-JUDGMENT-

Before:

Mr. Justice TEARE

1. There are before the court two applications by the Appellant. One is an appeal from an arbitration award pursuant to section 69 of the Arbitration Act 1996 (brought with the leave of Hamblen J.) and the other is a challenge to the award on the grounds of a serious irregularity pursuant to section 68 of the Arbitration Act 1996. The appeal pursuant to section 69 raises a question of law which is of importance to the general law of contract and, in particular, the assessment of damages for breach of contract.

2. The Appellant and the Respondent were party to a contract of affreightment (the "COA") dated 19 August 2008 which provided for the Respondent (as "disponent owners of the Glory Wealth to be nominated motorship") to carry 6 cargoes of coal in bulk in each of the years 2009, 2010 and 2011. The arbitration award in respect of which the section 69 appeal and section 68 challenge are brought relates to the failure of the Appellant (as charterers under the COA) to declare laycans for the 5th. and 6th. shipments of 2009 and for all 6 shipments in 2010. The arbitration panel awarded damages to the disponent owners in the sum of US$5,426,608.60 plus interest.

3. The arbitration panel found that the charterers were in actual repudiatory breach of the COA by failing to declare laycans for the voyages in question and that each such repudiatory breach had been accepted by the disponent owners as terminating the disponent owners' obligation to carry cargoes on those voyages. The panel further found that the lost revenue, the difference between the COA rate and market rate, was US$5,426,608.60. The reason for such a great difference between the COA and the market rates was that, following the collapse of Lehman Brothers, the freight market, which had already started to experience a slow decline, suffered a sudden collapse. In October 2008, the Baltic Index was 3,025 but by December 2008 it had fallen by more than 75% to 700.

4. The charterers said that as a result of the market's collapse the financial position of the disponent owners had so deteriorated that, had the charterers declared the laycans in question, the disponent owners would have been incapable of providing the required vessels. They submitted that the disponent owners were only entitled to substantial damages if they, the disponent owners, could prove that if the charterers had declared any of the laycans in question the disponent owners would have been able to perform the corresponding voyages by going out into the market and chartering in a vessel at the relevant time.

5. The arbitration panel rejected the submission made on behalf of the charterers. The rejection of that submission has given rise to the first question of law, described in these terms in the application notice:

> "Whether, pursuant to *The Mihalis Angelos, The Simona* and *Gill & Duffus SA v Berger & Co. Inc*, in order to displace the prima facie substantial measure of damages for breach of contract, the "contract breaker" must prove that at

the time when the innocent party accepted the repudiatory breaches, said innocent party was already in breach. The Tribunal found that it was not open to the "contract-breaker" to allege that the innocent party still bore the burden of proving its loss on the balance of probabilities if it had accepted the repudiatory breach of the "contract-breaker".

6. The arbitration panel also held that the words "disponent owners of the Glory Wealth to be nominated motorship" meant only that the disponent owners were obliged to nominate vessels that would carry the charterers' cargo. The panel held that those words did not require the disponent owners to have time-chartered or voyage-chartered the vessels, though it was likely that the vessels would be so chartered. That holding has given rise to the second question of law, described in these terms in the application notice:

> "Whether, in order to fulfil contractual obligations under a COA it is sufficient for the vessel "owner" to arrange for vicarious performance of its contractual obligations (ie by procuring vessels over which it had no contractual control), or whether contractual control by an Owner or disponent Owner over a nominated vessel was an essential characteristic of a contractual nomination."

7. On the facts of the case the arbitration panel held, on the totality of the evidence before it, that the disponent owners would have been able to fulfil their obligations under the COA. The charterers had sought permission to appeal this finding on the grounds that it was so unreasonable as to amount not to a finding of fact but to a question of law. Unsurprisingly permission to appeal was refused. The charterers now submit that if they succeed on both questions of law the award should be remitted to the arbitration panel to enable them to decide, having regard to the proper construction of "disponent owner", whether the disponent owners would have been able to perform their obligations under the COA.

<u>The first question of law</u>

8. Mr. Hancock QC, on behalf of the charterers, submitted, on the basis of the *Golden Victory* [2007] 2 AC 353 and the *Mihalis Angelos* [1970] 2 Lloyd's Reports 43, that the measure of the disponent owners' loss was the freight which they as the innocent party would have earned had the contract been performed (less the cost to them of providing the nominated vessel, the market rate of freight) and that in assessing such loss any contingencies, such as the inability of the disponent owners to perform their future obligations under the COA which might have prevented them earning freight under the COA, must be taken into account.

9. Mr. Akka QC, on behalf of the disponent owners, submitted, on the basis of *Braithwaite v Foreign Hardwood Company* [1905] 2 KB 543 and *Gill & Duffus v Berger [1984] AC 382* that in assessing their loss it had to be assumed that they, as the innocent party, would have been able to perform their obligations under the COA. They had accepted the charterers' repudiation of the charterparty and so were no longer obliged to perform their obligations under the charterparty.

10. Mr. Hancock, in response, said that whilst it was accepted that as result of the disponent owners' acceptance of the charterers' repudiatory breaches the disponent

owners were no longer obliged to perform their respective obligations under the COA, the assessment of damages had to be assessed on the hypothesis that the charterers had performed their obligations and that the disponent owners remained obliged to perform their obligations. Only by so doing could the court compare the position in which the disponent owners would have been in had the COA been performed with the position that they were in as a result of the several repudiatory breaches.

11. The distinguished academic lawyer Sir Guenter Treitel is of the opinion that

> "where the charterer's case was that he would have been entitled to terminate on account of the shipowner's future breach" that cannot be taken into account so as to reduce damages to a nominal amount "for once the shipowner had accepted the charterer's earlier repudiation and so terminated the contract for that anticipatory breach, the shipowner would be relieved of any further obligation to perform, so that his failure to perform on the due day could no longer be a breach."

12. This opinion is expressed in *The Law of Contract* 13th. ed. at paragraph 20-082. That work is now edited by Professor Peel but I was told that the passage can be traced back to earlier editions written by Sir Guenter Treitel. He has expressed the same view in *Benjamin's Sale of Goods* 8th.ed. at paragraphs 19-169 and 19-170. He relies upon the decision and reasoning in *Gill & Duffus v Berger*. Sir Guenter Treitel contrasts the position, illustrated by the *Mihalis Angelos*, where a contract gives the innocent party the right to cancel the contract on the occurrence of a specified *event*, irrespective of whether there has been a *breach*. He accepts that such an *event* can still occur even after the innocent party has accepted a repudiatory breach as terminating the contract. Thus, if that event in fact occurred, then the possibility that the party in breach would have exercised his right to cancel can be taken into account when assessing the damages caused by the repudiatory breach.

13. However, in another chapter of *Benjamin's Sale of Goods*, written by Professor Bridge, a rather different view is expressed. In paragraph 9-011 Professor Bridge states that

> "there is some doubt as to whether and in what circumstances the buyer may raise as a defence to liability, in reduction of the damages payable, the fact that the seller was or would have been incapable of performing the contract in accordance with its terms."

14. In paragraph 9-020 Professor Bridge noted that earlier authority on the question was "divided" and footnote 103 referred to a number of cases in support of that proposition. However, Professor Bridge expressed the opinion that it has now been established by the decision of the House of Lords in the *Golden Victory* that considerations of certainty and finality have to yield to the overriding principle that the claimant's loss has to be assessed accurately,

> "or else a seller would be entitled to windfall damages in respect of a loss which, in fact, he would never have sustained. This will necessarily involve the court in an assessment of what would have happened if the contract had not been repudiated…"

15. But, although he noted in his comment on the decision of the Court of Appeal in the *Golden Victory* that this issue is "a contentious area of the law" (see in 123 LQR 9 at p.12), Sir Guenter Treitel has not changed his opinion in the light of the decision of the House of Lords in the *Golden Victory*. At paragraph 19-172 of *Benjamin's Sale of Goods* he points out that the decision in the *Golden Victory*

> "was not concerned (even by analogy) with the situation in which a buyer seeks to neutralise a seller's claim for damages for wrongful rejection by arguing that, after acceptance by the seller of the buyer's repudiation, the buyer would have become entitled to reject, and would have rejected, the goods on account of their non-conformity to the contract, amounting to a repudiatory breach by the seller. The right to cancel in the *Golden Victory* arose on the occurrence of a specified *event* which had nothing to do with any *breach* by the shipowner."

16. The arbitration panel in the present case followed the opinion of Sir Guenter Treitel. The panel did not consider the decision of the House of Lords in the *Golden Victory* because it was not cited to them. Indeed, its potential relevance to this appeal was only appreciated shortly before the hearing of the appeal. No mention had been made of the *Golden Victory* in Mr. Hancock's Skeleton Argument (though Mr. Akka mentioned it in a footnote). The argument before this court was thus more extensive and wide-ranging than both the argument before the arbitration panel and the arguments noted in the Skeleton Arguments. Further, after the hearing it was necessary to consider several cases which had not been specifically addressed in the oral or written argument.

Discussion of the first question of law

17. The compensatory principle which governs the assessment of damages suggests that Mr. Hancock's submission is to be preferred to that of Mr. Akka. An award of damages is compensatory. It is to compensate the victim of the breach for the loss of his contractual bargain. This was described by Lord Scott in the *Golden Victory* at paragraph 29 as the fundamental principle governing the quantum of damages for breach of contract. Thus the object of an award of damages is to put the innocent party in the same position, and in no better position than, that he would have been in had the contract been performed; see *Robinson v Harman* (1848) 1 Exch 850, *Wertheim v Chicoutimi Pulp Co.* [1911] AC 301 at pp.307-8, *British Westinghouse Electric and Manufacturing Co. Ltd. v Underground Electric Railway* [1912] AC 673 at p.689 and the *Mamola Challenger* [2011] 1 Lloyd's Reports 47 at paragraphs 11-18. Thus, where there has been a wrongful repudiation, this will involve:

> "assuming that what has not occurred and never will occur has occurred or will occur i.e., that the defendant has since the breach performed his legal obligations under the contract, and if the estimate is made before the contract would otherwise have come to an end, that he will continue to perform his legal obligations thereunder until the date of its termination." (per Diplock LJ in *Laverack v Woods* [1967] 1 QB 278 at p. 294.)

18. Damages are assessed by comparing the position that the innocent party would have been in had the contract been performed (necessarily, as just explained, a hypothetical exercise because the contract had not been performed) with the

position that the innocent party was in fact in as a result of the breach. That is why the prima facie measure of damages for non-acceptance by a buyer in breach of a contract for the sale of goods is the difference between the contract price and the market price and why the prima facie measure of damages for breach of a charterparty by the charterer is the difference between the charter rate of hire and the market rate of hire. In the present case, when carrying out the hypothetical exercise of assessing the position of the disponent owner had the contract been performed by the charterer, it would be necessary to consider whether the disponent owner would have been able to perform its obligations under the COA. If, let it be assumed, it is clear that the disponent owner would not have had the resources to provide a carrying vessel and the court or tribunal did not take that matter into account, then, if the disponent owner were awarded substantial damages on the prima facie measure, such an award would put the disponent owners in a better position than if the charterparty had been performed by the charterer. For if the charterer had declared the required laycans the disponent owner would still not have earned the agreed freight. In those circumstances an award of substantial damages would be a windfall and would breach the compensatory principle.

19. Those considerations, based upon the fundamental compensatory principle which governs the law of damages, suggest that the panel of arbitrators was wrong in law when it rejected the submission made by Mr. Hancock that it was necessary for the disponent owners to prove on the balance of probabilities that when the time came for performance by them, they would have been able to perform. However, Mr. Akka submitted that the panel was not wrong in law and that the opinion of Sir Guenter Treitel which the panel accepted was not only correct but was supported by authority.

20. Mr. Akka submitted that in a case such as the present, where a repudiatory breach by the charterer has been accepted as terminating the contract, it is not necessary for the disponent owner to prove on the balance of probabilities that, when the time came for their performance, it would have been able to perform. That proposition is said to follow from the well-established principle of the law of contract that the effect of an accepted repudiation is to excuse the innocent party from its obligations to perform its future obligations under the contract. Thus, once the contract has been terminated as a result of the acceptance of a repudiatory breach, there cannot be a subsequent breach by the innocent party. Indeed, it is said that it is to be assumed that the innocent party would have performed his obligations. By contrast, where there is an express contractual right to cancel a charterparty upon the occurrence of an event, for example, where the vessel does not arrive at the loading port by a particular date (as in the *Mihalis Angelos*) or where there is an outbreak of war (as in the *Golden Victory*), that event can still occur. It is not dependent upon there being any breach.

21. Mr. Hancock submitted that this submission was "based upon a logical fallacy". He accepts that where an innocent party has accepted a repudiation as terminating a contract the innocent party is relieved of the obligation to perform his future obligations. However, he says that in assessing damages the question is what would hypothetically have happened had the contract been performed by the party in breach. In performing that assessment Mr. Hancock submits that "it cannot be the case that the hypothesis is that the contract has not been performed".

22. Mr. Hancock's criticism of Mr. Akka's submission appears to me to be right as a matter of principle. It is consistent with the manner in which damages for breach of contract are assessed and ensures that the innocent party is not, by reason of the award of damages, placed in a better position that he would have been in had the contract been performed by the party in breach. However, the authorities are said to require a different approach and so it is necessary to consider them to see whether any of them require this court to adopt a different approach from that suggested by principle and, in particular, to assume that the innocent party would have performed its obligations under the contract and, as a result, to make an award of substantial damages that puts the innocent party in a better position than he would have been in had the contract been performed by the party in breach.

23. Before considering *Gill & Duffus v Berger*, on which Sir Guenter Treitel's opinion rests, I shall first consider the several cases listed in *Benjamin's Sale of Goods* at paragraph 9-020, fn. 130, in support of Professor Bridge's opinion that, prior to the decision in the *Golden Victory*, authority on the question was "divided".

Braithwaite v Foreign Hardwood Co. Ltd. [1905] 2 KB 543.

24. In *Braithwaite* the seller of 100 tons of rosewood logs on cif terms sought damages from the buyer who had repudiated the contract by refusing to accept the documents. The first instalment of 63 tons had been shipped on the vessel *Spheroid*. The buyer wrongfully repudiated the contract by refusing to accept any goods under it. Thereafter the bill of lading was tendered by the seller but the buyer refused to accept it or pay for it. The seller sold the cargo on the market. The second instalment which had been shipped on the vessel *Saba* arrived and the bill of lading was tendered. The buyer refused to accept it or pay for it. The seller sold the cargo on the market. It subsequently came to the notice of the buyer that 17 tons of the cargo ex *Spheroid* did not answer to the contractual description. The seller claimed damages assessed by reference to the difference between the cif price and the price at which the goods had been sold on the market. The seller recovered such damages less an allowance in respect of the 17 tons of cargo ex *Spheroid* which did not correspond with the contractual description. The buyer appealed in respect of the award of damages in respect of the cargo ex *Spheroid*. It was submitted that before the seller could recover damages he had to show that he had fulfilled all conditions precedent on his part. The shipment was not in accordance with the contract and so the buyer was entitled to reject it. The appeal was dismissed. It was held that by repudiating the contract the buyer had waived the need for performance by the seller of its obligations under the contract; see the judgment of Collins MR at pp.551-2 and Mathew LJ at p.554.

25. As to damages Collins MR said at p.552

> "In such a case the ordinary rule as to the measure of damages is the proper rule to apply. In the present case it has, I think, been applied, if anything, somewhat too favourably for the defendants. Logically, the damages should, I think, be assessed upon the footing that the wood which the plaintiff was excused from delivering was up to the standard stipulated for in the contract, though it turns out that it in fact fell slightly short of the monetary value of wood quite to that standard; but the learned judge has assessed

damages from the point of view of common sense rather than of strict law, and has made an allowance, of which the defendants cannot complain."

26. This passage would appear to support Mr. Akka's submission in the present case.

27. *Braithwaite* is a notoriously difficult decision to explain. The problem arises from the fact that the decision appears to be inconsistent with the rule that a party who refuses to perform citing a bad ground for doing so may justify his refusal by showing that a good ground for his refusal in fact existed. Attempts to explain the decision have been made by Greer J. in *Taylor v Oakes, Roncoroni and Co.* (1922) 27 Comm Cas 262 at p.268, by Lord Sumner (the losing counsel in *Braithwaite*) in *British and Benningtons Ltd. v NW Cachar Tea Co.* [1923] AC 48 at p.70, by Scrutton LJ (the successful counsel in *Braithwaite*) in *Continental Contractors v Medway Oil and Storage Company* (1925) 23 Lloyd's List Reports 124 at pp.132-134 and by Salmon LJ in *Esmail v J. Rosenthal & Sons Ltd.* [1964] 2 Lloyd's Reports 447 at p.466, whose views were endorsed by Lord Ackner in the *Simona* [1989] 1 AC 788 at p.805. Sir Guenter Treitel has carried out a masterly and comprehensive review of the facts of *Braithwaite* and of three possible justifications for the decision in *Benjamin's Sale of Goods* at paragraphs 19-176 – 19-180. The first justification is that there was no breach by the sellers, the second is that if there was a breach it was not repudiatory and the third was that the buyer was precluded by his conduct from relying upon the seller's breach. Having regard to the question at issue in the present case, it is not necessary for me to enter into this debate as to the true basis of the decision in *Braithwaite*. It suffices to say that the passage which I have already quoted from the judgment of Collins MR appears to provide support for Mr. Akka's submission.

28. However, there is no suggestion in the report of the case that the seller, by being awarded substantial damages, was being placed in a better position than he would have been in had the contract been performed. That possibility does not appear to have been discussed. Indeed, Lord Sumner observed in *British and Benningtons* at p.71 that "it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right." If the seller had been able to do so then the award of damages would not have put the seller in a better position than he would have been in had the contract been performed.

29. Moreover, the discussion in *Braithwaite* was concerned, not with the compensatory principle which underlies the assessment of damages, but with the need for a claimant who seeks damages for breach of contract to show that he was ready and willing to perform his obligations under the contract in circumstances where there had been an accepted repudiation of the contract. The need to show readiness and willingness was based upon a requirement that willingness and ability to perform must be pleaded to establish the claimant's cause of action; see the reference made by Collins MR in *Braithwaite* at p. 551 to the "old form of pleadings", the statement of what must be alleged and proved in any action for breach of contract by Pickford LJ in *Jefferson v Paskell* [1916] 1 KB 57 at p. 74 (which was cited by counsel in *British and Benningtons* at p.50 notwithstanding that the actual facts of the case concerned breach of a promise to marry), the account given by Lord Diplock in *Gill & Duffus v Berger* at p.391 F-H of the old form of pleading and the account of the law on this topic by Leggatt J. in the *Simona* [1986] 1 Lloyd's Reports 171 at

p.174. The requirement was, I presume, derived from the "concept of dependent covenants" discussed by Professor Coote in his comment on the *Golden Victory* at 123 LQR 503 at p.507; see also Lord Mustill's historical account in his comment on the *Golden Victory* at 124 LQR 569 at pp.574-5.

Taylor v Oakes, Roncoroni and Co. (1922) 27 Comm Cas 262

30. In 1922 *Braithwaite* was considered in two cases, the first being *Taylor v Oakes, Roncoroni and Co.* The buyers of a quantity of hatter's fur accepted and paid for one instalment of fur but then refused to accept any further instalments on the ground that their sub-buyers had defaulted. After action had been brought by the sellers the buyers learnt that the fur which had been delivered was not in accordance with the contract. Greer J. found (at p.264) that the "goods delivered failed in a slight but appreciable degree to come up to the standard required by the contract description", (at p.265) "that the damages were unsubstantial" and that "the breach was not a repudiation of the whole contract". The buyers had therefore repudiated the contract by their refusal to accept any further instalments. Greer J. then had to deal with the submission that had the buyers not refused to take any more fur the sellers would in all probability have tendered goods which the buyers would have been justified in refusing to accept. He referred (at p.265) to an admission by the sellers that a sample of the fur which had been delivered would correctly represent the quality of all the fur which would have been delivered so that as "a practical certainty" the sellers would have tendered goods which the buyers would, if they so chose, have been entitled to refuse to accept.

31. Greer J. held (at p.265), following *Braithwaite*, that this "would afford no defence to the seller's claim". He said that

> "if the buyer wrongfully repudiates his contract, and the seller does not tender performance on his part, but accepts the repudiation and claims damages, the buyer is not released from liability by proving that if he had not repudiated the contract, but called for its performance, the seller would have been unable or unwilling to perform it, but on the contrary would have tendered goods which he, the buyer, would have been justified in rejecting."

32. It is not clear that the submission dealt with by Greer J. was one to the effect that the seller could not recover substantial damages if to award such damages would put him in a better position than he would have been in had the contract been performed. He may have been dealing with a submission which was directed, not to the question whether substantial damages could be proved, but to the question whether in circumstances where the seller would have been unable or unwilling to deliver goods which conformed with the contract the buyer had no liability at all, whether for substantial or nominal damages. The latter is the more likely submission; it is the more natural meaning of the phrase "released from liability" and of the phrase "would afford no defence to the …claim".

33. The Court of Appeal upheld this decision without calling upon counsel for the sellers. Bankes LJ quoted Greer J as saying that *Braithwaite* decided that

> "a buyer cannot justify his refusal of an offer to deliver goods under the contract, by proving that if he had not refused, the goods when delivered would not have been in accordance with the contract."

34. That also suggests that Greer J. was dealing with a submission which went to liability rather than to damages.

35. Nevertheless, it is arguable that Greer J. and the Court of Appeal must have appreciated, though they did not say so, that by awarding substantial damages to the sellers, the sellers would be placed in a better position than if there had been no repudiation by the buyers. That is because Greer J. had recorded at p. 265 an admission by the sellers that a sample of the fur which had been delivered would correctly represent the quality of all the fur which would have been delivered so that as "a practical certainty" the sellers would have tendered goods which the buyers would, if they so chose, have been entitled to refuse to accept. However, at an earlier point in his judgment Greer J., having pointed out that no complaint had been made after the first instalment, said (at p.264) "*non constat* that if the defendants had asked for a better compliance with the contracts the plaintiffs might not have been able to improve their further deliveries so as to make them a strict compliance with the contracts." There may therefore have been some doubt as to what would in fact have happened had there been no repudiation by the buyers. It is thus not entirely clear that the award of damages put the seller in a better position than he would have been in had the contract been performed.

<u>*British and Benningtons Ltd. v NW Cachar Tea Co.* [1923] AC 48</u>

36. *British and Benningtons* was also decided by the House of Lords in 1922 (after, but with no reference to, *Taylor v Oakes, Roncoroni and Co.*). The buyers of several cargoes of tea refused to accept delivery on the grounds that a reasonable time for delivery had expired. The arbitrator held that a reasonable time had not expired so that the buyers had repudiated the contract, which repudiation had been accepted by the sellers. The buyers argued (see p.50) that the contract required delivery in London and that it was "obvious from the facts that the sellers never were ready and willing to deliver in London." The sellers responded (at p.52) that since the buyers had wrongfully repudiated the contract by refusing to accept delivery on the grounds of delay they could not rely upon on the ground that the sellers were not ready and willing to deliver in London. Reliance was placed on *Braithwaite*. Lord Atkinson concluded (at p.66):

> "…..the purchasers, having on July 28, 1920, wrongfully repudiated their contract, the sellers were not, in order to recover damages for breach of this contract, bound to prove that they were ready and willing on that day to deliver the teas in London."

37. That would appear to provide support for Mr. Akka's submission. However, the submission made on behalf of the appellants was not that the appeal should be allowed because the sellers had been placed in a better position than they would have been in had the contract been performed. Rather, it was a submission "that in every contract the party who brings an action for damages for the breach of it must prove that he was ready and willing to perform the contract" and "that the respondents' case fails at the outset, because not only is there no evidence that they

were ready and willing to perform their contract, but there is conclusive evidence to the contrary"; see the argument of Talbot KC at p.50. Lord Atkinson did not consider whether the result of the decision was that the sellers were placed in a better position than they would have been in had there been no repudiation by the buyers. By contrast Lord Sumner (with whom it appears three other members of the House of Lords agreed) noted (at p.72) that

> "it is not found that they [the sellers] could not have forwarded the tea to London, or that the tea, when so forwarded, would not have been still such as the contract provided for."

38. Thus it seems that the findings of fact did not enable it to be said the result of the decision was that the sellers were placed in a better position than they would have been in had there been no repudiation.

Brett v Schneideman Bros Ltd. [1923] NZLR 938

39. In 1922 the courts of New Zealand also had to consider *Braithwaite* in *Brett v Schneideman Bros Ltd*. In that case a tailor had refused to pay for certain goods which had been bought on his behalf and/or for sale to him. He was sued for breach of contract but the claim was dismissed. It was held at first instance that the claimant was never ready and willing to supply goods in accordance with the contract. The decision was appealed but the court of appeal was equally divided and so the appeal was dismissed. In those circumstances, notwithstanding the several judgments in the court of appeal, I do not consider that much assistance can be derived from this case. It was certainly not a case where the claimant was placed, by an award of damages, in a better position than he would have been in had the contract been performed. His claim failed.

Continental Contractors v Medway Oil and Storage Company (1925) 23 Lloyd's List Law Reports 124

40. In this case there was a claim for damages by sellers against buyers for their repudiation of a contract to purchase 50,000 tons of kerosene. The claim failed at first instance but the seller succeeded on appeal. The buyers had sought to justify their refusal to accept delivery on the grounds that a guarantee had not been provided by the sellers. On appeal it was held that the buyers' refusal could not be justified on that ground and accordingly the buyers had repudiated the contract and were liable for the agreed damages; see the judgment of Scrutton LJ at p.131. The buyers also argued that the sellers could not prove that they were able to deliver the goods and that their claim should fail on that ground. That argument failed because Scrutton LJ did not accept that the sellers were unable to perform; see p.132. Scrutton LJ went on to consider whether the argument was correct in law. That gave him the opportunity to explain the decision in *Braithwaite* and to comment upon what his old adversary Lord Sumner had said about that case in *British and Benningtons*. Scrutton LJ endorsed what Collins MR had said in *Braithwaite* which, for convenience I shall quote again:

> "Logically, the damages should, I think, be assessed upon the footing that the wood which the plaintiff was excused from delivering was up to the

standard stipulated for in the contract, though it turns out that it in fact fell slightly short of the monetary value of wood quite to that standard."

41. Scrutton LJ said (at p.133) that this was the "logical result" and treated *Braithwaite* as:

> "a case where strictly the plaintiff need not prove any performance at all, because he has been absolved from the performance."

42. Whilst this appears to support Mr. Akka's submission *Continental Contractors v Medway Oil and Storage Company* was not a case in which the sellers were placed in a better position than they would have been in had there been no repudiation by the buyers. On the facts it had not been shown that the sellers would not have been able to deliver the oil.

YP Barley Producers Ltd. V Robertson (EC) Pty Ltd. [1927] VLR 194

43. In this Australian case the seller of barley was obliged to deliver the goods in Melbourne. The buyer refused to accept the barley saying it was not of the contractual standard. The seller was held to be ready and willing to perform its obligations under the contract and so was entitled to claim substantial damages. The judge, McArthur J., considered *Braithwaite, British and Benningtons* and *Taylor v Oakes, Roncoroni*. His comments, which appear to have been obiter dicta, are of some interest in the present context. He accepted that where there has been a repudiation which has been accepted by the innocent party the latter is not required to prove his readiness and willingness to perform his obligations because the contract has been brought to an end by the accepted repudiation; see p.209. However, he considered, at p.212, that readiness and willingness may be most material on the question of damages. He said at pp.213-4:

> "The true measure of damages in most, if not all, cases would be either the difference between contract price and market value at date of repudiation; or the difference between contract price and the costs to the seller of fulfilling the contract. In those cases there must always necessarily be taken into consideration on the one side, as the fundamental basis, the contract price. If, therefore it appears that- quite apart from the repudiation- the seller could never have performed the contract, and therefore could never have earned the contract price, it is clear that he cannot have suffered substantial damage by the repudiation. ……..As in ordinary cases, the onus would be upon the plaintiff to prove his substantial damages, and he would therefore have to satisfy the jury that, but for the repudiation, he would have earned the contract price. ……..According to my view, therefore, the question whether in these cases the plaintiff has to prove that he was ready and willing to perform the contract, becomes little more than academic – my opinion being (as I have indicated) that he need not prove it as an essential element of his cause of action, but that he must (at all events, in most cases) prove it in order to recover substantial damages."

44. The view of McArthur J. is, in my judgment, consistent with the compensatory principle underlying the assessment of damages. It is also consistent with the view that when, in cases such as *Braithwaite, Taylor v Oakes, Roncoroni and Co., British and*

Benningtons and *Continental Contractors,* reference is made to the requirement that the claimant must establish his readiness and willingness to perform his obligations (assuming the contract remains alive and has not been terminated), that is a matter which he must prove (absent an accepted repudiation) in order to establish his cause of action. *YP Barley Producers Ltd. V Robertson (EC) Pty Ltd.* therefore supports Mr. Hancock's submission.

Esmail v Rosenthal & Sons Ltd. [1964] 2 Lloyd's Reports 447

45. This is the most recent case in the list of cases in footnote no.103 to paragraph 9-020 of *Benjamin's Sale of Goods.* It was a case in which the buyer of goods, having accepted a quantity of the goods he had agreed to buy, rejected another quantity of those goods. The seller claimed damages for the buyer's breach of contract. The buyer denied liability. His reasons for doing so were bad but he then alleged that the goods did not correspond with their contractual description. It was held, by a majority of the Court of Appeal, that the first quantity did not comply with the contractual description. However, the Court of Appeal also held that the contract was for one shipment and that part of the goods having been accepted it was not open to the buyer to reject the second quantity of goods. It was therefore unnecessary for the Court of Appeal to consider a question raised by the seller, namely, that in circumstances where the buyer had based his rejection on a bad reason he could not justify his rejection by reference to the goods not complying with their contractual description. The effect of the decision in *Braithwaite* did not therefore have to be considered. But Salmon LJ discussed the case and said that there was no question (in *Braithwaite*) of the buyers bringing the contract to an end after a fundamental breach by the sellers. He said:

> "What might or might not have occurred had there been no total breach by the buyers could not affect the issue of liability but it might be most material on the issue of damage."

46. That passage would appear to support Mr. Hancock's submission that the principle of the law of contract on which reliance is placed is relevant to the question of liability but not to the question of damages.

47. Before considering the more recent authorities it is appropriate to consider the extent to which *Braithwaite* and the several cases listed in footnote no.103 are binding decisions to the effect that where an innocent party has accepted a repudiation as terminating the contract he may claim substantial damages even though such an award of damages would put him in a better position than he would have been in had there been no repudiation because the innocent party would himself have been unable to perform his obligations when the time came for his performance. *Braithwaite, Taylor v Oakes, Roncoroni and Co., British and Benningtons* and *Continental Contractors v Medway Oil and Storage Company* contain dicta which appear to support Mr. Akka's submission. But, properly understood, those dicta should not be regarded as supporting Mr. Akka's submission because the reference in those cases to the need for a claimant to prove his readiness and willingness to perform his obligations (absent an accepted repudiation) concerns the establishment of his cause of action, not whether he can prove that he had suffered substantial damages. Where the innocent party has accepted a repudiation of the contract he is released from his further obligations under the contract and so, as Sir

Guenter Treitel has observed, the fact that the innocent party may not in the event have been able to perform his further obligations cannot provide the guilty party with "an ex post facto justification" for his repudiation; see 123 LQR 9 at p.12. Further, none of the cases appears to be a clear decision awarding substantial damages in circumstances where, had there been no repudiation by the buyer, the seller would have been unable to perform (though *Taylor v Oakes, Roncoroni and Co.* is close to being such a decision). By contrast *YP Barley Producers Ltd. v Robertson (EC) Pty Ltd.* and *Esmail v Rosenthal & Sons Ltd.* contain dicta which support Mr. Hancock's submission.

The *Mihalis Angelos* [1971] 1 QB 164

48. It is now necessary to consider the *Mihalis Angelos*, the principal decision on which Mr. Hancock relied before the arbitrators. The owners claimed damages against charterers, who, the owners said, had repudiated the charterparty by wrongfully purporting to cancel the charterparty on the grounds of *force majeure*. The court of appeal held that the claim failed because although there had been no *force majeure* the owners were in breach of a condition of the charterparty which the charterers were entitled to accept and thereby terminate the charterparty. The court of appeal went on to consider whether the owners could have received substantial damages had the charterers' conduct been a breach of the charterparty. It was held that they could not have recovered substantial damages because, if and when the vessel arrived at the loading port, the charterers would have exercised their express right to cancel the charterparty on the grounds that the vessel had not arrived by the cancelling date.

49. Lord Denning explained the matter in this way at p.49 lhc:

> "Seeing that the renunciation itself is the breach, the damages must be measured by compensating the injured party for the loss he has suffered by reason of the renunciation. You must take into account all contingencies which might have reduced or extinguished the loss. That is made clear by the very first case in which that doctrine of anticipatory breach was established, in *Hochster v. De la Tour*, (1853) 2 E. & B. 678, at pp. 686-687. It follows that if the defendant has under the contract an option which would reduce or extinguish the loss, it will be assumed that he would exercise it. Again, if it is reasonable for him to take steps to mitigate his loss, he must do it. And so forth. In short, the plaintiff must be compensated for such loss as he would have suffered if there had been no renunciation: but not if he would have lost nothing. Seeing that the charterers would, beyond doubt, have cancelled, I am clearly of opinion that the shipowners suffered no loss: and would be entitled at most to nominal damages. On this point the two experienced arbitrators (one on each side) were quite agreed. I agree with them. I would allow the appeal and restore the award, which adjudged that the claim of the owners failed."

50. Lord Justice Edmund Davies was to the same effect at p.53 lhc:

> But the true test in a case of anticipatory breach is: "What would the position of the parties have been if the defendant had not wrongly announced his refusal to fulfil his part of the contract when the time for

> performance arrived?". One must look at the contract as a whole, and if it is clear that the innocent party has lost nothing, he should recover no more than nominal damages for the loss of his right to have the whole contract completed. The assumption has to be made that, had there been no anticipatory breach, the defendant would have performed his legal obligation and no more. . . . a defendant is not liable in damages for not doing that which he is not bound to do. [per Lord Justice Scrutton in *Abrahams and Another v. Herbert Reiach Ltd.*, [1922] 1 K.B. 477, at p 482] . . . cited with approval by Lord Justice Diplock in *Lavarack v. Woods of Colchester Ltd.*, [1967] 1 QB 278, at p. 293. In the light of the arbitrators' finding, it is beyond dispute that, on the belated arrival of the *Mihalis Angelos* at Haiphong, the charterers not only could have elected to cancel the charter-party, but would actually have done so. The rights lost to the owners by reason of the assumed anticipatory breach were thus certain to be rendered valueless. It follows from this that, in my judgment, the arbitrators were right in holding that, in the circumstances, the claim of the owners for damages should be dismissed.

51. Finally Lord Justice Megaw put the matter in the following way at p.58 lhc:

> In my view, where there is an anticipatory breach of contract, the breach is the repudiation once it has been accepted, and the other party is entitled to recover by way of damages the true value of the contractual rights which he has thereby lost, subject to his duty to mitigate. If the contractual rights which he has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events.

52. It is of course correct that the *Mihalis Angelos* did not concern an argument that the innocent party could not recover substantial damages because, had the party in breach not repudiated the contract, the innocent party would not have been able and willing to perform his obligations under the contract and his own (hypothetical) repudiation of the contract would have been accepted. But it is difficult to see why, in order to assess the true value of the contractual rights which the disponent owners have lost, it is not necessary to consider whether they would have been able to perform their obligations and if not whether the charterers would have exercised their common law right to accept such inability as a repudiation of the contract, just as it was necessary in the *Mihalis Angelos* to consider whether the charterers would have exercised their right to cancel the charterparty. Exercise of a common law right to accept a repudiatory breach, like the exercise of an express right to cancel, would prevent the disponent owners from earning any freight at all in the hypothetical event that the charterers had not committed a repudiatory breach of the charterparty.

53. Mr. Akka submitted that the basis of the decision in the *Mihalis Angelos* was that it had to be assumed on *Laverack v Woods*/mitigation principles that the party in breach would exercise its right to cancel the charter, on the basis that where a party could perform a contract in more than one way it was to be assumed that he would

choose to perform the contract in the manner which was least onerous to him. By contrast, said Mr. Akka, there was no assumption that a party in breach would exercise a common law right to accept a repudiatory breach and thereby terminate the charter. It is true that Lord Denning and Edmund Davies LJ referred to this principle. However, all three members of the court of appeal had in mind that the charterer would in fact have exercised his right to cancel. Lord Denning said that was "beyond doubt", Edmund Davies LJ said it was "beyond dispute" and Megaw LJ described it as "pre-ordained". The *Mihalis Angelos* was considered by the House of Lords in the *Golden Victory* and the emphasis there was on the factual question; see Lord Scott at para.30, Lord Carswell at para.61 and Lord Brown at para.74. In these circumstances I am not persuaded that I can regard the "rationale of the *Mihalis Angelos"* as an assumption based upon *Laverack v Wood*/mitigation principles. But if that were the rationale of the decision I do not see why such principles should not apply to a common law right to accept a repudiatory breach as terminating the contract when one is considering the damages recoverable by the innocent party. Just as with an option to perform in more than one way the court would assume that the party in breach would exercise its option to accept a repudiatory breach if that was the least onerous action to take; per contra if such action would be "to cut off his nose to spite his face"; see Diplock LJ in *Laverack v Woods* at pp.295-296.

54. There was therefore, it seemed to me, force in Mr. Hancock's submission, based upon the *Mihalis Angelos*, that the disponent owners were required to prove that had the charterers performed their obligation to nominate laycan ranges the disponent owners would have performed their obligation to provide vessels to carry the cargoes. If they could not establish that then they could not prove that they had suffered any loss as a result of the charterers' breach. The contractual rights lost by the disponent owners would therefore have had no value.

Gill & Duffus v Berger [1984] AC 382

55. The decision and reasoning of the House of Lords in *Gill & Duffus v Berger* [1984] AC 382 is relied upon by Sir Guenter Treitel in support of his opinion, which opinion was accepted and followed by the panel of arbitrators. The sellers had agreed to sell 500 tonnes of bolita beans cif Le Havre. In the event only 445 tonnes were discharged at Le Havre and the remaining 55 tonnes were on-carried to Rotterdam. The documents in respect the 500 tonnes were presented but rejected on the ground that they did not contain a quality certificate. The documents were re-presented with a quality certificate in respect of the 445 tonnes. They were again rejected. The sellers accepted this as a repudiation of the contract and claimed damages. The 445 tonnes discharged at Le Havre were found not to correspond with their contractual description. The House of Lords held that a buyer under a cif contract could not justify a refusal to accept conforming documents on the grounds that the goods in fact shipped did not conform with their contractual description. Thus the buyers' rejection of the documents was a repudiatory breach which the sellers had accepted as terminating the contract. Where, at the time of the buyers' repudiation the sellers had committed a breach by shipping non-conforming goods, the buyers could counterclaim for damages caused by that breach. On the facts of the case the terms of the quality certificate were final and binding and so no breach could be established in relation to the 445 tonnes. Since the buyers lacked a finding that a similar certificate would not have been issued in respect of the 55 tonnes no

breach could be established in relation to that quantity either. The sellers were therefore entitled to damages in respect of all 500 tonnes.

56. Lord Diplock was careful to emphasise (at p.390 B-D) that whilst the sellers could claim damages for breach of the buyers' obligations *future as well as past*, the buyers could only set-off against their liability damages for any *past* non-performance by the sellers. Mr. Hancock does not, and could not, challenge that statement of the law. What he says is that when the disponent owners claim damages for breach of the charterers' obligations (*future as well as past)* to declare laycan periods the disponent owners must show that had there been no breach the disponent owners would have been able to provide the necessary vessel; for otherwise the disponent owners would never have earned the agreed freight.

57. Mr. Hancock submitted that Lord Diplock recognised this at p.396 A-B where he said:

> "As already mentioned, if the seller sued the buyer for damages for his failure to pay the price of the goods against tender of conforming shipping documents, the buyer, if he could prove that the seller would not have been able to deliver goods under those shipping documents that conformed with the contract of sale, would be able to displace the prima facie measure of damages by an amount by which the value of the goods was reduced below the contract price by that disconformity; but this goes to a quantum of damages alone. "

58. The passage begins "as already mentioned". This seems to me a reference back to the passage at p.392 D-G where Lord Diplock said:

> "Prima facie the measure of such damage would be the difference between the contract price of the 500 tonnes of beans that were the subject matter of the contract and the price obtainable on the market for the documents representing the goods at date of the acceptance of the repudiation. Such prima facie measure might, however, fall to be reduced by any sum which the buyers could establish they would have been entitled to set up in diminution of the contract price by reason of a breach of warranty as to description of quality of the goods represented by the shipping documents that had been actually shipped by the sellers if those goods had in fact been delivered to them."

59. I am not sure that Lord Diplock was there making the point which Mr. Hancock is making. The passage at p.396 is as the end of two paragraphs which deal with the relevance of the cif buyer's two rights of rejection; his right to reject the documents and his right to reject the goods themselves. Lord Diplock had observed that where the seller has accepted the buyer's rejection of the documents as terminating the contract the seller is released from any obligation to deliver the goods themselves. It must follow that the buyer no longer had any right to reject the goods themselves. However, Lord Diplock pointed out, in the passage relied upon by Mr. Hancock at p.396, that the buyer could reduce the amount of damages payable by him by the amount by which the value of the goods had been reduced below the contract price by reason of the seller having shipped goods which did not conform with the contract of sale. Lord Diplock did not say that the buyer's liability in

damages could be extinguished altogether or that the seller would be unable to prove any substantial damages because the buyer would have been able to reject the goods themselves.

60. Thus, based upon *Gill & Duffus v Berger*, Sir Guenter Treitel has stated as follows at paragraph 19-169 in *Benjamin* that:

> "the buyer cannot, where the seller has rescinded, neutralise such liability ….[by saying]……..the seller's rights against him were worthless as he would, if the goods had actually been delivered to him, have rejected them and so have become entitled to the return of the price that he ought to have paid on tender of documents. When the seller has rescinded, such an argument will fail since the stage at which the buyer would have been entitled to reject the goods on account of the seller's breach in shipping defective goods would never be reached. Lord Diplock in *Gill & Duffus v Berger Co. Inc.* explains this point on the ground that rescission by the sellers relieved them from "any further obligation to deliver to the buyers any of the goods that were the subject-matter of the contract".

61. Professor Francis Reynolds, another distinguished academic lawyer, has expressed a similar opinion in his comment on the *Golden Victory* in 2008 HKLJ 333 at p.343:

> "The view expressed by Lord Diplock [in *Gill & Duffus v Berger*] appears to me to be that he [the buyer] could only claim for a breach which had already occurred (the shipment of non-conforming goods); it is not suggested that he could defend an action for damages by saying no loss had been caused at all because he would have rejected the goods anyway. This seems consistent with principle: by accepting a repudiation the seller terminates the contract and prevents the buyer from relying upon subsequent events. "

62. The reasoning of Lord Diplock in *Gill & Duffus v Berger* does therefore support Sir Guenter Treitel's opinion. However, *Gill & Duffus v Berger* was not a case where the award of damages placed the sellers in a better position than they would have been in had there been no repudiatory breach by the buyers. For, in circumstances where the 445 tonnes had been certified as conforming with the contract and where there was no finding that a similar certificate would not have been issued in relation to the balance of 55 tonnes the buyers were unable to show that there would have been a breach by the sellers which (had the contract been subsisting) would have entitled the buyers to reject the goods themselves. No reference was therefore made to the compensatory principle underlying the assessment of damages.

The Simona [1986] 1 Lloyd's Reports 171

63. This case concerned a voyage charterparty to carry a cargo of steel. The laycan dates were 3/9 July 1982. On 30 June the owners nominated a vessel for 13-16 July and on 2 July asked for an extension to the cancelling date. The charterers declined to agree an extension and purported to cancel the charter. This was wrongful because the right to cancel could not be exercised until 9 July. The repudiation of the charterparty was not accepted. On 5 July the owners said that loading would start on 8 July. Notice of Readiness was tendered on 8 July but the charterers refused to accept it and commenced to load their cargo on another vessel. The

owners claimed for deadfreight. The charterers said that they were not liable because the owners could not have commenced loading steel by 9 July because of an obligation to load a cargo of granite first. The arbitrators held that the burden lay on the charterers to show that the vessel could not have commenced to load steel by 9 July and that since they were unable to do so they were liable for deadfreight. The charterers appealed to the High Court. Leggatt J. held that the arbitrators were wrong to place the burden on the charterers. He accepted as correct (at p.175) the conclusion of McArthur J. in *Y.P.Barley Products v Robinson Proprietary* that the onus lay on the claimant to prove substantial damages by showing that, but for the repudiation, he would have earned the sum due under the contract. He regarded this approach as supported by the *Mihalis Angelos*.

64. The approach of Leggatt J. therefore supports the submission of Mr. Hancock in the present case. But the actual decision is not a decision in his favour because it concerned an unaccepted repudiation, not an accepted repudiation. Leggatt J. regarded this as an "essential distinction" and this was also emphasised by Lord Ackner in the House of Lords (see [1989] 1 AC 788 at p. 801). This caused Sir Guenter Treitel to observe that "it can be inferred that his [the shipowner's] claim would have succeed in full if, instead of affirming the charterparty, he had rescinded it." (see *Benjamin's Sale of Goods* para.19-170 fn 1230).

North Sea Energy Holdings NV v Petroleum Authority of Thailand [1997] 2 Lloyd's Reports 418

65. In *North Sea Energy Holdings NV v Petroleum Authority of Thailand* the claimants had agreed to sell 70m. barrels of Arabian light and Arabian heavy of Saudi Aramco grade crude oil to PTT, a Thai state enterprise. The sellers said that the buyers had repudiated the contract and that they, the sellers, had accepted that repudiation. They claimed damages by reference to the large profit they would have made by buying the oil which they were to supply to PTT from a company called Magoil. In the alternative they claimed damages on the basis of the loss of profits that would normally have arisen. Thomas J. (as he then was) held that PTT had repudiated the contract, that the repudiation had been accepted by the sellers and that they were entitled to damages. He rejected the claim to substantial damages assessed by reference to the Magoil contract because on the balance of probabilities the oil would not have been made available to the sellers through Magoil. If it could have been then the claim would in any event fail because, although a loss of profit based upon a discount from the seller's supplier was within the reasonable contemplation of the parties, the Magoil contract was an extravagant and unusual bargain and therefore irrecoverable. An alternative claim for damages assessed by reference to the loss of profits that would normally have arisen was dismissed on the grounds that there was no evidence on which the court could assess a reasonable level of profit.

66. Before deciding that on the balance of probabilities the oil would not have been made available to the sellers through Magoil Thomas J. had to deal with a submission to the effect that the sellers did not have to show that they would have been supplied with oil through Magoil because PTT had repudiated the agreement before the time for performance of the sellers' obligation had arisen. Thomas J. rejected this submission at pp.432-433. He said that it was not in dispute that when a repudiatory breach has occurred the innocent party is relieved from further performance of his obligations under the contract and does not have to prove that

he was ready willing and able to perform the contract in accordance with its terms. Reference was made to a number of cases including *British and Bennington*s. Thomas J. thus said that if the sellers had claimed by reference to a market then it would be irrelevant whether or not oil could have been delivered under the Magoil contract. But the sellers had claimed by reference to a specific offer which the sellers say would have entitled them to very significant profits. Thomas J. said "it must follow that the party in repudiation, PTT, can contend that those profits could never have been earned because that specific offer could never have been performed." He then referred to *Gill & Duffus,* the *Mihalos Angelos* and *British and Bennington*s.

67. Mr. Akka gains support for his submission from the fact that Thomas J said that

> "an innocent party is not required to prove, before being entitled to damages, either that he could perform at the time of termination or that he could have performed in the future. Similarly, the party in repudiation cannot rely on arguments to the effect that that the innocent party could not, or might not, have been able to perform the obligations which he had undertaken under the contract."

68. However, *North Sea Energy* was not a case where that principle was applied in such a way as to put the innocent party in a better position than he would have been had there been no repudiation. The claim for damages failed for other reasons, namely, it was found that on the balance of probabilities the oil would not have been made available to the sellers through Magoil and there was no evidence on which the court could assess a reasonable level of profit. (Thomas J's decision was upheld on appeal but I was told that nothing was there said on the issues relevant to the present case.)

Chiemgauer Membran und Zeltbau GMBH v The New Millenium Experience Company Limited, 15 December 2000 (unreported).

69. This case concerned the construction of the Millenium Dome. The defendant had terminated the contract pursuant to an express right to do so and without fault on the part of the claimant. In such circumstances the defendant was liable to pay to the claimant "any direct loss and/or damage caused by the determination". The defendant contended that the claimant would have become insolvent during the performance of the contract which would have resulted in automatic termination of the contract pursuant to another clause. In those circumstances the defendant contended that the claimant would not have made any profit from the contract in any event. In advancing its case the claimant made reference to the common law and said that in assessing its entitlement under the terms of the contract the same principles applied as if it were a repudiation case.

70. The judge, Mr. Vos QC, as he then was, thus had to determine a question of construction, namely, whether, when assessing the claimant's entitlement to "direct loss and damage," the court must assume that the claimant would have been able, had the contract not been terminated, to perform the contract according to its terms. Mr. Vos considered the position at common law. He referred to *Braithwaite* and, at paragraph 47, recorded that "numerous cases have held that, in cases of anticipatory breach, where a contract is terminated by the acceptance of a repudiation, the repudiating party is not entitled to contend that the innocent party

could not or might not have performed the contract according to its terms." Reference was made, inter alia, to *British and Benningtons*, *Taylor v Oakes, Roncoroni* and *North Sea Energy*. Mr. Vos further said, in paragraph 48, that whilst all future facts can be taken into account in assessing what the loss of profit would have been, a "basic assumption" had to be made that the contract would be performed. It was argued (see paragraph 49) that "the assumption could not be taken as preventing the repudiating party seeking to prove that the innocent party would not in fact have been able to perform the contract, because of some supervening event ……." But Mr. Vos said that "this cannot be right, because it would affect the basic premise upon which the law operates, namely that the party repudiating a contract is, once the repudiation is accepted, waiving his right to future performance by the innocent party."

71. This is a passage from which Mr. Akka derives support for his case. However, Mr. Vos went on to say that that there was an exception to the rule, as evidenced by the *Mihalis Angelos*, if it was inevitable that the repudiating party would have been entitled to terminate the contract in any event. This part of Mr. Vos' understanding of the law did not, I think, fit with Mr. Akka's submission or with Sir Guenter Treitel's opinion.

72. Having accepted that there was a proper analogy between a repudiation and a termination without cause pursuant to the express terms of the contract Mr. Vos said, at paragraph 58:

> "…..the reason why the assumption is made in favour of the innocent party in accepted repudiation cases is because, in deciding that the contract has been repudiated, the Court is also deciding that the innocent party is entitled to the benefits that it would have received had the contract been performed – in other words, that the loss of those benefits as at the date of the acceptance of the repudiation was caused by the repudiating party's default. That causation question is already resolved. The repudiating party cannot rely on a new intervening act after the acceptance of the repudiation as obliterating the innocent party's right to those damages, because that right has vested, and causation has (in that respect) been decided against the repudiating party….".

73. This decision of Mr. Vos is a clear statement of the assumption on which Mr. Akka relies, namely, that where there has been an accepted repudiation it is assumed that the innocent party will be able to perform his future obligations under the contract (save where it is inevitable that the contract would not have been performed according to its terms). However, Mr. Vos departs from Mr. Akka's case because Mr. Vos does not say that the principle in the *Mihalis Angelos* has no application where the (future) right to terminate would arise on a repudiation of the contract by the innocent party.

74. Before coming to the *Golden Victory* I should pause to consider whether any of the more recent cases to which I was referred are decisions where, by reason of the accepted principles of the law of contract concerning the effect of an accepted repudiation, the innocent party received an award of damages which put it into a better position than it would have been in had there been no repudiation. None of them is such a decision. However, the approach of Lord Diplock in *Gill & Duffus*

has been understood to suggest that in a cif contract for the sale of goods a buyer cannot suggest that the recoverable damages for refusing to accept the documents are nil by showing that he would have been entitled to reject the goods themselves. Since Lord Diplock based his judgment upon ordinary principles of the law of contract that decision would appear to be of general application, as stated by Sir Guenter Treitel.

The *Golden Victory* [2007] 2 AC 353

75. In July 1997 the owners chartered their vessel GOLDEN VICTORY to the charterers for 7 years. By clause 33 both parties had the right to cancel the charterparty if war broke out between certain countries. In December 2001 the charterers repudiated the charter party and the owners accepted that repudiation. They claimed damages. In March 2003 war broke out between countries named in clause 33. The arbitrator found that in December 2001 a reasonably well-informed person would have considered war not to be inevitable or probable but only a possibility. The arbitrator however held that the owners' recoverable damages were limited to the period ending in March 2003 when war in fact broke out and the charterer would have cancelled the charter. That decision was upheld by the Commercial Court, the Court of Appeal and the House of Lords, though in the House of Lords there was a powerful dissent by Lords Bingham and Walker. The debate was whether the importance of certainty and predictability in commercial transactions required the owners' damages to be assessed as at the date of breach, on which date the owners had lost a charterparty which was then considered to have slightly less than four years to run, without regard to what only became known at the date of the hearing of the arbitration, namely, that war had broken out. The majority in the House of Lords (Lords Scott, Carswell and Brown) considered that what was known at the date of the hearing of the arbitration had to be taken into account for otherwise the compensatory principle which governed the law of damages would be breached.

76. The importance which the majority attributed to the compensatory principle (described by Lord Scott as the "lodestar") is relied upon by Mr. Hancock in this case. He says that if the COA had not been repudiated by the charterers and had remained on foot, it would have been terminated by the charterers on the grounds that the owners were, by reason of their financial difficulties, unable to provide any vessels to carry the charterers' cargoes and so no freight would have been earned by the owners. The compensatory principle requires that to be taken into account when deciding whether the owners have proved that they have sustained substantial damages as a result of the charterers' repudiation of the COA.

77. The *Golden Victory*, like the *Mihalis Angelos*, involved an express contractual right to cancel in a certain event (war in the one case and the late arrival of the vessel in the other). Neither case involved the common law right to accept a repudiatory breach as terminating a contract. However, the importance ascribed to the compensatory principle is illustrated by this passage in the judgment of Lord Scott at paragraph 36 dealing with an anticipatory breach the acceptance of which had terminated an executory contract:

> "The contractual benefit for the loss of which the victim of the breach can seek compensation cannot escape the uncertainties of the future. If, at the

> time the assessment of damage takes place, there were nothing to suggest that the expected benefit of the executory contract would not, if the contract had remained on foot, have duly accrued, then the quantum of damages would be unaffected by the uncertainties that would be no more than conceptual. If there were a real possibility that an event would happen terminating the contract, or in some way reducing the contractual benefit to which the damages claimant would, if the contract had remained on foot, have become entitled, the quantum of damages might need, in order to reflect the extent of the chance that that possibility might materialise, to be reduced proportionately. The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more."

78. That statement of the governing principle does not suggest that the "event" which might terminate the contract can only be an event which gives rise to an express contractual right to cancel, as opposed to an event which, had the contract remained on foot, would have given the party in breach a common law right to bring the contract to an end.

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79. I was not referred to this decision but it appears to be relevant. Tomlinson LJ (with whom Jackson LJ and Maurice Kay LJ agreed) referred to *Chitty on Contracts* 30th.ed. at para.24.023 which stated that following an accepted repudiation which relieved the innocent party from the need to prove his readiness and willingness to perform his obligations it could not be a defence to liability to show that if the contract had not been renounced the innocent party would not have been able to perform his obligations, but added that

> "proof of such inability to perform might possibly be material in the assessment of damages."

80. Tomlinson LJ said at paragraph 52 that an inability to perform must be material to the assessment of damages and that loss of profit cannot be recovered where it is posited upon performance which would not have taken place. That appears to me to support the submission of Mr. Hancock.

Conclusion on the first question of law

81. Since the court is concerned with a question as to the assessment of damages the court must have regard to the compensatory principle which underlies the assessment of damages. For the reasons expressed earlier in this judgment that principle, illustrated by the *Mihalis Angelos* and the *Golden Victory*, supports Mr. Hancock's submission. Neither of those cases dictates the outcome of the present case because each concerned an express right to cancel on the happening of a certain event and those are not the facts of the present case. However, the importance ascribed to the compensatory principle in the *Golden Victory* is a powerful argument for applying it in the present case.

82. The decisions of the appellate courts in *Braithwaite*, *Taylor v Oakes, Roncoroni and Co., British and Benningtons*, and *Continental Contractors v Medway Oil and Storage Company* did

not address the compensatory principle which underlies the assessment of damages. They were concerned with establishing the claimant's cause of action as explained by McArthur J. in *YP Barley Producers Ltd. V Robertson (EC) Pty Ltd.* and as accepted by Leggatt J. in The *Simona.* They were not clear decisions pursuant to which the innocent party was placed in a better position than he would have been in had the party in breach not repudiated the contract. They are not therefore decisions which bind me to depart from the compensatory principle. Those decisions only establish that where there has been an accepted repudiation the innocent party is released from its future obligations so that the party in breach cannot rely upon a future hypothetical breach as an ex post facto justification for its repudiation.

83. Mr. Akka's submission and the decision of the arbitrators is supported by the reasoning of the House of Lords in *Gill & Duffus v Berger,* though the reasoning did not address the compensatory principle and the case was not a decision pursuant to which the innocent party was placed in a better position than he would have been in had the party in breach not repudiated the contract. It is not therefore a decision which binds me to depart from the compensatory principle.

84. The reasoning of the House of Lords in *Gill & Duffus v Berger* and in the *Golden Victory* lead in different directions. But neither is a decision on the actual point which the court must determine. The court can only follow one approach. Since the court is dealing with a question concerning the assessment of damages and since there has been no clear decision of an appellate court which is binding upon the court and pursuant to which the application of the contractual principles regarding an accepted repudiation has led to an award of damages which puts the innocent party in a better position than he would have been in had the contract been performed I have concluded that the court should follow the compensatory principle endorsed by the House of Lords in the *Golden Victory.* This is consistent with the approach of McArthur J. in *YP Barley Producers Ltd. V Robertson (EC) Pty Ltd.*, of Leggatt J. in The *Simona*, of Salmon LJ in *Esmail v Rosenthal & Sons Ltd.* and of Tomlinson LJ *in Acre 1127 Limited v De Montfort Fine Art.* In so far as my decision is inconsistent with the approach of Thomas J. in *North Sea Energy Holdings NV v Petroleum Authority of Thailand* or of Mr. Vos in *Chiemgauer Membran und Zeltbau GMBH v The New Millenium Experience Company Limited* I must, with respect, disagree with them.

85. The assessment of loss necessarily requires a hypothetical exercise to be undertaken, namely, an assessment of what would have happened had there been no repudiation. That enables the true value of the rights which have been lost to be assessed. The innocent party is claiming damages and therefore the burden lies on that party to prove its loss. That requires it to show that, had there been no repudiation, the innocent party would have been able to perform his obligations under the contract. If the court were to assume that the innocent party would have been able to perform, rather than to consider what was likely to have happened in the event that there had been no repudiation, the court might well put the innocent party in a better position than he would have been in had the contract been performed. The assessment of damages does require an assumption to be made, but it is not the assumption suggested by Mr. Akka. When assessing what the innocent party would have earned had the contract been performed the court must assume that the party in breach has performed his obligations.

86. For these reasons I have concluded that the arbitrators were wrong in law on the first question.

The second question of law

87. This question of law involves the determination of a term of the charterparty which described the owners and the vessel which would perform the voyage in question as "disponent owners of the Glory Wealth to be nominated motorship". This term was the product of the fixture recap and a proforma charterparty. It was described by the arbitration panel as a "cryptic expression". The charterers submitted in the arbitration that the term meant that the vessel nominated must be owned by the disponent owners or be time, voyage or slot chartered by them. The owners submitted in the arbitration that they were obliged to nominate a vessel to carry the charterers' cargo but without any contractual requirement that the nominated vessel possessed, vis-à-vis the owners, any particular contractual status or relationship. The arbitration panel held that the owners' submission was correct. The term meant simply that the owners were obliged to nominate the vessels that would carry the charterers' cargo.

88. The panel also said that "what is necessary is that the Owners must have the vessel that they nominate at their disposal (by whatever means) and that the vessel nominated by them must perform the cargo-carrying voyage as required by the COA." I did not find this observation entirely easy to follow. It could be taken as suggesting that when nominated the vessel must be at the disposal of the owners by some means (presumably contractual, because it is difficult to see how else the owners could have control of the vessel), though not necessarily a time or voyage charter. However, neither counsel suggested that that was what the panel meant. Both counsel (who appeared at the arbitration) submitted that the panel had found that when a vessel was nominated there was no requirement for the owners to have, at that time, any contractual control over the vessel. Reading the reasons as a whole, and bearing in mind the submissions made to the panel, I have reached the conclusion that the panel did not hold that when a vessel was nominated there must exist a contractual relationship between the disponent owners and the vessel which enabled the owners to control the use of the vessel. The panel held that the disponent owner was obliged, having nominated a vessel, to ensure, by whatever means it could, that the vessel carried the charterers' cargo.

89. The panel reached this conclusion, essentially, for two reasons. First, if it had been intended that the nominated vessel should be chartered by the owners the panel would have expected clears words to that effect rather then the "cryptic expression" which they had used. Second, clause 25 provided that both parties shall have the privilege of transferring the charter to others, "each party guaranteeing to the Owner (sic) due fulfilment of this charter party". (The panel thought that the word "Owner" should have read "other".) The panel considered that clause 25 supported its conclusion that the Owners could transfer their obligations to others and did not need to have the specific degree of contractual control over the vessel for which the charterers had contended.

90. Mr. Hancock submitted that this construction of the charterparty was wrong for several reasons. First, it was said that "disponent owner" had a well recognised meaning, namely, that he has the contractual right to the use of the vessel under

either a time or a voyage charter. However, the arbitration panel said that the term was used commonly, perhaps usually, to describe a time charterer and that the charterers did not embrace this meaning but suggested a wider meaning to include not only time but also voyage (and slot) charterers as the most likely commercial interpretation of the words. In the light of the panel's view of the common meaning it is difficult, it seems to me, for the charterers to say that their suggested meaning is the "well-recognised" meaning.

91. It was said that the panel's interpretation "simply cannot be correct". In support of this submission it was said that the panel's meaning denuded the concept of disponent ownership of any level of legal control, that it must be possible to determine, when the ship is nominated, whether the owner is in fact the disponent owner of the vessel and that clause 25 did not assist.

92. Where a panel of commercial arbitrators has construed a clause expressed in "cryptic" terms the court should be wary of concluding that its construction "simply cannot be correct". It is true that the panel's interpretation means that at the time of nomination there need not be any contractual relationship between the owner and the vessel but I was not persuaded that this was necessarily wrong. The panel of commercial arbitrators said:

> "what was important was that each of the Charterers' cargoes would be carried safely to its destination in accordance with the COA, not the precise relationship between Glory Wealth and the nominated vessel."

93. Thus the charterer does not need to know at the time of nomination what the relationship is between the owner and the vessel. What matters to the charterer is that the vessel in fact arrives and picks up his cargo. If it does not do so the charterer has an undoubted claim against the owner for failure to provide the nominated vessel.

94. Clause 25 supports the panel's construction because it emphasises that whilst another owner may perform the carrying voyage the disponent owner remains liable to the charterer.

95. I was not therefore persuaded that the panel's interpretation "simply cannot be correct."

96. Second, it was said that in considering the commercial realities of the situation, it is improbable "in the extreme" that a charterer would agree to contract with an owner who had no contractual control over the nominated vessel. "Considerations such as ensuring the proper provenance of the vessel, ensuring back-to-back insurance or other arrangements, and handling of disputes wholly militate against this position." These considerations were not mentioned by the panel of "commercial" arbitrators. On the contrary the panel said that the precise relationship between the disponent owner and the vessel was not important to the charterer. In those circumstances I am wary of concluding that the factors mentioned by Mr. Hancock are commercial considerations which are relevant to the true construction of the COA. I myself am not aware that in practice a charterer, when a disponent owner nominates a vessel to carry a cargo, requests information as to the contractual relationship between the disponent owner and the vessel in order to satisfy himself as to back-to-back

insurance insurance or other arrangements and the handling of disputes. It seems to me more likely, as submitted by Mr. Akka, that what matters to the charterer is that if the nominated vessel does not turn up to carry the cargo the charterer has a cause of action against the disponent owner.

97. Third, reliance was placed on cases which determined that an "owner" must personally provide the vessel's services (as would a registered owner or an owner by demise) and that the panel's conclusion was contrary to those authorities; see *Time Charters* 6th.ed at para.3.9. However, the clause in this case did not concern an "owner" but a "disponent owner" and it was common ground that a disponent owner need not personally provide the vessel's services. Thus the authorities did not assist.

98. I was therefore unpersuaded by Mr. Hancock's submissions that the panel of arbitrators had erred in law in their construction of the COA. On the contrary I consider that the panel of arbitrators correctly construed the COA. A "disponent owner" is obliged to provide the nominated vessel to carry the charterers' cargo. How he provides the vessel is a matter for him. It will usually be by some form of charter but there is no requirement that such charter (or such other means as the disponent owner uses to provide the vessel) must be in place at the time of nomination. What matters to the charterer is that when the time comes for the cargo to be lifted the nominated vessel is there to perform that task. If it is not then the disponent owner will be liable because he will have failed to do that which a disponent owner must do, namely, provide the nominated vessel.

Conclusion on the s.69 appeal

99. There being no second error of law there is no cause to allow the appeal by remitting the award to the arbitrators for their consideration. The arbitrators found as a fact that the owners would have been able to perform the COA if the charterers had called upon them to do so. Thus, had the arbitrators concluded that the disponent owners were obliged to prove that they had sustained substantial damages by showing that had the charterers performed their obligations they would have provided the necessary vessels, the result of the arbitration would have been no different.

100. I must therefore dismiss the s.69 appeal.

The challenge pursuant to s.68

101. The charterers are clearly dissatisfied with, and disappointed by, the panel's finding that the disponent owners, notwithstanding their insolvency, would have been able to perform their obligations under the COA. They were unable to appeal this finding of fact pursuant to section 69 and have sought to challenge the award under section 68 alleging three serious irregularities. They were (i) a repeated refusal by the panel to order certain disclosure by the disponent owners until 12 days before the hearing; (ii) a repeated refusal by the panel to order disclosure by the disponent owners of unredacted documents until 5 days before the hearing; and (iii) a refusal by the panel to consider an issue of dishonesty raised by the charterers with regard to the disponent owner's evidence as to how they had performed certain of the shipments. In counsel's skeleton argument it was said that the documents which

were belatedly disclosed related to the ability of the disponent owners to perform their obligations under the COA, that the late disclosure therefore impeded the charterers' ability to investigate the case properly and to cross-examine properly and that the tribunal not only relied on the documents which had been disclosed but failed to draw appropriate inferences from the disponent owners' late and incomplete disclosure. These complaints were further explained and particularised in a witness statement which prompted a long and detailed statement in response and which in turn prompted a further statement in reply. However, the oral and written submissions in support of the section 68 challenge did little more than summarise the complaints and invite the court to rely upon the totality of the complaints.

102. It is now well-established that section 68 is designed as a long stop, only available in extreme cases and that it is concerned with the arbitrators' conduct of the arbitration, not with the correctness of the arbitrators' decisions. Measured against those principles the section 68 challenge has, in my judgment, no prospect of success.

103. Disclosure: The fact that the arbitrators initially refused the application for disclosure and then, shortly before the hearing of the arbitration, changed their mind and ordered disclosure, does not evidence a serious irregularity. There are instances both in court and in arbitration when disclosure is initially not seen to be appropriate but is later recognised to be appropriate. At best, the arbitrators' initial decision may be said to have been wrong, but making a wrong decision is not a serious irregularity.

104. Failure to consider the issue of dishonesty: The arbitrators said in paragraph 87 of their Reasons that it was unnecessary for them to consider the allegation of dishonesty. That was because of their decision on the two matters of law which were the subject of the section 69 appeal. However, they went on to say that for the purpose of forming a view as to the owners' ability to perform the COA it was necessary for them to consider the evidence. The arbitrators then considered the evidence between paragraphs 88 and 98 and in the course of doing so accepted (in paragraph 93(a)) that the two vessels which had been the subject of the dishonesty allegation had been properly nominated. Thus the arbitrators did consider the allegation of dishonesty and rejected it.

105. Inability to investigate or prepare properly for cross-examination: The complaint made in the witness statement is that certain documents were produced during the hearing itself, and some only after the material witness had been cross-examined. This, although regrettable, happens from time to time, both in litigation and in arbitration. It can be dealt with in various ways. Additional time can be sought, adverse inferences can be drawn, if considered appropriate, or further evidence or submissions can be put in after the hearing. There is no suggestion that the arbitrators were asked for further time and refused it. Indeed, as appears from paragraph 76 of the Reasons, the charterers were permitted to introduce further evidence on at least one topic regarding the quantum of loss after the hearing and both parties were requested to put in further submissions. I was not persuaded by the witness statements or the submissions of counsel that the manner in which the arbitrators dealt with the consequences of the owners' late disclosure amounted to a serious irregularity. The emphasis was on the failure of the arbitrators to order

disclosure earlier than they did rather than on what they did or did not do when the disclosure was given. But, as already stated, a failure to order disclosure earlier than they did, even if wrong, does not constitute a serious irregularity within section 68.

106. Reliance on the disclosed documents and failure to draw inferences from late and incomplete disclosure: This is simply a complaint as to the conclusions drawn or not drawn from the owners' disclosure. The conclusions may be right or wrong but they cannot manifest a serious irregularity.

107. The section 68 application must be dismissed.