Assessment of Damages in Charterparty Disputes: Post Breach Events - Do they Matter?

The Hon Sir Bernard Eder

1. The latest edition of *Scrutton on Charterparties and Bills of Lading* (22nd Edition) para 19-021 has the following statement in Art 206 under the heading *Rules of Damages*:

> *"Date for assessment. The date for the assessment of damages is normally thought to be the date when the cause of action arose: ie the date of the breach of contract or the date of the tort (which if the tort is actionable only on proof of damages, such as the tort of negligence, will be at the date of damage)"* (emphasis added)

In support of that statement, reference is made in the footnote, by way of example, to *Philips v Ward* [1956] 1 W.L.R. 471 and *Dodd Properties (Kent) v Canterbury City Council* [1980] 1 W.L.R 433.

2. The text continues by saying that this was departed from by the House of Lords in *Golden Strait Corp v NKK (The Golden Victory)* [2007] 2 A.C. 353. The facts in that case are well known. As summarised in *Scrutton,* it concerned a 7-year charterparty. After about 3 years, there was a repudiatory breach by charterers which owners accepted as terminating the charter. Two years later, the Iraq war broke out which, under a war clause in the charter, would have entitled the charterers to terminate the charter in any event and it was assumed that, had the charter still been on foot, they would have done so. The question that arose was whether damages

should be assessed as at the date of the acceptance of the repudiation on the basis of the value of a 4-year remaining charter ignoring the outbreak of war; or as at the date of the trial taking into account the known outbreak of war and hence on the basis of only a 2-year remaining charter. By a 3–2 majority (Lords Bingham and Walker dissenting), it was held that damages should be assessed on the latter basis. This was justified as more precisely measuring the owners' known loss in a situation where the owners had not attempted to mitigate their loss by concluding a substitute charter for the 4-year period. The minority preferred to adhere to the date of breach "rule" as promoting commercial certainty.

3. There is also a footnote in the text to the brilliant article by Michael Mustill (formerly a Lord of Appeal) in (2008) 124 L.Q.R. 569 in which he presents a historical exegesis of this aspect of the law of damages and expresses the view that the original arbitrator (and therefore the minority in the House of Lords) was "absolutely right".

4. There is no doubt that *The Golden Victory* is a very controversial decision[1]. It represents the apogee of the exception to what *Scrutton* considers to be the "normal" basis for the assessment of damages i.e. the extent to which it is permissible to take into account post-breach events in assessing damages. For what it is worth, I agree with the views of Michael Mustill ! However, that is not really the focus of this paper. Rather, my purpose is to examine more generally the statement in *Scrutton*; to consider whether it is

[1] See, e.g. the discussion in *McGregor on Damages*, 19th edition, paras 10-115 to 10-119.

correct; and, in light of recent authority, to raise questions which might justify possible further changes to the text[2]. I would hope that the editors will perhaps adopt these suggestions in the forthcoming new edition of the book – together with any further observations which may be made in the course of the discussions that will, I hope, follow this paper. We can but hope !

5. There is no doubt that the broad statement in the text is supported by numerous authorities as referred to, for example, in paragraph 11 of the speech of Lord Bingham in *The Golden Victory.* A well-known example from the financial field is the old case of *Jamal v Moolla Dawood Sons & Co* [1916] AC 175 where the buyer had defaulted on a contract to take delivery of shares on a particular date at a particular price.

6. At the outset it is important to clarify one point viz. that so far as damages for wrongful repudiation are concerned, the normal "rule" is not the date of the repudiation itself but, of course, the date when the repudiation is accepted and the contract brought to an end. Further, the word "normally" in the *Scrutton* text conceals a more complex legal landscape. English law generally proceeds by way of principle. So what is the underlying principle ? What is the nature of the so-called "rule" ? And, if it is subject to qualification or exceptions, what are they ? As appears from the seminal paper by Professor S M Waddams, *The Date for the Assessment of*

[2] For present purposes, I am not concerned with the discrete question as to whether, and in what circumstances, an innocent party may recover wasted expenditure as considered, for example, in *Omak Maritime Ltd v Mamola Challenger Shipping Co & Ors* [2010] EWHC 2026 (Comm)

Damages (1981) 97 LQR 445, this is not a novel enquiry – and the answers to these questions remain, even now, somewhat elusive.

7. The two cases cited by *Scrutton* in support of the statement in Art 206 in fact point in somewhat different directions.

8. The first, *Philips v Ward,* concerns the extent of a valuer's liability in damages as a result of a negligent survey. The plaintiff in that case bought the property for £25,000 in 1952. The cost of repairing the house would have been £7000 at that time. However at the time of the hearing of the action, the cost of repairs would have been substantially more. In the event, it was held that (i) the damages should be assessed at the date when the damage occurred viz in 1952; (ii) allowance should not be made for the increase of the cost of executing the requisite work of repair between that time and the date of the hearing of the action; (iii) the measure of damages was the difference between the fair value of the property if it had been in the condition described in the surveyors' report (£25,000) and its value in its actual condition (£21,000); and (iv) accordingly, the amount recoverable in damages was £4000.

9. The second, *Dodd Properties v Canterbury CC,* points in a different direction. In particular, the Court of Appeal there held that where a building was damaged by a tortious act and put in need of repair, the cost of repairs was to be assessed according to the broad and fundamental principle regarding damages, namely that they were compensatory and should as far as possible put the injured party in the same position as if the wrong has not been committed; and, applying that principle, the cost of repairs was to

be assessed at the earliest date when, having regard to all the circumstances, they could reasonably be undertaken, rather than the date when the damage occurred. In the circumstances of that case, it was held that the fact that (i) it made commercial sense to postpone the repairs until the outcome of the action; (ii) the plaintiffs were not in breach of any duty owed by them to the defendants for their failure to carry out the repairs earlier and were thus for practical purposes not under a duty to mitigate the damages if they could not afford to do so; and (iii) the defendant had wrongly denied liability leaving the plaintiffs to establish their rights by litigation, were all matters to be considered in deciding the date at which the cost of repairs was to be assessed. My researches indicates that the approach in *Dodd* has been applied in numerous cases including most recently *Shepherd Homes Ltd v Encia Remediation* [2007] EWHC 1710 (TCC).

10. These are, of course, not shipping cases – still less claims for damages for wrongful repudiation of a charter where there is an available market; but they provide a helpful backdrop to the present discussion. A little closer to home (but still not of the sea) is the famous case of *Miliangos v George Frank (Textiles)* [1976] A.C. 443 where the House of Lords departed from the "breach date conversion" rule and held that an English court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency under a contract, the proper law of which was that of a foreign country, and when the money of account was that of that country or possibly some country other than the United Kingdom; and that, in an appropriate case, conversion should be at the date

when the court authorised enforcement of the Judgment in terms of sterling. The case is important in particular because of the general statement by Lord Wilberforce at page 468:

> *".....I therefore see no need to overrule or criticise or endorse such cases as The Volturno [1921] 2 A.C. 544 or Di Ferdinando v Simon, Smits & Co Ltd [1920] 3 K.B. 409. I would only say, in agreement with Scrutton LJ (The Baarn [1933] P 251, 266), that the former case leaves a number of difficulties unsolved and that the mere fact that as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach need not preclude, in particular cases, the conversion into sterling of an element in the damages which arises and is expressed in foreign currency, as at some later date. It is for the courts, or for arbitrators, to work out a solution in each case best adapted to give the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered....."*

This was the passage relied upon by Megaw LJ in *Dodd* to say, in effect, that although the "general rule" may be that in English law damages for tort or for breach of contract are assessed at the date of the breach, it is not a "universal rule" and is subject to many exceptions and qualifications.

11. Even broader statements appear, for example, in the speech of Lord Wilberforce in *Johnson v Agnew* [1980] A.C. 367, 401 where he stated that although even in contract of sale cases where the assessment of damages is normally taken at the date of breach, *"...this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances..."*; and in *Alcoa Minerals of Jamaica Inc. v Broderick* [2002] 1 A.C. 371, where Lord Slynn in the Privy Council stated: *"...it seems to their Lordships that in a*

case where damages are the appropriate remedy, if adoption of he breach date rule in assessing them produces injustice the court has a discretion to take some other date….". The language in these statements – i.e. *"injustice"*, *"....as may be appropriate…."* and *"discretion"* – is very broad indeed; and, if an arbitrator concludes in a particular case that (i) the application of the general rule would give rise to "injustice" and (ii) the rule should as a matter of "discretion" be departed from, one wonders perhaps on what basis a disappointed party in an arbitration might properly challenge such conclusion and seek leave to appeal under s69 of the Arbitration Act 1996. But that is for another day[3] !

12. In the shipping context, there are many cases in which the general "rule" has been applied. Of these, the highpoint is probably *A-G of the Republic of Ghana and Ghana National Petroleum Corpn v Texaco Overseas Tankships Ltd, The Texaco Melbourne* [1994] 1 Lloyd's Rep 473. The dispute arose out of the admitted breach by the owners of *The Texaco Melbourne* in the wrongful delivery of a cargo without production of bills of lading. The carrying voyage involved a short trip along the coast of Ghana from Tema to Takoradi. The claimant was the true owner of the cargo. Its claim for damages was based on the cost of obtaining a replacement cargo from Italy and shipping it to Takoradi i.e approx. US$2.9

[3] Cf: *Famosa Shipping v Armada Bulk Carriers, The Fanis* [1994] 1 Lloyd's Rep. 633 where the question arose as to whether the damages awarded to the charterers against the owners of *The Fanis* should take into account the profit made by them selling the bunkers on board another vessel, the *Chusovoy* on her redelivery under the substitute charter. Mance J held that it was for the arbitrators *"…to form a judgment one way or another…"* whether such profit did or did not arise out of or as a consequence of the breach. The arbitrators answered the question in the negative. In upholding the award, Mance J stated that he saw no error of law in the arbitrators' approach or conclusion. Cf: *Dalwood Marine Co v Nordana Line, The Elbrus* [2010] 2 Lloyd's Rep 315

million. At the date of breach this would have represented in local currency (i.e. Ghanaian cedis) GC 8 million. The US dollar equivalent of that sum was, by the date of trial, no more than US$21,165 ! If the cargo had been duly received at Takoradi, the price for which it could have been sold there was approx. GC 11 million which was equivalent, at the date of trial, to approx. US$31,046. In the event, the House of Lords held that damages were to be assessed in accordance with the general rule i.e. as at the date of breach; that the claimant had felt its loss in its local currency i.e. Ghanaian cedis; that the claimant took the risk of subsequent currency fluctuations; that such fluctuations were therefore irrelevant; and that accordingly the claimant was entitled to recover its loss in that currency only i.e. Ghanaian cedis.

13. In the context of a claim by a charterer for wrongful repudiation by an owner, the modern line of authorities probably starts with the decision of Robert Goff J in *Koch Marine Inc. v D'Amica Societa Di Navigazione ARL, The Elena D'Amico* [1980] 1 Lloyd's Rep 75. In that case, the vessel was chartered by the owners to the charterers for a period of three years from the date of delivery. In the event, the vessel was delivered on 10 January 1972 and for a period of 14 months performed voyages both in the Italian coastal trade and elsewhere. It was common ground that the owners wrongfully repudiated the charter in March 1973 and on 30 March 1973 the charterers treated the contract as at an end. Although there was at that time an "available market" to charter in another vessel, the charterers did not do so either in March 1974 or at any other time thereafter. The sole issue was the amount of damages to be awarded. There was a substantial rise in the market rate after

March 1973 and in the arbitration, the charterers claimed that by reason of the owners' breach, they had been deprived of the profits they would have made in the Italian coastal trade during *inter alia* the period January to April 1974. The owners however argued that the charterers were only entitled to the difference between contract and market prices. The arbitrator found in favour of the owners. The matter then came before the court in the form of a special case, the question of law being: whether on the facts found the proper measure of damages was (a) the difference between the cost of hiring the *Elena* and the cost of hiring a similar vessel on the market; or (b) to be based on profits which the charterers would have earned but for the wrongful withdrawal of the *Elena*; or (c) the profit the charterers could have made by taking an Italian flagship in Italian coastal trading during the period 1 January to 20 April 1974. In the event, Robert Goff J held that the proper measure of damages was as stated in (a) and upheld the arbitrators' award.

14. The reasoning underlying the Judge's decision is important. In essence, the Judge applied what he considered to be the "normal measure" of recovery in cases of premature wrongful repudiation of a time charter by the owners i.e. if there is at the time of the termination of the charter an "available market" for the chartering in of a substitute vessel, the damages will generally be assessed on the basis of the difference between the contract rate for the balance of the charter period and the market rate for the chartering in of a substitute vessel for that period. That conclusion was based in part on previous authority i.e. *Snia Soc. Di Navigazione Ind. et Comm. v Suzuki & Co* (1924) 18 Ll.L. Rep 334 and *Goldberg v Bjornstad*

& Brækus (1921) 6 Ll.L Rep 73, (1921) 8 Ll.L. Rep 7; and also by analogy with the law as set out in s51 of the Sale of Goods Act 1893. Of particular importance in the present context is the discussion by the Judge at pp87-90 with regard to the question in relation to sale of goods as to why, as a matter of principle, it is that if the buyer decides to delay buying in goods following a repudiation by the seller, the buyer cannot, if the market rises, add the increased cost of his damages or, if the market falls to be compelled to bring the saving into account when the damages are assessed particularly where the actions of the buyer in these circumstances is "reasonable" and, as such, might be regarded as reasonable steps taken in mitigation of his damage.

15. The passage contains an important analysis of the principle of mitigation of damage and justifies reading in full. In essence, the answer given by the Judge is that what is alleged to constitute mitigation in the law can only have that effect *"...if there is a causative link between the wrong in respect of which damages are claimed and the action or inaction of the plaintiff..."*. In other words, there must be a causative link between the breach of contract and the action or inaction in question to bring into play the principle of mitigation of damage. As stated by the Judge, it did not matter that the charterer's decision in that case was a reasonable one, or was a sensible business decision, taken with a view of reducing the impact upon him of the legal wrong committed by the owners because his decision so to act was independent of the wrong. His decision not to charter in a substitute vessel was merely a decision which was "triggered off" by the fact that there had been a breach; but it was not caused by the breach.

16. As already stated, the *Elena D'Amico* concerned a claim by charterers against owners for wrongful repudiation. But, in principle, there is no reason why a similar approach should not apply in relation to a claim by owners against charterers for wrongful repudiation.

17. It is also noteworthy that although the *Elena D'Amico* was concerned with a claim by charterers seeking to increase their claim for damages, there would seem to be no reason why similar principles do not apply so as to preclude the party in wrongful repudiation (whether owners or charterers) from seeking to bring into account a "benefit" that the innocent party may have acquired which has no causative link with the breach. In essence, that is demonstrated by a number of cases including *Famosa Shipping v Armada Bulk Carriers, The Fanis* [1994] 1 Lloyd's Rep. 633 where the court upheld the decision of the arbitrators that the damages awarded in favour of charterers against the owners of the *Fanis* did not have to take into account the profit made by them selling the bunkers on board another vessel, the *Chusovoy*, on her redelivery under the substitute charter; and, more recently, the decision last year of Popplewell J in *Fulton Shipping Inc v Globalia Business Travel, The New Flamenco* [2014] 2 Lloyd's Rep 230. In that case, the vessel was time-chartered from 13 February 2004 to 2 November 2009. In the event, the charterers redelivered the vessel early i.e. in October 2007 and the owners treated the charterers as being in repudiatory breach. At about that time, the owners sold the vessel for approx. US$23.7 million. However, had the charterers not repudiated the charter and if the

vessel had been redelivered in accordance with the terms of the charter in November 2009, the value of the vessel at that time ie in November 2009 would have been much less i.e. only about US$7 million. On this basis, the charterers sought to claim "credit" for the difference between US$23.7 million and US$7 million which exceeded and would therefore have 'wiped out" the owners' claim for damages. That argument was accepted by the arbitrator but the award was reversed on appeal.

18. The Judgment in *The New Flamenco* contains a full review of the earlier authorities and an important summary of a number principles derived from them at [64]. In essence, the Judge concluded that in order for a benefit to be taken into consideration in reducing the loss recoverable by the innocent party for a breach of contract, it is generally speaking a necessary condition that the benefit is caused by the breach; that it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit or merely triggered his doing so; that the fact that a mitigating step, by way of action or inaction, may be a reasonable and sensible decision with a view to reducing the impact of the breach, does not of itself render it one which is sufficiently caused by the breach; that subject to the stated principles, whether a benefit is caused by a breach is a question of fact and degree which must be answered by considering all the relevant circumstances in order to form a commonsense overall judgement on the sufficiency of the causal nexus between breach and benefit; and that although causation between breach and benefit is generally a necessary requirement, it is not always sufficient. As stated by the Judge, considerations of justice,

fairness and public policy have a role to play and may preclude a defendant from reducing his liability by reference to some types of benefits or in some circumstances even where the causation test is satisfied. I understand that an appeal is pending and due to be heard later this year.

19. *The Elena D'Amico* was a case where there was an available market. Where there is no available market, the cases show a somewhat different approach: see, for example, *Tharros Shipping Co Ltd v Bias Shipping Ltd, The Griparion* [1994] 1 Lloyd's Rep 533 and *Dalwood Marine Co v Nordana Line, The Elbrus* [2010] 2 Lloyd's Rep 315. Thus, in *The Elbrus,* the charterers wrongfully terminated the charter when the vessel was in Lobito, Angola on 4 April 2005 i.e. about 39 days before the earliest contractual redelivery date i.e. 13 May 2005. On 4 April, there was no available market for the vessel off the west coast of Africa; and the owners therefore decided to sail to Setubal, drydock the vessel and then deliver the vessel to other charterers (Navimed) under a charter previously entered into at a higher rate of hire. If the original charterers had not wrongfully terminated the original charter, the vessel would have missed the laycan under the Navimed fixture and the owners would not have had the benefit of such higher rate of hire. The owners submitted that as a matter of law the tribunal ought to have assessed what they lost under the original charter for the remaining 39 days of that charter and simply deducted what the owners in fact earned during that period. This was rejected by the tribunal who took into account the vessel's actual and notional earnings after 13 May 2005 by reference to various permutations and schedules. That conclusion

was upheld by the court. In particular, the court accepted that where, as in that case, there was no available market, the measure of damages was the sum which would put the owners in the same financial position as if the charter had been performed; and that the approach adopted by the tribunal could not be said to be wrong in law. Other examples of cases where the court has similarly departed from the *prima facie* measure of damages include *Rheinoel GmbH v Huron Liberian Co., The Concordia C* [1985] 2 Lloyd's Rep 55 and *SIB International Srl v Metallgesellschaft Corp, The Noel Bay* [1989] 1 Lloyd's Rep 361.

20. This difference in approach between, on the one hand, where there is an available market at the date of the acceptance of the repudiation (or perhaps within a reasonable period after such date[4]) and, on the other hand, where there is no available market, raises the question as to what should be the approach if there is no available market at the date of the acceptance of the wrongful repudiation but the market then "revives" at a much later date. The answer would seem to be that in such a case, damages are to be assessed by reference to actual losses: see *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd, The Kildare* [2011] 2 Lloyd's Rep 360; *Glory Wealth Shipping Pte Ltd v Korea Line Corporation, The Wren* [2011] 2 Lloyd's Rep 370. This is, of course, subject to the usual rules including the principle that where

[4] See, for example, the argument, in *Glory Wealth Shipping Pte Ltd v Korea Line Corporation, The Wren* [2011] 2 Lloyd's Rep 370 at [32]-[34].

the innocent party has unreasonably failed to mitigate its losses, it may not be able to claim such losses[5].

21. As stated by Lord Scott in *The Golden Victory* at [29]:

> *"The fundamental principle governing the quantum of damages for breach of contract is long established and not in dispute. The damages should compensate the victim of the breach for the loss of his contractual bargain…"*

The fundamental nature of this "compensatory principle" which underlies the general rules of damages is indisputable. It follows (see per Lord Scott at [30]) that if a contract for performance over a period has come to an end by reason of a repudiatory breach accepted by the innocent party but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must be taken into account in an assessment of the damages payable for the breach; and that if it is certain that the event will happen i.e. "predestined to happen"[6], the damages must be assessed on that footing.

22. However, what is – perhaps surprisingly – more controversial is the incidence of the burden of proof. That was one of the issues which arose for determination in *Flame SA v Glory Wealth Shipping Pte Ltd, The Glory Wealth* [2013] 2 Lloyd's Rep 653. In that case, the owners claimed damages against the charterers for wrongful repudiation of a contract of affreightment on the basis of

[5] However, in that context, the revival of the market at a later date may be a factor to be taken into account: see *The Wren* at [31]
[6] See per Megaw LJ in *The Mihalos Angelos* [1970] 2 Lloyd's Rep 43.

the difference between the COA rate and the market rate. The charterers sought to argue that as a result of the collapse of the freight market in late 2008, the owners' financial position had so deteriorated that they would not have been able to provide the required vessels under the COA and that therefore they were not entitled to any damages. In summary, the tribunal held *inter alia* that once the wrongful repudiation had been accepted, it was not open to the contract-breaker (i.e. the charterers) to allege that the innocent party (i.e. the owners) still bore the burden of proving its loss on a balance of probabilities. Following a full review of the earlier authorities, this was held by Teare J to be an error of law on the basis that (i) consistent with the "compensatory principle", the owners were required to prove on the balance of probabilities that, had there been no repudiation, they would have been able to perform when the time came for performance by them; and (ii) the assessment of loss necessarily required a hypothetical exercise to be undertaken, namely an assessment of what would have happened had there been no repudiation[7]. However, the appeal was rejected and the decision of the tribunal upheld by Teare J. because the tribunal had found on the evidence that the owners would have been able to fulfil their obligations under the COA had the charterers not been in repudiatory breach. Needless to say, in this context, the focus is not with <u>actual</u> post-breach events but rather with the hypothetical exercise as referred to by Teare J..

[7] Teare J recognized that insofar as his decision was inconsistent with the approach of Thomas J in *North Sea Energy Holdings v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep 418 or of Mr Vos QC in *Chiemgauer v The New Millenium Experience* [2000] All ER (D) 2313, he would, with respect, disagree with them.

23. This hypthetical exercise is often somewhat problematic particularly when it involves gazing some distance into the future – for example, in the case of the wrongful repudiation of a long- or mid-term time charter - and seeking to evaluate a wide range of potential risks. The difficulties involved in such exercise are illustrated by *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd, The Kildare* [2011] 2 Lloyd's Rep 360, which concerned a claim for damages by owners for wrongful repudiation by charterers of a 5 year consecutive voyage charter. In the event, the court held that the charterers had wrongfully repudiated the charter about a year after the commencement of the charter with about 4 years remaining. As to quantum, there was a number of issues including how many days would the vessel have been trading during the remainder of the original charter. With regard to what might be described as "ordinary" risks (e.g. heavy weather, dry docking, breakdown and port delays), the views expressed by the experts ranged from 5 to 15 days per annum. The Judge recognised that the assessment was not one that could be accomplished with any great precision and, in the event, plumped for the middle of the range i.e. 10 days per annum (a figure in fact conceded by the owners).

24. Even more problematic was the question of what, if any, potential allowance should be given for the risk of what were described as catastrophic contingencies such as *"total loss, bankruptcy and so on…"*. In the event, the Judge allowed a further "discount" of 1.5% for such contingencies - see [73]. No explanation is given as to the basis of such assessment but presumably it rested upon some form of expert evidence. I have no doubt that a "discount" is, in

principle, justifiable although the appropriate figure may be a matter of debate. Even so, I would respectfully suggest that it is perhaps doubtful (to say the least) whether any such discount should take into account the risk of bankruptcy of the contract-breaker.

25. That leads on to my final point which I suspect will be somewhat controversial – and which I throw out for discussion. In the case of a wrongful repudiation by charterers and in circumstances where there is an available market, I have heard it suggested that an award of damages calculated simply by reference to the difference between contract rate and market rate may be over-simplistic particularly in the case of a long-term charter where owners seek compensation by way of a capital sum based on the unexpired period of the charter far into the future. Even when a (small) discount is given for accelerated receipt of income (as in *The Kildare)*, the result is often to award owners with a very substantial lump sum.

26. As stated by Lord Scott in *The Golden Victory* at [30]:

> *"…Another way of putting the point being made by Megaw LJ [in The Mihalos Angelos] is that the claimant is entitled to the benefit, expressed in money, of the contractual rights he has lost, but not to the benefit of more valuable contractual rights than those he has lost,,,,,"* (emphasis added)

Similarly, Lord Scott stated at [32]:

> *"The underlying principle is that the victim of a breach of contract is entitled to damages representing the value of the contractual benefit to which he was entitled but of which he has been deprived."* (emphasis added)

27. Of course, in the example stated above, the contractual benefit which the owners have "lost" is the future stream of charter income less the market rate. But, what is the (present) value of such future stream of income ? In that context, the argument runs that the appropriate question is: what could the owners "sell" such stream of income for ? In truth, that question may be difficult, if not impossible, to answer. In any event, whatever the answer to that question may be, the next stage of the argument is that quantum of owners' loss is certainly not fairly represented by a lump sum based upon the capitalisation of a (net) future stream of income derived simply from the difference between the charter rate and the market rate (even after the deduction of a discount for accelerated receipt of income). On the contrary – so the argument goes – an award of such lump sum gives the owners substantially more than the contractual rights which have been lost and (it is said) represents (at least in practical terms) a windfall to owners. In any event, the protagonists of such argument say that the appropriate discount for accelerated receipt of income should, at the very least, be much higher than that allowed in, for example, *The Kildare.*

28. That is an interesting argument as to which, I should make plain, I have no firm views one way or another. But I hope that it provides some food for thought !! Thank you.

Bernard Eder/April 2015