

**QUEEN'S BENCH DIVISION  
(COMMERCIAL COURT)**

13–14, 18 May; 4 August 2010

OMAK MARITIME LTD  
v  
MAMOLA CHALLENGER SHIPPING CO  
(THE "MAMOLA CHALLENGER")

[2010] EWHC 2026 (Comm)

Before Mr Justice TEARE

**Charterparty (Time) — Damages — Charter prematurely repudiated by charterers — Owners claiming damages by reference to wasted expenditure — Owners earning more from substitute fixtures than would have been earned under time charter — Owners sustaining no net loss — Whether owners nevertheless entitled to recover wasted expenditure as reliance loss.**

The vessel *Mamola Challenger* was time-chartered for a period of five years. Under the charterparty the owners were required to make certain modifications to the vessel prior to delivery which included the installation of a new crane. The owners incurred various expenses in preparation for the modifications, including the cost of removing from another vessel the crane which the owners intended to install on *Mamola Challenger*.

The charterparty required the charterers to sub-charter the vessel to a Nigerian company, but the latter company could not or would not enter into a sub-charterparty without the approval of the National Petroleum Investment Management Services, which approval was not forthcoming. The owners regarded the charterers' conduct as a repudiatory breach, which they accepted as bringing the charter to an end. As a result, the expenses which the owners had incurred were wasted.

At the time of the repudiation the market rate of hire was higher than the charterparty rate. After the repudiation the owners concluded a number of short-term fixtures. Over the five-year term for which the charterparty would have run, the owners earned, or would earn, more from those fixtures than they would have earned under the charterparty, and the excess was greater than the amount of the wasted expenditure.

The dispute was referred to arbitration. The owners claimed as damages a sum in excess of US\$675,000 which they claimed were the expenses which had been wasted. The charterers contended that the owners were not entitled to any damages because the owners had not suffered any net loss.

The tribunal held that the charterers' conduct amounted to a repudiatory breach, and it awarded the owners damages for wasted costs in the sum of US\$86,534. The tribunal held that the fact that the vessel might have been occupied in more gainful employment as a result of the charterers' repudiation was not a matter to be brought into account. The

expenses, such as they were, were wasted in preparing for the charterparty and were rendered irrecoverable not by any provision of the charterparty but as a result of its termination.

The charterers appealed, contending that the owners had in fact suffered no loss. The owners responded that where the law protected a party's "reliance" interest, the benefit flowing from the substitute employment could not be taken into account.

—Held by QBD (Comm Ct) (TEARE J) that the appeal would be allowed.

(1) The fundamental principle was that an award of damages was designed to put the innocent party in the position he would have been in had the contract been performed. Reliance losses were a species of expectation losses. Both bases of damages were founded on and were illustrations of the fundamental principle (*see* para 42 and 55);

—*Robinson v Harman* (1848) 1 Exch 850 applied; *C & P Haulage v Middleton* [1983] 1 WLR 1461 considered.

(2) The tribunal had erred in law in regarding a claim for wasted expenses and a claim for loss of profits as two separate and independent claims which could not be mixed. The tribunal should have made a comparison between the claimant's position and what it would have been had the contract been performed. Where steps had been taken to mitigate the loss which would otherwise have been caused by a breach of contract the benefits obtained by mitigation had to be set against the loss which would otherwise have been sustained. To fail to do so would put the claimant in a better position than he would have been in had the contract been performed (*see* para 65).

The following cases were referred to in the judgment:

*Anglia Television Ltd v Reed* (CA) [1972] 1 QB 60;

*Bowlay Logging Ltd v Domtar Ltd* [1978] 4 WWR 105;

*British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co of London Ltd* (HL) [1912] AC 673;

*C & P Haulage v Middleton* (CA) [1983] 1 WLR 1461;

*CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] 1 QB 16;

*Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 66 ALJR 123;

*Cullinane v British "Rema" Manufacturing Co Ltd* (CA) [1954] 1 QB 292;

*Filobake Ltd v Rondo Ltd* (CA) [2005] EWCA Civ 563;

*Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory)* (HL) [2007] UKHL 12; [2007] 2 Lloyd's Rep 164; [2007] 2 AC 353;

*L Albert & Son v Armstrong Rubber Co*, 178 F.2d 182 (1949);

*Lloyd v Stanbury* [1971] 1 WLR 535;

*Robinson v Harman* (1848) 1 Exch 850;

*Surrey County Council v Bredero Homes (CA)* [1993] 1 WLR 1361;

*Wallington v Townsend* [1939] 1 Ch 588;

*Wertheim v Chicoutimi Pulp Co (PC)* [1911] AC 301.

This was an appeal by Omak Maritime Ltd, the time charterers of the vessel *Mamola Challenger*, from an arbitration award determining that they were liable to pay damages for wasted expenditure following their repudiatory breach of charter notwithstanding that the owners, Mamola Challenger Shipping Co, had suffered no net loss as a result of the breach.

Timothy Young QC, instructed by Stephenson Harwood, for the charterers; Timothy Brenton QC and Charles Holroyd, instructed by MFB Solicitors, for the owners.

The further facts are stated in the judgment of Teare J.

Judgment was reserved.

Wednesday, 4 August 2010

## JUDGMENT

### Mr Justice TEARE:

1. This is an appeal by Omak Maritime Ltd ("the charterers" and respondents in the reference) from an award of an LMAA tribunal in favour of Mamola Challenger Shipping Co ("the owners" and claimants in the reference) which concerns the true basis in law of the principle which permits a contracting party to claim, as damages for breach of contract, expenditure which has been wasted as a result of a breach of that contract.

2. The question is raised in the context of a long-term charterparty which was terminated as a result of the owners' acceptance of the charterers' repudiatory breach of the charterparty. The charterparty was repudiated by the charterers in unusual circumstances. The market rate of hire was higher than the charterparty rate of hire. In such circumstances one would usually expect the charterers to wish to retain the benefit of the charterparty. As a result of the owners' acceptance of the charterers' breach the owners were able to trade the vessel at the higher market rate and were not restricted to trading the

vessel at the lower contract rate. They nevertheless claimed damages, namely, the expenses they had incurred in preparing to perform the charterparty. The arbitral tribunal held that the owners were entitled to do so notwithstanding that the tribunal held, as a fact, that the owners "did not . . . suffer any net loss in this case and that they "more than recuperated the losses they claim in this arbitration". Mr Young QC, counsel for the charterers, has submitted on this appeal that the tribunal erred in law. Mr Brenton QC, counsel for the owners, has submitted that the decision of the tribunal was correct in law.

3. There is also a cross-appeal by the owners which only arises in the event that the tribunal's decision was right in law.

### *The facts as found by the tribunal*

4. Mr Brenton summarised the facts as found by the tribunal as follows:

(i) The charterers agreed to charter the owners' vessel *Mamola Challenger* for five years. Under the charterparty the owners were required to make certain modifications to the vessel prior to delivery which included the installation of a new crane.

(ii) The owners incurred various expenses in preparation for these modifications, including the cost of removing from another vessel the crane which owners intended to install on *Mamola Challenger*. (The removal took place at Port Gentil, Gabon, on 27 and 28 December 2006.) When doubts arose as to whether the charterers would perform the fixture, the owners held the vessel at Cape Town (where they intended to do the works) pending clarification of the charterers' position. (The vessel arrived at Cape Town on 19 January 2007 and waited until 30 January 2007.)

(iii) Ultimately the owners accepted the charterers' conduct as bringing the charter to an end (on 29 January 2007). The expenses which the owners had incurred were wasted; they had no residual value or benefit for the owners.

(iv) After the repudiation of the charterparty the owners concluded a number of short-term fixtures. (The vessel arrived at Luanda, Angola, on 5 February 2007 where she was delivered into the first of such fixtures.) The tribunal has held that, over the five-year term for which the charterparty would have run, the owners have earned, or will earn, more from these fixtures than they would have earned under the charterparty, and the excess is greater than the amount of the wasted expenditure.

5. The circumstances in which the charterers repudiated the charterparty were these. The original

intention was for the vessel to be chartered by the owners to Shell Nigeria Exploration & Production Co Ltd ("SNEPCO") but in order to comply with local laws and regulations it was necessary to include a local Nigerian company in the venture and it was consequently arranged for the charterers to charter the vessel from the owners and sub-charter her to SNEPCO. The charterparty between the owners and the charterers was concluded but SNEPCO could not or would not enter into a sub-charterparty without the approval of the National Petroleum Investment Management Services ("NAPIMS"). No such approval was forthcoming. The charterers defended themselves against the owners' claim for damages by arguing, first, that SNEPCO approval was a condition precedent to the charterparty and, second, that the lack of approval from NAPIMS frustrated the charterparty. Both arguments were rejected by the tribunal.

6. The rate of hire under the charterparty was US\$13,700 per day whereas the market rate of hire was US\$21,347. Thus as a result of the termination of the charterparty the owners were able to earn about US\$7,500 per day more than they would have earned under the charterparty.

7. The owners claimed as damages a sum in excess of US\$675,000 which they claimed were expenses which had been wasted. The tribunal awarded the owners damages in the sum of US\$86,534.

8. The tribunal said this in support of its decision:

"[The expenses] were simply wasted as a result of the termination of the contract by the other party. The fact that the vessel might have been occupied in more gainful employment as a result of the termination of the Charterparty by the charterers is not a matter to be brought into account on the authority of *C & P Haulage [v Middleton]* [1983] 1 WLR 1461]. The expenses, such as they were, were wasted in preparing for the Charterparty and were rendered irrecoverable not by any provision of the Charterparty but as a result of its termination. It seems to us that to take the charterers' position and look at the net overall position is to mix this basis of claim with a claim based on the difference between contract and market rates inasmuch as the latter contains within it the concept of what the vessel should have earned overall from substitute employment as compared with what would have been earned under the Charterparty."

#### *The opposing arguments*

9. Mr Young submitted that the tribunal's decision was wrong in law. His argument was simple. The owners had in fact suffered no loss by reason of

the charterers' breach because the market rate of hire was higher than the charter rate of hire and therefore the owners "more than recuperated the losses they claim in this arbitration". In those circumstances the decision to award any damages to the owners (other than nominal damages) breached the principle that awards of damages for breach of contract are compensatory (see *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] 2 Lloyd's Rep 164) and are designed to put the innocent party in the position he would have been in had the contract been performed (see *Robinson v Harman* (1848) 1 Exch 850) rather than the position he would have been in had no contract been made (see *C & P Haulage v Middleton* [1983] 1 WLR 1461). Where the innocent party receives a benefit which flows directly from the breach that benefit must be taken into account in assessing damages for that breach (see *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co of London Ltd* [1912] AC 673).

10. Mr Brenton submitted that the tribunal's decision was right in law. His argument was, perhaps, not as simple but was nevertheless principled. Where the law protects a party's "negative" or "reliance" interest, as where wasted expenditure is claimed, the benefit flowing from the substitute employment cannot be taken into account to reduce or extinguish a claim for wasted expenditure. *Robinson v Harman* does not require that benefit to be taken into account since it is concerned with the protection of a party's "positive" or "expectation" interest. It is only when the law is protecting that interest that it is appropriate to compare a party's actual position with the position had the contract been performed. *Robinson v Harman* does not provide a rational and sensible explanation for the award of damages in a wasted expenditure case. Mr Brenton accepted that the principle in *British Westinghouse* applied to claims for injury to a claimant's negative interest but submitted that, properly applied, it did not prevent the claimant from recovering expenditure wasted as a result of the breach of contract. By entering into the charterparty the owners not only committed themselves to expenditure which was wasted by the charterers' breach but also gave up the opportunity to charter the vessel at the market rate. That sacrifice was also wasted by the breach. By chartering the vessel out at the market rate after the charterparty had been terminated the owners ensured that their sacrifice had in fact caused them no loss from the date on which the vessel was employed at the market rate. But such earnings did not compensate them for their expenditure which had been incurred before that date and which therefore remained "wasted".

*Discussion*

11. It is necessary to start with *Robinson v Harman* (1848) 1 Exch 850. The plaintiff sought damages for breach of a contract to grant a lease. The premises were worth considerably more than the agreed rent and the plaintiff sought both his expenses incurred "in and about the preparation of the said agreement and lease" and damages for his loss of bargain. A sum of £25 was paid into court which exceeded the expenses incurred of £20 but there was a dispute as to the plaintiff's entitlement to any further damages. It was held that he was entitled to further damages of £200 for his loss of bargain. In a celebrated and short passage Baron Parke stated:

"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."

12. It is to be noted that the plaintiff claimed both expenses incurred in reliance on the contract and damages for loss of bargain. There is no discussion as to how the expenses were taken into account when calculating the damages but, in the light of Baron Parke's principle, it is to be inferred that the plaintiff did not end up in a better position than he would have been in had the contract been performed.

13. The principle enunciated by Baron Parke in *Robinson v Harman* was restated in *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at pages 307 and 308 and in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co of London Ltd* [1912] AC 673. It has recently been said to be the "fundamental principle governing the quantum of damages for breach of contract"; see *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] 2 Lloyd's Rep 164 at para 29 per Lord Scott.

14. A corollary of that principle is that an award of damages for breach of contract should not put the claimant in a better position than he would have been in had the contract been performed; see *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at page 308.

15. In a typical claim for damages for breach of contract on the expectancy basis both expected profits and necessary expenses will be taken into account. The claimant will claim a sum equal to the benefit he expected to earn from performance of the contract less the costs he would have had to have incurred in order to earn that benefit, which costs would include not only any sum he would have had to pay to the party in breach but also any expenses he would have had to incur in preparation for performance of the contract. Damages calculated in

that way would put the claimant in the position he would have been in had the contract been performed. The measure of loss thus compensates for the loss of bargain and in doing so takes account of the expenses the claimant would have incurred in reliance on the contract being performed. To ignore those expenses when assessing damages would put the claimant in a better position than he would have been in had the contract been performed. Equally, if those expenses had already been incurred at the date on which the contract was repudiated, to award those expenses in addition to damages for loss of bargain would put the claimant in a better position than he would have been in had the contract been performed.

16. The principle is closely related to the well-recognised principles of mitigation. If, as illustrated by *Wertheim v Chicoutimi Pulp Co*, the effects of mitigation are ignored, the claimant will end up in a better position than he would have been in had the contract been performed.

17. The principle and its relationship with the principles of mitigation of loss were explained and applied in *British Westinghouse v Underground Electric Railway* [1912] AC 673. In that case the appellants had supplied turbines to the respondents. The turbines were defective and the respondents purchased other turbines of a different make and design. The replacement turbines mitigated or prevented the loss which the respondents would otherwise have suffered but also, because they were superior machines, enabled the respondents to save expenses which would have been incurred had the appellants' turbines been of the standard contracted for. At issue was whether that benefit should be brought into account when assessing the appellants' damages.

18. The House of Lords held that it should. Viscount Haldane LC referred to two broad principles at page 689. The first was that:

"... he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."

The second was:

"... the duty of taking all reasonable steps to mitigate the loss consequent on the breach ... When in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."

Thus action taken to mitigate loss diminishes the loss recoverable pursuant to the first broad principle:

"... provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage. ... I think the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain. (See pages 690 and 691.)"

For these reasons the House of Lords held that the benefit represented by the expenses which would have been incurred had the appellants' turbines been of the standard contracted for but which were saved by the purchase of superior machines should be brought into account when assessing the appellants' damages.

19. The law of damages permits a claimant to seek damages on the reliance basis rather than upon the expectancy basis. He may "elect" to claim damages by reference to the expenses incurred by him in reliance on the contract being performed; see *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 QB 292 and *Anglia Television Ltd v Reed* [1972] 1 QB 60.

20. In the present case the claimant, having abandoned his claim to damages on the expectancy basis, claimed damages in the sum of the expenses incurred by him in reliance on the contract being performed. There is no dispute that damages may be claimed on that basis but the question raised by Mr Brenton's submission is whether and if so how the principle in *Robinson v Harman* applies so as to ensure that the claimant is not put in a better position than he would have been in had the contract been performed.

21. There is considerable authority, both in other common law jurisdictions and in this jurisdiction, for the proposition that the recovery of damages on a reliance basis is governed by Baron Parke's principle in *Robinson v Harman*. Given the fundamental nature of that principle that is not surprising.

22. This question was addressed in *L Albert & Son v Armstrong Rubber Co* 178 F.2d 182 (1949), a decision in the United States Court of Appeals, Second Circuit. Presiding over that Federal Court was Chief Judge Learned Hand (who "is numbered among a small group of truly great American judges of the twentieth century, a group that includes Oliver Wendell Holmes, Jr, Louis Brandeis and Benjamin Cardozo"; see the preface to *Learned Hand* by Gerald Gunther.) A purchaser of machines designed to recondition rubber sought damages for breach of contract, namely, the cost of the founda-

tion on which the machines were placed. However, the purchaser did not prove the earnings he would have received from the machines had they been in conformity with the contract. Nor did the defendant prove that the plaintiff would not have recovered his expenditure had the contract been performed. It appears that it was a case where it was difficult to know what the result of the contract would have been. Chief Judge Learned Hand said this at page 189:

"In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee's outlay, such a result imposes the risk of the promisee's contract upon the promisor. We cannot agree that the promisor's default in performance should under this guise make him an insurer of the promisee's venture; yet it does not follow that the breach should not throw upon him the duty of showing that the value of the performance would in fact have been less than the promisee's outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other. On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed."

23. Having stated that principle Chief Judge Learned Hand noted (at page 190) that the Restatement of Contracts allowed recovery of the promisee's outlay in necessary preparation for the performance, subject to several limitations, of which one was that the promisor may deduct whatever he can prove the promisee would have lost if the contract had been fully performed. He further noted with obvious approval the "very simple formula" suggested by Professor Fuller in an article written in 1936 in the *Yale Law Journal*, *The Reliance Interest in Contract Damages*, 46 *Yale Law Jour* 52, at page 79:

"We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed."

24. Chief Judge Learned Hand's statement of principle is therefore consistent with the recovery of expenses wasted by a breach of contract being governed by the principle enunciated by Baron Parke in *Robinson v Harman*.

25. In *Cullinane v British "Rema"* [1954] 1 QB 292 a purchaser of plant which did not perform as warranted recovered both the capital expended (less the unpaid balance of the purchase price and the residual value of the plant) and loss of profits. The Court of Appeal held that this measure of damage was excessive. The purchaser could claim the capital loss or the lost profits but not both. They were alternatives.

26. In *Anglia Television Ltd v Reed* [1972] 1 QB 60 an actor had agreed to play the leading role in a television play to be produced by the plaintiffs. He repudiated the contract and the production was abandoned. The plaintiffs claimed their wasted expenditure. The issue before the Court of Appeal was whether such damages extended to expenditure incurred before, as well as after, the contract was made. It was held that they did so long as it was reasonably within the contemplation of the parties that they were likely to be wasted if the contract were broken. Lord Denning MR said that the plaintiffs had to elect between claiming loss of profits or expenses thrown away.

27. Neither *Cullinane v British "Rema"* nor *Anglia Television Ltd v Reed* expressly dealt with the question whether wasted expenditure could be recovered in circumstances where an award of damages on that basis might put the claimant in a better position than he would have been in had the contract been performed.

28. That issue, which had been addressed by Chief Judge Learned Hand in *L Albert & Son v Armstrong Rubber Co* was also addressed by a Canadian Court in *Bowlay Logging Ltd v Domtar Ltd* [1978] 4 WWR 105. In that case the parties had made a contract whereby the claimant would cut timber and the defendant would haul the timber away. The claimant said that the defendant breached the contract by supplying insufficient trucks to haul the timber away. He claimed as damages his wasted expenditure. Berger J, having referred to the judgment of Chief Judge Learned Hand and Professor Fuller's formula at pages 114 and 115, awarded only nominal damages because the defendant had proved that claimant would have made a loss on the contract as a whole. Berger J, having noted that the issue he had to decide had not been raised in either *Cullinane v British "Rema"* or *Anglia Television Ltd v Reed* at page 114, said at page 117:

"The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not

losses flowing from the Defendant's breach. In these circumstances, the true consequence of the defendant's breach is that the plaintiff is released from his obligation to complete the contract — or, in other words, he is saved from incurring further losses.

If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise."

29. Thus the effect of the decision was that the claimant was not entitled to claim damages on a basis which would place him in a better position than he would have been in had the contract been performed.

30. In *C & P Haulage v Middleton* [1983] 1 WLR 1461 the English Court of Appeal followed the approach of Chief Judge Learned Hand in *L Albert & Son v Armstrong Rubber Co* and of Berger J in *Bowlay Logging Ltd v Domtar Ltd* and refused to award damages by reference to wasted expenses where the expenses would have been wasted in any event by reason of the terms of the contract. Ackner LJ, having also referred to *Cullinane v British "Rema"* and *Anglia Television Ltd v Reed*, said at page 1467:

"It is not the function of the courts where there is a breach of contract knowingly, as this would be the case, to put a plaintiff in a better financial position than if the contract had been properly performed."

31. Fox LJ agreed and noted at page 1468:

"... while it is true that the expenditure could in a sense be said to be wasted in consequence of the breach of contract, it was equally likely to be wasted if there had been no breach, because the plaintiffs ... could terminate the licence at quite short notice. A high risk of waste was from the very first inherent in the nature of the contract itself, breach or no breach. The reality of the matter is that the waste resulted from what was, on the defendant's side, a very unsatisfactory and dangerous bargain."

32. That reasoning mirrored the reasoning of Berger J in *Bowlay Logging Ltd v Domtar Ltd*.

33. No question of the burden of proof arose in *C & P Haulage v Middleton* because reliance was placed on a term of the licence to show that the contract was a bad bargain. In *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] 1 QB 16 Hutchinson J had to consider the burden of proof and in particular whether it was right to modify the

general rule as to the onus of proof in the manner suggested by Chief Judge Learned Hand in *L Albert & Son v Armstrong Rubber Co*. He concluded at pages 39 and 40 that it was:

"Even without the assistance of such authorities, I should have held on principle that the onus was on the defendant. It seems to me that at least in these cases where the plaintiff's decision to base his claim on abortive expenditure was dictated by the practical impossibility of proving loss of profit rather than by unfettered choice, any other rule would largely, if not entirely, defeat the object of allowing this alternative method of formulating a claim. This is because, notwithstanding the distinction to which I have drawn attention between proving a loss of net profit and proving in general terms the probability of sufficient returns to cover expenditure, in the majority of contested cases impossibility of proof of the first would probably involve like impossibility in the case of the second. It appears to me to be eminently fair that in such cases where the plaintiff has by the defendant's breach been prevented from exploiting the chattel or the right contracted for and, therefore, putting to the test the question of whether he would have recouped his expenditure, the general rule as to the onus of proof of damage should be modified in this manner."

34. Finally, there is the Australian case of *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 66 ALJR 123. This is a judgment of the High Court of Australia where the jurisprudential basis of reliance damages was examined in depth. Wasted expenditure was claimed and there was a complex dispute as to what the consequences of performing the contract would have been. The High Court allowed the claim for wasted expenditure but in so doing provided considerable support for the proposition that reliance damages are governed by the principle in *Robinson v Harman*; see the judgments of Mason CJ and Dawson J at pages 80 to 82 and pages 84 to 86, of Brennan J at pages 99 and 104 to 108, of Deane J at pages 126 to 128, of Toohey J at pages 134 and 135, of Gaudron J at pages 154 to 156 and of McHugh J (who dissented as to the result of the case) at page 163. For present purposes the following extract from the judgment of Mason CJ and Dawson J at pages 80 to 82 will suffice:

"The award of damages for breach of contract

The general rule at common law, as stated by Parke B in *Robinson v Harman* (35), is "that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to dam-

ages, as if the contract had been performed". This statement of principle has been accepted and applied in Australia (36).

The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often described as 'expectation damages'. The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained. That is to say, a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation.

In the ordinary course of commercial dealings, a party supplying goods or rendering services will enter into a contract with a view to securing a profit, that is to say, that party will expect a certain margin of gain to be achieved in addition to the recouping of any expenses reasonably incurred by it in the discharge of its contractual obligations. It is for this reason that expectation damages are often described as damages for loss of profits. Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred by a plaintiff in the discharge of contractual obligations and any amount by which gross receipts would have exceeded those expenses. This second amount is the net profit.

The expression 'damages for loss of profits' should not be understood as carrying with it the implication that no damages are recoverable either in the case of a contract in which no net profit would have been generated or in the case of a contract in which the amount of profit cannot be demonstrated. It would be an invitation to the repudiation of contractual obligations if the law were to deny to an innocent plaintiff the right to recoupment by an award of damages of expenditure justifiably incurred for the purpose of discharging contractual obligations simply on the ground that the contract breached would not have been or could not be shown to have been profitable. If the performance of a contract would have resulted in a plaintiff, while not making a profit, nevertheless recovering costs incurred in the course of performing contractual obligations, then that plaintiff is entitled to recover damages in an amount equal to those costs in accordance with *Robinson v Harman*, as those costs would have been recovered had the contract been fully performed. Similarly, where it is not possible for a plaintiff to demonstrate whether or to what extent the performance of a contract would have

resulted in a profit for the plaintiff, it will be open to a plaintiff to seek to recoup expenses incurred, damages in such a case being described as reliance damages or damages for wasted expenditure.

A further example of the application of *Robinson v Harman* which will result in a plaintiff being entitled to claim damages for wasted expenditure is in a contract for services such as that between a solicitor and a client. Where a solicitor has breached his or her contractual duty of care, the measure of damages to which a client will be entitled will be such an amount as would put the client in the position he or she would have been in had the contract of retainer been performed without negligence. In cases where, had non-negligent advice been given, the client would not have entered into a subsequent transaction, for example a purchase of real property, then, in conformity with *Robinson v Harman*, the client will be entitled to recover as damages expenditure wasted on account of the negligent advice, less anything subsequently recovered and given reasonable acts of mitigation. The amount of wasted expenditure will be the appropriate measure of damages in such a situation because, it having been established that the client would not have entered into the subsequent contract if proper advice had been given, it is not sensible to speak of loss of profits. *Hayes v Dodd* is a useful illustration of the statement that the expressions 'expectation damages', 'damages for loss of profits', 'reliance damages' and 'damages for wasted expenditure' are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim."

35. Mr Brenton accepts, as he must in the light of the above authorities, that there are authorities which seek to explain reliance loss as a species of expectation loss but he submits that there are others which treat such loss as "an independent form of loss". He further submits that the expectation loss principle cannot provide a rational and sensible explanation for the award of damages in wasted expenditure cases.

36. The first authority relied upon by Mr Brenton is *Cullinane v British "Rema"* and in particular the passage in the judgment of Lord Evershed MR at page 303:

"As a matter of principle also it seems to me that a person who has obtained a machine . . . which was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may . . . claim to recover the capital loss he has incurred . . . A

claim of that kind puts the plaintiff in the same position as though he had never made the contract at all . . . But, alternatively, . . . he may, in my judgment, make his claim on the basis of the profit which he has lost because the machine as delivered fell short in its performance of that which it was warranted to do . . ."

37. It is arguable that this passage suggests that the basis of a claim for wasted expenditure is to put the claimant in the same position in which he would have been in had the contract not been made. This is a different basis from that stated by Baron Parke in *Robinson v Harman*. However, Lord Evershed MR did not address the question whether damages in the amount of wasted expenditure could be awarded where to do so would put the claimant in a better position than he would have been in had the contract been performed. That question was addressed by the Court of Appeal in *C & P Haulage v Middleton* in which case Ackner LJ expressly held that the court could not put a plaintiff in a better financial position than he would have been in had the contract been performed. I am not therefore persuaded that the dicta of Lord Evershed MR relied upon by Mr Brenton should be regarded as authority for the proposition that the jurisprudential basis for awarding damages for wasted expenditure is different from Baron Parke's principle in *Robinson v Harman*.

38. The second authority relied upon by Mr Brenton is *Lloyd v Stanbury* [1971] 1 WLR 535. However, the extent to which this case can be regarded as authoritative is limited by the circumstance that the discussion of the law by Brightman J was based on a concession by counsel that where there was no evidence of a loss of profits the claimant was entitled to be put in the position he would have been in had the contract never been made; see page 544. The debate was whether costs could be recovered where they had been incurred in anticipation of the contract rather than those incurred or in reliance on the contract. Brightman J held that costs could be recovered notwithstanding that they had been incurred in anticipation of the contract provided that they were within the contemplation of the parties.

39. The concession in that case may well have been based upon *Wallington v Townsend* [1939] 1 Ch 588 in which Morton J held that where a vendor of land failed to complete for reasons other than a defect in title and the purchaser was unable to prove a loss of profits he was entitled by way of damages, in addition to the return of the deposit, to interest in respect of the loss of use of the deposit and to the costs of approving and executing the contract, investigating title, preparing the conveyance and of searches. However, neither this case nor *Lloyd v Stanbury* expressly dealt with the question whether

such expenses could be recovered in the (unlikely) event that such costs would not have exceeded the value of the property which was the subject of the contract. In *C & P Haulage v Middleton* Ackner LJ said that neither case bore on the question which he had to consider, namely, whether substantial damages could be awarded in a case where the claimed expenditure would not in any event be recovered; see [1983] 1 WLR 1461 at pages 1466 to 1468.

40. The third authority relied upon is *Surrey County Council v Bredero Homes* [1993] 1 WLR 1361 in which Steyn LJ drew a distinction between a claimant's "positive or expectation interest" and his "negative" interest which enables a claim to be made for "reliance" losses. However, the point at issue in that case was whether the remedy in damages allowed a claimant to claim the profit which the defendant had made by breaching the contract. It was held that the claimant could not recover a sum equal to that profit because it was not a loss and damages are purely compensatory. The court did not consider the question whether a claimant could claim reliance losses in circumstances where to do so would put him in a better position than he would have been in had the contract been performed.

41. Mr Brenton also relied upon *McGregor on Damages*, 18th Edition, para 2-020 where reference is made to a "different basis" and to putting the claimant in the position he would have been had the contract not been made. However, the discussion continues to para 2-025 where reference is also made to *C & P Haulage v Middleton* without any criticism of that decision. Mr Brenton also referred to *Chitty on Contracts*, 13th Edition, para 26-002 which referred to a distinction between the expectation interest and reliance interest (the latter being further referred to at paras 26-072 to 26-079) but without indicating a clear answer to the problem which I must resolve.

42. I consider that the weight of authority strongly suggests that reliance losses are a species of expectation losses and that they are neither, to use Mr Brenton's phrase, "fundamentally different" nor awarded on a different "juridical basis of claim". That they are a species of expectation losses is supported by the decision of the Court of Appeal in *C & P Haulage v Middleton* and by very persuasive authorities in the United States, Canada and Australia.

43. Mr Brenton nevertheless invites me to prefer his submission because the expectation loss analysis does not provide a rational and sensible explanation for the award of damages in wasted expenditure cases.

44. It seems to me that the expectation loss analysis does provide a rational and sensible explanation

for the award of damages in wasted expenditure cases. The expenditure which is sought to be recovered is incurred in expectation that the contract will be performed. It therefore appears to me to be rational to have regard to the position that the claimant would have been in had the contract been performed.

45. If there were an independent principle pursuant to which expenditure incurred in expectation of the performance of a contract was recoverable without regard to what the position would have been had the contract been performed the defendant would in effect underwrite the claimant's decision to enter the contract. If the contract was unwise from his point of view, because his expenses were likely to exceed any gross profit, it is difficult to understand why the defendant should pay damages in an amount equal to that expenditure. His breach has not caused that loss. The claimant's expenditure should only be recoverable where the likely gross profit would at least cover that expenditure.

46. This was the approach of Chief Judge Learned Hand in *L Albert & Son v Armstrong Rubber Co* and of Berger J in *Bowlay Logging Ltd v Domtar*. That approach was followed and approved in *C & P Haulage v Middleton*.

47. The authorities therefore state a rational and sensible explanation for the view that the expectation loss principle underpins the award of damages in wasted expenditure cases. In some cases a contract can be shown to be a bad bargain. In other cases it may not be possible to show one way or the other whether the likely gross profits would at least equal the expenditure. In that latter type of case the question arises as to which party should bear the evidential burden of proof. Should the burden be on the claimant to show that the likely profits would at least equal his expenditure or on the defendant to show that the likely profits would not at least equal the claimant's expenditure? The authorities to which I have referred, in particular *L Albert & Son v Armstrong Rubber* and *CCC Films (London) Ltd v Impact Quadrant Films Ltd* provide a rational and sensible explanation for the view that that burden should be on the defendant.

48. Mr Brenton suggested several reasons why the expectation loss principle cannot provide a rational and sensible explanation for the award of damages in wasted expenditure cases.

49. Firstly, he criticised the circumstance that it rests on an assumption (articulated in *Commonwealth of Australia v Amann Aviation* by Deane J in particular, at page 126, but by other judges in that case as well) that had the contract been performed the claimant would have recouped his expenditure out of profit. This criticism has been developed by

Professor Treitel in an article commenting on *Commonwealth of Australia v Amann Aviation* in (1992) 108 LQR 229. It is said that the assumption is not consistent with experience in that there are many unprofitable contracts, a point made by McHugh J in *Commonwealth of Australia v Amman Aviation* at pages 165 and 166. It is true that there are many unprofitable contracts. But it does not follow that the assumption leads to unrealistic results for the assumption is rebuttable by evidence. The important question is whether the defendant should bear the evidential burden of proof in this regard. The reasons why he should bear that burden have been explained by Chief Judge Learned Hand in *L Albert & Son v Armstrong Rubber* and by Hutchinson J in *CCC Films (London) Ltd v Impact Quadrant Films Ltd*. I am therefore not persuaded by Mr Brenton's first criticism, notwithstanding that it is supported by Professor Treitel.

50. I am however naturally troubled that Professor Treitel suggests that an award of reliance damages appears to be inconsistent with the principle in *Robinson v Harman*, that he suspects that the suggestion that such an award is consistent with that principle is a "verbal trick" and that there are in reality two different principles, which are recognised by English law, which cannot be welded into one. Those principles are, firstly, that an award of damages on an expectancy basis is designed to put the claimant in the position he would have been in had the contract been performed and, secondly, that an award of damages on a reliance basis is designed to put the claimant in the position he would have been in had the contract not been made. This is Mr Brenton's argument.

51. Mr Brenton illustrates this argument by observing that if a claim for reliance loss is to be explained as a claim for expectation loss it makes no sense to talk of a claimant having an *election* as to which loss he claims. And yet English law states that a claimant has such an election; see *Anglia Television Ltd v Reed* at pages 63 and 64 per Lord Denning. He submits that the need for an election shows that the two claims are fundamentally different.

52. However, the force of this criticism depends upon what is meant by an *election*. The criticism assumes that the right to elect between a claim for expectation losses and a claim for reliance losses is a right to elect between two inconsistent remedies or courses of action. An example of such an election is where, following a repudiatory breach, the innocent party must elect between affirming a contract and accepting the breach as terminating the contract. If, however, all that is meant is that a claimant may choose to frame his claim for damages on the reliance basis rather than on the expectancy basis, as suggested by Hutchinson J in *CCC*

*Films (London) Ltd v Impact Quadrant Films Ltd* at page 32, with the defendant having the opportunity to prove that the expenditure sought to be recovered would not in any event have been recouped because, for example, the contract was a loss making contract, then the right so to *elect* is not inconsistent with reliance losses being a form of expectation losses.

53. This approach to what is meant by an election in this context is reflected in certain observations in *Commonwealth of Australia v Amman* by Mason CJ and Dawson J at page 85:

"We do not regard the language of *election* or the notion that *alternative* ways are open to a plaintiff in which to frame a claim for relief as appropriate in a discussion of the measure of damages for breach of contract. In truth, as has been seen, damages for loss of profits and damages for expenditure reasonably incurred are simply two manifestations of the general principle enunciated in *Robinson v Harman*."

54. Reliance was also placed by Mr Brenton on certain observations in *Filobake Ltd v Rondo Ltd* [2005] EWCA Civ 563, in particular that there are "formidable objections" to running claims for loss of profits and wasted expenditure in the alternative (see para 64). However, only limited, if any, assistance can be gained from the dicta in this case. The relevant discussion took place in the context of the dismissal of an application to amend (made at the commencement of an appeal) to permit a claim for wasted expenditure in place of a claim for lost profits which had failed; see para 58. The claim was said to raise very difficult issues which the court did not decide but referred to in order to show that the application, if successful, would require a remission to the court of first instance and that such remission would "almost certainly result in return to this court, if not indeed to the House of Lords, not only to resolve uncertainties in the very sparse authority available on the *Cullinane* principle, but also to determine how that authority fits into the particular facts of this case"; see para 59. Thus the discussion did not resolve any legal issues. It merely posed problems which would have to be resolved at a later stage; see para 63.

55. I am not therefore persuaded that the right to choose or elect between claiming damages on an expectancy basis or on a reliance basis indicates that there are two different principles at work. Both bases of damages are founded on, and are illustrations of, the fundamental principle in *Robinson v Harman*, for the reasons explained by Chief Judge Learned Hand in *L Albert & Son v Armstrong Rubber Co*, by Berger J in *Bowlay Logging Ltd v Donmar Ltd*, by all members of the High Court of Australia in *Commonwealth of Australia v Amman*

*Aviation* and by the English courts in *C & P Haulage v Middleton* and *CCC Films (London) Ltd v Impact Quadrant Films Ltd*. Thus, notwithstanding my unfeigned respect for any opinion of Professor Treitel, I am unable to accept that there are two principles, rather than one, governing the law of damages for breach of contract.

56. Mr Brenton has a further criticism, namely, that there are many contracts where a party does not expect or aim to make a profit, such as where purchases are made for pleasure or for charitable purposes. He suggests that the expectancy basis would deny recovery of wasted expenditure in such cases. I disagree. In such cases the defendant will usually be unable to show that the expenses exceeded the benefit expected to be obtained from the contract and thus the expense will be recoverable as damages. This was recognised by Deane J in *The Commonwealth of Australia v Amman* at page 127:

"The presumption will not, however, be displaced . . . by the circumstance that the perceived 'benefit' which the plaintiff sought and for which he incurred the past expenditure is something which is of value only to the plaintiff or which, for some other reason, is not capable of being objectively valued in monetary terms."

57. I am therefore unpersuaded that the expectation loss principle cannot provide a rational and sensible explanation for the award of reliance losses. The reasons for regarding the expectation loss principle as explaining an award of reliance losses have been set out in American, Canadian, Australian and English cases. They are substantial reasons. Moreover, they illustrate that the principle in *Robinson v Harman* is what it has been declared to be, namely, the fundamental principle governing damages for breach of contract.

58. Mr Brenton submitted that there was no authority which concerned the position where, as a result of a breach and action taken to mitigate his loss, the claimant has suffered no "net" loss. For example, *C & P Haulage v Middleton* was concerned with a claimant who had made a bad bargain (where the lease which had been broken by the landlord was in any event determinable on one month's notice).

59. This appears to be true and is the reason why both parties accepted that there was no binding authority as to the question which the court has to decide. However, in circumstances where, for the reasons I have given, the weight of authority firmly suggests that an award of reliance damages is governed by the principle in *Robinson v Harman* I consider that to award substantial damages, measured by wasted expenditure, where the owners have, as a result of the charterers' breach, been able

to trade the vessel at the higher market rates and have "more than recuperated" their loss, would be wrong in principle. Such an award would place the owners in a better position than they would have been in had the contract been performed. Moreover, damages for breach of contract are intended to compensate for loss suffered and the owners have, as a result of their own efforts to mitigate their loss, suffered no loss. To ignore the benefits received by the owners as a result of their action to mitigate their loss would be contrary to the principles established by *British Westinghouse*.

60. Mr Brenton submitted that this reasoning was erroneous. His argument was as follows. The charterparty prevented the owners from being able to trade the vessel at the higher market rate; this was "the alternative employment sacrificed". As a result of the charterers' breach, which was accepted by the owners as terminating the charterparty, the owners were free to trade the vessel at the higher market rate. By doing so the loss inherent in the "alternative employment sacrificed" was expunged as from the date on which the charterers' repudiation of the charterparty was accepted and the vessel was employed on a substitute employment. But the prior expenditure wasted on preparing to perform the charterparty was not expunged. Applying that reasoning to the facts of the instant case the alternative employment sacrificed would have commenced on 15 January 2007, at the market rate of US\$21,347 per day. The substitute earnings in fact commenced on 5 February 2007 at US\$21,347 per day and expunged the earnings sacrificed from that date but did not expunge either the expenses incurred before that date or the earnings sacrificed before that date. These submissions were illustrated by two intriguing diagrams labelled TB 1 and TB 2.

61. Mr Brenton's reasoning is based upon the premise that as a matter of law when awarding damages to compensate for wasted expenditure the court does not compare the owners' actual position with the position the owners would have been in had the charter been performed. For he accepts that if one makes *that* comparison then the earnings arising from the substitute employment (at the market rate of US\$21,347 per day) will expunge not only the loss of earnings suffered as a result of non-performance of the charter (which would have been earned at the rate of US\$13,700 per day) but also the expenditure incurred before the substitute earnings commenced. It was on that basis that the arbitrators were able to say that the owners "did not, taking into account actual earnings, suffer any net loss in this case" and had "more than recuperated the losses they claim in this arbitration".

62. I consider that Mr Brenton's premise does not represent the law. The premise requires one to put to one side Baron Parke's principle in *Robinson*

*v Harman*. That would, for the reasons I have endeavoured to explain, be against the weight of authority in this and other common law jurisdictions. It follows that I am unable to accept that the reasoning based on *British Westinghouse* is erroneous.

63. Finally, Mr Brenton argued that the result of cases such as *C & P Haulage v Middleton* (bad bargain cases) need not be regarded as being founded on the principle that the claimant is put in the position he would have been had there been no contract, and therefore contrary to Baron Parke's principle in *Robinson v Harman*, because the result can be explained by saying that the expenditure was wasted, not by the breach of contract, but by the contract itself; see the reasoning of Fox LJ in *C & P Haulage v Middleton* (and also the reasoning of Berger J in *Bowlay Logging Ltd v Donmar Ltd*). This is true but the causation argument is entirely consistent with the principle in *Robinson v Harman*. It puts the claimant in the position he would have been in had the contract been performed.

#### Conclusion

64. I am therefore unpersuaded by Mr Brenton's submission that the tribunal's decision was correct in law, notwithstanding the obvious care and skill with which his submission was presented. I am persuaded that the tribunal's decision was wrong in law. The tribunal said that:

"to take the charterers' position and look at the net overall position is to mix this basis of claim with a claim based on the difference between contract and market rates inasmuch as the latter contains within it the concept of what the vessel should have earned overall from substitute employment as compared with what would have been earned under the Charterparty."

65. The tribunal's error was to regard a claim for wasted expenses and a claim for loss of profits as two separate and independent claims which could not be "mixed". But the weight of authority clearly shows that both claims are illustrations of, and governed by, the fundamental principle stated by Baron Parke in *Robinson v Harman*. That principle requires the court to make a comparison between the claimant's position and what it would have been had the contract been performed. Where steps have been taken to mitigate the loss which would otherwise have been caused by a breach of contract that principle requires the benefits obtained by mitigation to be set against the loss which would otherwise have been sustained. To fail to do so would put the claimant in a better position than he would have been in had the contract been performed.

66. It follows that the appeal must be allowed and the award set aside.

#### *The owner's cross-appeal*

67. The owners claimed as part of their wasted expenditure claim the earnings they lost between 15 January and 5 February 2007. They calculated that if they had not kept the vessel available to perform the charterparty the vessel would have arrived in West Africa by 15 January and would have been able to earn hire at the market rate. As it was the vessel was unable to do so until 5 February. The hire thereby lost amounted to US\$448,300.65.

68. The tribunal refused to allow this claim. The tribunal had two reasons for dismissing the claim. First, it was said that a claim for wasted expenses could not include earnings the owners might have earned had they not spent time making the vessel ready for the charterparty. Second, it was said that the vessel would not have earned anything during the 21-day period and so there was no loss.

69. It is common ground that if the charterers' appeal succeeds then the owner's cross-appeal must fail. Thus, in the light of my decision to allow the charterers' appeal, the owners' cross-appeal must be dismissed. It is therefore unnecessary for me to say anything more.

70. However, in case any further appeal takes place I will briefly indicate what my decision would have been had I dismissed the charterers' appeal and accepted Mr Brenton's submissions with regard to that appeal. I would have accepted Mr Brenton's submission that claims based upon protection of a party's negative interest may include not only compensation for wasted expenditure but also compensation for a wasted decision to forego earnings at the market rate. There is no reason to differentiate between the two losses. Compensation for each would be required to put the owners in the position they would have been in had the charterparty not been made. I would therefore have held that the tribunal's first reason was wrong in law. The tribunal's second reason would also have been wrong in law because it would have been inconsistent with Mr Brenton's submissions on the charterers' appeal (which, for this purpose, I am assuming I would have accepted).

71. I would not have accepted Mr Young's submission that the owners were merely keeping their options open to sue for specific performance and cannot claim damages for what they lost in so doing. He relied upon a statement by Brightman J in *Lloyd v Stanbury* that if a buyer (of freehold property) treats a contract as repudiated he is not entitled to recover an expense which he only incurred because he was at that time keeping his option open to sue for specific performance.

72. I was not persuaded that the two situations were comparable. Firstly, Brightman J allowed

recovery of expenditure in anticipation of the execution of the contract. That would appear to allow recovery of expenses incurred or earning opportunities lost by the owners in anticipation that the charterparty would be performed. The tribunal allowed as wasted expenses the agency fees incurred at Cape Town "while the vessel waited to learn whether she was to perform the Charterparty or not". Similarly the tribunal allowed as wasted expenses the bunkers consumed at Cape Town: "... this was plainly an expense incurred for the purposes of keeping her ready to perform the Charterparty ...". Secondly, specific performance of a charterparty is unlikely whereas it is common in contracts for the sale and purchase of land. Thirdly, in the present case the charterparty was not treated as terminated until 29 January. Until the charterers' repudiation had been accepted on 29 January the owners were obliged to keep the vessel ready to perform the charterparty. By the time the repudiation had been accepted the opportunity to earn the

market rate of hire from 15 January had been lost.

73. Mr Young further submitted that the owners lacked a finding that the vessel would have been employed from 15 January. There was evidence from the owners that the vessel would have been employed immediately on her arrival at West Africa. There was, however, no finding to that effect. Mr Brenton accepted that there was a question as to whether the owners could claim for the period from 15 to 19 January and suggested that remission was the appropriate remedy. In those circumstances I would have ordered that the award be remitted to the tribunal for the appropriate findings to be made and for the lost hire to be calculated.

*Summary of conclusions*

74.

- (i) The charterers' appeal is allowed.
- (ii) The owners' cross-appeal is dismissed.