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Case No: CL-2024-000135
CL-2024-000136

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF ARBITRATION CLAIMS

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 13 December 2024

Before :

MR JUSTICE BRIGHT

- -

Between :

HAPAG-LLOYD AG

Claimant

- and -

(1) SKYROS MARITIME CORPORATION
(2) AGIOS MINAS SHIPPING COMPANY

Defendants

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- -

Steven Berry KC and Adam Board (instructed by MFB Solicitors Ltd) for the Claimants
Julian Kenny KC and James Lamming (instructed by Wikborg Rein LLP) for the Defendants

Hearing dates: 25 November 2024

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Approved Judgment

This judgment was handed down remotely at 10:00am on 13 December 2024 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

The arbitrators' Awards

1. This judgment concerns the appeal under section 69 of the Arbitration Act 1996 of the Claimant ("Charterers") in relation to two arbitration awards ("the Awards") both dated 7 February 2024 and both supported by the same Reasons. The disputes dealt with by the Awards arose under two materially identical timecharter charterparties on the NYPE form (the "Charterparties"). The Charterparties were in respect of the MV 'Skyros' and the MV 'Agios Minas' (the "Vessels"), which at the time were owned by the Defendants in these two related actions (collectively, "Owners").

2. The Awards concerned a preliminary issue, which was determined on assumed facts. Those assumed facts are summarised in paragraphs 3 and 4 of the arbitrators' Reasons, as follows:

> "3. The Vessels were both chartered to the Respondent Charterers, under Charterparties dated 20 February 2017 (*Skyros*) and 23 March 2020 (*Agios Minas*). By the terms of the Charterparties, the latest times when the Vessels could lawfully be redelivered were 24:00 on 30 May 2021 (*Skyros*) and 24:00 on 31 May 2021 (*Agios Minas*). Before these dates, the Owners entered into MOAs, dated 22 April 2021 and 23 March 2021, agreeing to sell the Vessels to respectively MSC Shipping SA and Maersk A/S. In breach of the Charterparties, both Vessels were redelivered late by the Charterers: *Skyros* by about two days and *Agios Minas* by about seven days. During the overrun periods, the Charterers paid hire at the rates agreed in the Charterparties. By this time, the rates which the market would have offered for the Vessels were significantly higher than the Charterparty rates. The market rates in the Lists of Assumed Facts are for fixtures of around 30 to 60 days and 24 to 26 months. We emphasise that, for the purpose of the preliminary issue, we have not been asked to determine the relevant market rates, or how the Owners' losses would be quantified if we were to hold that they were entitled to substantial damages.
>
> 4. It is common ground between the parties for the purposes of the assumed facts that, even if the Vessels had been delivered timeously, the Owners would not have chartered them again after redelivery and so would not have earned any further hire. The Vessels would have been delivered to the buyers as soon as they were redelivered under the Charterparties."

3. Paragraph 5 of the Reasons noted that the Owners' case was that Charterers' voyage instructions for the last voyage before redelivery were orders that the Vessels could not reasonably be expected to complete in time for redelivery within the Charterparty limits – in other words they were illegitimate (although it was thought that nothing turned on this). Paragraph 6 then said:

> "6. The preliminary issue raises a novel point. In essence, the question is whether substantial damages are recoverable for late redelivery of a ship under a time charterparty where there is evidence that after a timely redelivery, the owner could not or would not have chartered it out. Despite a thorough and helpful review of authorities, the parties' counsel were unable to direct

> us to any reported case in which the courts dealt explicitly with circumstances of this sort. For that reason, it has been necessary for us to return to first principles and to look for guidance in those authorities, including a number of cases which arose from contracts outside the shipping sector, some in the context of torts."

4. It is relevant to set out some of the charterparty terms, taking the 'Skyros' charterparty as representative of both (at the suggestion of Counsel).

5. The charterparty period was defined as follows, in lines 14-15:

> "… the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for a Timecharter period of a minimum 11 (eleven) months/maximum 13 (thirteen months, exact period in Charterers' option. Charterers' option is declarable latest on 31st December, 2017, for a further period, counting from the commencement of the 14th month onhire, of a minimum 11 (eleven) months/maximum 13 (thirteen) months, exact period in Charterers' option…""

6. Hire was to be paid at a stipulated daily rate, over the following period, as provided in clause 4:

> "4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of US$14,750… and US$30,000… for the optional period… commencing on and from the time of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire computation to be based on UTC; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) on dropping last outward sea pilot one safe port in Charterers' option Singapore/South Japan range including People's Republic of China, Hong Kong, Taiwan, South Korea, anytime day or night Saturdays, Sundays and holidays included unless otherwise mutually agreed. Charterers to tender 60/45/30/30/10 days approximate noticed of delivery and probably port and 7/4/1 day(s) definite notice of vessels' expected redelivery to Owners and definite port."

7. During the currency of the Charterparty, Charterers were entitled to require the Vessel to be employed as they wished (always subject to the geographical limits and cargo restrictions, etc., in other clauses. This is the result of clause 8:

> "8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, trim, discharge and lash/unlash the cargo at their expense under the supervision of the Captain, who if

> requested by Charterers and/or their agents, is to sign Bills of Lading for cargo in conformity with Mate's or Tally Clerk's receipts."

8. It is also relevant to note that, under the terms of the MOAs, Owners had agreed not to enter into any further charter fixture, following the expiry of the subject Charterparties, before delivering the Vessels to the buyers under the MOAs. Owners therefore were precluded from letting the Vessels on the charter market. This meant that, in the language of paragraph 6 of the Reasons, this was a case where Owners "could not" have chartered the Vessels out – not merely one where they "would not" have done so.

9. The preliminary issue that the arbitrators were asked to resolve was as follows:

> "On the basis of the facts as alleged in the agreed Assumed Facts, are Owners entitled to recover from Charterers:- (i) substantial damages, compensation, remuneration or other monetary relief (as Owners allege); or (ii) only nominal damages (as Charterers allege)?"

10. The arbitrators' answer to this question was:

> "On the basis of the facts as alleged in the agreed Assumed Facts, the Owner is entitled to recover from the Charterer substantial damages, compensation, remuneration or other monetary relief."

The Charterers' breach

11. On the basis of the assumed facts, the Charterers were in breach of their obligations under lines 14-15 to redeliver the Vessels before the expiry of the charter period, by the overrun period in each case: i.e., about two days, and about seven days, respectively.

12. However, contractual hire did not stop accruing when the charter period ended. Under clause 4 it continued to accrue until the moment of the actual redelivery of each Vessel, at the stipulated charter rate. Charterers duly paid this hire. This is not, therefore, a case where Charterers have ever had the Vessels' services without paying for them. They have paid, at the agreed rate, pursuant to the Charterparty contracts.

13. Nevertheless, the Charterers were in breach of their obligation under lines 14-15 to make timely redelivery. In principle, the Owners are entitled to claim damages for this breach, if they have suffered any recoverable damages, always taking into account the hire that became due and was paid in respect of the overrun period for each Vessel.

14. Such claims are conventionally brought in circumstances where the market rate at the end of the charter period is higher than the rate of charter hire. The claim is for the difference between the two, for the duration period of the overrun period.

Summary of the parties' positions

15. Owners have duly framed their claims in the arbitration proceedings as being for the difference between the charter rate and the market rate, for the overrun period in relation to each Vessel – i.e., about two days, and about seven days, respectively.

16. Charterers' case was that the Owners are not entitled to such damages, because their breach has not caused Owners to suffer any such loss. Having agreed to sell the Vessel under the MOAs, Owners were unable to let the Vessels on the market, when the subject Charterparties expired and the Vessels were redelivered. They accordingly were unable to take advantage of the higher charter rates prevailing at that time. Charterers' breach therefore did not cause Owners to lose the opportunity to profit from the higher market rates: Owners had already decided not to take that opportunity, when they concluded the MOAs.

17. Charterers relied on the well-known principle, familiar from cases such as *Robinson v. Harman* (1848) 1 Exch 850, 855, that the basic measure of contractual damages is to put the innocent party "so far as money can do it… in the same situation, with respect to damages, as if the contract had been performed". They said that Owners therefore were only entitled to be put into the same position as if the Vessels had been redelivered on time. If there had been no breach, Owners would have been no better off, in monetary terms.

18. Owners did not contend that they would have been better off, in monetary terms, if there had been no breach. They said that, as a matter of legal principle, they were entitled claim the difference between the charter rate and the market rate. At the heart of their arguments was the contention that the MOAs must be disregarded.

19. On this point, Owners relied principally on *Transfield Shipping Inc v Mercator Shipping Inc (The 'Achilleas')* [2008] UKHL 48, in particular per Lord Hoffmann at [23]. Charterers relied principally on a number of cases concerned with the doctrine of res inter alios acta.

20. Each said that the other's arguments were misconceived and off-point. Charterers said that *The Achilleas* was really about remoteness. Owners said that the cases relied on by Charterers were not applicable in the charterparty context and, anyway, did not support Charterers' arguments.

21. Despite the occasional use of florid language to emphasise how exceedingly wrong the opposing arguments were, the case was presented with exemplary skill by Mr Steven Berry KC and Mr Adam Board on behalf of Charterers, and by Mr Julian Kenny KC and Mr James Lamming on behalf of Owners. The debate was genuinely fascinating.

<u>The orthodox approach to the quantum of a claim for late redelivery</u>

22. The orthodox approach to the quantum of a claim for late redelivery is apparent from *Time Charters* (7th ed), §4.52 and §4.53:

> "**Owners' measure of damages for late redelivery**
> **4.52** Where the charterers fail to redeliver the ship at the end of the agreed charter period and the market rate of hire at that time exceeds the charter rate, the owners are entitled to damages compensating them for the loss of the opportunity to take advantage of the market rate during the period of the overrun. In certain circumstances, discussed below at paragraphs 4.57 *et seq.*, the owners may also be entitled to recover in respect of additional losses.

> ***The normal measure***
> **4.53** The normal measure of damage is the difference between what the owners earned in hire under the charter during the period of the overrun and what the market would have paid for the use of the ship during the same period. An early statement of this measure of damages is in Atkin, J.'s judgment in *Watson* v. *Merryweather* (1913) 18 Com. Cas. 294. More recently Bingham, L.J., stated that this was the owners' measure of damages in *The Peonia* [1991] 1 Lloyd's Rep. 100 (C.A.), at page 108, and his statement was adopted by Lord Mustill in *The Gregos* [1995] 1 Lloyd's Rep. 1 (H.L.), at page 5. The House of Lords confirmed the correctness of this measure in *The Achilleas* [2008] 2 Lloyd's Rep. 275, discussed at paragraphs 4.58 *et seq*., below."

23. To similar effect is *Carver on Charterparties* (3rd ed) §12-283:

> "When considering the measure of damages for late delivery, it is important to keep in mind that each case will turn upon the particular terms of the charter under consideration and the facts. Nevertheless, where the time charterer is late in redelivering the vessel, the shipowner will in general be entitled to payment of hire at the charter rate until the date on which the vessel is actually redelivered and to damages for the overrun period (if the then current market rate is higher than the charter rate) for the difference between the charter rate and the market rate. If the market rate for the period of overrun is lower than the charter rate of hire, the charterer will nevertheless have to pay the charter rate of hire for that period."

24. The authorities cited in support by *Carver* are considerably more numerous, starting with *Watson Steamship Co v Merryweather & Co* (1913) 18 Com. Cas. 294 and ending with *Lansat Shipping Co Ltd v Glencore Grain BV (The 'Paragon')* [2009] EWCA Civ 855.

25. I asked both counsel whether they accepted that the passages set out above in *Time Charters* state the law accurately, at least as a generality. They both said that they did, subject, of course, to those passages being correctly applied to the assumed facts of this case. I did not specifically put the same question to them in relation to *Carver* §12-283, but I do not think it likely that they would have answered any differently.

<u>The main points on which the arbitrators determined the preliminary issue</u>

26. The arbitrators came to their conclusion without really analysing the orthodox approach or its applicability. Instead, they accepted the following three arguments, all raised by Owners.

<u>Quantum meruit</u>

27. First, Owners said that they could claim in quantum meruit. This cannot be right. Quantum meruit is a principle of restitution/unjust enrichment which comes into play

where services are rendered without any agreement as to their remuneration. It cannot apply here, because hire was earned and paid at the charterparty rate. Owners' claim is not in respect of services that were rendered but for which there was no agreement as to the remuneration payable. It is for the breach of the redelivery obligation under lines 14-15.

28. This is the obvious effect of the Charterparty provisions that I have set out above. Furthermore, it was made clear by the decision of the Court of Appeal in *The Paragon* [2009] EWA Civ 855 at [25]:

> "In my opinion, in the ordinary case in which charterers give orders for an illegitimate last voyage there is no basis for implying a request by the charterers that the owners should perform such a voyage outside the charterparty and on terms that they will pay for the voyage at the market rate. There is no case, so far as I am aware, in which that has been suggested, let alone held to be the case. On the contrary the charterers are instructing the owners to perform a voyage under the charterparty. If it is a non-contractual order because the voyage would be illegitimate, the owners can refuse to perform it but, as explained above, if they do perform it, they do so under the charterparty but are entitled to damages at the market rate if redelivery takes place after the end of the charterparty period."

29. Thus, an order for an illegitimate last voyage (i.e., one that will extend beyond the latest permitted redelivery date) is not a request to perform non-contractual services, but to perform a voyage under the charterparty. The Owners' case was that the last voyage instructions for both Vessels were illegitimate. The Charterers denied this, but it was agreed as part of the assumed facts that this should not make any difference. This must be right, because, even if the last voyage instructions for both Vessels were illegitimate, the Owners chose to accept those instructions. They followed those instructions and performed the last voyage for each Vessel, under the Charterparties.

30. Late redelivery, even after an illegitimate last voyage order, is not comparable to a case like *Steven v Bromley* [1919] 2 KB 722, where by loading non-contractual cargo (for which a higher rate of freight would normally be paid) the charterers obtained a service that was outside the charterparty. There was no agreement for freight in respect of the non-contractual cargo, and the owners were entitled to a quantum meruit payment. Here, there was agreement as to the rate of hire payable for all the services rendered, including those rendered after the Vessels should have been redelivered.

31. I accept that the situation may, for a while, have been muddled by two judgments of Lord Denning MR.

(1) In *The Alma Shipping Corporation of Monrovia v Mantovani (The 'Dione')* [1975] 1 Lloyd's Rep 115, he said at p. 118 lhc, that in the event of an illegitimate last voyage under a timecharter:

> "If the shipowner accepts the direction and goes on the illegitimate last voyage, he is entitled to be paid – for the excess period – at the current market rate, and not at the charter rate, see

> *Meyer v Sanderson* (1910) 32 TLR 428. The hire will be payable at the charter rate up to the end of the charter period, and at the current market rate for the excess period thereafter."

(2) In *Arta Shipping Co. Ltd v Thai Europe Tapioca Service Ltd (The 'Johnny')* [1977] 2 Lloyd's Rep. 1, at p. 2 rhc, he said that, in this situation:

> "… it is plain the owners could recover either damages or a quantum meruit – see *The Dione* [1975] 1 Lloyd's Rep. 115 at p. 118."

32. The legal analysis of owners' rights is not expressed consistently in the two quotations, and neither is accurate. Contrary to what Lord Denning MR said in *The Dione*, hire is not payable at the current market rate for the period after the end of the charter period: it remains payable at the charter rate throughout, but owners can in principle also claim damages, if the charter rate leaves them not fully compensated. By contrast, what Lord Denning MR said in *The Johnny* entirely ignores the fact that the owners are entitled to charter hire (hence, I suspect, the error as regards quantum meruit).

33. More importantly, any muddle was cleared up a long time ago. That the owners' ability to recover the difference between the charter hire rate and the market rate is separate, and arises in damages, was made clear by Lord Morris in *Timber Shipping Co SA v London & Overseas Freighters Ltd (The 'London Explorer')* [1972] AC 1, at p. 120) and has been confirmed several times since, notably in *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd (The Peonia)* [1991] 1 Lloyd's Rep. 100 and in *The Paragon*.

34. I therefore reject the Owners' argument on quantum meruit.

User damages

35. Owners next said that they could recover user damages, referring to the summary given by Nicholls LJ in *Stoke-on-Trent City Council v W&J Wass Ltd* [1988] 1 WLR 1406 at p. 1416, quoted with approval by Lord Reed in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, at [29]:

> "It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other s property."

36. It seems to me not quite correct to say (as Owners must, and as Mr Julian Kenny KC therefore did, on their behalf) that Charterers "wrongfully used" the Vessels during the periods of overrun. The failure to redeliver the Vessels on time was wrongful. But Owners were never deprived of possession of the Vessels, because Charterers never had possession. Owners remained in possession throughout (in the person of the Master of each Vessel), and used the Vessels to provide the services under the Charterparties that enabled them to earn hire.

37. It is true that Charterers also had the use of the Vessels, in the sense of being able to give orders under clause 8. However, this was not wrongful. It occurred within the Charterparty terms, under the first line of clause 4. The fact that such use continued after the Vessels should have been redelivered was indirectly caused by of Charterers' breach. However (repeating the point made in *The Paragon*), the direct cause was, on Owners' own case, their decision to accept the illegitimate last voyage order. That decision had the result that clauses 4 and 8 continued in effect.

38. Furthermore, in *One Step (Support) Ltd v Morris-Garner*, Lord Reed gave his own careful summary of the law at [95]. It includes the following observations:

> "(1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed user damages) are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.
> …
> (6) Common law damages for breach of contract are intended to compensate the claimant for loss or damage resulting from the non-performance of the obligation in question. They are therefore normally based on the divergence between the effect of performance and non-performance upon the claimant s situation.
> (7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.
> (8) Where the breach of a contractual obligation has caused the claimant to suffer economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence.
> (9) Where the claimant s interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages."

39. The doctrine of user damages emerged in the context of tort, and is still most active there – hence the references at [95(1)] to the invasion of property rights (i.e., in general, wrongful use), "by detinue, conversion or trespass". There is no reason in principle

why the doctrine cannot apply in the context of contract, but it is surely no accident that the only example found by either party was *Penarth Dock Engineering Co. Ltd. v Pounds* [1963] 1 QB 359, where the breach of contract was an act of trespass and the proceedings were brought both in tort and in contract. The Charterers' breach here involved no similar invasion of property rights; and they did not take something for nothing, they paid the agreed rate of hire.

40. Lord Reed's observations at [95(6), (7) and (8)] are self-explanatory. They emphasize the compensatory nature of contractual damages and the importance of assessing economic loss accurately, with the burden falling on the claimant.

41. As to [95(9)], in this case, Owners' interest in the performance of the contract was purely economic, but they cannot establish that any economic loss has resulted from the breach.

42. I therefore reject the Owners' argument on user damages.

Negotiating damages

43. Finally, Owners said that they could claim negotiating damages. These are damages assessed by reference to the sum that the claimant could hypothetically have negotiated from the defendant in return for releasing him from the obligation that he has failed to perform. As explained by Lord Reed in *One Step* at [92], negotiating damages are available in the following circumstances:

> "where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which Lord Shaw's second principle[1] and Nicholls LJ's user principle were applied. The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment."

44. Lord Reed dealt with negotiating damages in his overall summary in paragraph [95] as follows:

> "(10) Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was

[1] *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18, per Lord Shaw of Dunfermline at pp. 29-31, setting out a principle of "price or hire", applicable "wherever an abstraction or invasion of property has occurred"

> infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment"

45. I note that *Carver* expresses scepticism about this principle applying under a conventional time or trip charter, at §11-478. I agree, and for the same reasons as those given by the authors of *Carver*. In circumstances where the owner has suffered no conventional loss because of the charterer's failure to redeliver on time, the obligation to make timely redelivery cannot be said to create or protect a valuable asset. On the assumed facts, timely redelivery was not of any economic value to the Owners (at any rate, if the overrun was modest, as here).

46. I therefore also reject Owners' argument on negotiating damages.

The Reasons, paras. 39-46

47. Under the heading of "User damages", the Reasons set out at paragraph 38 the arbitrators' conclusion that the Owners were entitled to recover user damages (and I have already set out my views on this). From paragraphs 39 to 46, although still under the same heading, they then turned to a different question, which they introduced by saying:

> "39. In our view, these conclusions are enough to enable the Owners to succeed on user damages, but we will address also the question of remoteness which was raised in this context. Mr Kenny described this as "*complementary*" to the submission that user damages are based on a valuation of the lost right, but capable of standing independently: if the former submission had failed, he could still have relied on the latter.
>
> 40. The Owners contend that the MOAs with the buyers, and any effect they might have had on the amount of any pecuniary detriment to the Owners, are circumstances which are too remote to be taken into account in determining their claim for damages: each MOA is *res inter alios acta*. Mr Kenny submitted that a transaction which is too remote for this purpose is to be disregarded, whether its effect, if it were taken into account, would be to increase or reduce those damages: remoteness, he said, is not just a rule in reduction of damages. The Charterers dispute this: on their case, the doctrine of remoteness operates only one way: it precludes recovery of certain losses that fall within the compensatory principle; it does not expand recovery to allow the innocent party to recover damages for losses it has not suffered."

48. The discussion that follows was essentially drawn from *The Achilleas*, per Lord Hoffman at [23]. There are also citations from a part of the judgment of Goff J in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The 'Pegase')* [1981] 1

Lloyd s Rep 175, 183, which Lord Hoffmann cited in *The Achilleas* at [18]; and from the judgment of Lord Esher MR in *Rodocanachi v Milburn* [1886] 18 QBD 67, at pp. 76-77.

49. This part of the Reasons ends with the following conclusion:

> "46. We conclude that, where a contract between a claimant and a third party is too remote to be taken into account in assessing damages for breach, then it is disregarded for all such purposes. This is not to say, in Mr Karia's words, that the doctrine of remoteness expands recovery to allow an innocent party to recover damages for losses which it has not suffered. Rather, the point is that the existence of contracts which are too remote does not affect the quantification of damages payable on the ordinary measure. In short, we conclude that the sale contracts are, to adopt the language of Bankes LJ, to be regarded as *"accidental"* as between the present Owners and Charterers, or *"peculiar"* to the Owners - or, if Latin is still permissible, to be regarded as *res inter alios acta* - and that therefore they do not affect the Owners' claims as a result of the Charterers' breach of contract and use of the Vessels in the overrun periods."

50. Thus:

(1) The topic under discussion was originally said to be remoteness.

(2) The main focus of the discussion was part of Lord Hoffmann's speech in *The Achilleas*, which is normally understood to be dealing not with remoteness but with assumption of responsibility/scope of duty.

(3) The discussion then shifted to *Rodocanachi v Milburn*, which is not concerned with remoteness but is a sale of goods case. Moreover, it is a case that finer minds than mine have wrestled with unsuccessfully for many decades – along with the other cases usually mentioned in the same breath, notably *Wertheim v. Chicoutimi Pulp Company* [1911] AC 301, *Williams Bros v Agius Ltd* [1914] AC 510 and *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11, which the arbitrators did not discuss.

(4) This led to a further shift, from remoteness to res inter alios acta, which the arbitrators said meant that they could ignore the MOAs.

(5) On that basis, the arbitrators allowed the Owners to recover damages they had not suffered, while denying that this was the effect of their decision and maintaining that the result fell within "the quantification of damages payable on the ordinary measure."

(6) They did so with references to the language of "Bankes LJ", but I think they meant the judgment of Lord Esher MR in *Rodocanachi v Milburn*, which they had cited in the preceding paragraph 44 and which uses the words "accidental" and "peculiar". The only references in the Reasons to Bankes LJ were in a separate part and concerned his judgment in *Steven v Bromley*, which is not obviously relevant to the discussion in this part of the Reasons.

My analysis of The Achilleas, esp. per Lord Hoffman at [23]

51. Before me, Mr Kenny KC's focus in the course of this part of his submissions was firmly on Lord Hoffmann's speech in The Achilleas, specifically at [23]:

> "23. If, therefore, one considers what these parties, contracting against the background of market expectations found by the arbitrators, would reasonably have considered the extent of the liability they were undertaking, I think it is clear that they would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility. Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter into a forward fixture, they would have no idea when that would be done or what its length or other terms would be. If it was clear to the owners that the last voyage was bound to overrun and put the following fixture at risk, it was open to them to refuse to undertake it. What this shows is that the purpose of the provision for timely redelivery in the charterparty is to enable the ship to be at the full disposal of the owner from the redelivery date. If the charterer's orders will defeat this right, the owner may reject them. If the orders are accepted and the last voyage overruns, the owner is entitled to be paid for the overrun at the market rate. All this will be known to both parties. It does not require any knowledge of the owner's arrangements for the next charter. That is regarded by the market as being, as the saying goes, res inter alios acta."

52. The first difficulty with *The Achilleas* is to identify the majority ratio. Mr Berry KC suggested that Lord Hoffmann's speech did not contain the majority ratio, but I think it better to follow the view of Hamblen J in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The 'Sylvia')* [2010] EWHC 542 (Comm), at [36]-[39], which was that it did. This approach acknowledges that the analysis of Lord Rodger may also have provided the, or a, majority ratio (cf. *ASM Shipping Ltd of India v TTMI Ltd of England (The 'Amer Energy')* [2009] 1 Lloyd's Rep 293, per Flaux J at [17]-[18]).

53. *The Achilleas* was also a case of late redelivery by a charterer, by nine days. The owner in that case had entered into a forward fixture, concluded on 21 April April 2003 with a different charterer (Cargill). This was about two weeks before the latest date for redelivery – 2 May 2003. It happened that, on 21 April 2003, the market (which was unusually volatile) was exceptionally high. It then fell. The charterer's failure to redeliver within time meant that the owner was bound to miss the cancelling date under the Cargill fixture, and had to re-negotiate with Cargill – which it did in early May 2003, agreeing upon the reduced market rate which then prevailed. This mean that the owner lost substantial profits over the balance of the period of that subsequent fixture – agreed to be US$1,364,584.37.

54. All five members of the House of Lords agreed that the owner was not entitled to recover US$1,364,584.37, and that its claim should be limited to the difference between the charter rate and the market rate for the overrun period – agreed to be

US$158,301.17. I should say that, although not explained directly in any of the judgments, it is apparent that the market rate that was used for this purpose (which was agreed between the parties) was the market rate in early May 2003 – i.e., at a time when the owner was not in fact able to go to the market, because it had already committed the vessel's services to Cargill.

55. It is convenient to begin with the speeches in *The Achilleas* that are generally taken to represent the "orthodox" approach, based on well-established principles of remoteness and familiar authorities such as *Hadley v Baxendale* (1854) 9 Exch 341. Lord Rodger considered the relevant question to be whether at the time of the contract the parties would reasonably have contemplated that an overrun of nine days would "in the ordinary course of things" cause the owners the kind of loss claimed. He concluded that they would not have done. Lady Hale agreed, adding that the loss claimed only arose because of the unusual volatility of the market, which had not been within the parties' contemplation.

56. This was an orthodox application of the principles of remoteness. It did not lead to the owner's claim failing entirely. It meant that the owner could not recover the loss actually suffered (loss of the lucrative forward contract) but could recover on the basis of the market rate that would have been available if it had gone to the market at about the time of breach. This was not the loss actually suffered; ex hypothesi, it was loss of a different type.

57. In one sense, therefore, it can be said that, in such circumstances, the claimant is being allowed to recover loss that he has not suffered. However, this is (as already emphasized) entirely orthodox. It follows directly from the judgment of Alderson B in *Hadley v Baxendale*, and specifically from the sentence in that judgment that Lord Rodger highlighted in *The Achilleas* at [48] – that, if the special circumstances were unknown to the defendant:

> "…he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." ((1854) 9 Exch 341, per Alderson B at p. 356)

58. As Lord Rodger explained in *The Achilleas* (still at [48]), this provides the substitute basis of recovery, on the application of the established principle. The result of *Hadley v Baxendale* being applied is that, instead of recovering the greater loss of the type actually suffered, the claimant can instead recover the smaller loss, of a different type, not actually suffered, but contemplated by the defendant.

59. Lord Hoffmann's analysis begins at [9], where he identified the question in very different terms from those suggested by Lord Rodger:

> "The case therefore raises a fundamental point of principle in the law of contractual damages: is the rule that a party may recover losses which were foreseeable (not unlikely) an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a prima facie assumption about what the parties may be taken to have

> intended, no doubt applicable in the great majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?"

60. At [14] and [15] he rejected the view that the starting-point for the assessment of contractual damages was the compensatory principle per *Robinson v Harman*. However, I do not understand him to have rejected the principle *per se*. He merely felt that, before considering the effect of that principle, it was preferable first to decide whether the loss for which compensation is sought is the "type" for which the contract-breaker had accepted responsibility.

61. In the light of this remark of Lord Hoffmann's (and its precursor in *Banque Bruxelles Lambert v Eagle Star Insurance* [1997] AC 191, at p. 211 – generally referred to as "*SAAMCO*"), there has been some debate about whether the first step in the court's task is (as Lord Hoffmann said) to identify the scope of the duty, or whether the first step should be to identify the loss actually suffered. However, whether it is to be applied at step one or at step two, the continued validity of the compensatory principle has never been questioned. See *McGregor on Damages* (22nd ed), at §2-003, referring to Jackson LJ's judgment in *Grange v Quinn* [2013] EWCA Civ 24, at [76]. I am also struck by *McGregor* §2-004, which cites Lord Hoffmann in *The Achilleas* at [14] as reinforcing *Robinson v Harman* – not dispensing with it.

62. Having referred to *SAAMCO*, Lord Hoffmann then referred to *The Pegase*, and to *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, per Sir Anthony Evans at [33], who said that the traditional remoteness test "is not a complete guide to the circumstances in which damages are recoverable at law". Then, at [22], Lord Hoffmann said:

> "22. What is the basis for deciding whether loss is of the same type or a different type? It is not a question of Platonist metaphysics. The distinction must rest upon some principle of the law of contract. In my opinion, the only rational basis for the distinction is that it reflects what would have been reasonable and have been regarded by the contracting party as significant for the purposes of the risk he was undertaking."

63. Immediately after this came [23], which I have set out above and on which the arbitrators (in their Reasons) and Mr Kenny KC (before me), primarily relied.

64. Over the final three paragraphs of his speech, Lord Hoffmann explained why he was not bound by the factual findings of the arbitrators on the question whether the loss claimed was one for which the charter had assumed contractual responsibility, and why it was irrelevant that this could have been addressed by an express provision.

65. He then simply said: "I therefore allow the appeal." He did not address what the financial consequence of this would be, or why it was right to award the owner US$158,301.17 rather than zero. However, he of course was aware that the effect of allowing the appeal was that the owner would receive damages assessed on the basis of

the difference between the charter rate and the market rate, for the overrun period; and he had noted at [23] that the recovery of a loss of this type would have been anticipated:

> "If the orders are accepted and the last voyage overruns, the owner is entitled to be paid for the overrun at the market rate. All this will be known to both parties."

66. I have now put [23] into its context. Bearing in mind the conclusions that the arbitrators drew from [23] (Mr Kenny KC said, correctly), I must make the following observations about it:

(1) The question that Lord Hoffmann had begun with, at [9], was, in effect, whether the (orthodox) rule that "a party may recover losses which were foreseeable" was irrebuttable, or whether it could be rebutted if, on the facts of the case, the defendant did not or assume would not have assumed responsibility for them.

(2) He was not considering the question whether there can be recovery of sums that have not actually been lost. He was considering whether the recovery of sums actually lost ("losses") is constrained only by one principle – remoteness – or whether it can only be restricted by a further principle – assumption of responsibility.

(3) Lord Hoffmann did not intend to discard or ignore the compensatory principle, per *Robinson v Harman*.

(4) The outcome of his approach – the recovery of US$158,301.17 – was no different from the outcome that Lord Rodger and Lady Hale arrived at through their wholly orthodox approach.

(5) That is because all five of their Lordships approached matters on the basis that, whichever analysis were to be followed – the orthodox remoteness analysis or Lord Hoffmann's analysis – the effect would be (potentially) to reduce the recoverable losses below the sum total of those actually suffered; just as had been the effect of Alderson B's judgment in *Hadley v Baxendale*.

67. Not considered by any of their Lordships, or (I think) raised as an issue in argument before them, was whether the effect of either analysis could or should be to allow the recovery of damages by a claimant who has suffered no loss at all. It must be taken for granted that Lord Rodger and Lady Hale did not think that their orthodox approach could have that effect. I am entirely confident that, if Lord Hoffmann had intended his speech to do so, he would have made this clear.

68. That, however, is the effect of his analysis, according to the arbitrators and according to Mr Kenny KC. Specifically, Mr Kenny KC submitted that the final sentence of [23] meant that the Cargill fixture was res inter alios acta, within the full legal meaning of that phrase, for all purposes; and, therefore, the MOAs in this case must also be res inter alios acta; and, therefore, they cannot be taken into account in the assessment of Owners' damages.

69. I regard this as wholly unrealistic. It does not reflect the question that Lord Hoffmann was considering. It inflates the significance of what looks like a throwaway remark

("as the saying goes"), made without any foregrounding discussion of the sense in which Lord Hoffmann meant by it. It ignores the fact Lord Hoffmann did not say that the law treats the owner's future business arrangements as res inter alios acta, for all purposes; he said that this is how they are "regarded by the market".[2] Above all, it does not have regard to the fact that the purpose for which he said the market (i.e., charterers) did not take account of such future business arrangements was, specifically, that of establishing what type of loss they did and did not assume responsibility for, if loss were suffered.

70. Furthermore, even if that was what Lord Hoffmann intended by the final sentence of [23] (which I reject), this would require a fresh consideration of what the majority ratio is in *The Achilleas*. This final sentence is not critical to the rest of Lord Hoffmann's analysis. While Lord Hope, Lord Walker and Lord Rodger (but not Lady Hale) may be said to have endorsed the proposition that assumption of responsibility is relevant to the recoverability of damages, I see no warrant for saying that they also endorsed the "res inter alios acta" comment (at least, if Owners are right about what that comment meant).

71. I should make it clear that I am not suggesting that Lord Hoffmann was not familiar with *Rodoconachi v Milburn* and the line of cases derived from it. I am suggesting that his use of the phrase res inter alios acta cannot be understood as a reference to that line of cases – which is how the arbitrators seem to have understood the final sentence of his paragraph [23], even though none of those cases had been cited to the House of Lords in *The Achilleas*, and even though they were not relevant to the issues before the House of Lords.

The submissions before me on the *Rodoconachi* line of cases

72. Charterers' response to Owners' reliance on the final sentence of *The Achilleas* per Lord Hoffmann at [23] and also to the arbitrators' reference to *Rodoconachi v Milburn* was that this was an incorrect approach to the doctrine of res inter alios acta, which I should reject. They said I should instead pay regard to *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 and *Wertheim v. Chicoutimi Pulp Company* [1911] AC 301, in particular as explained by Prof. Treitel in 'Damages for Breach of Warranty of Quality' (1997) LQR 188, esp. 192-193.

73. Prof. Treitel's article was published shortly after the judgment of the Court of Appeal in *Bence Graphics International Ltd v Fasson UK Ltd* [1996] QB 87. In it, Prof. Treitel considered a number of authorities in the series that runs from *Horne v Midland Ry* (1873) LR 8 CP 131 to *Bence Graphics*, all relating to the question when onward contracts should, or should not, be taken into account. Mr Berry KC suggested that perhaps I should embolden myself to say (possibly) that the Privy Council was wrong in *Wertheim*, and (definitely) that the Court of Appeal had been wrong in *Bence Graphics*; although he acknowledged that this would require (in his words) "a brave first-instance judge". He was certainly right on that last point.

[2] I am doubtful that market people are in reality familiar with or use this or any other Latin legal maxim. I am not sure that Lord Hoffmann's remark was intended entirely seriously. Cf. the old joke that ends with the punchline: "My Lord, in my client's village of [XXXX], they speak of little else."

74. I have noted that the arbitrators referred to *Rodocanachi v Milburn*. Mr Kenny KC also referred me to that authority, and specifically to the passage that the arbitrators cited in their Reasons at paragraph 44. Extending the quotation slightly, this is [1886] 18 QBD 67, per Lord Esher MR at pp. 76-77:

> " I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. What, then, is that difference? If the goods are delivered he obtains them, but in order to obtain them he must pay the freight in respect of which there is a lien on them. If there were no lien, he would be entitled to the goods without paying anything. Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for sale of the goods."

75. This passage begins with a reference to "cases of this kind." Lord Esher MR did not spell out precisely what he meant, but it seems likely that he meant cases where the benefit of the contract to the claimant was the supply – whether under a contract of sale or (as in *Rodocanachi v Milburn*) under a contract of carriage – of goods for which there is a market. I understand this to mean both (i) that there is a market in which equivalent, replacement goods can readily be bought and sold and (ii) that the

transactions in such equivalent goods establish a market price, which can readily be adopted in the assessment of damages. In the context of ships such as these Vessels, it is necessary to extend this, by analogy, to markets in which equivalent replacement ships can be chartered in or let out.

76. The reasons generally advanced for using (or not using) market price as the benchmark for the assessment of damages frequently focus on one or both of these features – as they did in the arguments of Mr Berry KC and Mr Kenny KC. In particular, the intellectual and economic justification for using market price is said (and was said before me by both counsel) to be that the fact that a party can buy or sell (or charter or hire) either the subject goods or replacement goods. The pragmatic justification is said (and was said by Mr Kenny KC) to be that the focus on market price (or market rate of hire) makes quantification more straightforward and predictable, which provides certainty and simplicity.

77. Applying authorities that are (in general) concerned with interchangeable commodities must be undertaken carefully where the subject-matter is a ship. There is certainly a market for ships: indeed there is both a sale and purchase market and a charter market, in the sense that ships with similar characteristics are bought and sold, and chartered and hired. Such transactions happen sufficiently frequently that market prices are established – exemplified by the fact that the parties were able to agree on assumed facts as to the market chartering price (both for 30-60 day fixtures and for 24-26 month fixtures).[3]

78. However, it would not be quite accurate to say, without qualification, that a party can go into either of these markets to buy or sell (or charter or let) a replacement. Ships are not interchangeable commodities, for contractual purposes. In particular, an MOA for a named ship is a contract that cannot be fulfilled by going into the market to find a replacement. Mr Berry KC emphasized that Owners in this case could neither buy nor charter in replacement ships to supply under the MOAs instead of the subject Vessels (whether permanently or on a temporary, chartered basis).

79. I understood his argument to boil down to two alternative arguments (and I should say that I found it impossible to understand which was his primary argument and which his secondary alternative):

(1) The *Rodoconachi* principle does not apply to cases of delayed delivery, per *Wertheim*. This is a case of delayed delivery.

(2) The *Rodoconachi* principle does not apply where the claimant could only fulfil the onward contract with the specific goods to be supplied under the main contract. In other words, it does not apply where (as here) the claimant could not go into the market to buy (or charter) replacement goods to supply under the onward contract in substitution for the goods that were to be supplied to him under the contract with the defendant; and where (as here) if contractual goods were ultimately supplied by the defendant, the claimant could not then sell them in the market, being precluded from doing so by the nature and/or terms of the onward contract.

[3] Arguably, therefore, there is not one charter market, but several.

80. The problem with the first argument is that the Privy Council in *Wertheim* did not explain why late delivery is different from non-delivery. This led to *Wertheim* being criticised by Scrutton LJ in *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11, at pp. 23-24, (although Bankes LJ and (possibly) Warrington LJ had a different view, at pp. 15, 18).

81. The problem with the second argument is that, in *Williams Bros v Agius Ltd*, the speech of Lord Moulton can be read as supporting this theory (at pp. 531-533, where he appears to have been open to the idea that the result would have been different if Williams had been obliged to sell the same specific goods to the onward buyer), but the others cannot. See in particular per Viscount Haldane, [1914] AC 510, at p. 520 (dealing with "a wholly distinct point" – meaning, in context, even if Williams had been obliged to sell the same specific goods to the onward buyer); and per Lord Dunedin at p. 523:

> "The truth is that the respondents' argument leaves them in a dilemma. Either the sub-sale was of the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract ? All that will depend upon what the sub-buyer will be able to make out. The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns."

82. Lord Dunedin thus poured scorn on the notion that the onward sale price should be relevant to the assessment of damages, even if the onward sale was for the same specific goods. However, he did so on the basis of a rhetorical question that asks, "how can it ever be known…?" This suggests that, if the seller under the main contract did know about – or, possibly, contemplated – the onward contract, then the answer may be different.

83. Having said all this, it is right to note that the main point on which the House of Lords came to its decision in *Williams Bros v Agius Ltd* was that, in that case, the onward contract was not, in fact, one for the specific goods supplied under the main contract; so the passages per Viscount Haldane at p. 520 and per Lord Dunedin at p. 523 therefore can be said to have been obiter.

Charterers' first argument: Wertheim

84. Mr Berry KC did not press this argument with much vigour. The reality is that, notwithstanding *Wertheim*, most commentators suggest that, in cases of delayed delivery where the goods are accepted late, the normal measure is the difference between the market price at the time when delivery should have been made and the

market price when the goods were actually delivered: see for example *Chitty on Contracts* (35th ed), at §47-413. This is on the basis that the claimant buyer could have bought substitute goods in the market on the contractual delivery date, and so fulfilled his onward contract; and he was then able to sell the contract goods in the market when he accepted their delayed delivery. I think it is time for this court to acknowledge that Chitty is right. I therefore reject Mr Berry KC's first argument.

Charterers' second argument: the CA judgments in *Slater v Hoyle & Smith*

85. Considering the second argument, in particular, requires particular attention to be paid to *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11. The three Court of Appeal judgments in that case have received more comment and analysis than most. I am acutely aware that my own efforts are not going to push matters on significantly. Nevertheless, it is necessary to highlight the particular features of *Slater v Hoyle & Smith Ltd* that are relevant to the decision that I have to make, on the facts of the case before me.

86. The case involved the delivery of damaged goods, not non-delivery or delayed delivery. The goods were supplied by Slater to H&S. The main contract and the onward contracts were all contracts of sale. H&S had two onwards contracts, one at a price below the market price, one above it (see per Scrutton LJ at p. 20). Neither was for the sale of the specific goods supplied by Slater and bought by H&S under the main contract. There does not appear to have been any evidence that Slater contemplated that H&S might be engaging in onwards sales on terms that were not at the market price.

87. Bankes LJ cited the most familiar part of Lord Esher MR's judgment in *Rodocanachi v Milburn* (at p. 14)[4]. On p. 15 he distinguished *Wertheim* on the basis that it was a case of delayed delivery. He then said (without deciding the point, and without first having identified what he thought the rule in *Wertheim* was) that if the rule in *Wertheim* were ever to be applied in a case like *Slater v Hoyle & Smith Ltd*, this could only be where the sub-sale is a sale of the identical goods.

88. Warrington LJ cited and considered applicable the same passage from Lord Esher MR's judgment in *Rodocanachi v Milburn*. He noted at p. 17 that the onward contracts "were not for the identical goods, and they might or might not be performed by delivering the goods the subject of the head contract", which suggests that his decision may have been different, if the onward sale had been for the identical goods. At p. 18 he referred to *Wertheim*, which he distinguished on the basis that:

> "The purchaser here has received inferior goods of smaller value than those he ought to have received. He has lost the difference in the two values, and it seems to me immaterial that by some good fortune, with which the plaintiffs have nothing to do, he has been able to recoup himself what he paid for the goods. If the goods had been of the quality contracted for he might have sold them at a higher price and made a profit. In truth, as I have

[4] [1886] 18 QBD 67, per Lord Esher MR at p. 77: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods."

> already pointed out, in the class of case we are dealing with, the contract price does not directly enter into the calculation at all."

89. Scrutton LJ referred at p. 20 to the fact that H&S were under no obligation to deliver under the onward sales the same specific goods as those supplied by Slater, and noted that they had in fact delivered a large quantity of different goods, not obtained from Slater.

90. He then set out the question arising. His answer to that question (still on p. 20) began by noting that H&S would only be able to take advantage of the prices in the onwards sales in a claim for damages (i.e., in so far as they were higher than the market) if that had been contemplated when the main contract was concluded, referring to *Horne v Midland Ry Co*. (1873) LR 8 CP 131 – i.e., the classic approach to remoteness of damages. He then turned to the situation where the onward contract is below the market price and said on p. 21 that damages must not be limited by the price in the onward contract. He too referred to *Rodocanachi v Milburn* and to *Williams Bros v Agius Ltd*, which he said applied.

91. Significantly, however, before he cited those authorities, he first justified the conclusion by equiparating the position where the onward sale contract is below the market rate with that where it is above the market rate ("On the above reasoning it would seem not."). This suggests that he regarded it as critical that the onward contract, whether above or below the market price, had not been in contemplation when the main contract was concluded. In other words, if Slater had contemplated that H&S might be contracting to sell below the market price, the result might have been different. This comparison of the situation where the onward sale was above the market with the situation where it was below the market was perhaps natural on the facts of *Slater v Hoyle & Smith Ltd*, which included both situations, as already noted.

92. In dealing with *Williams Bros v Agius Ltd*, at pp. 21-22, Scrutton LJ set out the passage from the speech of Lord Dunedin that I have set out above, [1914] AC 510, at p. 523. As I have noted, Lord Dunedin appears to have had no truck with the idea that the position must be different where the onward sale is for the same specific goods. However, his speech (and, specifically, his rhetorical question) at least implied that the position might be different if the onward sale for the same specific goods had been within the knowledge, and perhaps the contemplation, of the parties to the main contract, when the main contract was concluded.

93. Scrutton LJ then applied the principles to a case involving the delivery of damaged goods, at p. 22. He assimilated delivery of damaged goods to non-delivery, on the following basis:

> "… sub-contracts do not come into account, for the buyer is under no obligation to use these goods for his sub-contract; he may buy in the market, and he will then be left with goods damaged to a certain extent at the then market price of such goods instead of sound goods at the then market, price of sound goods. The difference between the two market prices should be the measure of damages. If the buyer delivers under the sub-contract the damaged goods and has to pay damages, these damages will not be the measure of damages. As Lord Dunedin says [1914] AC 510, 523…"

94. Thus, the premise of the onward sale being ignored is that there is no obligation to use the goods for the onward sale – i.e., it is assumed that the onward sale is not for the same specific goods. In the citation from Lord Dunedin's speech in *Williams Bros v Agius Ltd* which follows – specifically setting out, for a second time within the space of two pages, Scrutton LJ set out, for a second time, Lord Dunedin's rhetorical question, "and how can it be known…?".

95. This suggests that Scrutton LJ also considered it necessary for the onward sale to be known or at least contemplated, before it could be taken into account. That suggestion confirmed by the remainder of the paragraph, where Scrutton LJ said:

> "If these damages are greater than the difference in market price of sound and damaged goods, they will clearly not be recoverable. The result seems the same if they are less; it is res inter alios acta: " circumstances peculiar to the plaintiff," which cannot affect his claim one way or the other. If the buyer is lucky enough, for reasons with which the seller has nothing to do, to get his goods through on the sub-contract without a claim against him, this on principle cannot affect his claim against the seller any more than the fact that he had to pay very large damages on his sub-contract would affect his original seller."

96. Once again, Scrutton LJ here equiparated the situation where the onward sale is on terms that are below the market price with that where the onward sale is above the market price. Both situations were treated as though the same remoteness test was applicable to each.

97. Finally, at pp. 23-24, Scrutton LJ turned to *Wertheim*. He distinguished it as a case of delayed delivery, but criticised both the reasoning and the result. At p. 24, he referred to a dictum made by Lord Atkinson [1911] AC 301, at p. 307, to the effect that in non-delivery cases the price of the onward contract is irrelevant, and commented:

> "It is always so treated, as I understand the law, unless the buyer can affect the seller with such notice of the sub-contract as makes him liable for loss by its non-fulfilment."

98. In other words, knowledge of or at least the contemplation of the onward contract is critical.

99. Scrutton LJ's conclusion at p. 25 once again illustrates his view that any case should be treated the same way, no matter whether the onward contract is on terms that are above or below the market price:

> "For these reasons I think that Greer J. was right in dis-regarding the fact that the buyers, for reasons we do not know, were able to deliver inferior goods under their sub-contract, without having to pay damages, just as he would have been right in disregarding the fact if they had had to pay larger damages than the difference in market value."

Cases where the onward contract was in contemplation

100. The decision of the House of Lords in *R & H Hall Ltd v WH Pim, Junr, & Co. Ltd* (1928) 30 Ll.L.R. 159 suggests that the position is different if it was always contemplated, and indeed the main contract provided, that the goods being supplied under the main contract would be used specifically for the onward contract. In that case, the discussion in the House of Lords was entirely concerned with remoteness and with cases such as *Hadley v Baxendale* (1854) 9 Exch 341 and *Hammond & Co. v Bussey* (1887) 20 QBD 79.

101. In *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, defective vinyl film supplied by Bence to Fasson had been used to manufacture decals, but Fasson faced only one small claim for compensation from its customers and end-users. The majority of the Court of Appeal (Lords Justices Otton and Auld) held that damages should not be assessed by reference to sound/actual market price. They held that, on the facts, Bence knew that the vinyl would be used to make a product that would be sold on, and that any latent defect might render Fasson liable to claims made by third parties.

102. Otton LJ considered that the fact that Bence was aware of the use to which the film would be put meant that *Slater v Hoyle & Smith Ltd* could be distinguished: at p. 99C. Auld LJ agreed with Otton LJ as to the result, and as to the significance of Bence's awareness of how the vinyl film would be used. However, he considered that *Slater v Hoyle & Smith Ltd* could not be distinguished, and said that it was wrongly decided: see esp. at p. 105 D-F. Thorpe LJ dissented.

103. In no subsequent decision has it yet been necessary to decide whether Auld LJ's criticisms of *Slater v Hoyle & Smith Ltd* were right. However, there have been subsequent decisions where it was known or contemplated at the time of the main contract that the same specific goods would be used for an onward contract, rather than the market price. In such cases, the price under the onward contract has been taken into account. See *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), at [21]-[23]; and *Euro-Asian Oil SA v Credit Suisse AG* [2018] Civ 1720, at [72]-[73]:

> "72. The normal measure of damages for a failure to deliver goods is the estimated loss directly and naturally resulting, in the ordinary course of events from the seller's breach of contract: see section 51(2). Where there is an available market for the goods, the measure of damages is prima facie the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver: see section 51(3). However, the application of section 51(2) may mean that the prima facie rule in section 51(3) is not applied, or may be "displaced" in the particular circumstances of the case. An example was given by Devlin J in [*Chao v British Traders & Shippers Ltd* [1954] 2 QB 459, at p. 489]: a string contract for specific goods. The issue in each case depends on the particular circumstances.

> 73. In the present case, the sale contracts formed part of a series of what were effectively financing transactions involving Abilo, Euro-Asian and Real Oil (or another of Mr Igniska's companies). They were not exactly string contracts, and I would accept that Euro-Asian could have performed its delivery obligation under the sub-sale other than through the purchase from Abilo. Nevertheless, there was a proper factual foundation, as set out at paras 72 to 79 of the judgment, which I have endeavoured to summarise at paras 12 to 14 above, for the judge's conclusion that "it was always contemplated" that Euro-Asian would nominate the same cargo to perform the Real Oil contracts that Abilo nominated to perform the sale contracts, so that he was entitled to his view that the damages he awarded was the measure of loss contemplated by the parties."

104. The decision in *Euro-Asian Oil* is especially interesting. The two parties to the main contract were Abilo as seller and Euro-Asian as buyer. As the judgment reflects at [73], it was not a case conforming to the example given by Devlin J in *Chao v British Traders & Shippers Ltd* – i.e., it was not a case involving a string of contracts for specific goods. Euro-Asian could have performed its onward contract by supplying different goods. However, both Abilo and Euro-Asian contemplated that Euro-Asian would perform the onward contract by delivering the goods supplied by Abilo. That was held sufficient to displace the normal measure.

105. After I drew these decisions to the parties' attention, Owners referred me to *Pindell Ltd v AirAsia Berhad* [2010] EWHC 2516 (Comm), where the delayed redelivery of a leased aircraft led to the loss of the owner's onward sale contract. I was unable to see the relevance of this case, which was a straightforward application of *The Achilleas* to prevent the recovery of loss actually suffered, because the loss was of a kind that had not been contemplated and for which the defendant had not assumed responsibility. The claimant was relying on the onward contract, rather than contending that it was irrelevant and should be ignored. It sheds no light on the *Rodoconachi* line of cases, nor on res inter alios acta.

Is res inter alios acta a relevant doctrine, on the facts of this case?

106. Before me, Mr Berry KC and Mr Kenny KC both made frequent use of the phrase "res inter alios acta". In doing so, they echoed both Lord Hoffman in *The Achilleas* at [23], and Scrutton LJ in *Slater v Hoyle & Smith Ltd* at p. 23. However, both acknowledged that it is difficult to identify precisely the legal doctrine for which the Latin phrase stands. The best effort was that of Mr Kenny KC, citing *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, per Lord Sumption at [11]:

> "Res inter alios acta
> 11. The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (res inter alios acta), which the law treats as not making good the claimant s loss. It is difficult to identify a single principle underlying every case. In spite of what the latin tag might lead one to expect, the critical

> factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity insurance: *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1. Or disability pensions under a contributory scheme: *Parry v Cleaver* [1970] AC 1. In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: *Arab Bank plc v John D Wood Commercial Ltd* [2000] 1WLR 857, paras 92—93 (Mance LJ). Or because the benefit is derived from steps taken by the claimant in consequence of the breach, which mitigated his loss: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689, 691 (Viscount Haldane LC). These principles represent a coherent approach to avoided loss. In *Parry v Cleaver* [1970] AC 1, 13, Lord Reid derived them from considerations of justice, reasonableness and public policy. Justice, reasonableness and public policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits."

107. I have deliberately set out the entire paragraph, in order to show that it really has nothing to do with this case. The benefits received by Owners under the MOAs were indeed collateral payments – the price received for each Vessel. However, Charterers do not say that these benefits should be taken into account. The issue between Mr Berry KC and Mr Kenny KC in this case simply is not about collateral benefits.

108. This is not true of all cases descended from *Rodocanachi v Milburn*. In particular, it is not true of *Slater v Hoyle & Smith Ltd*, where Scrutton LJ used the phrase. In that case, for the reasons that Scrutton LJ explained, H&S could have sold the goods on the market, at the market price. H&S therefore had, in fact, lost the opportunity to sell goods as warranted on the market, and that loss was to be expressed as the difference between the sound market value and the market value in actual condition. The question for the court was whether or not it should take into account the price actually realised by H&S via the onward sale contract under which some of the goods had been

delivered. In other words: by taking into account the benefits received under that contract.

The Sanix Ace

109. I was also referred by Owners to *Obestain Inc v National Mineral Development Corporation Ltd (The 'Sanix Ace')* [1987] 1 Lloyd's Rep. 465. This confirmed that a person with the right to possession of goods is able to sue for damages if the goods are lost or damaged, even if that person is not the owner and was able to collect the price under an onward sale. It has no bearing on any of the issues that arise in this case, because it was concerned with the title to sue that derives from the right to possession: see per Hobhouse J at p. 468 rhc to p. 469 lhc.

My analysis of *Slater v Hoyle & Smith Ltd*

110. It is obvious, not least from s. 53 of the Sale of Goods Act 1979 that, in cases involving the sale or (by extension) other delivery of goods, damages should generally be assessed by reference to their market price. *Slater v Hoyle & Smith Ltd* provides specific confirmation for this in the context of non-delivery and the delivery of defective or damaged goods. It also provides support for this approach even in the context of delayed delivery, *pace* the Privy Council in *Wertheim.*

111. In such cases, if there had been no breach, the claimants (at least in theory) could have sold the goods on the market, at the market rate for goods of the warranted quality that were delivered on time. The defendants' breach meant that the claimants lost the opportunity to do so.

112. However, the judgment of Scrutton LJ indicates that the position is different where (i) the onward contract is for the same specific goods as those delivered under the main contract (so that the claimant was not free to buy/sell on the market) and (ii) this was known to or at least within the contemplation of the defendant when the main contract was concluded.

113. The judgments of Bankes and Warrington LJJ are, at least, consistent with Scrutton LJ in this regard. They both referred to criterion (i), although not to criterion (ii).

114. The judgment of Andrew Smith J in *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm) is an example of the normal measure being displaced where both criteria are satisfied. This result seems unproblematic, not least because it is consistent with *Slater v Hoyle & Smith Ltd*

115. What is less clear is what the outcome should be when only one of criteria (i) and (ii) is satisfied.

116. It is readily apparent why the first criterion is important. If the claimant has concluded an onward contract on terms that prevent him from entering the market to sell (or let) the subject goods, and he cannot use the market to buy (or hire/charter) replacement goods to satisfy his obligations under the onward contract, he has precluded himself from the opportunity to contract at the market rate. The opportunity to do so was not lost by reason of the breach, but by reason of his own decision to contract on terms that made this impossible.

117. I can also see why, even where the onward contract was not for the same specific goods, it should nevertheless be taken into account, if, when the main contract was concluded, it was contemplated that the onward contract would be satisfied with goods to be delivered under the main contract. This was the outcome in *Euro-Asian Oil SA v Credit Suisse AG*.

118. It is less obvious to me why an onward contract that is for the same specific goods should only be taken into account to reduce the claim if the onward contract was within the defendant's knowledge or contemplation at the time of the main contract. I can see why it should not be taken into account so as to increase the claim – because of the requirements of remoteness and assumption of responsibility, per *The Achilleas*. However, I do not see why it should not be take into account so as to reduce the claim. I do not see the two situations as mirror-images. Scrutton LJ's equiparation in my view is based on a false equivalence; and it is too heavily influenced by Lord Dunedin's rhetorical question – to which, as with many rhetorical questions, there is a ready answer, at least in this case.

119. This is a case of delayed delivery, where the claimant Owners had precluded themselves from selling or letting the Vessels on the market and where they could not buy or charter in a replacement. All they could do, and what they in fact did, was accept the delayed delivery and immediately deliver the Vessels to the purchasers under the MOAs. It is these facts that mean both that Owners were never able to profit from the market rate of hire, and that the res inter alios act doctrine, as normally understood, is not applicable.

120. There is no suggestion that damages should be assessed by taking into account the benefit that Owners have received under the MOAs – i.e., the sale price for each Vessel. At issue is what loss Owners have suffered. This falls to be assessed by comparing what would have happened if there had been no breach (the Vessels would not have been let on the charter market) with what actually happened (the Vessels were not let on the charter market). The comparison shows that have not lost the opportunity to let the vessels out, at the market rate.

121. The MOAs are relevant in a narrative sense. They explain why the Vessels would never have been let on the charter market. However, the assessment of damages does not require an answer to the question "Why were the Vessels not let?" It only requires an answer to the question, "Have Owners lost the opportunity to earn charter hire?" – to which, on the assumed facts, the answer must be: "No".

122. The rhetorical question posed by Lord Dunedin in *Williams Bros v Agius Ltd* – which so delighted Scrutton LJ in *Slater v Hoyle & Smith Ltd* that he quoted it twice – focuses on the difficulty of establishing what benefit the claimant would have received under the onward contract, and how to compare it with "the original contract", which I think means the main contract between claimant and defendant. I am not convinced by the force of this, no matter what the particular circumstances of the case are: I am not convinced that assessing the hypothetical benefit under the onward contract is necessarily difficult; nor am I sure why it would normally be relevant to compare it to the position under the main contract, rather than the market price. Furthermore, even if the exercise is complex, the fact that a judicial task is difficult is not a reason for avoiding it, if that is what justice requires.

123. In the particular circumstances of this case, however, the problem simply cannot arise. It is not relevant to establish what benefit Owners would have received under the MOAs. Nor is it relevant to perform any kind of comparison. The significance of the MOAs is not that they provided a benefit to Owners, it is that they precluded Owners from entering the charter market. A stipulation that Charterers cannot refer to the MOAs will not change the answer to the question: "What difference did the breach make?" The answer must remain: "No difference whatsoever".

Conclusion

124. I consider the law to be stated correctly in *Time Charters* at §4.52 and §4.53 and in *Carver on Charterparties* at §12-283.

125. As *Time Charters* puts it, these passages set out "[t]he normal measure of damage…", but, as *Carver* says, "each case will turn upon the particular terms of the charter under consideration and the facts." There is no assumption that the owner suffers any such loss, where the charterer redelivers late; still less is the owner deemed to have suffered such loss.

126. On the contrary, as *Time Charters* says at §4.52, the reason for this being the normal measure is that "the owners are entitled to damages compensating them for the loss of the opportunity to take advantage of the market rate during the period of the overrun." If the owner has not lost any such opportunity, because of a commitment such as the MOAs in this case, there is no scope for this kind of compensation to arise.

127. This conclusion is not inconsistent with the result in *The Achilleas*. In that case, the owner had suffered a very real loss and a very substantial one. Here, by contrast, Owners are no worse off because of Charterers' breach.

128. Nor is it inconsistent with Lord Hoffmann's reasoning or analysis in *The Achilleas*. In that analysis, the principle underpinned by assumption of responsibility is one that constrains and limits the right to recover damages, even though loss has been suffered. It does not create a right to recover damages that would not otherwise be recoverable because there had not in fact been any loss suffered.

129. Nor is it inconsistent with *Rodocanachi v Milburn* or (in my view) with *Slater v Hoyle & Smith Ltd.* – if one ignores Scrutton LJ's requirement that the onward contract was in the contemplation of the parties when the main contract was concluded; as I consider one should, at least in a case such as the present.

130. Owners' other points (quantum meruit, user damages, negotiating damages) are, in my judgment, makeweights.

131. It follows that Charterers' appeal against each Award succeeds. The answer to the preliminary issue is that Owners are entitled to only nominal damages.

132. I have come to this conclusion because (among other reasons) I do not consider it necessary as a matter of law that, when the Charterparties were concluded, it was contemplated that, following redelivery at the end of the charter periods, Owners might sell the Vessels under MOAs, rather than letting them out in the charter market. It may be useful to make it clear that, if I had decided that it was necessary for this to have

been contemplated, I would have treated that as a question of fact for the arbitrators, the answer to which is not mandated by the assumed facts.

Closing remarks

133. In this judgment, I have referred to all the authorities in the line flowing from *Rodocanachi v Milburn* that were included in the authorities, and several that were not. Of these, the parties' skeletons referred only to a handful. In oral submissions, the only authorities I was taken to and shown in this regard were *The Achilleas*, *Rodocanachi v Milburn* (but only because I begged) and *Slater v Hoyle & Smith Ltd*.

134. The hearing lasted for one day. However, about half that time was taken up with other points – quantum meruit, user damages and negotiating damages. It would have been much better if the parties had been able to concentrate on *The Achilleas* and on the line of cases flowing from *Rodocanachi v Milburn*, and I would have benefited from more time being spent in oral submissions on the crucial judgments.

135. Furthermore, I am sure that more research might have yielded additional authorities. These include not only *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), at [21]-[23]; and *Euro-Asian Oil SA v Credit Suisse AG* [2018] EWCA Civ 1720, which I found, and on which I therefore was able to invite the parties' comments; but also other cases that I have not found, but which I suspect may exist either in this jurisdiction or in other common law jurisdictions.

136. I am also sure that there are more academic articles that may assist. Not least among these is least Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 LQR 405, which my judicial assistant located, and which I consider particularly interesting, but on which it was not practical to ask for the parties' comments.

137. I make these remarks because, if this matter proceeds to the Court of Appeal, I trust that the members of that court will receive all the assistance that is merited by points of this significance and intellectual interest.