsection (2). It is not obvious from the terms of the section how it is to apply to a case where by reason of an accepted renunciation the contract has come to an end in advance of the contractual time for delivery. That situation gives rise to two potential questions which are not always sufficiently distinguished in the case-law. The first question is: assuming that there is an available market, as at what date is the market price to be determined for the purpose of assessing damages? It is clear that once that date is determined, any subsequent change in the market price is irrelevant. Most of the case-law on the measure of damages for the repudiation of a contract of sale arises out of disputes about the relevant market price, and this is what judges speaking of the breach-date rule are usually referring to. The second question is: in what if any circumstances will it be relevant to take account of contingencies (other than a change in the market price) if subsequent events show that they would have reduced the value of performance, perhaps to nothing, even without the defaulter's renunciation? This may happen, for example, if the injured party would have been unable to perform it when the time for performance arrived, or if the defaulter would have been relieved of the obligation to perform by frustration or under the express terms.

17. The answer to the first question, although like section 51(3) it is only a prima facie answer, is that where there is an available market for the goods, the market price is determined as at the contractual date of delivery, unless the buyer should have mitigated by going into the market and entering into a substitute contract at some earlier stage: *Garnac Grain Co Inc v HMF Fauré & Fairclough Ltd* [1968] AC 1130, 1168; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, 102. Normally, however, the injured party will be required to mitigate his loss by going into the market for a substitute contract as soon as is reasonable after the original contract was terminated. Damages will then be assessed by reference to the price which he obtained. If he chooses not to do so, damages will generally be assessed by reference to the market price at the time when he should have done: *Koch Marine Inc v d'Amica Societa di Navigazione (The Elena D'Amico)* [1980] 1 Lloyd's 75, 87, 89. The result is that in practice where there is a renunciation and an available market, the relevant market price for the purposes of assessing damages will generally be determined not by the prima facie measure but by the principles of mitigation.

18. The answer to the second question was given initially by the Court of Appeal in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis*

Angelos) [1971] 1 QB 164 and then by the House of Lords in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353.

19. In the first of these cases the Court of Appeal held that on the assumption that the voyage charterers of *The Mihalis Angelos* had repudiated the contract they were nevertheless not liable for substantial damages. This was because if the contract had continued they would have terminated it lawfully for breach of a condition as to the time of the vessel's arrival at the port of delivery. Lord Denning and Edmund Davies LJ put the matter entirely generally. In Lord Denning's words (at p 196), "You must take into account all contingencies which might have reduced or extinguished the loss". But difficulty arose from the suggestion of Megaw LJ (at pp 209-210) that the result turned on the fact that the vessel was "predestined" to arrive late at the port of delivery.

20. The subsequent decision in *The Golden Victory* disposed of the argument, based on Megaw LJ's dictum, that a subsequent event which would have reduced or extinguished the loss had to be inevitable, viewed at the time when the repudiation was accepted. The facts were that a seven-year time charter had been brought to an end by the charterer's repudiation in the course of performance some four years before its contractual terms but only fourteen months before it would have been cancelled in any event under a war clause. At the time when the charterers' repudiation was accepted, war was far from inevitable. It was found to be no more than a possibility. The question was how long it should be assumed, in those circumstances, that the charterparty would have lasted if it had not been wrongfully terminated. The House held by a majority that the overriding principle (or "lodestar") was the compensatory principle. Irrespective of the date as at which the market price was ascertained, it was necessary to take account of contingencies known at the date of the arbitrator's assessment to have occurred, if their effect was that the contract would have been lawfully terminated at or before its contractual term. It followed that damages were to be assessed on the assumption that the charter would have lasted for another 14 months.

21. The reasoning has to some extent been obscured by the focus on the implications of the so-called "breach-date rule" and on the competing demands of certainty and compensation. The real difference between the majority and the minority turned on the question what was being valued for the purpose assessing damages. The majority were valuing the chartered service that would actually have been performed if the charterparty had not been wrongfully brought to a premature end. On that footing, the notional substitute contract, whenever it was made and at whatever market rate, would have made no difference because it would have been subject to the same war clause as the original contract: see Lord Scott of Foscote at para 37, and Lord Brown of Eaton-under-Heywood at paras 76-78 and 82. The minority on the other hand considered that one should value not the chartered service which would actually have been performed, but the charterparty itself, assessed at

the time that it was terminated, by reference to the terms of a notional substitute concluded as soon as possible after the termination of the original. That would vary, not according to the actual outcome, but according to the outcomes which were perceived as possible or probable at the time that the notional substitute contract was made. The possibility or probability of war would then be factored into the price agreed in the substitute contract: see Lord Bingham of Cornhill at paras 22 and Lord Walker of Gestingthorpe at paras 45-46. I think that the majority's view on this point was correct. Sections 50 and 51 of the Sale of Goods Act, like the corresponding principles of the common law, are concerned with the price of the goods or services which would have been delivered under the contract. They are not concerned with the value of the contract as an article of commerce in itself. As Lord Brown observed at paras 82-83, even if the charterparty rights could have been sold for a capital sum, this was not a proper basis for assessing loss, and an assessment which proceeded as if it were would "extend the effect of the available market rule well beyond its proper scope".

22. The leading speech for the majority, which was delivered by Lord Scott of Foscote, contains dicta which have sometimes been taken to suggest a distinction between a contract for a one-off sale and a contract for the supply of goods or services over a period of time: see paras 34-35. These dicta influenced both the Appeal Board and Hamblen J in the present case. But I do not think that Lord Scott was suggesting that the underlying principle was any different in the case of a one-off sale. Where the only question is the relevant date for taking the market price, the financial consequences of the breach may be said to "crystallise" at that date. But where, after that date, some supervening event occurs which shows that that neither the original contract (had it continued) nor the notional substitute contract at the market price would ever have been performed, the concept of "crystallising" the assessment of damages at that price is unhelpful. The occurrence of the supervening event would have reduced the value of performance, possibly to nothing, even if the contract had not been wrongfully terminated and whatever the relevant market price. The nature of that problem does not differ according to whether the contract provides for a single act of performance or several successive ones. Nor, as it seems to me, is there any principled reason why the majority's solution should be any different in the two cases. If a distinction were to be made between them, it is difficult to see how *The Mihalis Angelos*, which concerned a contract for a single voyage, could have been decided as it was. As Lord Scott observed in *The Golden Victory* at para 36, the compensatory principle would be equally offended by disregarding subsequent events serving to reduce or eliminate the loss under "any anticipatory breach the acceptance of which had terminated an executory contract". The most that can be said about one-off contracts of sale is that the facts may be different. In particular, if the injured party goes into the market and enters into a substitute contract by way of mitigation, it will not necessarily be subject to the same contingencies as the original contract.

23. The principle upheld in *The Golden Victory* has come in for a certain amount of academic criticism and judicial doubt. To my mind both the criticism and the doubt are unjustified. The most comprehensive and influential critic has been Professor Treitel. His views were set out in their fullest form in a case note on the decision of the Court of Appeal, which had reached the same conclusion as the majority of the Appellate Committee: see "Assessment of Damages for Wrongful Repudiation", (2007) 123 LQR 9. Professor Treitel's case note was cited to the Appellate Committee but evidently did not move them. His main criticisms were, first, that the decision failed to distinguish between the different supervening events (successful mitigation by the defaulting party, inability of the innocent party to perform, cancellation under an express provision) which may serve to reduce or extinguish the loss; secondly, that it took no account of the collateral motives that might have moved the party who had repudiated the contract to cancel it lawfully at a later stage if it had continued; and, thirdly, that it attached insufficient weight to the commercial value of certainty. I am no more convinced by these criticisms than the Appellate Committee was in *The Golden Victory*. The principle which the Committee applied was neither new nor heterodox. There is no principled reason why, in order to determine the value of the contractual performance which has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred. On the contrary, this seems to be fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach. If the contract had not been repudiated, it would have been lawfully cancellable. If it was lawfully cancellable, the charterer would have been entitled to avail himself of that right regardless of his motive. The only question is whether he would in fact have done so, a question which in practice would probably have been determined by his financial interest. Commercial certainty is undoubtedly important, although its significance will inevitably vary from one contract to another. But it can rarely be thought to justify an award of substantial damages to someone who has not suffered any. As Lord Mance pointed out in the Court of Appeal in *The Golden Victory* [2006] 1 WLR 533, para 24, the degree of uncertainty involved in that case was no greater than the uncertainty inherent in the contract itself. The parties' obligations were always defeasible in the uncertain event of war, just as their obligations under the contract presently in issue were always defeasible in the uncertain event of an export embargo.

Clause 20 of GAFTA 49

24. Mr Rainey QC, who appeared before us for the sellers, submitted that there was a strong presumption that an express damages clause was not intended to depart from the compensatory principle applied in *The Golden Victory*. Unless the contract provided otherwise in clear terms, damages would not be awarded where no loss had been sustained. This was not, he said, inconsistent with clause 20, which only required the assessment of damages to be "based on" the difference between the contract price and the market price or value at the relevant time. He proposed that

effect should be given to the parties' presumed intention to adhere to the compensatory principle by distinguishing between two stages of the inquiry, namely (i) whether any loss has been sustained as a result of the breach, and (ii) if so, how much loss had been suffered. Clause 20, he suggested, was concerned with stage (ii) but not stage (i).

25. Two preliminary observations are called for.

26. The first is that damages clauses are commonly intended to avoid disputes about damages, either by prescribing a fixed measure of loss (as in the case of a liquidated damages clause) or by a providing a mechanical formula in place of the more nuanced and fact-sensitive approach of the common law (as in clause 20 of GAFTA 49). In either case, it is inherent in the clause that it may produce a different result from the common law. For that reason there can be no scope for a presumption that the parties intended the clause to produce the same measure of damages as the compensatory principle would produce at common law. The mere fact that in some cases its application will over- or under-estimate the injured party's loss is nothing to the point. Such clauses necessarily assume that the parties are willing to take the rough with the smooth. However, I would accept a more moderate version of Mr Rainey's presumption. A damages clause may be assumed, in the absence of clear words, not to have been intended to operate arbitrarily, for example by producing a result unrelated to anything which the parties can reasonably have expected to approximate to the true loss.

27. The second preliminary observation is that such clauses are not necessarily to be regarded as complete codes for the assessment of damages. A damages clause, like any other contractual provision, is conclusive of the matters with which it deals. It may also implicitly exclude considerations which, although not directly within its scope, cannot be applied consistently with its terms. But it is a question of construction whether the mere fact that it deals with damages means that it must have been intended to do so exhaustively, thereby impliedly excluding any considerations which it has not expressly addressed. To treat a damages clause as a complete code in this all-embracing sense is to tax the foresight of the draftsman in a way which is rarely appropriate unless the alternative is to undermine the coherence or utility of the clause.

28. Clause 20(a)-(c) of GAFTA 49 is concerned with the determination of the difference between the contract price of the goods and their market price or value. Detailed analysis of the way that it works does not affect the outcome of this appeal, and argument on the point was largely foreclosed by the way that the case was put to the arbitrators. But given the importance of the GAFTA default clause, it is right to deal with it. The position may in my view be summarised as follows:

(1) The clause applies, as its opening words declare, "in default of fulfilment of contract by either party". As a matter of ordinary language, the "fulfilment" of the contract means its performance, and "default of fulfilment" means its non-performance. This is the sense in which "fulfilment" is used throughout GAFTA 49. Thus clause 4 deals with brokerage, and provides that it is payable "contract fulfilled or not fulfilled", but not if "such non-fulfilment" is due to the (lawful) cancellation of the contract under the prohibition or force majeure clauses. Clause 13, the prohibition clause, provides that prohibition of export, blockade or of hostilities will cause the contract to be cancelled if and so far as it "prevents fulfilment whether by shipment or by any other means whatsoever". Clause 14 is a more general force majeure clause applicable to cases where "the execution of this contract or any unfulfilled portion thereof" is prevented by specified categories of event. Clause 22 provides for the closing out of the contract in the event of insolvency supervening "before fulfilment of this contract". In each of these contexts the "fulfilment" of the contract clearly refers to the performance of the parties' contractual obligations, and "non-fulfilment" or "default of fulfilment" to their non-performance. The use of the same term in the opening words of clause 20 indicates that that clause is concerned with non-performance. For this purpose, it does not matter whether the contract has not been performed because it was repudiated in advance of the time for performance, or because it was simply not performed when that time arrived. In either case, there is nothing other than contractual performance which can be said not to have been "fulfilled".

(2) Clause 20(a) gives the injured party the option, at its discretion, of selling or buying (as the case may be) against the defaulter, in which case the sale or purchase price will be the "default price". Either party is at liberty to reject the default price, if there is one, as the basis for assessing damages. If either (i) there is no default price, because the injured party did not go into the market to buy or sell against the defaulter, or else (ii) there is a default price but one of the parties is dissatisfied with it, then damages must go to arbitration in accordance with sub-clause (c).

(3) Sub-clause (c) provides for two alternative bases of assessment by the arbitrators. The first, which applies if a default price has been established but not accepted, is the difference between the default price and the contract price. In other words, if the injured party has gone into the market and bought or sold against the defaulter, the arbitrators may accept that the default price should be used to calculate damages, notwithstanding the objections of one or other party or even both of them. The second basis of assessment is the difference between the contract price and the "actual or estimated value" of the contract goods at the "date of default". This means the date of the "default of fulfilment" referred to in the opening words of clause 20, ie the date on

which the contract should have been "fulfilled" by performance in accordance with its terms. (The words "established under (b) above" merely refer to the value "settled by arbitration", that being the only basis on which (b) provides for a value to be fixed.)

(4) The combined effect of sub-clauses (a), (b) and (c) is therefore to produce a measure of damages which differs in two main respects from the common law paradigm. The first is that the injured party is not required to mitigate by going into the market and buying or selling against the defaulter, but has a discretion whether to do so. Damages can be assessed as at the date when the injured party accepted the repudiation only if he actually went into the market to fix a price at that date. The second is that if the injured party has not in fact gone into the market and made a substitute contract the contract price falls to be compared not with the market price of the goods but with their "actual or estimated value". This may be assessed by reference to the market price of different but comparable goods, for example goods of different origin or shipment date.

29. Mr Rainey submits that this careful scheme is concerned only with the question how much loss has been suffered, and that it applies only once it has been determined on a preliminary inquiry that there has been at least some loss. It does not apply if at common law there has been none. I do not accept this. In my view there is one question, namely how much loss has been suffered. Zero is simply one possible answer to that question. Mr Rainey's approach does not even secure the consistent application of the compensatory principle which is said to be its justification. If the clause produces a high figure for the injured party's loss, it would fall to be applied if the figure calculated in accordance with the compensatory principle was low but not if it was zero. If, for example, the injured party had suffered some modest out of pocket expenses recoverable under sub-clause (d), that would result in the application of the clause to the whole of the rest of the claim, however much its effect was to overstate the actual loss. These consequences seem at least as arbitrary and anomalous as those of which Mr Rainey's clients complain.

30. The real distinction in my opinion is not between cases where there would be some damage at common law and cases where there would be none. It is between the two questions which I have identified at para 16 above. As applied to facts like these, they are, first, what is the relevant market price or value of the goods for the purposes of assessing damages? And, secondly, in what circumstances is it relevant to take account of contingencies, other than changes in the market price or value of the goods, which would have prevented the goods from being delivered whatever the market price or value, with the result that the buyer would have suffered the same loss in any event?

31. Leaving aside the provisions of sub-clause (d) relating to additional expenses and losses on sub-contracts, which have no bearing on the present issue, clause 20 is concerned only with the first of these questions. Sub-clauses (a) to (c) constitute an elaborate, indeed a complete, code for determining the market price or value of the goods that either were actually purchased by way of mitigation or might have been purchased under a notional substitute contract. The clause does not deal at all with the effect of subsequent events which would have resulted in the original contract not being performed in any event. The effect of these events could be excluded from consideration only if clause 20 were treated as a complete code not just for determining the relevant market price or value but for every aspect of the assessment of damages.

32. In my opinion clause 20 cannot be viewed in that way. In the first place, it neither provides nor assumes that assessment will depend only on the difference between the contract price and the relevant market price or value. It provides that the damages payable "shall be based on" that difference. It does not exclude every other consideration which may be relevant to determine the injured party's actual loss. The clause is consistent with a conclusion that because of a subsequent supervening event the contract would never have been performed and the same loss would have been suffered even if it had not been renounced. Secondly, this is what one would in any event infer from the limited subject-matter of the clause. Clause 20 is not sufficiently comprehensive to be regarded as a complete code covering the entire field of damages. Sub-clause (c) covers the same territory as sections 50(3) and 51(3) of the Sales of Goods Act, and sub-clauses (a) and (b) cover the territory occupied by the common law principles concerning the mitigation of losses arising from price movements. But this is very far from the entire field. These provisions bring a valuable measure of certainty to issues arising from price movements which have given rise to difficulty and dispute at common law for 150 years. That is a valuable purpose which the clause achieves whatever the answer to the question now before us. But clause 20 is not concerned with bases of assessment which do not depend on the terms of a notional substitute contract or on any determination of the market price: for example expenses incurred by the buyer in the course of performance, which are not occasioned by the breach of contract but have been rendered futile by it, and would normally be recoverable as an alternative to the prima facie measure. Moreover, although the clause deals with the injured party's duty to mitigate by going into the market to buy or sell against the defaulter, it does not deal with any other aspect of mitigation. It therefore leaves open the possibility that damages may be affected by a successful act of mitigation on the part of the injured party or by an offer from the defaulter which it would have been reasonable for the injured party to accept. Likewise, in my opinion, clause 20 neither addresses nor excludes the consideration of supervening events (other than price movements) which operate to reduce or extinguish the loss.

33. A similar conclusion was reached in two decisions concerning similar default clauses, both of which I respectfully regard as consistent with principle. *Bem Dis A Turk S/A TR v International Agri Trade Co Ltd (The Selda)* [1998] 1 Lloyd's Rep 416 (Clarke J), [1999] 1 Lloyd's Rep 729 (CA) arose out of the sellers' repudiation of a C&F contract containing an earlier version of the GAFTA default clause, which was similar to clause 20 but did not include the provision of sub-clause (d) allowing the recovery of expenses occasioned by the breach. The buyers made no claim for damages based on the difference between the contract price and the market price or value, presumably because the market had moved in their favour since the original contract was made. They claimed only the expenses occasioned by the repudiation. They recovered them from the arbitrators, and the award was affirmed by both Clarke J and the Court of Appeal. Among the arguments which were rejected at all three stages was that the default clause was a complete code covering the whole field of damages. This was because it was concerned only with the computation of damages "based on" the difference between the contract price and the market price or value, or on the losses incurred on sub-contracts. A claim for expenses lay outside its scope and was not therefore implicitly excluded.

34. The argument rejected in *The Selda* was that the default clause impliedly excluded any head of loss which it did not expressly allow, and some significance was attached to the analogy with exclusion clauses drawn by Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717-718. But I think that the analysis would have been the same in the converse case, where it was suggested that the clause impliedly required the award of a head of damage which has not been suffered. This was the position in *Novasen SA v Alimenta SA* [2013] 1 Lloyd's Rep 647, the facts of which were indistinguishable from those of the present case. The contract incorporated a standard form of the Federation of Oil, Seeds and Fats Associations which included a default clause similar to clause 20(a)-(c) and (e) of GAFTA 49, except that the difference between the contract and the market price was expressed to be the maximum measure of damages. The issue was whether a loss computed in accordance with the clause had been extinguished by the later operation of an export ban at the contractual point of shipment. Popplewell J held that it had, on the ground that nothing in the clause required a loss calculated in accordance with the default clause to be awarded to the injured party if supervening events showed that it had not been suffered.

35. This result seems to me to be consistent with principle. The alternative is to allow the clause to operate arbitrarily as a means of recovering what may be very substantial damages in circumstances where there has been no loss at all. In the present case, the sellers jumped the gun. They repudiated the contract by anticipating that the Russian export ban would prevent shipment at a time when this was not yet clear. But fortunately for them their assumption was in the event proved to have been correct. The ban would have prevented shipment when the time came. The buyers did nothing in consequence of the termination, since they chose not to go

into the market to replace the goods. They therefore lost nothing, and the arbitrators should not have felt inhibited from saying so.

Conclusion

36. In my opinion the answer to question 2.3 in Andrew Smith J's order granting permission to appeal from the award is that the compensatory principle established in *The Golden Victory* is not limited to instalment contracts, and that the GAFTA Appeal Board was in error in thinking that it was. The answer to question 2.2(ii) in the order is that the default clause in GAFTA 49 does not exclude the principle identified in *The Golden Victory* [2007] 2 AC 353. In both respects, the correct conclusion had been reached in the first tier award. It follows that I would allow this appeal and vary the award of the Appeal Board by excising so much of it as awards substantial damages to the buyers and substituting an award of nominal damages in the sum of US$5. The parties should be directed to deal in writing with the question whether the award should also be varied so far as it awarded costs against the sellers (para 6.4), and with the incidence of costs of the proceedings following the award.

LORD TOULSON: (with whom Lord Neuberger, Lord Mance and Lord Clarke agree)

37. The appellants ("the sellers") contracted to sell to the respondents ("the buyers") 25,000 metric tonnes of Russian milling wheat FOB Novorossiysk. The contract incorporated the GAFTA 49 form of contract designed for the delivery of goods from central and Eastern Europe in bulk or bags on FOB terms. The appeal raises questions about the construction of a clause of the contract and about the applicability and correctness of the decision of the majority of the House of Lords in *Golden Strait Corporation v Nippon Yusen Kubisha Kaisha ("The Golden Victory")* [2007] UKHL 12, [2007] 2 AC 353. I agree with the conclusions of Lord Sumption, but because we are disagreeing with the judgments of the Court of Appeal, Hamblen J and the GAFTA Appeal Board, and the decision in *The Golden Victory* has generated much debate, I will set out my reasoning in my own words.

38. GAFTA 49 includes these terms:

> "13. **PROHIBITION** - In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin of the goods, or the country from which the goods are to be shipped, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and to the extent of such total

or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract or any unfulfilled portion thereof shall be cancelled. Sellers shall advise buyers without delay with the reasons therefor and, if required, Sellers must produce proof to justify the cancellation.

20. **DEFAULT** - In default of fulfilment of contract by either party, the following provisions shall apply:

(a) The party other than the defaulter shall, at their discretion have the right, after serving notice on the defaulter, to sell or purchase, as the case, may be, against the defaulter, and such sale or purchase shall establish the default price.

(b) If either party shall be dissatisfied with such default price or if the right at (a) above is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.

(c) The damages shall be based on, but not limited to, the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods on the date of default established under (b) above.

(d) In all cases the damages shall, in addition, include any proven additional expenses which would directly and naturally result in the ordinary course of events from the defaulter's breach of contract, but shall in no case include loss of profit on any sub-contracts made by the party defaulted against or others unless the arbitrator(s) or board of appeal, having regard to special circumstances, shall in his/their sole and absolute discretion think fit.

(e) Damages, if any, shall be computed on the quantity called for, but if no such quantity has been declared then on the mean contract quantity and any option available to either party shall be deemed to have been exercised in favour of the mean contract quantity.

24. **ARBITRATION** -

> (a) Any and all disputes arising out of or under this contract or any claim regarding the interpretation or execution of this contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules …"

39. The contract was made on 10 June 2010 and provided for delivery in August 2010. The delivery period was later narrowed to between 23 and 30 August 2010.

40. On 5 August 2010 the buyers nominated a vessel to take delivery, but on the same day the Russian government announced the passing of a resolution imposing a prohibition on the export of agricultural products including wheat from the territory of the Russian Federation between 15 August and 31 December 2010.

41. On 9 August 2010 the sellers sent an email to the buyers notifying them of the export ban and saying that the contract was therefore cancelled under GAFTA 49, clause 13. This was a mistake. The notification was sent six days before the ban was due to come into effect and 14 days before the start of the contractual delivery period. It was not beyond the bounds of possibility that the ban might in the meantime be lifted, and the sellers therefore jumped the gun by their unqualified statement that the contract was cancelled.

42. On 11 August 2010 the buyers responded by saying that the sellers' email was a repudiation of the contract, which the buyers accepted; that the sellers were now in default; and that the buyers' claim would follow shortly.

43. On 12 August 2010 the sellers replied expressing puzzlement over the buyers' position. They said that their earlier email had been sent in accordance with the prohibition clause, since under the ban it would not be possible to deliver the goods, and they stated that they would perform the contract if the ban were lifted or changed. They queried whether the buyers truly believed that it was sensible to incur the costs of chartering a vessel and presenting it for loading, but they stated that they formally offered to reinstate the contract on all its terms including the prohibition clause.

44. The buyers declined the sellers' offer. The export ban was not lifted but was later extended.

45. It is not now in dispute that the buyers were entitled as a matter of law to treat the sellers' email of 9 August 2010 as a wrongful repudiation of the contract.

46. A fair minded outsider would say that the buyers suffered no loss from the sellers' mistake in prematurely treating the export ban as making the performance of the contract impossible. As soon as the sellers received the buyers' email on 11 August 2010 treating the contract as repudiated, the sellers immediately made it plain that the original terms remained available to the buyers (not that it would have made the slightest commercial difference to the buyers whether they accepted them since the ban remained in place, as both parties no doubt expected).

47. By contrast, arbitration proceedings have resulted in an award to the buyers of US$3,062,500, which has been upheld by judgments of Hamblen J and the Court of Appeal (respectively [2013] EWHC 84 (Comm); [2013] 1 Lloyd's Rep 621 and [2013] EWCA Civ 1628; [2014] 1 Lloyd's Rep 404). It is necessary to explain how this has happened in order to understand the issues before this court.

48. The contract price of the wheat was $160 per metric tonne. Before the first tier GAFTA arbitration panel the buyers relied on statements from two brokers putting the market value of wheat at the termination of the contract as $285 and $280 respectively. The buyers contended for a midway figure of $282.50. The sellers did not contest that evidence but they argued that the buyers had suffered no loss since the contract would have been cancelled in any event. The first tier panel accepted the sellers' argument and rejected the buyers' claim.

49. The GAFTA Appeal Board allowed the buyers' appeal. It is important to understand what was agreed and what was in issue. Paragraph 5.7 of the appeal award recorded the following points, which I will break up into sub-paragraphs:

> i) It was common ground that an anticipatory repudiatory breach of a contract for the sale of goods on GAFTA terms is a default within the meaning of the default clause.
>
> ii) It was also common ground that the date of the default for the purposes of the default clause was the date on which the repudiation is accepted as bringing the contract to an end.
>
> iii) Here the relevant date was 11 August 2010.
>
> iv) The buyers' market evidence was not challenged by the sellers.

v) Neither side suggested any other figure as the correct measure of damages and it was a question whether the buyers recover the full sum claimed, ie $3,062,500, or whether they recover nothing.

50. In its award the appeal panel said that the default clause is designed to achieve certainty and it observed that this object is reinforced by clause 20(e), which avoids inquiry as to the quantity that would have been shipped but for the default.

51. The sellers argued that the first tier tribunal had been right to reject the buyers' claim for the reasons given by it, that is to say, because the ban remained in place and the lost contract would therefore have been cancelled in due course in any event. The sellers relied in support of their argument on the decision of the majority of the House of Lords in *The Golden Victory*. The appeal panel held that the fact that the contract would subsequently have been cancelled was irrelevant, since the default clause required the loss to be assessed on the date of default, which was agreed to be 11 August 2010.

52. The sellers applied for and were given permission to appeal to the High Court on the following points of law:

i) Is the application of the GAFTA prohibition clause limited to a case where it can be seen after the event that performance of the contract has in fact been prevented by the prohibition in question?

ii) Does the GAFTA default clause exclude common law principles for the assessment of damages for anticipatory breach and in particular (i) the principle of mitigation and/or (ii) the compensation principle identified in *The Golden Victory*?

iii) Is the "overriding compensatory principle" established by *The Golden Victory* limited to instalment contracts?

iv) Was the Board wrong in law to conclude that the buyers' rejection of the sellers' offer to reinstate the contract did not constitute a failure to mitigate on the ground that the sellers did not offer to reinstate the contract on different and more favourable terms than contained in the original contract?

53. The first question related to liability. Hamblen J decided it in the buyers' favour and it is no longer in issue. The other questions related to damages. The

sellers argued that on common law principles the buyers had suffered no loss and were entitled to no more than nominal damages for two reasons. First, *The Golden Victory* established that whether loss had been suffered as a result of the early termination of a contract depends on what would have happened in the absence of that termination. Secondly, by offering to reinstate the contract on its original terms the sellers had offered to restore to the buyers precisely what any damages claim would assert had been lost. The buyers' rejection of the offer was a failure properly to mitigate.

54. The sellers further argued that the operation of those common law principles was not excluded by the default clause. First, there was a distinction to be drawn between proof of loss and the assessment of its amount. The default clause went only to the assessment of quantum. It did not displace the application of common law principles in deciding whether there was a loss to be assessed. Secondly, the words "based on" in clause 20(c) did not exclude the operation of common law principles of compensation or the doctrine of mitigation.

55. Hamblen J rejected the sellers' argument about the effect of the default clause. He did not accept that there was a clear dividing line between the causation and assessment of loss. The default clause prescribed how damages were to be assessed and the Appeal Board had correctly applied it. On the mitigation issue he added that the Board had found that the buyers had acted reasonably and their finding was a finding of fact which could not be appealed. He described it as an open question whether *The Golden Victory* approach was applicable to a one off contract of sale of goods, but it was not necessary for him to decide the third question on which permission to appeal had been given.

56. The judgment of the Court of Appeal was given by Moore-Bick LJ, with whom Floyd and Christopher Clarke LJJ agreed. He dealt with the issue of damages quite briefly. Counsel who appeared for the sellers (not Mr Simon Rainey, QC) raised the issue whether the opening words of the default clause "In default of fulfilment of contract" limited the operation of the clause to breaches by non-delivery or non-acceptance, rather than a default resulting from an accepted repudiation of the contract. He recognised that this argument had not been advanced before the Appeal Board or the judge, but he reserved his position on it. His main argument was that the default rule was to be read as being subject to the compensatory principle applied in *The Golden Victory* and that, since the export ban had remained in force throughout the contractual shipment period, the sellers would have been unable to perform the contract in any event and the buyers had suffered no loss. He also repeated the argument advanced before Hamblen J about the distinction between the proof of loss and measurement of loss. Moore-Bick LJ recorded that the sellers did not challenge the judge's decision on mitigation. On the points about damages which the sellers argued, the Court of Appeal upheld the

reasoning and conclusions of Hamblen J. Like him, it expressed no view about the effect of the decision in *The Golden Victory*.

57. The parties have agreed that the issues on this appeal can be summarised as follows:

> Issue 1: On the assumption, in the sellers' favour, that *The Golden Victory* applies to the present case and that the buyers on the facts of the present case would be entitled only to recover nominal damages for the sellers' default absent the GAFTA default clause, does that clause entitle the buyers to recover damages in the sum awarded by the GAFTA Appeal Board?
>
> Issue 2: If not, is the assumption valid (it being the buyers' contention that it is not valid, but the sellers' contention that it is valid)?

58. I will take issue 1 first. The question turns on the meaning to be given to the words of clause 20(c) "The damages shall be based on, but not limited to, the difference between …". According to the buyers' argument, clause 20 is a complete code; and these words set a minimum level of damages equal to the difference between a) the contract price and b) the default price or estimated value of the goods, in addition to which the claimant may recover other expenses provided that they are not too remote and do not include loss on a subcontract save in exceptional circumstances. According to the sellers' argument, the words "based on" are not to be read as "fixed at" or "consist of" but permit a more flexible approach. On this construction, the provision does not set a floor below which damages may not fall; it prescribes one or other method of valuation of the goods as a baseline for the calculation of damages but no more. It therefore does not preclude a tribunal from adopting the approach which was taken by the first tier panel.

59. Before considering the particular problem in the present case, it is instructive to consider a situation in which at the time of the breach there is no available market for the purchase or sale of goods answering precisely to the description of the contract goods. Mr Philip Edey QC on behalf of the buyers submitted that under clause 20(a) the party which is not in breach may decide to sell or purchase "against the defaulter" goods which are not identical to the contract goods. Mr Rainey on behalf of the sellers submitted the opposite. One answer would be that the innocent party, if he is a buyer, is entitled to purchase non-identical goods and hold the seller liable for damages equal to the difference in price, without any adjustment even if the replacement goods are of a higher quality than the contract goods. Another answer would be that under clause 20(a) the replacement goods have to be precisely the same. A third answer would be that the price of goods bought as a replacement, even if not identical, provides the basis or foundation for calculating damages, but

that adjustment should be made for the superior quality of the replacement goods in order to avoid over-compensation and to achieve a just result. The first answer is not one which the parties could reasonably have intended. The second and third answers would lead to the same practical result. Either the clause was premised on there being an available market for identical goods, in the absence of which ordinary common law principles would apply for the assessment of damages, or else the clause accommodates the situation by the words “based on” affording the necessary flexibility to make a fair adjustment. I prefer the former interpretation, because it seems most likely that the purpose of this part of the clause is to provide a surrogate for the valuation of the contract goods, which presupposes that they are identical, but the point is academic.

60. In the present case the hypothetical contract on which the buyers’ claim for damages was based was on identical terms, save as to price, but the contract and its notional substitute were extremely unlikely to be capable of fulfilment for reasons beyond the control of the parties. The contract stood to be automatically cancelled unless the Russian government ban was raised. The clause does not in terms address such a situation. As in the previous example there are three possible answers. One is that however improbable it may have been that the ban would be lifted, the language of the clause precludes that factor from being taken into consideration. The second is that the clause is concerned only with placing a mathematical value on the goods, assuming the contract to be capable of performance, and that it is not intended to oust the application of ordinary common law principles where that assumption is inappropriate. The third is that the language of the clause has sufficient flexibility to make a fair adjustment in the assessment of what the buyers have lost. Again, the second and third answers would lead to the same outcome.

61. In disagreement with the appeal panel, the judge and the Court of Appeal, I do not consider that the language of the clause is sufficiently clear to have the preclusive effect for which the buyers contend. In my view the second, or (if I am wrong) the third, is a more reasonable interpretation. The first construction would require the tribunal to adopt a blinkered approach to the facts, which would place the buyers financially in a far better position than if the breach had not occurred. This is most unlikely to have been the drafter’s intention. It is far more likely that the drafter had in mind the usual situation of a non-delivery or non-acceptance of goods for which there was an available market. I am reinforced in this view by the judgment of Clarke J in *Bem Dis A Turk S/A TR v International Agri Trade Co Ltd (The Selda)* [1998] 1 Lloyd’s Rep 416, where he held that the words “shall be based on” were not to be construed as synonymous with “shall consist exclusively of” or “shall be limited to”. (His judgment was approved by the Court of Appeal at [1999] 1 Lloyd’s Rep 729).

62. I also reject the argument that the clause precludes the operation of the common law principle regarding mitigation of loss, but, perhaps unfortunately, the

application of the principle to the facts of this case has not been the subject of argument before this court.

63. I would therefore answer issue 1 in the sellers' favour and turn to issue 2 concerning *The Golden Victory*.

64. *The Golden Victory* was a case of wrongful repudiation of a time charter by the charterers. The charter contained a war clause entitling either party to cancel the charter if war or hostilities broke out between any of a number of countries including the USA, UK and Iraq. At the time of the repudiation in December 2001 there was a minimum period of nearly four years to run under the contract. A reasonably well-informed person would have regarded the outbreak of hostilities between the USA or UK and Iraq as a possibility but no higher. In fact, hostilities began in March 2003. In October 2004 the arbitrator delivered an award declaring that no damages were recoverable in respect of the period from March 2003 onwards. His decision was upheld on appeal by the judge, the Court of Appeal and a majority of the House of Lords. Their decisions are reported at [2005] EWHC 161 (Comm), [2005] 1 Lloyd's Rep 443; [2005] EWCA 1190, [2006] 1 WLR 533; and [2007] UKHL 12, [2007] 2 AC 353.

65. In a succinct judgment Langley J held that the arbitrator's award accorded with the basic compensatory rule for the assessment of damages. The charterparty which the owners lost was subject to the uncertainty of the war clause. If the owners recovered damages for the period after the outbreak of hostilities they would be recovering more than the charterparty was worth to them.

66. That essential reasoning was affirmed by the Court of Appeal and a majority of the House of Lords. In giving the judgment of the Court of Appeal, Lord Mance (with whom Auld and Tuckey LJJ agreed) said about the "available market rule" at para 27:

> "The purpose of that rule is to fix a rate which then falls to be compared with the original charter rate. In this way, the owners are put back notionally in the same position as they would have been under the original charter. Assuming that the owners grant a substitute charter, they can operate the vessel subject to that charter or dispose of her with it, as they like. But the aim in assessing damages on such an assumption is not to eliminate from consideration any of the original charter terms, or any effect which they might have had. Indeed, the market rate for a substitute charter 'must be ascertained by postulating a charterparty which corresponds as closely as possible with the actual charterparty': cf *Arta Shipping Co Ltd v Thai Europe*

Tapioca Service Ltd (The Johnny) [1977] 2 Lloyd's Rep 1, 4, per Sir David Cairns."

67. In the House of Lords the majority comprised Lords Scott, Carswell and Brown. Lords Bingham and Walker dissented. Lord Scott, at para 36, described the lodestar as being 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". It had been accepted in argument that the owners' charterparty rights would not in practice have been marketable for a capital sum. The contractual benefit to the owners, of which they were deprived by the repudiatory breach, was the right to receive the hire rate during the currency of the charterparty, but that right was subject to the war clause. The owners were seeking compensation exceeding the value of the benefits of which they were deprived.

68. Lord Scott contrasted the case with that of a contract for a one-off sale. He said, at para 34, that the assessment at date of breach rule is particularly appropriate in such a case where there is an available market, by reference to which the amount of the loss can be fixed, but he noted that even here some period must normally be allowed for arrangements for a substitute sale to be made (*Kaines (UK) Ltd v Osterreichische Warrenhandelgesellschaft* [1993] 2 Lloyd's Rep 1). But, he said at paras 35 and 36, in a case of a contract for the supply of goods over an extended period, or any anticipatory breach the acceptance of which terminated an executory contract, the application of the breach date rule may not be apt because "[t]he contractual benefit for the loss of which the victim of the breach can seek compensation cannot escape the uncertainties of the future".

69. Lord Brown, agreeing with Lord Scott, emphasised that any hypothetical substitute contract would have been subject to the same conditions as the repudiated contract. Although the arbitrator had said that if the owners had sold the vessel with the benefit of a four year charter the value of that charter would have been taken into account with war being regarded as no more than a possibility, the measure of loss did not fall to be crystallised on the basis of a hypothetical sale of the vessel herself.

70. Lord Bingham (with whom Lord Walker agreed) took as his starting point that 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 there was an available market for the chartering of vessels, the injured party's loss would be calculated on the assumption that he had, within a reasonable time of accepting the repudiation, taken reasonable commercial steps to obtain alternative employment for the vessel for the best consideration reasonably available, and damages would ordinarily be assessed at that date. In support of this

approach he referred to the decision of Robert Goff J in *The Elena D'Amico* [1980] 1 Lloyd's Rep 75, which he described as authoritative.

71. Lord Bingham accepted that the courts had been willing to depart from the general rule about the date of assessment if the court judged it necessary or just to do so in order to give effect to the compensatory principle. He accepted too that if at the date of acceptance of a repudiatory breach the court judged that the contract was bound to be lawfully cancelled in the near future it would be proper to award only nominal damages. This would not involve taking into account later events, but merely recognising that the value of the contract in such circumstances was nil. In that respect he regarded the Court of Appeal's decision in *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 as "entirely orthodox". He also accepted 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".

72. Lord Bingham attached critical significance to what he said was the clear and crucial finding of the arbitrator that what the owners lost was a charterparty with slightly less than four years to run and that "on the arbitrator's finding it was marketable on that basis" (para 22). While acknowledging that the value of a contract in the market may be reduced if terminable on an event which the market judges to be likely, he said "but that was not what the arbitrator found to be the fact in this case".

73. I have difficulty with this part of Lord Bingham's reasoning. According to the law reporter's note, counsel for the owners had submitted that they had lost a charterparty with slightly less than four years to run and that had they sold the vessel on that day the value which they would have received would have been calculated on that basis. But that value would have been undiminished if the owners had re-chartered the vessel on identical terms, and there was no suggestion that the owners could not have done so. Indeed, Lord Mance noted in his judgment in the Court of Appeal, at para 12, that counsel for the owners submitted that it had to be assumed for present purposes that the owners could, within a relatively short time, have arranged a substitute charter for the balance of the charter period. So the charterers' repudiation would not have brought about a loss in the marketable value of the vessel with a substitute charter. Nor would the repudiation have affected the potential duration of the charterparty. In neither respect, therefore, were the owners financially worse off by reason of the charterers' repudiation.

74. Because the issue raised by the arbitrators' award was confined to whether the assessment of damages should take account of the period after the outbreak of hostilities in Iraq, the House of Lords was not directly concerned with the supplementary question how damages in respect of that period were to be assessed.

Lord Bingham did not address that question beyond observing that it would of course be very difficult to calculate loss of profit prospectively over a four year period, but an injured party could recover damages for loss of a chance of obtaining a benefit and that the difficulty of accurate calculation was not a bar to recovery.

75. In his review of the authorities Lord Bingham referred with approval to a decision of mine in *Dampskibsselskabet Norden A/S v Andre & Cie ("Norden v Andre")* [2003] EWHC 84 (Comm), [2003] 1 Lloyd's Rep 287, as an example of the application of the general principle. In that case a forward freight agreement ("FFA") for a period of 12 months was terminated by reason of the defendant's breach in the third month. The claimant sought damages equal to the amount to which it would have been entitled under the contract if it had run its full course, amounting to over US$750,000. The evidence established that there was an available market in which the claimant could have obtained a substitute contract or contracts at average price amounting to a little over $185,000. I held that the amount recoverable was the lesser figure, following the analysis of the relevant legal principles in the judgment of Robert Goff J in *The Elena D'Amico*.

76. The fundamental principle for the assessment of damages in cases of breach of contract (reiterated in *The Elena D'Amico*) is the principle of restitutio in integrum within the limits expressed in *Hadley v Baxendale* (1854) 9 Exch 341. In the present case the sellers offered the buyers total restitution in integrum immediately upon the termination of the contract. There was no finding by the Appeal Board that the offer was not genuine, and on the fundamental compensatory principle it provides a full answer to the claim.

77. Secondary to the fundamental restitutionary principle, in various types of case there is a normal measure of recovery which the courts have developed to give effect to that principle. *The Elena D'Amico,* like *The Golden Victory*, involved the premature wrongful repudiation of a charterparty. The judge held that if there was at the time of termination an available market for chartering in a substitute vessel, damages would normally be assessed on the basis of the difference between the contract rate for the balance of the contract period and the market rate for a substitute charter. He arrived at this result by analogy with cases of sale of goods or shares in which either the seller failed to deliver or the buyer failed to accept delivery: *Jamal v Moolla Dawood Sons and Co* [1916] 1 AC 175 and *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65.

78. The broad principle deducible from *The Elena D'Amico* and the cases there considered is that where a contract is discharged by reason of one party's breach, and that party's unperformed obligation is of a kind for which there exists an available market in which the innocent party could obtain a substitute contract, the innocent party's loss will ordinarily be measured by the extent to which his financial

position would be worse off under the substitute contract than under the original contract.

79. The rationale is that in such a situation that measure represents the loss which may fairly and reasonably be considered as arising naturally, ie according to the ordinary course of things, from the breach of contract (*Hadley v Baxendale*). It is fair and reasonable because it reflects the wrong for which the guilty party has been responsible and the resulting financial disadvantage to the innocent party at the date of the breach. The guilty party has been responsible for depriving the innocent party of the benefit of performance under the original contract (and is simultaneously released from his own unperformed obligations). 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.

80. Whether the innocent party thereafter in fact enters into a substitute contract is a separate matter. He has, in effect, a second choice whether to enter the market – similar to the choice which first existed at the time of the original contract, but at the new rate prevailing (the difference being the basis of the normal measure of damages). The *option* to re-enter or stay out of the market arises from the breach, but it does not follow that there is a causal connection between the breach and his *decision* whether to re-enter or to stay out of the market, so as to make the guilty party responsible for that decision and its consequences. The guilty party is not liable to the innocent party for the adverse effect of market changes after the innocent party has had a free choice whether to re-enter the market, nor is the innocent party required to give credit to the guilty party for any subsequent market movement in favour of the innocent party. The speculation which way the market will go is the speculation of the claimant.

81. It is well recognised that the so-called duty to mitigate is not a duty in the sense that the innocent party owes an obligation to the guilty party to do so (*Darbishire v Warran* [1963] 1 WLR 1067, 1075, per Pearson LJ). Rather, it is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided.

82. There are three important things to note about measurement of damages by reference to an available market. First it presupposes the existence of an available market in which to obtain a substitute contract. Secondly, it presupposes that the substitute contract is a true substitute. The claimant is not entitled to charge the defendant with the cost of obtaining superior benefits to those which the defendant contracted to provide. Thirdly (and in the present case most importantly), the purpose of the exercise is to measure the extent to which the claimant is (or would be) financially worse off under the substitute contract than under the original contract.

83. Depending on the nature of the market, cases in which this method is appropriate may include an anticipatory repudiatory breach of a one-off contract of sale, a contract of sale in instalments or a period contract. A single unconditional contract of purchase or sale of a commodity in the futures market is an example of the first. The accepted repudiation by the buyer or seller amounts to the premature closing out of the transaction. The innocent party can then use the market to put himself back in the same position at a price which will reflect the market's assessment of the value of the contract. The same may apply equally in the case of a periodic futures agreement (*Norden v Andre*).

84. However, in this case the lost contract and its hypothetical substitute were subject to automatic cancellation unless the Russian government ban was lifted, and the extent to which the buyers were worse off by loss of the original contract could not be measured by a simple comparison of the contract price with the price of a hypothetical substitute contract.

85. The fundamental compensatory principle makes it axiomatic that any method of assessment of damages must reflect the nature of the bargain which the innocent party has lost as a result of the repudiation. In this case the bargain was subject to a high risk of cancellation. Leaving aside for the purposes of this discussion the sellers' offer to reinstate the contract, what the buyers lost was the chance of obtaining a benefit in the event of the export ban being lifted before the delivery period, only in which case would the contract have been capable of lawful performance. In *The Golden Victory* Lord Bingham observed, uncontroversially, that although it may be difficult to calculate a loss prospectively, an injured party can recover damages for the loss of a chance of obtaining a benefit. He also acknowledged that the market value of a contract may be reduced if terminable on an event which "the market" judges to be likely but not certain. But how is the chance to be valued if there is no market risk index to which the court can refer? (In this case the Appeal Board merely found that there "was a possibility that the ban might be lifted or relaxed in some way".) The assessment would have to be made by the arbitrator or judge doing the best he can.

86. Should the assessment be made on the facts as known at the date of the assessment or should the tribunal apply a retrospective assessment of how the chances would have appeared at the date of the repudiation? I see no virtue in such circumstances in the court attempting some form of retrospective assessment of prospective risk when the answer is known. To do so would run counter to the fundamental compensatory principle. In *The Golden Victory* Lord Bingham acknowledged that the saying "you need not gaze into the crystal ball when you can read the book" is in many contexts a sound approach in law as in life. He did not consider that approach to be appropriate in that particular context because of the available market rule. I have given my reasons for not regarding that rule as apt for

the circumstances of this case, by contrast with cases such as *The Elena D'Amico* and *Norton v Andre*.

87. Mr Edey submitted that the present case is distinguishable from *The Golden Victory* because it involved a single sale rather than a period contract, but I can see no logical foundation for the distinction. It is founded on the passage in Lord Scott's judgment where he distinguished the charterparty in that case with a simple contract for a one-off sale, but I take him to have been referring to the simple case of repudiation by non-delivery or non-acceptance. It makes no sense to differentiate between a contract for a single sale or for more than one sale. The relevant criterion is whether the contract is reasonably replaceable by a substitute contract at a readily ascertainable market price, in which case it will ordinarily be right to measure the innocent party's loss by reference to the substitute contract.

88. Alternatively, Mr Edey submitted that the majority of the House of Lords were wrong in *The Golden Victory*. He suggested that it was inconsistent with the decisions of the House of Lords in *Gill and Duffus SA v Berger and Co Inc (No 2)* [1984] AC 382 and *Fercometal SARL v Mediterranean Shipping Co SA (The Simona)* [1989] AC 788. Neither of those cases was directly concerned with the assessment of damages for the anticipatory breach of a contract which was subject to a condition likely to cause its cancellation. It was common ground in *The Golden Victory* that the risk of cancellation was potentially relevant to the assessment of damages. The difference was whether (as the minority held) it was irrelevant on the facts because it did not affect the market value of the contract at the date of breach, or (as the majority held) proper application of the compensatory principle made it right to take into account the facts known at the date of assessment. For the reasons given I support the decision of Langley J, the Court of Appeal and the majority of the House of Lords.

89. Accordingly, I agree with Lord Sumption as to the disposal of this appeal.