Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia [2006] APP.L.R. 12/01

JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE: . Commercial Court. 1st December 2006

1. This is an appeal under section 69 of the Arbitration Act 1996 to set aside an Award made on 17th May 2006. The Award, which was by a majority (Mr David Farrington and Mr Bruce Buchan, Mr Christopher Moss dissenting), determined that the appellants, Mercator Shipping Inc of Monrovia, the owners of the m.v. "Achilleas" (hereafter "the Owners") were entitled to recover US $1,364,584.37 by way of damages for late redelivery of the vessel under a charterparty. The question raised by this appeal is whether loss of earnings under a subsequent fixture is recoverable under the first limb of the rule in ***Hadley v Baxendale*** [1854] 9 Exch 24, although, as will become apparent, the resolution of the appeal does not appear to me to depend upon whether or not the case can be pigeon holed into that category. The appeal, as Aikens J observed when giving leave, raises an issue of general public importance in the shipping industry.

The facts

2. The "Achilleas" is a single decker self trimming bulk carrier built in 1994. On 22nd January 2003 she was chartered to Transfield Shipping Inc, the respondents (hereafter "the Charterers") on an amended NYPE 1946 form (hereafter "the Charterparty") for a time charter period of "*about 5 to about 7 months (exact period at Charterers' option, about means +/- fifteen (15) days*". The daily hire was $13,500 and the Charterers were to give the Owners "*20/15 days approximate notice of redelivery date and port, 10/5/3 days definite notice of redelivery date and port*".

3. By an Addendum to the Charterparty dated 12th September 2003 the vessel was fixed, in direct continuation of the Charterparty for a further period of "*minimum five (5) months, maximum seven (7) months, exact period in Charterers' option*" at a new hire rate of $16,750 per day. The extended period under the Addendum began on 2nd October 2003 and accordingly the maximum duration of the extended period expired on 2nd May 2004.

Notices of redelivery

4. On 8th April 2004 the Charterers gave 20 days notice of redelivery between 30th April and 2nd May. On 15th April they gave 15 days notice of redelivery between 30th April and 2nd May.[1] On 20th April they gave 10 days notice of redelivery between the same dates.

The subsequent fixture

5. On or about 21st April the Owners fixed a period charter (about 4-6 months) with Cargill International SA ("Cargill") at a rate of $39,500 per day. I call this the "Cargill charter". The laycan was from 28th April to 8th May 2004.

6. On 23rd April the Charterers gave 7 days notice of redelivery between 30th April and 2nd May, intention Oita.

The Charterers' final subcharter

7. On a date that the Award does not record the Charterers fixed the vessel under a subcharter to load a cargo of 66,799 tonnes of coal at Quingdao for discharge at Tobata and Oita in Japan.

8. On 24th April loading of the coal at Quingdao was complete. On 26th April the Charterers indicated that discharge at Oita was not expected to be completed until 6th or 7th May. On 27th April Charterers gave a revised notice of redelivery on 4th/5th May. On 30th April, following discharge at Tobata, the vessel arrived at Oita where she was delayed. Charterers gave a revised notice for redelivery of 8th/9th May.[2] In the event the vessel was not redelivered until 0815 local time on 11th May.

9. By 5th May the Owners had recognised that the vessel would be redelivered late. They therefore sought an extension of the cancelling date under the Cargill charter. On that date it was agreed between the Owners and Cargill that the cancelling date would be extended from 8th to 11th May but that the daily rate of hire would be reduced from $39,500 to $31,500.

10. The vessel was delivered by the Owners to Cargill at 0815 local time on 11th May i.e. at the same time as her redelivery by the Charterers. The Cargill charter continued until 0815 hours on 18th November 2004 – a period of 191 days and 11 hours.

The claim

11. The Owners claimed damages at the rate of $8,000 per day, being the difference between the $39,500 rate originally agreed with Cargill and the revised rate of $31,500 for the period of the Cargill charter, against which they gave credit for the additional sums earned under the Charterparty by reason of the late redelivery. It was agreed that the rates negotiated under the Cargill charter and the variation thereto were market rates. It was not suggested by the Charterers that the Cargill charter was in any way unusual or peculiar in its terms or length. Nor was it suggested that the Owners had allowed an unusually short gap between the date for redelivery under the Charterparty and the cancelling date under the Cargill charter.

12. In the alternative the Owners claimed damages of $158,301.17 being the difference between the market rate of hire and the Charterparty rate during the period from midnight on 2nd May to 0815 on 11th May.

13. The majority arbitrators have made an Award in the Owners' favour, calculated on the former basis. The Charterers contend that the Award should have been calculated on the latter basis, which is the award that the minority arbitrator would have made.

[1] The facts recorded in the first two sentences of this paragraph are not set out in the Award but there is no dispute about them.

[2] The facts in this sentence are not recorded in the Award; but there is no dispute about them.

The facts agreed or found

14. It was not in dispute before the arbitrators that the Owners net loss of $1,364,584.37 was caused by the Charterers' breach of charter in failing to redeliver the vessel by 2nd May. The majority arbitrators recorded that the following facts were agreed or found:

> *"8 …As Mr Males* [Counsel for the Charterers] *agreed in exchanges with members of the Tribunal, the "not unlikely" results arising from the late redelivery of a vessel were not numerous, but would include missing dates for (a) a subsequent fixture, (b) a dry docking and (c) a sale of the vessel*
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> *9. We consider that in today's market with its ease of communication and much higher emphasis of maintaining a vessel in almost continuous employment those "not unlikely results" are known, recognised and accepted hazards of late redelivery. They were not very unusual. To the contrary, they were the kind of results which the parties would have had in mind. Although the issue in this reference was not concerned with a particular market at a particular port, nevertheless the parties were actively engaged in the shipping market. It was not in dispute that the market rates for tonnage goes [sic] up and down, sometimes quite rapidly, and that such variations are market knowledge. …..We consider on the facts that the type or kind of loss suffered by the Owners i.e. the need to adjust the relevant dates for the subsequent employment of the vessel through the revised Cargill terms, was within the contemplation of the parties as a not unlikely result of the breach. The fact that the extent of the loss was greater than anticipated is not relevant: see* ***Hill v Ashington Piggeries*** *(1969) 3 All ER 1496 (Davies L.J. at p 1524F)*
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> *10. No attempt was made by Mr Males to persuade us that the Charterers had little or no knowledge of the not unlikely results if a vessel was redelivered late, in breach of charterparty. Nor did he seek to persuade us that the Charterers had little or no market knowledge, including that of movements in rates for the type of vessel in question.*
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> *11. ….The types of losses* [referred to in paragraph 8] *are certainly readily identifiable to those who have even a minimum of experience in the shipping industry. It might well be that the precise amount of the loss can be seriously affected by market factors (as happens to be the case in this matter where the rate for the particular type of vessel dropped sharply during the relevant period) but the type of loss was readily identifiable. ……..*
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> *18 Mr Males submitted that it was necessary to ask whether there was anything in the particular circumstances to suggest that the charterers would or should have understood that they were "assuming responsibility" for the risk of the loss of a particular follow on fixture concluded by the owners. The use of the words "assuming responsibility" was used in the context of the discussion in paragraphs 26-055 in Chitty on Contracts 29th Ed. We consider that the point does not actually assist the Charterers. We believe that Mr Croall [Counsel for the Owners] is correct when he said that what mattered was that the type of loss claimed was foreseeable; there was no need to show the foreseeability of precise figures. The length of the follow on fixture was irrelevant, we consider, in terms of remoteness but the length might have some effect in terms of quantum if it was an extravagant or unusual bargain. As a result of the agreement between the parties on quantum we were not, unfortunately, taken to the expert evidence. We were not, therefore, called upon to decide whether in terms of remoteness a trip charter should be considered differently from, say a period charter. Further the Charterers did not submit or otherwise argue that the original Cargill fixture was an extravagant or unusual bargain. Thus we are not able to make any finding on whether the original Cargill fixture or the revised Cargill terms amounted to such a bargain. ……..*
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> *20 We consider that Lord Reid's comments at pages 382/3 in* ***The Heron II*** *as endorsed by Staughton J (as he then was) in* ***The Rio Claro*** *lead to the conclusion that the type of loss for which the Owners claim must be taken to have been within the parties' contemplation at the date of the Addendum. Accordingly, we find that the principal claim falls within the first rule of* ***Hadley v Baxendale.*** *We are satisfied on the evidence that there was not and could not have been any actual or implied knowledge of the original Cargill fixture by the Charterers at the date of the Addendum so as to bring the claim within the second rule in* ***Hadley v Baxendale.***
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> *21 Having concluded that the Owners' claim falls within the first rule of* ***Hadley v Baxendale,*** *it follows that Owners succeed in their principal claim in the amount of US $ 1,364,584.37".*

The Charterers' submissions

15. The Charterers submit that there has never been a recorded case where damages have been awarded in respect of a loss of profits caused by late redelivery. The well recognised prima facie measure of damages is the difference between the market rate and the charterparty rate for the period from the time when the vessel should have been delivered until the time of her actual redelivery ("the overrun"). Such damages recompense the Owners in respect of their loss of use of the vessel during the overrun. It is on this basis that damages are habitually awarded under the first limb of the rule in *Hadley v Baxendale*. The majority made their Award in respect of something different, namely a loss of profit in respect of the subsequent charter. Such an award could only be made under the second limb of that rule. The Charterers would have to have been told, at or before the making of the Addendum, that the Owners were going to enter into a subsequent fixture of the same type as the Cargill fixture and that it was critical that redelivery take place on time; and it would have to have been brought home to them that they would be assuming responsibility for the loss of that fixture on account of late redelivery.

16. In the Charterers' submission the distinction between what was recoverable under the two limbs of the rule has been expounded in several cases and textbooks. Even if those decisions are not strictly binding they are

statements of high authority from which the Court should not depart unless satisfied that they are clearly wrong. Delayed redelivery is a recurrent situation where a clear prima facie measure of market over charterparty rate for the period of the overrun has been established. That rule is simple, certain and fair. Further, as the cases have now established, liability for delayed redelivery is strict. The charterer will be in breach if redelivery does not take place (otherwise than by fault of the owners) by the last possible date, even if this is because of events over which he has no control. It is a general principle of commercial law that, where there is an available market, then, in the absence of special circumstances, contracts made by owners with third parties are *res inter alios acta*. Any different approach could produce the result that, because of a few days delay in redelivery, the charterer had to shoulder a disproportionate burden in the form of loss of profit on a charter lasting months or a year or more, when the charterer had never assumed responsibility for such a loss.

The Owners' submissions

17. The Owners point out that they have undoubtedly suffered a loss of $1,364,584.37 on account of the Charterers' breach of contract. They are entitled to be put into the same position as if that breach had never occurred, save that they are not entitled to recover in respect of any losses which, even though caused by the breach, are too remote. On the majority arbitrators' findings their losses were not too remote. On the contrary they were within the contemplation of both parties as a type of loss that was a not unlikely consequence of the breach. The Owners can only be deprived of such damages if there is some special rule that the first limb of the rule in ***Hadley v Baxendale*** can only lead to damages calculated by taking the difference between the market and the charterparty rate for the overrun, so that damages for loss of profit on the subsequent charter can only be claimed under the second limb. There is no such rule.

The authorities on late redelivery

18. In ***Watson Steamship Co v Merryweather & Co*** [1913] 18 Com Cas 294 the vessel was redelivered 20 days late: on November 20th instead of October 31st . The special case recorded that:

> *"6. A claim was made by the owners for damages for dislocation of business and other special damage, but there was no evidence before the umpire that such damages were within the contemplation of the parties at the time the said charterparty was entered into, and he therefore found that such damages were too remote.*
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> *7. The umpire directed and awarded that the charters should pay to the owners £100, being damages for 20 days detention of the Hugin calculated at the difference between the chartered rate and the current rate for the said period".*

19. The question at issue was whether there was a breach of contract in not redelivering the vessel by October 31st. Atkin, J, as he then was, held that there was such a breach and upheld the award. The special case does not make clear what the "*dislocation of business*" was; but whatever it was, the umpire was not able to find that it was something contemplated by the parties. I do not regard this case as anything more than an illustration of an award where, in the absence of any finding that the parties had anything more in contemplation, damages were awarded on the market versus charterparty rate basis,.

20. In ***Meyer v Sanderson*** [1913] 108 L.T. 428,429 Atkin J held that, where the vessel was kept illegitimately beyond the last redelivery date (she had been sent out on an extra voyage on that very date), the charterers had to "*pay for the use of the steamer on that last voyage at the rate current at the time*". No question of loss of profit on a subsequent charter arose.

21. In ***The London Explorer*** [1972] AC 1 a vessel was chartered on terms that hire was "*to continue until the hour of the day of her redelivery*". She was delivered about 3 months late because, although she had been sent on a legitimate last voyage, she met with strikes at her last two discharging ports. The owners succeeded in recovering hire at the charterparty rate even though the market rate during the overrun period was less than the charterparty rate. In the course of his speech Lord Morris said: *"Even though the time set out in a charterparty is not made of the essence so that continued use of the vessel after the stated time will not at once have the result that such continued use will be in breach of contract, it will be necessary that redelivery should be within a reasonable time. It might well be …that with a clause similar to clause 4 a charterer would be liable to pay hire at the contractual rate to the time of actual redelivery and in addition (if the current rate exceeded the contractual rate) to pay damages in respect of his failure to redeliver within a reasonable time*".

    Again, no question arose of a claim in respect of loss of profits on a subsequent charter.

22. In ***The Dione*** [1975] I LLR 117 the charterers, who should have redelivered the vessel by 28th September, were held liable for the difference between the market and charterparty rate for the overrun period. Lord Denning observed that where the charterer had an obligation to redeliver by a stated date: "*If he does not do so - and the market rate has gone up – he will be bound to pay the extra. That is to say he will be bound to pay the charter rate up to the end of the stated period and the market rate thereafter, see* ***Watson v Merryweather***".

    Again, no question of loss of a subsequent fixture arose.

23. In ***The Johnny*** [1977] 2 LLR 1,2 Lord Denning said that in the case of an illegitimate last voyage, the measure of recovery, whether as damages or upon a quantum meruit, was as follows: "*In either case the amount would be assessed at the market rate then ruling for a time charter trip for a voyage at that time. That is for a time charter for the period of time occupied by such a voyage based on spot rates for the voyage charter but adjusted to a time charter basis. That would be obviously fair and just. The charterer by sending her on that last illegitimate voyage*

would have received the high market rate then prevailing and should pay damages based on that rate for that voyage".

However, the majority of the Court concluded that, under the provisions of the amended Baltime form, the market rate should be assessed by reference to the market rate for 11-13 month charters (the period of the charterparty) as at the date of the commencement of the overrun period and then applied to that period alone. There was no claim for loss of a subsequent fixture.

24. In ***The Peonia*** [1991] I Lloyd's Rep 100, a central question was whether, when the vessel was sent on a *legitimate* last voyage but, through no fault of the charterers, was then redelivered after the final terminal date, the owners were entitled in respect of the overrun period to hire at the market rate (if higher than the charterparty rate) or only at the charterparty rate. After a comprehensive review of the authorities Lord Justice Bingham (as he then was) held that the answer was the former. In relation to an *illegitimate* last voyage Lord Justice Bingham said that the owner: *"..was entitled to payment of hire at the charterparty rate until redelivery of the vessel and (provided he does not waive the charterer's breach) to damages (being the difference between the charter rate and the market rate if the market rate is higher than the charter rate) for the period between the final terminal date and redelivery".*

25. Lord Justice Slade said that his view, which he expressly declared to be obiter, was that: *"The judgments of Lord Denning, M.R. and Lord Justice Browne in* ***The Dione*** *…are, in my opinion, on a proper analysis, authority binding this Court for the proposition that if charterers send a vessel on a legitimate last voyage and the vessel is thereafter delayed for any reason (other than the fault of the owners) so that it is redelivered after the final terminal date, the charterers will (in the absence of agreement to the contrary) be in breach of contract and accordingly, if the market rate has gone up, will be obliged to pay by way of damages the market rate for any excess period after the final termination date up to redelivery…"*

26. ***The Peonia*** was not concerned with any claim in respect of a subsequent fixture; and neither Lord Justice Bingham nor Lord Justice Slade's words can be taken as deciding that only the market/charterparty rate differential is recoverable as damages under the first limb of the rule in *Hadley v Baxendale,* or as deciding the measure of recovery on facts such as those found by the majority arbitrators.

27. In ***The Black Falcon*** [1991] I LLR 77 Steyn, J, as he then was, overturned an award that had not followed ***The Dion***e on damages. In a case involving an illegitimate last voyage, the arbitrators had awarded the market rate of hire from the date when the vessel would have been delivered if she had not undertaken her last (illegitimate) voyage rather than from the last date when she could have been delivered without a breach of charterparty.

28. Steyn, J said: *"In my judgement the arbitrators' approach conflicts with the principle governing the calculation of damages which was enunciated in* ***The Dione*** *…A study of the judgments of the majority reveals that this case is authority for the proposition that in circumstances where the owners undertook the illegitimate last voyage without waiving their rights to claim damages, the charterers' obligation is to pay the charter rate until the last permissible date for redelivery, and thereafter pay the market rate until the actual redelivery ….I am of course bound by this decision. But … I would have come to the same conclusion in the absence of authority."*

29. In ***The Gregos*** [1991] 2 LLR 40 the principal issue was whether or not the legitimacy of the last voyage fell to be established at the date when the order was given or at the time when the last voyage began. Evans, J, as he then was, held that it was the latter. In the course of his judgment he observed that "*the charterer does commit a breach of contract by failing to redeliver at the end of the charter period and is liable in damages, if the market rate exceeds the charter rate, as well as for hire until redelivery takes place*". No question of a subsequent charter arose.

30. The Court of Appeal took a different view. The Court (Hirst, Russell and Simon Brown, L.JJ.) held that the legitimacy of the last voyage was to be tested at the date when the order was given. In the course of his judgement Lord Justice Hirst recorded the argument of Mr Bernard Rix, Q.C., as he then was: *"Furthermore, and central to Mr Rix's argument, the owners would be compensated in damages in accordance with the normal common law measure of damages under the rule in Hadley v Baxendale for any period of overrun which would normally be based on market rates of hire under the first rule; but also, if the facts warranted, by additional damages (e.g. for the loss of a fixture) under the second rule".*

Later he recorded the argument of Mr Peter Gross, Q.C, as he then was: *"Mr Gross asserts that damages may be an inadequate remedy, since the owners are unlikely to be able to recover compensation for the loss of a subsequent fixture and are likely to be confined to recovering hire at the market rate (i.e. within the first rule in* ***Hadley v Baxendale****). But this is essentially a complaint against the well established common law rules on the measure of damages and indeed on the facts of individual cases the owners might well be able to bring themselves within the second rule in* ***Hadley v Baxendale*** *(e.g. if the owners explicitly warned the charterers at the time of the last voyage order then (sic) an overrun might imperil a subsequent fixture). "*

31. The House of Lords decided that the correct date for assessment of the legitimacy of the order was the date on which the vessel completed discharge and was ready to proceed on her last voyage, by which time, on the facts of that case, it had become apparent that she could not complete that voyage and be redelivered in accordance with the charterparty. The order previously given then became invalid and the charterers' persistence in requiring it to be obeyed was repudiatory.

32. In the course of his speech Lord Mustill observed: *"Finally, some of the legal consequences of late redelivery have been worked out. There remain a number of unanswered questions, with some of which your Lordships are now*

concerned." A later sentence of his speech reads: "*(On damages, see* ***Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co.Ltd (The Peonia),*** *[1991] 1 Lloyd's Rep 100)*".

33. As is apparent from this citation of authority there are a number of statements from commercial judges of distinction (or submissions by those who were to become such) that the prima facie measure of damages for late redelivery under the first limb is the difference between the market and charterparty rates for the overrun period. Moreover the decision of the Court of Appeal in ***The Gregos*** proceeds upon an apparent acceptance of the argument of Counsel that it was under the second limb of the rule that loss of a subsequent fixture was recoverable, if it was recoverable at all.

34. But in none of these cases was the question of recoverability of loss of profit on a subsequent charter actually in issue; nor were there any findings of fact such as those made by the majority arbitrators. Whilst, therefore, these cases are authority for the proposition that, absent any such finding, the owners are entitled to recover the market/charterparty rate differential, they cannot, in my judgment, be regarded as deciding that, even with such a finding, recovery of loss of profit on a subsequent fixture cannot arise under the first limb or cannot be recovered at all.

The textbooks

35. *Scrutton* 20th Edition provides, in relation to a legitimate last voyage that: *"If, through no fault of either side, the voyage does not finish within the tolerance , hire continues payable at the charter rate until the end of the period of express or implied tolerance and, in the absence of an exonerating clause, damages representing the market rate for the period thereafter"*

and, in relation to an illegitimate last voyage, states that: *"If the owner proceeds on the illegitimate voyage, hire will be payable at the charter rate up to the end of the tolerance period, and at the current market rate for the excess period thereafter".*

36. A footnote to the latter sentence reads: *"…Where these are not too remote, further damages (such as the loss of a substitute fixture) can be claimed:* ***The Gregos*** *[1993] 2 Lloyd's Rep 335. (although the question of remoteness must be tested when the contract is concluded and not, as suggested in that case, at the time of the last voyage order)."*

37. Wilford on Time Charters at paragraph 4.9 summarises ***The Peonia***. Included in the summary of the case is the sentence: "*On a proper understanding of* ***The London Explorer*** *and* ***The Dione*** *..charterers would be in breach, despite the legitimacy of their final voyage orders if they failed (otherwise than because of fault by owners) to redeliver by the end of the charter period and would be liable thereafter to pay the market rate if higher than the charter rate."*

The rule in Hadley v Baxendale

38. The rule is that the damages that a claimant may recover for breach of contract are: …such as may fairly and reasonably be considered either (a) arising naturally i.e. according to the usual course of things from such breach of contract itself or (b) such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract as the probable result of it."

39. In ***The Heron II*** [1969] 1 A.C. the House of Lords gave extensive consideration to the test of remoteness in contract. In his speech Lord Reid said that he regarded that part of the judgment in ***Hadley v Baxendale*** that followed the enunciation of the rule as throwing considerable light on the meaning that the court must have attached to the "*rather vague expressions used in the rule itself*". His analysis of that meaning is instructive.

40. The claim was for damages on account of the late arrival of the vessel at Basrah where the charterers intended to sell the cargo of sugar promptly upon arrival. The claim was for the fall in the market price of the sugar during the period of delay. Lord Reid began by setting out the knowledge and intentions of the parties at the time of the making of the contract. The charterers intended to sell the sugar in the market on arrival but were not shown to have had in mind any particular date as the likely day of arrival or to have had any knowledge or expectation of how the market would move around the time when the vessel was likely to arrive. The owners did not know what the charterers intended to do with the sugar. But they did know that there was a market in sugar at Basrah and, if they had thought about it, must have realised that, at the least, it was "*not unlikely*" that the sugar would be sold in the market at its market price on arrival. They must be held to have known that in any ordinary market prices fluctuate daily; but they had no reason to appreciate that during the relevant period the market would go down rather than up – it was an even chance that it would go down.

41. Lord Reid characterised the question for decision as being whether a plaintiff can recover as damages for breach of contract a loss of a kind which a defendant ought to have realised when he made the contract was "*not unlikely*" by which he meant a degree of probability "*considerably less than an even chance but nevertheless not very unusual and easily foreseeable*".

42. Lord Reid examined what Baron Alderson had said in ***Hadley v Baxendale*** when applying the rule. He was not, Lord Reid held, distinguishing between results which were foreseeable or unforeseeable but between results which were likely because they would happen in the great majority of cases and results which were unlikely because they would only happen in a small minority of cases. A result which would happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties. But a result which, though foreseeable as a substantial possibility, would only happen in a small minority of cases should not be regarded as having been in the parties' contemplation. Alderson B was – Lord Reid held – referring to such a result when he said: *"For such loss would neither have flowed naturally from the breach of this contract in the great*

multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants"

43. Lord Reid went on to observe that the line of reasoning in that and an earlier passage was that, because in the great majority of cases loss of profit would not in all probability have occurred, it could not reasonably be considered as having been fairly and reasonably contemplated by both parties for it would not have flowed naturally from the breach in the great majority of cases. A type of damage which was plainly foreseeable as a real possibility but which would occur only in a small minority of cases could not be regarded as arising in the usual course of things nor supposed to gave been in the contemplation of the parties.

44. The crucial question was whether, on the information available to the defendant when the contract was made : *"... he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."*.

45. I derive from Lord Reid's speech the following propositions:
(a) The mere fact that a type of loss is foreseeable is not, of itself, sufficient to make it recoverable; someone may foresee a result that is very remote.
(b) A claimant is, however, entitled to recover damages in respect of a foreseeable result which either (i) will happen in the great majority of cases; or (ii) in respect of which, on the facts known or available to the defendant, the chances of its happening are considerably less than evens but the occurrence of which would not be very unusual.
(c) But a plaintiff is not entitled to recover in respect of an occurrence which, although foreseeable as a substantial possibility will only happen in a small minority of cases and whose occurrence would therefore be very unusual.

46. There is an obvious distinction between a result which will happen in the great majority of cases and one which will only happen in a minority of cases, but not so small a minority as to make the result very unusual. It is debatable whether or not a result in the latter category is to be regarded as one that may fairly and reasonably be considered as "*arising naturally i.e. according to the usual course of things*" or whether it can only be considered as one that "*may reasonably be supposed to have been in the contemplation of both parties at the time that they made the contract as the probable result of the breach of it*".

47. Since the claimant recovers whichever limb of the rule he satisfies the distinction may not be important for practical purposes. But the wording of the rule, and its use as a formula for over 150 years, has led on occasion to a degree of rigidity in its practical application whereby it is divided into two mutually exclusive "limbs". If the result in respect of which damages are sought is one that happens in the majority of cases, the case plainly falls within the first limb. That limb has also been said to relate to losses which *everyone* would know would arise in the ordinary course of things: see the fourth of Asquith, L.J.'s propositions in *Victoria Laundry v Newman* [1949] 2 KB 528. If the first limb is confined to losses which everyone would know will arise in the majority of cases, losses which everyone knows could happen but only in a substantial minority of cases would fall only within the second limb; as would losses which the parties (but not any ordinary person) know will happen in the majority of cases (or, if relevant under the first limb, a substantial minority of cases).[3]

48. The potential effect of such compartmentalisation is apparent in the present case. The Owners contend that their claim falls within the first limb since, on the majority arbitrators' finding, the Charterers, as persons experienced in the shipping trade, must have realised that it was not unlikely that delayed redelivery would prejudice a subsequent fixture. They do not suggest that the loss for which they claim damages happens in the majority of cases. If, therefore, the first limb is confined either to what happens in the majority of cases or to consequences that would have been contemplated by anyone, whether experienced in the shipping trade or not, their claim lies under the second limb. The Charterers contend that, if the Owners are to recover at all, it must be under the second limb. The majority arbitrators have held that the case falls under the first, but not the second limb; although a result which arises naturally must necessarily be one that may reasonably be supposed to have been in the contemplation of the parties.

The modern approach

49. The modern approach is to treat the rule as a composite whole. Lord Reid made this clear in *The Heron II* when he said that he: "*did not think that it was intended that there were to be two rules or that two different standards or tests were to be applied*".

The judgment in ***Hadley v Baxendale*** was, in his view, directed to excluding, in the absence of special circumstances communicated to the defendants, recovery for loss which in the great majority of cases would not have occurred. Such losses could neither be considered as arising naturally i.e. in the usual course of things nor be supposed to have been in the contemplation of the parties. The corollary must necessarily be that loss which would occur in the majority of cases *would* arise naturally and would be such as may reasonably be supposed to have been within the contemplation of the parties as the probable result of the breach of it.

[3] See Lord Pearce in *The Heron II*: "*According to whether one categorises a fact as basic knowledge or special knowledge the case may come under the first part of the rule or the second. For that reason there is sometimes difference of opinion as to which is the part which governs a case and it may be that both parts govern it*".

50. Given that Lord Reid did not think that ***Hadley v Baxendale*** intended to lay down two rules, or different standards or tests, it seems to me that he would also have treated losses which would not occur in the majority of cases but were not unlikely (in the sense in which he used those words), as being losses which arose naturally and such as ought reasonably to have been in the contemplation of the parties. The reference to losses " *arising naturally i.e. according to the usual course of things"* does not have to mean that the loss in question usually results but rather that is not unlikely to occur and that its occurrence would not be very unusual. Lord Upjohn thought that there were two branches of one rule between which there was, however, no dichotomy for "*they may run into each other and, indeed, be one*".[4]

51. In ***The "Pegase"*** [1981] 1 Ll Rep 175 Goff, J., as he then was, said that the general result of ***The Heron II*** and ***Victoria Laundry v Newman*** [1949] 2 K.B. 528 was that: "*the principle in* ***Hadley v Baxendale*** *is now no longer stated in terms of two rules, but rather in terms of a single principle – though it is recognised that the application of the principle may depend on the degree of relevant knowledge held by the defendant at the time of the contract in the particular case*".

He also made it clear that there was no rule that excluded or restricted claims for loss of profits. All depends on the facts.

52. Moreover, in ***The Heron II*** the House of Lords departed from the *Hadley v Baxendale* formula in defining the remoteness test. As the head note records "*the sole rule as to the measure of damages for any kind of breach of any kind of contract was that the aggrieved party was entitled to recover such part of the damages actually caused by the breach as the defaulting party should have contemplated would flow from the breach*" . The claimant must show that the defaulting party should reasonably have contemplated that the result for which he seeks compensation was "*not unlikely*" (Lord Reid); or that such a result was "*liable to be or at least …result was not unlikely to be*" (Lord Morris); or that it was "*liable to be*" (Lord Hodson); or that there was a "*serious possibility or real danger"* (Lord Pearce and Lord Upjohn) that it would occur. Other judicial dicta cautioning against treating the rule as what in ***Kpohraror v Woolwich Building Society*** [1996] 4 AER 119 Evans, L.J.(as he had by then become) described as "*a straightjacket"* are to be found at *McGregor on Damages*,17th Ed, paragraphs 6-165 and 6-166.

53. Subsequent formulations of the test have been expressed in similar terms to those of Lord Reid. Thus in ***The Rio Claro*** [1987] 2 Lloyd's Rep 173 Staughton J (as he then was) said that, for a loss arising from a breach of contract to be recoverable: *"It must be such as the contract breaker should reasonably have contemplated as not unlikely to result. To that direction must be added the point that the precise nature of the loss does not have to be in his contemplation, It is sufficient that he should have contemplated loss of the same type or kind as that which in fact occurred. There is no need to contemplate the precise concatenation of circumstances which brought it about".*

54. In addition it is clear that the test for remoteness does not require the claimant to show that contract breaker ought to have contemplated as being not unlikely the actual *extent* of the loss that occurred: ***Hill v Ashington Piggeries*** [1969] 3 All ER 1496, 1524; ***Parsons v Uttley Ingham & Co*** [1978] QB 791, 813. This is so even if the loss that occurs is much greater in size than anyone anticipated: e.g. ***Brown v KMR Services*** [1995] 2 Lloyd's Rep 513,557.

Conclusion

55. In my judgment on the facts found by the majority arbitrators the Owners' primary claim is not too remote. They have determined that, to the knowledge of the Charterers, it was recognised and accepted as a hazard of late redelivery that the vessel would miss her cancellation date for the next fixture; that this was not something that was very unusual but, on the contrary, the kind of result which the parties would have had in mind; that rapid variations in market rates in either direction were market knowledge; and that the kind of loss suffered by the Owners, namely the need, on account of delay in redelivery, to adjust the dates for the subsequent employment of the vessel with a reduction in the previously agreed rate of hire, was within the contemplation of the parties as a not unlikely result of the breach.

56. Insofar as it is necessary to do so, the Owners' loss of profit can, in the light of the findings of the majority arbitrators, legitimately be treated as "*arising naturally i.e. according to the usual course of things from such breach of contract itself"*. In considering the first limb, the Court is not constrained to look at what people with not even a minimum knowledge of the shipping trade would contemplate. The court is entitled to look at the "*general… facts …., known to both parties*": per Lord Upjohn in *The Heron II* at page 424; and "*such knowledge and information as (the contract breaker), as reasonable men (sic), experienced in its trade, should have had and should have brought to bear in its contemplation*": per Davies LJ in ***Hill v Ashington Piggeries*** at page 1524 D.[5]

Foreseeability

57. Mr Dominic Kendrick, Q.C., for the Charterers, submitted that the majority arbitrators must have treated foreseeability as the relevant test for remoteness. That this was so was apparent from their decision to include missing a dry docking or a sale of the vessel as "not unlikely" consequences of late delivery. The fact that they had used the phraseology of ***The Heron II*** "parrot fashion" could not disguise their legal error.

[4] Citing Lord Shaw in ***R & Hall Ltd v W.H. Pim (Junior) & Co Ltd.*** See paragraph 76 below

[5] See also Scrutton, L.J., in ***The Arpad*** [1934] P 189,201: "… "*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". This brings in, in claims of contract, the contemplation of the parties, including the knowledge of one contracting party, either from actual communication, or from business knowledge, that the goods dealt with may probably be resold, so that failure to deliver them may probably prevent, if there is no market, the performance of a contract for resale and cause probable loss of profit*".

58. I do not regard the majority arbitrators' conclusions as invalidated because they have used some of the language employed in *The Heron II*. On the contrary this seems to me an indication that they have asked themselves the relevant questions. It is, I think, debatable whether missing a dry docking or, even more, the sale of a vessel on account of late redelivery is to be regarded as a contingency within the contemplation of the parties or whether it is sufficiently unusual to be outside their contemplation. I cannot, however, regard the fact that the majority arbitrators have held, apparently by way of agreement with Counsel for the Charterers, that both of these events were "not unlikely" as indicating that they have applied a test of foreseeability alone. Nor do I reach that conclusion because in paragraph 18 the majority accepted Mr Croall's submission that what mattered was that the type of loss claimed was foreseeable. In context the majority were plainly concerned with a result that was or ought to have been foreseen as not unlikely.

Assumption of responsibility

59. Mr Kendrick submitted that before the Charterers could be made liable it would be necessary to show that they assumed a responsibility for loss of profit on a subsequent charter. In support of this contention he relied, first, on the passage in the speech of Lord Reid in ***The Heron II*** which I have cited in paragraph 44 above.

60. I do not regard Lord Reid as having there laid down some additional requirement other than that the type of loss for which compensation is sought must be within the reasonable contemplation of the contract breaker as a not unlikely consequence of the breach in question. If it is, then it is "*proper*" to make him responsible for the loss.

61. In British Columbia, etc. **Saw Mills Co. Ltd v Nettleship** [1868] L.R. 3 C.P. 499, 509 Willes J said: *"…the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it ….Knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such knowledge or not".*

62. Mr Croall submits that this passage is addressing the second limb of the rule in ***Hadley v Baxendale*** as the current authors of *Chitty on Contracts,* 29th Ed Vol 1(paragraphs 26 -004 and 26- 005) and *McGregor on Damages*, paragraphs 6 – 175 and 175, treat it as doing.

63. It is not, however, necessary, if the claimant is to recover damages, for him to show that it was a term of the contract, express or implied, that the contract breaker should compensate the other party for the type of loss in issue. See Lord Upjohn in ***The Heron II*** at page 422: *"If parties enter into the contract with knowledge of some special circumstances, and it is reasonable to infer a particular loss as a result of those circumstances that is something which both must contemplate as a result of a breach. It is quite unnecessary that it should be a term of the contract".*

    and Goff J in ***The Pegase*** at page 182 ("*The decided cases appear to support the opinion so expressed by Lord Upjohn*".)

64. If the result for which compensation is sought is of a type that the parties, as persons experienced in the relevant market, would, if they thought about it, realise was a not unlikely consequence of the breach, the contract breaker must be taken to have accepted the risk of being liable to compensate the other party if that result occurs. That is the case here. On the findings of the majority the Charterers did not need to be told that if the vessel was nine days late, she might miss the cancelling date for her next fixture, as a result of which, if the market rate had fallen, a lower hire rate might have to be accepted if the fixture was not to be lost completely.

65. If the type of loss for which compensation is sought does not fall within that category e.g. because it would be very unusual, it will be necessary to show that the contract breaker became aware that the type of loss in question might result from the breach and that he did so in circumstances such that he accepted the risk of being liable for it, or must be taken to have done so because a reasonable person in his position would have understood that he was accepting this responsibility.[6] But, if the risk of a special type of loss is communicated to the contract breaker by or on behalf of his counterparty when the relevant contract is made and in the context of contractual negotiations, and he does not seek to exclude liability in respect of it, it is likely to be very difficult for him to contend that he has not accepted the risk.

The weight of authority

66. Mr Kendrick relied on the words of Hobhouse, LJ, as he then was, in ***The "Nukila"*** [1887] 2 Lloyd's Rep 146: *"Turning to the authorities it must at the outset be recognised that, whether or not they are strictly binding on us, they must, insofar as they represent the existing authoritative statements of the law only be departed from if they are clearly wrong. This principle has been stated on a number of occasions in the field of commercial law where it is recognised that the parties enter into contracts on the basis of the law as it has been stated in the applicable authorities. For a Court, in deciding a dispute under a commercial contract, later to depart from those authorities risks a failure to give effect to a contractual intention of those parties as evidenced by their contract entered into on a certain understanding of the law. As Lord Dunedin said in* ***Atlantic Shipping & Trading Co v Louis Dreyfus & Co.,*** *[1922] 10 Ll. Rep 703; [192]) 2 A.C. 250 at p 257:*

[6] See Goff, J, in ***The Pegase***: "*...the test appears to be: have the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of the making of the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of the breach".*

"My Lords in these commercial cases it is I think of the highest importance that authorities should not be disturbed and if your lordships find that a certain doctrine has been laid down in former cases and presumably acted upon you will not be disposed to alter that doctrine unless you think it clearly wrong"

67. I do not accept that it has been authoritatively decided that, on facts such as those found by the majority arbitrators, there can be no recovery in respect of loss of profit on a subsequent fixture either under the first limb or at all.[7] I must, therefore, decide whether, on the facts found, and in the light of all relevant authorities, including those such as ***The Heron II*** that lay down general principles and the need to restate ***Hadley v Baxendale*** in terms of a single principle, the majority arbitrators have erred in law.

The significance of an available market

68. Mr Kendrick submitted that the majority arbitrators did not properly take account of the fact that there is an available market in which vessels such as "***The Achilleas***" are chartered out and chartered in. Where there is such a market the owners' entitlement, in the absence of special circumstances, is, to the market/charterparty rate difference during the overrun period. Both in this context, and in the analogous case of the sale of goods, the law does not concern itself with contracts made between the claimant and third parties, whether the claimant is the owner of a vessel or a purchaser of goods. What a claimant chooses to do with his ship after redelivery, or his goods if and when they are delivered, is his own independent speculation which, ordinarily, can neither increase nor reduce his claim for loss of use or damages for late or non delivery.

69. In the light of those submissions I turn to consider whether the cases in this field point to a conclusion different to the one that I have reached.

Premature termination of a charterparty

70. In ***The Elena d'Amico*** [1980] 1 LLR 75 the owners wrongful repudiated a three year charterparty in March 1973, about 14 months after its inception. The charterers did not, however, go into the market and hire another substitute vessel for the balance of the charter period. They claimed, inter alia, damages for the loss of profits that they said they would have made between January and April 1974, during which period there was a substantial rise in market rates. Goff, J., as he then was, held that the normal measure of recovery, if there was an available market, was that damages should be assessed on the basis of the difference between the contract and the market rate for the balance of the charter period; but that a plaintiff could recover damages beyond the normal measure if those damages fell within "*the principle in* ***Hadley v Baxendale***". But he held that there was no causative link between the owners' breach of contract and the charterers' decision not to take advantage of the available market. The owners' decision was independent of the wrongdoing that had taken place, and, for that reason, there was no warrant for departing from the prima facie measure. So the owners' non recovery of damages for loss of profits was, as Mr Kendrick accepted, based on causation. But the same result, he submits, can and should be reached by applying the concept of remoteness. As is apparent from what I have already said, I do not accept that that is so.

Non delivery of goods

71. In ***The Elena d'Amico*** Goff J had relied in part on the analogous position in relation to damages for non-delivery under section 51 of the *Sale of Goods Act 1893,* now the *Sale of Goods Act 1979*, which provides that the measure of damages for non-delivery:

"(2) ….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 whey they ought to have been delivered or (if no time was fixed) at the time of refusal to deliver".

72. In ***R & H Hall Ltd v W.H. Pim Junr. & Co. Ltd*** [1928] 30 LLR 159 Pim had contracted to sell a cargo of Australian wheat to Hall (at 51s 9d a quarter). Hall had agreed to sell such a cargo to Williams (at 56s 9d a quarter). Williams had agreed to sell such a cargo to Suzuki (at 59s 3d a quarter). Pim bought a cargo of wheat on board the "*S.S. Indianic*" at 60s a quarter. Pim later secured agreement with all concerned that the sales from Pim to Hall and from Hall to Williams and from Williams to Suzuki should be treated, in each case, as resales of the cargo the subject of the preceding purchase in the chain. Pim gave notice appropriating the *Indianic* cargo to its contract with Hall and that notice was passed down the chain. Pim sold the *Indianic* cargo to Rank at 59s 11 ½ a quarter. When the cargo arrived the market price was 53s 9d a quarter. Having sold the cargo to Rank Pim was unable to, and did not, deliver the documents covering the cargo to Hall. The Court of Appeal held that Hall's damages were limited to the difference between the market (53s 9d) and the contract (51s 9d) price at the date of the breach. Hall claimed the difference between the price at which they had bought (51s 9d) and the price (56s 9d) under their sub-sale to Williams.

[7] I note also that before the arbitrators it was agreed that there was no authority precisely in point to support the owners' claim but both parties submitted that such authority as there was supported their respective contentions. The minority arbitrator said that he regarded the well established view in the industry to be that if a vessel was redelivered late then, unless the charterer was put on notice of the subsequent fixture, the measure of damages was the market versus contract rate for the period of the overrun, although he had never had the point argued previously. Even if that was the industry view (on which the majority make no findings) its view of the measure of damages (a question of law) is not the same thing as its view of the possible consequences of breach (a question of fact).

73. The House of Lords restored the decision of Rowlatt, J that Hall was entitled to recover the difference between the price at which it had bought and the price at which it had resold the cargo together with an indemnity for the damages and costs which Hall would have to pay to the buyers who had brought from them.

74. The House treated the question as one of the application of the rule in ***Hadley v Baxendale***. Viscount Haldane regarded the case as one where the contract was not merely for the sale of corn in bulk but for the sale of the cargo of an individual ship, either specifically identified or to be identified, by which the seller contracted to put the buyer in a position to fulfil such sub-contract as he might make. For that reason it mattered not whether the buyer was likely to enter into a sub-contract. He reached this conclusion on the terms of the contract alone without reference to what took place between the parties after the contract was made. Condition 1 of the contract had provided for notice of appropriation to be given by Pim, "*and by each other seller*"; the arbitration clause referred to intermediate buyers and sellers and to "*the last buyer*"; and the strike clause referred to notices being "*passed on in due course*".

75. Viscount Dunedin observed that it was well known to both parties that it was common practice to resell cargoes whilst afloat, that, apart from common knowledge, the contract itself showed this, and that the correspondence as to the actual appropriation of the vessel was additional proof, if proof were needed, of the familiarity of Pim with the practice of successive resales of cargo afloat. Pim knew as soon as it nominated a cargo that only delivery of that cargo could satisfy the contract, and it was sufficient to give rise to liability for loss of profit that there was an even chance of a sub sale taking place.

76. Lord Shaw took a view similar to that of Viscount Haldane ("*My principal reason is that I think that the two parties had actually provided for the very case of sub-sales*"). It was he who appears to have been the author of the proposition that a "*not unlikely*" result of the breach must be reckoned to be within the contemplation of the parties as to its breach. He deprecated an "*ultra analysis*" of Baron Alderson's sentence into two portions "*which are to be reckoned as necessarily and always two distinct and different cases*" and said: *"These two things, arising naturally from or the probable result of the breach, need not be antithetically treated; they may run into each other and, indeed, be one. I think for instance, that in this case, where the string of sales was to the knowledge of the breaker of the contract within the very scope of the conditions of his bargain, it was fairly and reasonably to be expected, not only, to use the language of the judgment as "arising naturally i.e. according to the usual course of things, from such breach", but also "such as may reasonably be supposed to have been in the contemplation of both parties, at the time that they made the contract, as the probable result of the breach of it".*

77. This passage, like that cited at paragraph 42 above, illustrates that what may be regarded as arising naturally from the breach, may itself be dependent on what is known to the parties at the time of the contract as a possible result of the breach.

78. Lord Phillimore thought the question to be one of contract. Notice or knowledge of an intended use would not do of itself. *"But if the tribunal which tries the case comes to the conclusion that he contracted to sell or to carry on terms that he should be responsible for damage which might accrue from his failure to provide for any one of certain objects then he must be held liable".* The contract terms were such that the sellers *"must be taken to have consented"* to a state of affairs whereby the purchasers would sell on in a string of sales and "thereby to have made themselves liable to pay to the appellants their profit on resale".

79. Lord Blanesburgh had no difficulty in holding that it must be taken to have been within the contemplation of the parties that in the event of default by the sellers in tendering documents "*their liability to their buyers in damages would be in exact correspondence with what it would have been if the contract had been specific all through and if to the knowledge of the sellers the sub-contract had at the date of that contract then existed or been in contemplation".*

80. I do not regard either section 51(2) or the decision in ***Hall v Pim*** as ruling out the Owners' claim to loss of profit. ***Hall v Pim*** was an application of ***Hadley v Baxendale***. The case plainly decides that loss of profits on a sub sale can be recovered if the contract itself contemplates that the buyers will sub sell the very same cargo without possibility of substitution and, at the time of breach, the sub contract price exceeds the contract and sub contract price. Although some members of the House rested their decision on the fact that the terms of the contract themselves contemplated a sub sale of the self same cargo, I do not regard the case as authority for the proposition that it is only in such circumstances that recovery of a loss of profits on sub sales is sufficient. It would be sufficient to establish that at the time of the contract the parties would, quite apart from the terms of the contract, have contemplated that a sub - sale of the very same (non substitutable) cargo was not unlikely to be made. That phrase must now be interpreted in the sense in which Lord Reid used those words in the ***Heron II.***

81. The buyers in ***Hall v Pim*** could not mitigate their loss, once notice of appropriation had been given, by buying in a replacement cargo. If they had been able to do so their claim to loss of profits would probably have been defeated on account of their failure to mitigate by doing so (as happened to the unsuccessful buyers in *Williams Bros v Ed.T. Agius Ltd* [1914] A.C. 510). In this respect the Owners were in an analogous position. Whilst it is true that there is a market rate for the chartering of vessels such as the ***"Achilleas",*** the Owners could not charter in another vessel in order to fulfil the Cargill charter, in the absence of any clause in the Cargill charter entitling them to substitute another vessel.

Supply of defective goods

82. Section 53 of the Sale of Goods Act 1979 provides:

(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach entitled to reject the goods; but he may:
(d) set up against the seller the breach of warranty in diminution or extinction of the price, or
(e) maintain an action against the seller for damages for the breach of warranty.
(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty
(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.
(4) The fact that the buyer has set up the breach of the warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage".

83. In ***Bence Graphics International Ltd v Fasson U.K. Ltd*** [1998] Q.B. 87 Bence sold to Fasson vinyl film to use for making decals bearing words, numbers or symbols used to identify sea-borne bulk containers. One of the terms of the contract was that the film should survive in good legible condition for at least five years. Fasson sold the decals to container manufacturers, mainly Sea Containers Ltd, who supplied the containers (usually on lease) marked with the decals to shipping lines. Some of the decals became illegible. Fasson brought an action for breach of warranty. The trial judge held that the prima facie measure of damages under section 53 (3) had not been displaced and awarded £564,328 damages based on the difference between the value of the goods (measured by the purchase price) at the time of delivery and the value they would have had if the warranty been fulfilled.

84. The majority of the Court of Appeal overruled the decision. It was in the contemplation of the parties when the warranty was given (a) that the goods sold would only be used in making a product which would be sold on to customers requiring five year durability; (b) that any defect in the film would not have been detected on delivery or in the process of manufacture; and (c) that, if there was a defect, the end users would claim damages against the container owners, who would claim against the manufacturers, who would claim against the plaintiffs . In such a case the damages should be based on the buyer's liability to the subsequent or ultimate users. The judgment was reduced to £22,000, being the cost of unused and defective material returned to the plaintiffs. The defendants had compensated the plaintiffs for the only claim that had been made on them; and it was not established that there were any others sufficiently in prospect to give rise to any claim for damages or an indemnity.

85. In reaching this conclusion Otton, L.J., distinguished ***Slater v Hoyle & Smith Ltd*** [1920] 2 K.B. 11. In that case the buyer had bought cotton cloth from the seller in order to fulfil another contract which the buyer had already made with a sub-buyer. The seller delivered cloth which was not of the contractual quality but the buyer was able to perform the sub-contract by delivering the same cloth. The sub-buyers paid the full price. Nevertheless the normal measure of damages was applied namely the difference between the market price at the time and place of delivery of cloth of the contractual quality and the market price at the time and place of delivery of the cloth actually delivered. Otton L.J distinguished the case from the facts in *Bence* on the ground that in *Slater* (a) the sub-sale was of the same goods (after bleaching) and (b) the seller did not know of the contemplated sub-sale; whereas in *Bence* (i) the goods were substantially converted or processed by the buyer and (ii) the sellers were aware of the precise use to which the film was to be put when the contract was made. Noticeably he rejected the submission that a conclusion that required the sellers to indemnify the buyers in respect of their liability to sub – purchasers was too "nebulous" and held that such difficulties of calculation as might arise were irrelevant to the issue that the judge had to decide.

86. Auld, L.J., agreed and said this: *"As to section 53 (3) there is, in my view, a danger of giving it a primacy in the code of section 53 that it does not deserve. The starting point in a claim for breach of warranty of quality is not to determine whether one or other party has "displaced" the prima facie test in that subsection. The starting point is the* ***Hadley v Baxendale*** *principle reproduced in section 53 (2) applicable to a breach of any warranty, namely an estimation on the evidence of "the ….. loss directly and naturally resulting in the ordinary course of events from the breach of warranty". The evidence may be such that the prima facie test in section 53 (3) never comes in to play at all.*

The ***Hadley v Baxendale*** *principle is recovery of true loss and no more (or less), namely to put the complaining party, so far as a money can do it, in the position he would have been if the contract had been performed. Where there is evidence showing the nature of the loss that the parties must be taken to have contemplated in the event of breach, it is not to be set aside by applying the prima facie test in section 53 (3) simply because calculation of such contemplated loss would be difficult. Equally, it should not be set aside in that way so as to produce a result where the claimant will clearly recover more than his true loss."*

……Put shortly, and drawing on the analysis of Scarman L.J. in ***H.Parsons (Livestock) Ltd v Uttley Ingham & Co. Ltd*** *(1978) Q.B. 791,807, the sort of question the judge should have asked is: "What would the parties have thought about the probable loss to the buyer in the event of a latent defect in film at the time of delivery later causing trouble?"*

87. Auld L.J. regarded his observations as running contrary the judgement of the Court in ***Slater***, which he though was not materially distinguishable from ***Bence*** on either of the two bases suggested by Otton, L.J. As to (a) he saw no distinction between bleaching unbleached cloth and incorporating the goods in a manufactured product for

onward sale. As to (b) the seller in Slater did not know of the specific contracts but did know that the buyer could sell the 3,000 pieces of unbleached cloth on, either unprocessed or processed and must be taken to have contemplated that loss could result from such onward sales if the cloth was not of the required quality. He thought that *Slater* ought to be reconsidered as being potentially wrong on four different counts. In particular he regarded it as having disregarded the reasoning of the Privy Council in ***Wertheim v Chicoutini Pulp Co*** [1914] A.C. 301 as approved by Lords Dunedin and Atkinson in ***Williams Bros v Ed T.Agius Ltd*** [1914] A.C. 50 that where there has been delivery in a mercantile contract and it can be seen what they buyer has done with the goods, it is possible and proper to measure his actual loss by reference to that outcome. He also regarded Slater as having had too much regard to practicality at the expense of principle in relying on possible difficulties of establishing causation and assessment where the goods sold have been subjected to some process or where the terms of the contract and sub-contract may for that or some other reason be different. He held that ***Bence*** was eminently a case in which the parties would have contemplated that, in the event of a breach by the seller discovered only after the decals had been in use, the buyer might wish to pass on to it claims for damages from dissatisfied customers

88. *Bence* is a breach of warranty of quality case, but it is, in my judgment, of relevance by analogy to the present case in its recognition of the following (a) that the principle in ***Hadley v Baxendale*** is one of "*recovery of true loss and no more (or less), namely to put the complaining party, so far as money can do it, in the position he would have been if the contract had been performed";* (b) that "*the ….. loss directly and naturally resulting in the ordinary course of events from the breach of warranty"* includes loss that the parties, in their state of knowledge, must be taken to have contemplated; (c) that the application of that test may mean that a difference in value test is inapplicable; (d) the importance of principle over practicality and (e) the potential significance of seeing what the buyer has done with the goods in determining the damages to which he is to be entitled.

89. In the present case the Owners' true loss was the loss of profit that they incurred on the Cargill charter. In the light of the majority arbitrators' finding such a loss was eminently one which the parties would have contemplated as a possibility if the vessel was redelivered late. There is in fact no practical difficulty in assessing the Owners' loss; but, even if there was, that is not a ground for awarding damages on a different principle. It can be seen what arrangement the Owners had to come to with Cargill and it is proper to measure their loss by reference to that outcome.

Delayed delivery

90. In ***Louis Dreyfus Trading Ltd v Reliance Trading Ltd*** [2004] 2LLR 243 Louis Dreyfus (LD) sold to Reliance Trading ("Reliance") 7,000 m.t. of sugar, C & FFO Banjul at $257.43 per m.t. Shipment was "*per m.v. Dawn currently discharging at Banjul*". An associated company of Reliance had previously agreed to sell 5,000 m.t. of similar sugar to Boule & Co Ltd ("Boule") at $290 per m.t., and it was to meet that company's obligations that Reliance had purchased the sugar from LD. But LD had insisted that Reliance buy the entire 7,000 m.t. and Boule had, by an amendment to the contract to buy 5,000 m.t., agreed to purchase the additional 2,000 m.t. at a discounted price of $253 per m.t. It was known when the contract was made that the sugar was being purchased by Reliance for resale under the amended contract between Reliance or its associated company and Boule. On August 17th payment was made by Reliance to LD and by Boule to Reliance for 3,000 m.t. Discharge was delayed in circumstances for which LD were responsible and by the time the vessel was finally discharged the market price had dropped to $224 per m.t. Reliance said that they would only take the 4,000 m.t. if a reduced price was applied to the whole 7,000 m.t. LD treated Reliance as in default in regards to the 4,000 m.t.

91. Reliance sought damages on the basis of the difference between the contract price ($257.43) and the value of the good when they eventually became available ($224). LD said that Reliance had suffered no loss. They pointed out that Reliance was to receive from Boule $290 for 5,000 m.t. and $253 for the balance and that it was likely that Reliance had obtained payment for the 3,000 m.t. discharged at $290 per m.t. as a result of which Reliance had made a profit. The arbitrators awarded Reliance damages calculated in the manner that they had sought.

92. Andrew Smith J held that the profit or loss made by a buyer on a sub-sale was generally irrelevant to the assessment of damages for breach by a seller of a warranty of quality or failure to deliver; but that if the parties had a particular sub-sale within their contemplation when making their contract the buyer might be entitled to have that sub-sale brought into account to increase his damages or the seller might be entitled to have it brought into account in order to reduce the award against him. In a case where the parties had in their contemplation when the contract was made that the buyer was committed to deliver the same goods to a sub-buyer under a specific contract, principles of remoteness did not require that the sub-sale be disregarded in assessing they buyer's damages. It was to be taken to have been within the parties' reasonable contemplation as a serious possibility, or a consequence not unlikely to result from LD being in breach of their obligations, that the loss suffered by Reliance might depend on the impact of the sub-sale to Boule. The case was remitted to the arbitrators for reconsideration because it was apparent that they had not considered whether or not LD had rebutted the presumption that the damages should be assessed in accordance with section 53 (3) of the 1979 Act.

93. I do not regard that case as inconsistent with the conclusion that I have reached. There is a superficial tension between the general principle laid down in *The Heron II* (that damages are recoverable for loss that the parties must have contemplated as a not unlikely consequence of the breach) and the principle that where there is an available market the buyer's damages for non delivery or delayed delivery are to be calculated by the

difference between the contract price and the market price at the date when delivery should have taken place or the date when delayed delivery in fact took place. As Lord Devlin said in ***Kwei Tek Chao v British Traders and Shippers Ltd*** [1954] 2 Q.B. 459 "*everyone who sells to a merchant knows that he bought for re-sale*". It must follow that, if the goods are not delivered and nothing else happens, a loss on a resale is not merely foreseeable, but not unlikely. The reason why such a loss is not recoverable, where there is an available market, is that the law's working assumption is that a merchant (or, in more modern parlance, a businessman) will go into that market and buy replacement goods. That is what the law contemplates that the buyer, acting reasonably, will do. It treats the parties as having the same contemplation.

94. But there are, as Lord Devlin also observed, cases where something different must be contemplated and a different measure is applicable. The archetypical situation is where the buyer cannot go into the market because he had agreed to sell the very same goods as those he had agreed to purchase. If late delivery of goods under a sale contract is to be regarded as analogous to late redelivery under a charterparty, it has to be remembered that that which is to be redelivered will in all probability be the very thing that is thereafter to be delivered under a subsequent charter.

Damaged goods

95. In ***Obestain Inc v National Mineral Development Corporation Ltd*** [987] I LLR 465. "***The Sanix Ace***" sailed from Cigading in Indonesia with a cargo of 7,558 DIR pellets. She arrived at Visakhapatnam in India with a major part of her cargo wet damaged. Only 2,000 tons could be salved. The charterers had purchased the cargo from the shippers FOB and sold it to the end users on terms that risk (but not property) passed on shipment. The charterers obtained the full price from the end users. The owners contended that, in those circumstances, the charterers had suffered no loss. Hobhouse, J., (as he then was) roundly rejected this suggestion upon the basis that: *"the owner of goods is entitled to sue and recover damages in respect of loss or damage to those goods …In contract, although nominal damages can be awarded, the right to recover substantial damages can be proved by proving possession or ownership of the relevant goods. The carriers' argument before me that the claimants had suffered no damage because they had subsequently been paid by the end users is misconceived. As soon as the goods are damaged the owner of the goods suffers loss. Formerly he was the owner of goods of full value and subsequently he is the owner of goods with only a reduced value. He has suffered a loss. Whether or not he is able to recover his loss from others is a separate question".*

96. In the course of his judgment he said this: *"Yet another aspect of the law with which the novel and erroneous proposition of the carriers before me comes into conflict is the established law about remoteness of damages and mitigation in relation to maritime contracts. As will be apparent from the article in Scrutton to which I have already referred[8] and the cases there cited, the provisions of contracts of sale and purchase to which the good owner is a party are, in the absence of special circumstances, res inter alios acta which are not to be taken into account in assessing the damages to be paid to the goods owner"*

97. I do not regard that case as providing any significant assistance in relation to the measure of damages for delayed redelivery under a charterparty. A claim in respect of damage to property rests upon a different footing. Property in the goods carries with it the right to substantial damages. It is common ground that, in some circumstances, a claim for damages in respect of a subsequent charter can be recovered. ***The Sanix Ace*** is not, in my judgment of assistance in determining what those circumstances are.

General considerations

98. Mr Kendrick submitted that, if the majority arbitrators were right, the assessment of damages might become very complicated. Suppose that a subsequent charter was lost that would have earned the Owners a generous rate of hire whilst it lasted but with the result that, when the vessel was redelivered under that charter, she would have needed employment at a time when the market had slumped. In fact, because she missed her subsequent charter, she obtained a less profitable immediate charter, but one that would have had her employed at above market rates during the market doldrums. Should account be taken of the fact that the rate was above market for a period after redelivery under the subsequent charter?

99. I should have thought that the answer was "Yes". I accept, also, that other factual situations may give rise to difficulties in assessing the owners' loss. But I do not regard the fact that in some cases there may be such difficulties as meaning that the Owners should be confined to recovery of a loss that is markedly less than their true loss, not least because such difficulties may also arise in those, admittedly more limited circumstances, in which, in accordance with Mr Kendrick's submissions, a claim would be possible.

100. It was also submitted that, as the minority arbitrator observed, if in this case there can be recovery of loss of profits under the first limb of the rule there is little room left for the application of the second limb. As to that, as I have already indicated, a strict delineation of the two limbs into two mutually exclusive categories is inappropriate, especially if it is used to support the proposition that a particular type of situation cannot fit into the first limb because, if it does, there is not much scope left for the application of the second. In any event there may be circumstances where the owners can only recover damages for loss of profit if at the time of the contract they had told the charterers (or they otherwise knew) that a particular charter was to be entered into on or shortly after its expiry. If, for instance, the rate under the subsequent charterparty was not a market rate, or its length was very unusual, or its terms were very special and compensation was sought because owners were

[8] Now Article 195.

deprived of the advantage of them, the owners might fail to recover if they had not informed the charterers of these features.

Finale

101. I have not come to the conclusion that I have reached with any sense of regret. As Lord Atkinson observed in ***Wertheim v Chicoutini Pulp***: *"it is 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 … That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages the difference in market prices at the respective times above mentioned is merely designed to apply this principle..."*

102. To award damages in this case on the basis of the difference between the market and the charter rate for the overrun would compensate the Owners for only a fraction of the true loss caused by the breach. In compensating them for the whole of it the majority did not, in my judgement, err in law. I shall, accordingly, dismiss the appeal.

Mr Dominic Kendrick QC (instructed by Swinnerton Moore) for the Claimant
Mr Simon Croall (instructed by Bentley Stokes & Lowless) for the Defendant