

“Speculation, prophecies, conjecture and guessing - the time for assessment of damages for the repudiation of contracts”

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INTRODUCTION

The “ruling principle”¹ which lies behind an award of damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman*:²

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

This principle has been continually confirmed throughout the common law world,³ together with its correlative principle, namely that an injured plaintiff is not entitled to be placed in a superior position to that which he would have been in had the contract been performed.⁴ This much is, I suggest, uncontroversial. In a lecture given at the Chancery Bar Association Conference on 20 January 2006, Lord Scott observed that damages is an area of the common law largely, although not entirely, untouched by statutory reform but some aspects of which are at risk of becoming, if they have not already become, incoherent. I hope it will not be considered too impertinent of me to suggest that the speech of Lord Scott in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)*,⁵ delivered just over a year after those prescient remarks, has done little to rectify the incoherency. Professor David McLauchlan has put it rather more plainly, asserting that the current law in this area “is in a dreadful muddle”.⁶

The title of this paper is taken from the judgment of Justice McColl in a decision handed down in April of this year in the matter of *McCrohon v Harith*⁷, a matter concerning an action brought against solicitors

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¹ *Wertheim v Chicoutimi Pulp Company* [1911] AC 301

² (1848) 1 Exch 850, 855; 154 ER 363, 365

³ See for example, *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)*[2007] 2 AC 353, [29]; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, (2009) 236 CLR 272, [13]; *European Bank Ltd v Robb Evans of Robb Evans & Associates* [2010] HCA 6, (2010) 264 ALR 1, [11]; *Bank of America Canada v Clarica Trust Company* [2002] 2 SCR 601; *Joint Insurance Brokers Ltd v ME Joblin Insurances Ltd* [2001] 1 NZLR 753; *ICI Swire Paints Ltd v Techi Motor Engineering & Trading Co* [2003] 3 HKC 432

⁴ *The Commonwealth of Australia v Amann Aviation Pty Ltd* [1991] HCA 5, (1991) 174 CLR 64, [8] citing Learned Hand CJ in *L Albert & Son v Armstrong Rubber Co* (1949) 178 F 2d 182

⁵ [2007] UKHL 12; [2007] 2 WLR 691

⁶ David McLauchlan, ‘Some Issues in the Assessment of Expectation Damages’ [2007] *New Zealand Law Review* 563, 629

⁷ [2010] NSWCA 67

for breach of retainer or, alternatively, their duty of care and their fiduciary duty. In discussing the principles relating to the assessment of damages both in contract and in tort, her honour observed:⁸

The general rule is that “damages for tort or for breach of contract are assessed as at the date of the breach”...However, the general rule is not rigid and “will yield if, in particular circumstances, some other date is necessary to provide adequate compensation”...Accordingly, the general rule will yield if, at the time damages are assessed, the court is aware of new and material facts relevant to the assessment because courts prefer actual facts to speculation, prophecies, conjecture and guessing.

Her honour also remarked upon the proposition that the “certainty of the principle concerning the time as at which damages are assessed has now been eroded”; referring to the decision both of the House of Lords in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)*⁹ and the remarks of Campbell JA in the NSW Court of Appeal in *Gagner Pty Ltd t/a Indochine Cafe v Canturi Corporation Pty Ltd*.¹⁰ In the latter case, Campbell JA appears to have eschewed even the general rule saying:¹¹

It follows that, even though a cause of action for breach of contract has accrued at the time the breach occurs, it cannot now be said that there is an accrued right at that time to receive any particular sum of damages. That is because it must await trial to decide what is the most appropriate way, in light of events then known, to give effect to the compensatory principle of damages.¹²

It is suggested that such statements by Australian courts do little to assist to rectify the incoherency or to clear up the muddle in this most critical area of commercial law. Indeed, they tend to obscure rather than illuminate a proper approach to the assessment of damages. The recent cases often draw no clear distinction between the assessment of damages in contract on the one hand and in tort on the other. Whilst there have been many cases which cite *The Golden Victory*, and indeed earlier cases, for the proposition that hindsight should be used in the assessment of damages, all of them with one exception, are cases involving breach of a duty of care or breach of s.52 of the *Trade Practices Act* (1974) the latter of which, unquestionably, is a statutory economic tort. Simply by way of example, *Gagner Pty Ltd trading as Indochine Cafe v Canturi Corporation Pty Ltd*,¹³ was a case concerned with the measure of damages for water damage caused by the negligence of those for whom the appellant was vicariously liable, Campbell JA referred specifically to *The Golden Victory* after adverting to counsel’s reminder to the Court of

the endorsement in *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 292-4 of the appropriateness of courts taking account, in assessing damages, of any events that have

⁸ Ibid [54] – [56]

⁹ [2007] UKHL 12, [2007] 2 WLR 691

¹⁰ [2009] NSWCA 413, (2009) 262 ALR 691, [51]

¹¹ Ibid [54]

¹² Emphasis added

¹³ [2009] NSWCA 413, (2009) 262 ALR 691

occurred between the time of accrual of the cause of action and trial that bear upon the damage that a plaintiff has actually sustained, and the preferability of relying on facts rather than prophecies to assess damages.

The difficulty with the reasoning in *Gagner Pty Ltd trading as Indochine Cafe v Canturi Corporation Pty Ltd*, for present purposes, is two-fold. First, the assertion that it cannot now be said that there is an accrued right to damages as at the date of a breach of contract, is stated in absolute terms and does not withstand scrutiny, particularly when one has regard to cases where the application of the market price rule is appropriate. Secondly, the endorsement in *Kizbeau Pty Ltd v WG & B Pty Ltd* was made in the context of case concerning a claim for contravention of s.52 of the *Trade Practices Act 1974*, in respect of which the High Court said [15]:

Actions based on s 52 are analogous to actions for torts. It follows that, in assessing damages under s 82 of the Act, the rules for assessing damages in tort, and not the rules for assessing damages in contract, are the appropriate guide in most, if not all cases.

There is nothing in the judgment in *Kizbeau Pty Ltd v WG & B Pty Ltd* which casts any light on the appropriate approach to the assessment of damages for breach of contract.

The purpose of this paper is to suggest that the principles relating to the assessment of damages for breach of contract are indeed settled and, to the extent that Australian courts consider that the decision in *The Golden Victory* has removed the hitherto certainty that pertained with respect to the time at which damages are assessed, they have been misled.

THE PRINCIPLES RELATING TO THE ASSESSMENT OF DAMAGES WHERE A CONTRACT IS REPUDIATED

It is suggested that there are only two legitimate purposes for the award of damages in a civil suit: one is compensation for loss or damage caused by wrongful conduct; the other is vindication of a right that has been violated by wrongful conduct.¹⁴ The breach of contract is a wrong, a failure to comply with legal obligations for which the innocent party has bargained for and provided consideration.¹⁵ The law responds to the deficiency of the performance by an award of damages. The measure of damages can differ according to the wrong but the ruling principle applies nonetheless, qualified by questions of causation, remoteness and mitigation. This paper focuses on the wrongful repudiation of contracts for performance over a period of time, typically a contract for the performance of personal services or for the supply of goods. It is contended that the principles that apply to an award of damages in such circumstances are settled.

1. *The repudiation of a contract by one party, if accepted by the other, brings the contract to an end and releases both parties from their primary obligations under the contract.*¹⁶

¹⁴ Lord Scott, paper delivered to the Chancery Bar Association Conference, 20 January 2006

¹⁵ Francis Reynolds, 'The Golden Victory – A Misguided Decision' (2008) 38 *Hong Kong Law Journal* 333, 341

¹⁶ *The Golden Victory* [2007] 2 AC 353, [8]

2. *The injured party is thereby entitled to vindicate the repudiator's failure to comply with his primary legal obligations by enforcing against the repudiator the secondary obligation to pay damages.*¹⁷
3. *The damages recoverable by the injured party are such sum as will put him in the same financial position as if the contract had been performed.*¹⁸
4. *The injured party is entitled to recover such damages as arise naturally, that is, according to the usual course of things, from the breach, or such as may reasonably be supposed to have been within the contemplation of both parties at the time they made the contract as the probable result of the breach.*¹⁹

As the High Court observed in *The Commonwealth v Amaan Aviation Pty Ltd*, the Rule in *Hadley v Baxendale* does not detract from what was said in *Robinson v Harman*; rather, it is concerned with the question of remoteness and marks out the limits of the heads of damages for which the plaintiff is entitled to receive compensation. The High Court has also confirmed that the so-called "two limbs" of the Rule in *Hadley v Baxendale* represent the statement of a single principle and that the application of that principle may depend on the degree of relevant knowledge possessed by the defendant in the particular case.²⁰

5. *The injured party is not entitled, by the award of damages on breach, to be placed in a superior position to that which he would have been in had the contract been performed and the parties to the contract are kept to the benefits and burdens of the contract they have made: the injured party recovers no more than the net benefit he would receive under the contract: the defendant acquires no right to profit by his breach.*²¹
6. *Where there is an available market for the goods or services the subject of the contract, the normal measure of damages recoverable is the difference between the contract rate and the market rate for the goods or services; this is because the injured party has been wrongfully deprived of a marketable asset.*²²
7. *As a general rule, damages for breach of contract involving a marketable asset are assessed as at the date of breach; in the case of wrongful repudiation of a contract, this is the date on which the injured party accepts the repudiation and terminates the contract.*²³

¹⁷ *Ibid*

¹⁸ *Robinson v Harman* (1848) 1 Exch 850, 855, 154 ER 363, 365

¹⁹ *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64

²⁰ *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, per Mason CJ and Dawson J at [92], and see *European Bank Ltd v Robb Evans of Robb Evans & Associates* [2010] HCA 6, (2010) 264 ALR 1, [13]

²¹ *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64

²² *The Elena D'Amico*; ss 51 and 52 of the *Sale of Goods Act 1896* (Qld)

²³ *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175, *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65

As the injured party suffers the loss at the time of the defendant's wrong, the task of a tribunal is, so far as money can do it, to put the injured party into the position he would have been if the defendant had made immediate reparation, or reparation at the earliest time that the injured party could reasonably have made good his loss. Thus, the amount of the injured party's claim crystallises as at the date of the loss, or shortly thereafter, and subsequent delay will have an effect only on the interest component of the final award. The principle of crystallisation does not, of course, apply in all contexts. Most notably, it has been held not to apply where the defendant owes money in a foreign currency²⁴ or where damages are sought in substitution for specific performance.

8. *The crystallisation principle is displaced where specific performance is sought.*²⁵

Specific performance is usually sought in cases where there is no available market. In such cases the injured party's legitimate interest in actual performance justifies his failure to seek a substitute in the market and so a later date may be used to value the remedy for breach.

8. *It is permissible to take into account later events that are "predestined" or "inevitable"²⁶ but not to discount for "vague possibilities" or the possibility of the contract being frustrated.*

The question in such cases is whether, as at the date of the acceptance of the repudiation, the value of the injured party's rights was capable of being rendered less valuable or valueless because of events which, at that date, were predestined to happen. It is not a question of taking into account later events which had not yet materialised as at the date of acceptance of the repudiation.

9. *Only if the contract cannot be valued directly as a marketable asset is recourse required to be had to an estimate (viewed retrospectively as at the date when the exchange of value for compensation is effected) for the likely future earnings, discounted for the acceleration of cash flow.*²⁷

THE GOLDEN VICTORY

It is perhaps helpful to begin with the decision that has been cited by Australian courts as having eroded the certainty of the principle concerning the time at which damages are assessed. *The Golden Victory*²⁸ was a decision involving, essentially, a contract for services to be supplied over a period of 7 years. It concerned the breach of a time charterparty, which contained a clause giving either party the right to cancel in the event that war or hostilities broke out between two or more of a number of named countries including the US, the UK and Iraq. On 14 December 2001, the charterers repudiated the charter by redelivering the ship to the owners who, on 17 December, accepted the repudiation and then

²⁴ *Miliangos v George Frank (Textiles) Limited* [1976] AC 443

²⁵ *Radford v De Froberville* [1977] 1 WLR 1262

²⁶ *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164, *Tele2 International Card Company SA v Post Office Ltd* [2009] EWCA Civ 9, [2009] All ER (D) 144

²⁷ M. Mustill, 'The Golden Victory – Some Reflections', (2008) 124 *Law Quarterly Review* 570, 585

²⁸ *The Golden Victory* [2007] 2 AC 353

claimed damages in respect of the amount of time that would have become due to them for the whole of the remaining part of the charter, less amounts they could have earned by substitute employment. There was, at the time, some 4 years of the charter left to run. The charterers argued that on the outbreak of war between the US and Iraq on 20 March 2003, they would have exercised their right to cancel under the “war clause” such that the owners should only be entitled to damages between the date of the owners’ acceptance of the repudiation and the time when charterers would have cancelled.

Prior to the decision in *The Golden Victory* what had apparently been unclear was whether the injured party’s loss is to be assessed as of the date when he suffers the loss, in light of what is then known, or at a later date when the assessment is to be made in the light of such later events as may then be known. The principles said to be settled by the majority decision in *The Golden Victory* are:

1. the repudiation of a contract by one party, if accepted by the other, brings the contract to an end and releases both parties from their primary obligations under the contract;²⁹
2. the injured party is entitled to recover damages from the repudiator to compensate him for such loss as the repudiator’s breach has caused him to suffer;³⁰
3. the damages recoverable by the injured party are such sum as will put him in the same financial position as if the contract had been performed;³¹
4. an injured party may not, generally, recover damages against a repudiator for loss which he could reasonably have avoided by taking reasonable commercial steps to mitigate his loss;³²
5. where there is an available market, the injured party’s loss will be calculated on the assumption that he has, on or within a reasonable time of accepting the repudiation, taken reasonable commercial steps to obtain alternatively employment for the vessel for the best consideration reasonably obtainable,³³ (the rationale for this proposition being that there is no duty owed to the wrongdoer but fairness requires that the innocent party should not ordinarily be permitted to rely on his own unreasonable and uncommercial conduct to increase the loss falling on the repudiator: *Koch Marine Inc v D’Amica Societa di Navigazione Ace (The Elena D’Amico)* [1980] 1 Lloyd’s Rep 75 [10]);
6. an injured party can recover damages for loss of a chance of obtaining a benefit and the difficulty of accurate calculation is not a bar to recovery.³⁴

None of these principles, either alone or in combination, appears particularly controversial. However, in purported reliance on these principles, the House of Lords resolved that dilemma as to when damages ought to be assessed in the following manner. It was accepted that, as a general rule, damages for breach of contract are assessed as at the date of the breach.³⁵ However, it was also held that the rule should not be applied mechanistically in circumstances where assessment at another date may more

²⁹ Ibid [8]

³⁰ Ibid

³¹ Ibid [9],[29],[32],[57]

³² Ibid [10]

³³ Ibid [10], [57]

³⁴ Ibid [21]

³⁵ Ibid [21]

accurately reflect the overriding compensatory rule.³⁶ Such relevant circumstances were considered by their Lordships and included:

1. where the court making an assessment of damages has knowledge of what actually happened it need not speculate about what might have happened but should base itself on the known facts³⁷
2. if a contract for performance over a period of time has come to an end by reason of a repudiatory breach but might, if it had remained on foot, have terminated early on the occurrence of a particular event, the chance of that event happening must be taken into account in an assessment of the damages payable for the breach³⁸
3. If it is certain that the event will happen, damages must be assessed on that footing.³⁹ If the contract would inevitably have come to an end earlier than its due date anyway it is right that the damages should be limited accordingly, regardless of whether or not the event was predestined at the date of the repudiation. Therefore, a supervening event is capable of limiting the measure of damages.⁴⁰

Having taken such circumstances into account, their Lordships held that the rate at which the hypothetical new charter is to be fixed is that pertaining as at the date of the repudiation. This accords with the general rule that damages are to be assessed as at the date of breach. However, the duration of the period for which damages are payable is not so fixed. Thus the shipowners could not know where they stood when their right to damages accrued: the value of that right fluctuated in the light of later events for which they were not responsible and which, when the right accrued, were a mere possibility. Consequently the “available market rule” was displaced. The rationale for such an outcome was said to be that considerations of certainty and finality must yield to the greater importance of achieving an accurate assessment of damages.⁴¹

Lord Scott said:⁴²

Certainty is a desideratum, and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle. Otherwise incoherency of principle is the likely result.

It is the conclusion of the majority as to when damages are to be assessed that has proved controversial.

³⁶ Ibid [11], [32] & [57]

³⁷ Ibid [12], citing *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Company* [1903] AC 426; *In Re Bradbury* [1943] Ch 35; *Carslogie Steamship Co Ltd v Royal Norwegian Govt* [1952] AC 292; *In Re Thoars Dec'd* [2002] EWHC 2416 (Ch.); *McKinnon v E Survey Ltd* [2003] EWHC 475 (Ch.); *Aitchison v Gordon Durham & Co Ltd* (Unreported, Court of Appeal, 30 June 1995) – none of which involved repudiation of a commercial contract where there was an available market

³⁸ *The Golden Victory* [2007] 2 AC 353, [30]

³⁹ Ibid [30] & [61] citing *The Mihalis Angelos* [1971] 1 QB 164

⁴⁰ *The Golden Victory* [2007] 2 AC 353, [62]

⁴¹ Ibid [63]

⁴² Ibid [38]

Lord Bingham, in the minority, remarked:⁴³

...the majority's decision undermines the quality of certainty which is a traditional strength and major selling point of English commercial law, and involves an unfortunate departure from principle.

He raised four substantive objections to the majority's judgment, founded as it was on the proposition that the owners would otherwise be unfairly over-compensated. First – contracts are made to be performed, not broken. Secondly, if on their repudiation being accepted, the charterers had promptly honoured their secondary obligation to pay damages, the transaction would have been settled well before the Second Gulf War became a reality. Thirdly, owners were entitled to be compensated for the value of what they had lost on the date it was lost and it could not be doubted that what owners lost at that date was a charterparty with slightly less than four years to run. Finally, that the importance of predictability and certainty in commercial transactions has been a constant theme of English law, at any rate since the judgment of Lord Mansfield in *Vallejo v Wheeler* and has been strongly asserted in recent years.⁴⁴

There has been a veritable flood of academic commentary provoked by the decision in *The Golden Victory*, most of it directed either defending the compensation principle or, alternatively, lamenting the demise of certainty in commercial cases. Neither approach to a critique of *The Golden Victory* goes any way to explaining how the decision can be applied in practice and indeed an uncritical adoption of the reasoning of the majority in the case might lead to a conflation of the principles relating to the assessment of damages in contract on the one hand, and for equitable compensation on the other.⁴⁵ What is clear from the decision is that the governing principle in contract is the “compensatory principle”. All of their Lordships agreed with that proposition.⁴⁶ But their Lordships were divided as to the application of the principle. As Professor McLauchlan has elegantly put it: an award that the minority regarded as being consistent with the compensatory principle was said by the majority to “offend” it.⁴⁷ Ultimately what marks the critical difference between the majority and the minority approaches turned on two issues:

1. whether the market price rule or the compensatory principle should be applied – assuming that there is an inconsistency between the two? and
2. whether damages should be assessed as at the date of breach or the hindsight principle should be applied?.

So, does *The Golden Victory* give carte blanche to courts to postpone the date “as at which” the assessment of damages for breach of contract is to occur to the date of trial? The answer, is of course

⁴³ Ibid [1]

⁴⁴ Ibid [22] – [23]

⁴⁵ *McCrohon v Harith* [2010] NSWCA 67, [60] – [63]

⁴⁶ *The Golden Victory* [2007] 2 AC 353 per Lord Bingham at [9], Lord Scott at [29], Lord Brown at [83]

⁴⁷ David McLauchlan, ‘Some Issues in the Assessment of Expectation Damages’ [2007] *New Zealand Law Review* 563, 628

“no”. But even confining the decision to the specific facts of the case, it is contended that there is no inconsistency between the market price rule and the compensatory principle, indeed the market price rule gives full effect to the compensatory principle. Sir Anthony Mason has observed that the compensatory principle assumes that damages are to be assessed at an appropriate date and that happens to be the date of breach where the market rule is applied. When damages are assessed at the date identified in accordance with the applicable principle governing the assessment of damages, the compensatory principle is satisfied.⁴⁸ Thus, to the extent that the majority concluded that the market price rule would lead to overcompensation of the shipowners, it is contended that the case was wrongly decided and that the decision of the minority is to be preferred.

THE MARKET PRICE RULE

The market price rule is most usually invoked in respect of contracts for the sale of goods. Sections 51 and 52 of the *Sale of Goods Act 1896* (Qld), and their counterparts throughout the country, give statutory recognition to the rule. The sections provide that for non-acceptance and failure to deliver goods the *prima facie* measure of damages is the difference in market and contract prices at the time the goods ought to have been accepted or delivered, subject to the existence of an available market. In the sale of goods context, market price rule is straightforward. It crystallises damages as at the time of breach. It accords with the principle that the injured party is entitled to have his lost rights vindicated as at the date of the loss. Subsequent events, including what steps that injured party takes or omits to take then become irrelevant because, having had a mitigation opportunity which is easily valued by reference to the market itself, the injured party is deemed to have assumed the risk of subsequent price fluctuations.⁴⁹ The market price rule, however, is not confined to the sale of goods context and has been applied by analogy to a variety of other situations.⁵⁰ It applies whenever there is an available market to make a substitute contract for whatever has been lost on the basis that the injured party should ordinarily go out into the market to make a substitute contract to mitigate, and thereby crystallise, his loss.

The sale of goods cases usually concern buyers suing sellers for some type of defective performance but the market price rule applies equally to a buyer who declines to accept goods as was the case in *Jamal v Moolia Dawood Sons & Co*⁵¹ and *Campbell Mostyn (Provisions) Ltd v Barnette Trading Co*.⁵² In both cases, the liability of the buyer was assessed as at the date of acceptance of repudiation by the seller.

⁴⁸ Sir Anthony Mason, ‘The Golden Victory’ (June–August 2008) *Commercial Law Quarterly* 3

⁴⁹ Chris Nicoll, ‘The Available Market Rule and Period Charters: Golden Strait Corp v Nippon Kubishka Kaisha’ [2008] *The Journal of Business Law* 91, 93

⁵⁰ *Woodstock Shipping Co v Kyma Compania Naviera SA (The Wave)* [1981] 1 Lloyd’s Rep 521 (time charter); *SIB International SRL v Metallgesellschaft Corporation (The Noel Bay)* [1989] 1 Lloyd’s Rep 361 (voyage charter); *Kaines (UK) Ltd v Osterreichische Warranhadelsgesellscahft Austowaren Gesellscahft m.b.H.* [1999] 2 Lloyd’s Rep 1 (contract for the sale and purchase of crude oil); *Dampskibsselskabet “Norden” A/S v Andre Cie SA* [2003] 1 Lloyd’s Rep 287 (forward freight swap agreement)

⁵¹ [1916] 1 AC 175

⁵² [1954] 1 Lloyd’s Rep 65

The former case concerned the measure of damages for breach of a contract for the sale of negotiable securities. The Privy Council said:⁵³

If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer for loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

Thus, if the market falls, the seller cannot enhance his damages because he should have mitigated by reselling on the market. If he holds the shares, he speculates at his own risk or for his own profit. As Lord Bingham observed, “A party is not, after all, obliged to accept a repudiation: he can, if he chooses, keep the contract alive, for better or worse.”⁵⁴ The consequence is that the termination of the contract by acceptance of the repudiation has the effect of reallocating the market risk to the injured party.⁵⁵ That this must be correct is reinforced by the consequence of the contrary proposition; namely that it would create incentives for an injured party to delay.

The majority in *The Golden Victory* dismissed the application of the market price rule in the context of that case (which by analogy with the above cases concerns the person to whom services are being supplied refusing to continue to accept them), for the following reasons:

1. the application of the so-called “*Bwllfa* principle” militated against the application of the rule,⁵⁶
2. the rule does not require contingencies – such as the likely effect of a suspensive condition (as they had characterised the war clause) to be judged prior to the date when damages finally come to be assessed;⁵⁷
3. account should properly be taken of a contingency which would reduce the value of the contract lost even were the chance of it happening to be less than 50% provided always that it was of some real and not just minimal significance, thereby displacing the rule.⁵⁸

The attraction of the so-called “*Bwllfa* principle” on facts such as *The Golden Victory* is clear. Judges of all persuasions have adopted the oft cited dictum of Lord Macnaghten as justification for postponing the date of assessment of damages until trial:

Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?

⁵³ [1916] 1 AC 175, 179

⁵⁴ *The Golden Victory* [2007] 2 AC 353, per Lord Bingham at [22]

⁵⁵ S M Waddams, ‘The Date for the Assessment of Damages’ (1981) 97 *Law Quarterly Review* 445, 447

⁵⁶ *The Golden Victory* [2007] 2 AC 353, per Lord Scott at [36], Lord Carswell at [65], Lord Brown at [78]

⁵⁷ *Ibid*, per Lord Carswell at [59], Lord Brown at [78]

⁵⁸ *Ibid*, per Lord Brown at [76]

*Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co*⁵⁹ concerned a claim for statutory compensation arising under the *Waterworks Clauses Act 1847*. The issue between the parties was whether the compensation should be assessed, not on the basis of the value of the coalfield or the coal in question in October 1898, but on the basis of the amount which the appellant could have made from mining the coal? It was held that the proper basis for the assessment was the profit which the appellant could have made from mining the coal and, that being so, the arbitrator was required to take into account the up-to-date evidence of the rise in price of coal over the period since October 1898.

The “*Bwllfa* principle” seems to have risen to inexplicable prominence in the case law on the assessment of damages for breach of contract. The case does not concern a breach of contract nor any other form of wrong. As is observed by Professor Reynolds, it is not referred to in any contract text book.⁶⁰ Indeed, their Lordships were themselves careful to distinguish the sale of goods cases. Lord Halsbury said:⁶¹

It was not a purchase of the coal, nor is it analogous to a purchase of the coal. It is what it is, and it appears to me that considering what it is I think the question propounded is solved by the statement of what it is.

The “*Bwllfa* principle” in fact has nothing whatsoever to do with the issue which was under consideration in *The Golden Victory*, nor indeed with any of the issues under consideration in the cases which have cited it as authority for the proposition that it is appropriate to postpone the assessment of damages for breach of contract.⁶² It is suggested the co-called “*Bwllfa* principle” is best confined to history, despite the eloquence of Lord Macnaghten’s exhortation.

The second ground for dismissing the application of the market price rule is also misconceived. The majority asserted that the contract was subject to a “suspensive condition”, a condition which triggers the operation of the contract itself, or one of the obligations arising under the contract in certain circumstances. Again, Professor Reynolds points out the inherent lack of logic in such a characterisation.⁶³ How can the main obligation in a seven year time charter containing a war cancellation clause be in some way conditional on the non-outbreak of war? Professor Reynolds opines that the approach of the majority makes the action for damages for breach of contract look “somewhat like an action for loss of a chance that the contract will not be frustrated or ended for some other reason.”⁶⁴

Turning to the question of when account should properly be taken of a contingency which would reduce the value of the contract lost, the majority indicated that their views were consistent with those of the minority. However both Lord Bingham and Lord Walker were clear that only if war had been considered “inevitable” as at December 2001 would the arbitrator have been entitled to take it in to account. The

⁵⁹ [1903] AC 426

⁶⁰ Francis Reynolds, ‘The Golden Victory – A Misguided Decision’ (2008) 38 *Hong Kong Law Journal* 333, 336

⁶¹ [1903] AC 426, 428

⁶² Eg: *McCrohon v Harith* [2010] NSWCA 67, [56], *HTW Valuers (Central Qld) Pty Ltd v Astonland* [2004] HCA 54; (2004) 217 CLR 640, [39], *Kizbeau Pty Ltd v WG & B Pty Ltd & McLean* (1995) 184 CLR 281, [24]- [25]

⁶³ Francis Reynolds, ‘The Golden Victory – A Misguided Decision’ (2008) 38 *Hong Kong Law Journal* 333, 336-337

⁶⁴ *Ibid*

view of the majority does not accord with *The Mihalis Angelos*⁶⁵ where an exception to the general principle was made only for events which are “predestined” or “inevitable” as at the date of acceptance of the repudiation. It must be remembered that *The Golden Victory* was not a case of anticipatory breach in any event. It was an actual breach of contract, so reliance on cases like *The Mihalis Angelos* is really of no assistance.

Is there any further justification for eschewing the application of the market price rule? Professors Carter and Peden of the University of Sydney express the very firm view that *The Golden Victory* was rightly decided.⁶⁶ The authors argue that since the value of a bargain may be affected by unfilled conditions, and by contingencies which would have occurred had the contract not been terminated, it is generally appropriate for such events to be taken into account when assessing damages following termination for repudiation. That approach is reinforced by the general principle that the assessment of damages in contract should so far as possible reflect realities as established at the trial. They assert that such an approach is also applicable where there is an available market. They point to four factors which, in their view, show that in cases of repudiation it is not inconsistent with the market price rule for regard to be had to particular circumstances, bearing in mind that the onus is on the defendant to establish the relevance of those circumstances:⁶⁷

1. In the assessment of damages, certainty comes from knowledge of the basis on which damages will be determined. Application of the market price rule is a familiar basis but in the context of a claim for damages for repudiation, assessment is necessarily forward looking. Although the market price rule in *The Golden Victory* suggests that normally it is sufficient to look to the position and the time of termination, the market price was by definition merely an estimate of the shipowners’ loss. But the pursuit of certainty cannot justify an award which, by reliance on false assumptions, is known to be vitiated. Subsequent events may be taken into account when assessing damages if they provide a more accurate or reliable basis for assessment of a plaintiff’s loss. Although exercise of the cancellation right could not be proved as a fact in the case, the circumstances which would have enlivened the right were so proved and could not be ignored.

With respect to the learned authors, the flaw in this reasoning must be that the only matter that could be proved as a fact was that the Second Gulf War had in fact broken out. Whilst it was possible for a finding to be made that any substitute contract for the remaining balance of the original seven year term would have also contained a war cancellation clause, there could not be a finding that the hypothetical substitute charterer would similarly have cancelled the contract on the outbreak of war.⁶⁸

⁶⁵ *The Mihalis Angelos* [1971] 1 QB 164

⁶⁶ JW Carter and E Peden, ‘Damages following termination for repudiation: Taking account of Later events’, The University of Sydney, Sydney Law School, Legal Studies Research Paper No.08/91, August 2008, <http://ssrn.com/abstract=1222047>

⁶⁷ Ibid 14-15

⁶⁸ See contra *The Golden Victory* [2007] 2 AC 353, per Lord Brown at [82]

2. Because the war in Iraq was an event beyond the control of the parties, and because (from a commercial perspective) it was certain that the cancellation clause would have been activated and exercised, the circumstances in *The Golden Victory* were analogous to proof that the contract would have been frustrated had it not been terminated for repudiation. On one view, as a matter of principle, a court applying the Market Price Rule at the date of termination should ignore a contingency such as frustration or exercise of a cancellation right because such matters have already been taken into account by the market. The market has assessed the position and since the award of damages is made on a hypothetical basis the promisor cannot require the award to be discounted. If the market view is that there is a real possibility of frustration or a cancellation clause being exercised, it will depend on the circumstances whether the market price is higher or lower than it would otherwise have been.

There can be no quibble, at least with the latter part of this proposition. Indeed, it describes the operation of the market price rule precisely and reinforces the view that there is no need for a court to take account of later events because the market will have taken those events into account. The proposition reinforces the view that the date of acceptance of the repudiation is the correct date for the assessment of damages.

3. The majority clearly considered that contingencies could be brought into account when applying the Market Price Rule even if it had not been proved that cancellation was certain to have occurred. The authors comment that perhaps surprisingly, even the minority regarded it as legitimate to take the possibility of exercise of a cancellation right into account. Lord Bingham said that he could “readily accept that the value of a contract in the market may be reduced if terminable on an event which the market judges to be likely but not certain”. The authors comment that such an approach clearly introduces an element of uncertainty in the application of the market price rule which the minority was not otherwise prepared to countenance.

Again, this observation seems to confuse the issue of uncertainty created by the market place, which it is suggested commercial parties are attune to and can readily accept, as compared with uncertainty created by a principle of law that would “encourage defendants or their advisers if aware of it to prolong proceedings in the hope that something may turn up.”⁶⁹

4. If the Market Price Rule is not immune to deduction in relation to hypothetical events, it cannot logically be immune in relation to events which would actually have occurred. In terms of uncertainty, if evidence of views in the market – which must necessarily be speculative – as to the likelihood of events such as frustration or cancellation may be taken into account, it is difficult to see how there is any greater uncertainty in permitting reliance on events in relation to which speculation is not needed.

⁶⁹ Francis Reynolds, ‘The Golden Victory – A Misguided Decision’ (2008) 38 *Hong Kong Law Journal* 333, 338

In this respect, the authors say, it is important in a case like *The Golden Victory* that the market price rule is still applied. Only the extent (duration) of its application is qualified. They assert that the rule merely generates an estimate of hypothetical loss and that it is open to the defendant to establish that the period covered by the award should be reduced because the contract would have been frustrated or cancelled prior to the end date of the charter. Thus, Carter and Peden conclude that the majority in *The Golden Victory* was correct to permit the charterers to rely on evidence of events which occurred after termination, including that the contract would have been cancelled.⁷⁰ It is contended that this view must be wrong and that the only basis for reducing recovery in the circumstances would have been a finding that a substitute charterer would also have cancelled pursuant to a similar clause contained in the substitute, which, as has already been described above, was simply not the case. There was, therefore, no sufficient reason to depart from the ordinary rule that damages were to be assessed as at the date of acceptance of the repudiation.

A PRINCIPLED WAY FORWARD

Is there a sensible way of reconciling these conflicting views, other than simply ignoring *The Golden Victory*?⁷¹ It seems that the first step that is required is to identify the content of the contractual obligation breached and to accurately categorise the loss or losses in respect of which damages are claimed.⁷² In relation to *The Golden Victory*, Lord Mustill notes extra-curially that the conduct of the charterers was not the case of a repudiatory breach or of a “breach of condition” involving an actual breach by the charter of such magnitude and kind as to give owners an immediate right to treat themselves as free from the contract and to claim damages for the loss of it.⁷³ Instead there was what his Lordship describes as “renunciation”, which would then have been followed in due course by an actual breach in the shape of failure to pay the next instalment of hire. The shipowners did not wait for this to happen; rather they waited three days and then announced that on the basis of the charterers’ conduct they were treating the contract as at an end and then claimed damages for breach of contract.⁷⁴

This was what his Lordship describes as an instance of the alternative form of repudiatory conduct; not an infringement of any obligation calling for immediate performance, but intimation that breaches would follow in the future – that is a wrongful renunciation of the contract. Consequently, it was not until the 17th of December when the shipowners accepted the repudiation that an actionable breach then sprang into existence; actionable in the sense that the shipowners now had a vested right of suit – one that could immediately be enforced by action for damages at a time when, but for the premature termination the charterers’ obligations would still have been running.

⁷⁰ JW Carter and E Peden, ‘Damages following termination for repudiation: Taking account of Later events’, The University of Sydney, Sydney Law School, Legal Studies Research Paper No.08/91, August 2008, <http://ssrn.com/abstract=1222047>, 16

⁷¹ Which somewhat surprisingly seems to have been done recently by the English Commercial Court: *Glory Wealth Shipping Pte Ltd v North China Shipping Ltd* [2010] EWHC 1692 (Comm), [2010] All ER (D) 127

⁷² David McLauchlan, ‘Some Issues in the Assessment of Expectation Damages’ [2007] *New Zealand Law Review* 563, 629

⁷³ M. Mustill, ‘The Golden Victory – Some Reflections’, (2008) 124 *Law Quarterly Review* 570

⁷⁴ *Ibid* 571

Lord Mustill observes that there is nothing novel about such an analysis but what was perhaps unusual was the discussion of the remedy in *The Golden Victory* in terms of the general law of damages. He said:⁷⁵

...unlike the position regarding actual breach I do not see how damages for an “anticipatory” breach can be awarded with any semblance of intellectual rigour without at least an attempt to enquire into what was the breach to which the damages are attached, and what kind of breach it was, which could be omitted before there was any present obligation to perform...the common law has never succeeded in finding a solution which is both theoretically sound and capable of producing sensible results in practice.

His Lordship goes on to observe that the courts have been content to employ a “fiction” such that in the field of anticipatory repudiation, a breach was simply assumed to have occurred when the repudiatory conduct took place. So, at least where there was an available market for the goods or services the subject of the contract, those responsible for assessing damages were content to look directly to a comparison between current market prices or rates and those prescribed by the contract – without any enquiry as to why such a comparison was being made. This “rule- of- thumb method,” as Lord Mustill describes it, can no longer, however, be taken for granted even in cases where there is an available market given that what the majority in *The Golden Victory* have advocated is an inquiry into what the future of the contract would have been but for the repudiation and stipulate that in the interests of justice, after-events may be brought in to answer this question. Lord Mustill rightly observes that:⁷⁶

Once, however, the course is taken to search for a more “just” procedure, the whole intellectual landscape is opened up, not only of damages but also of the fictional breach to which the damages are attached. Those who advise parties on how to react at short notice to repudiatory conduct will need to be alert to the fact that the goalposts have been moved a considerable distance.

His Lordship further points out that many of the cases referred to by the Appellate Committee in *The Golden Victory* had nothing to do with breaches of contract that were, by orthodox reasoning “real” breaches. In his opinion, none had anything useful to say about the problem in the case which was, in essence, how to carry forward into reasoning about damages the alternative concepts of a fictional breach of a real obligation and real breach of a fictional obligation.⁷⁷ “Piling up cases which are not in point only serves to obscure.”⁷⁸

His Lordship therefore suggests that the better approach is to start with a blank slate and to analyse the authorities in relation to anticipatory breach. In so doing, one arrives, he suggests, at two possibilities. First, to push the repudiation date back in time to the contractual due date for performance, so that

⁷⁵ Ibid

⁷⁶ Ibid 572

⁷⁷ Ibid 583

⁷⁸ Ibid

obligation and breach are united “as at” that date, with damages computed accordingly.⁷⁹ Lord Mustill considers that whilst attractive at first sight, such an approach does not work because it does not account for the immediate right of suit, and also entails that the parties must remain in limbo until the due date, a date which in a conditional contract may never arise. The second possibility is that the doctrine notionally pulls the obligation forward in time so that it will be there; ready to be broken, when the repudiation takes place. But no explanation has been given of how the obligation could be currently alive ahead of the time prescribed for it by the contract. He says that the effort to extract from the cases a firm intellectual footing for deducing a measure of damages ends in failure. The concept of anticipatory breach cannot be rationalised, but must be seen as a piece of positive law, firmly established but not anchored in or deducible from the ordinary course of the law of contract. The act can be called a breach if one wishes, but it must always be kept in mind that this is not what it really is, and it follows that applying mainstream damages law to this arbitrary concept will not yield reliable results.⁸⁰

Rather, it should be inquired, what is the financial impact of the “breach”? The answer is: none directly, for the direct consequence is simply to give the promisee an option, either to ‘accept’ the contract as terminated or to leave it in being. ***The consequence of termination is that the promisee can no longer count on its future net benefits, and it is the value of these which the promisee should be entitled to recoup in exchange for his previously pre-existing contractual rights.***⁸¹

Lord Mustill says that we therefore arrive at the position from which the courts began their inquiry in *The Golden Victory* but via a different route: one which leaves its mark on the approach to damages, making it inevitable that the valuation of the lost rights should be performed as at the date of the acceptance.⁸²

How should such a conclusion be applied in practice? Lord Mustill says that this must depend on the nature of the contractual rights which the promisee has chosen to abandon. In *The Golden Victory* these were embodied in a time charter, which is a form of financial instrument having a capital value which, if there was an available market (as the arbitrators found there to be), can be ascertained directly through direct expert evidence. Such evidence will value the contract “warts and all”, taking into account any known factors which would tend to depress its value, such as the presence of a termination clause, coupled with a market estimation of the chance that events may bring the clause into play. It is only if the contract cannot be valued directly as a marketable asset that recourse would be required to an estimate (viewed retrospectively as at the date when the exchange of value for compensation is effected) for the likely future earnings, discounted for the acceleration of cash flow.⁸³

Lord Mustill’s conclusion, applying this reasoning, would accord with that of the minority in *The Golden Victory*. In his opinion, this reflects not just accurate legal reasoning, but also the justice of the case:

⁷⁹ Ibid 584 citing Cockburn CJ in *Frost v Knight* (1872) LR Exch 111

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid 585

The promisee must make up his mind rapidly if he is not to lose his right to terminate, and for this purpose he needs as stable a legal and economic base as possible for putting figures to the potential risks and benefits which he is called on to weigh up. Direct recourse to the current market value of the contract in its entirety yields a much quicker and more predictable outcome than the cumbrous process of speculating how the contract is likely to turn out in the long-term future, especially if as was implicit in the opinion of the majority, the outcome will depend on when the valuation is performed thereby exposing the parties to the hazards of the arbitrator's diary or the judge's list.⁸⁴

Lord Mustill makes clear that in arriving at the same conclusion as the minority, he regarded the arguments relating to certainty and convenience as reinforcement of that conclusion, rather than as the principal motive for it.⁸⁵

CONCLUSION

As was indicated at the outset, it does not seem that, on a proper analysis of the law, there is any real dispute about the principles that are applicable to the assessment of damages in the case of repudiation of a contract, including the principles that concern the time for the assessment of those damages. Rather, the courts seem to have become somewhat blinded by the opportunities that have apparently opened up to them such that they may no longer be "groping around in the dark" but instead "blinded by the light".⁸⁶

One therefore starts from the principle in *Robinson v Harman* and then asks, 'What is the value of the future net benefits that the injured party has lost?' If these future net benefits are marketable, an injured party has the opportunity of replacing those net benefits in the market. There is therefore nothing unjust about measuring the loss by the cost of replacement of those net benefits at the time when the injured party had a reasonable opportunity to make such a replacement. Subsequent events and apparent offsetting gains are irrelevant to the exercise of quantifying loss because termination of the contract by acceptance of a wrongful repudiation has the effect of reallocating market risk to the injured party.

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ It might be observed that the obfuscation of certainty in relation to the assessment of damages is not confined to contract cases. In the area of the assessment of damages in tort one can witness the slow and agonising death of the rule in *Potts v Miller*. In relation to that rule the certainty of the assessment of damages by reference to the market as at the date of an acquisition of an asset induced by misrepresentation is being eroded by reference to subsequent outcomes; See *Manwelland Pty Ltd v Dames & Moore Pty Ltd* (2002) Aust Contract R 90-141.