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Market damages or compensation?

*Professor Michael Bridge**

ABSTRACT

This paper deals with the tension between the compensatory role of damages and an approach to damages (the market approach) that calculates damages pragmatically with an eye to ease of assessment. The market damages approach, as it applies, for example, to a buyer's damages for non-delivery, closes out the contract according to the difference between the contract price and the market price at the due date of performance. It does not require the buyer to purchase substitute goods. In recent times, this market rule has been explained as based on mitigation of damages, which is contestable. Increasingly, moreover, there are signs of a movement away from the market rule in favour of a conventional approach looking to the particular buyer's actual loss rather than its presumptive loss. It has yet to be seen whether this movement will overturn the standard view that the buyer's damages will not take account of the buyer's position in sub-sales concluded before the seller's breach. This standard view applies also in the case of voyage charterparties. Finally, for sale and charterparties alike terminated before the performance date, there is a movement towards looking at contingencies so as to reduce a seller's or shipowner's damages to the extent that the plaintiff would not have been able to perform in full or at all after the date of the defendant's repudiation of the contract.

Keywords: damages, market, mitigation, sub-sale, charterparty, contingencies, non-conforming, compensation

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1 Introduction

1.1 Sale and charterparties

In the reported case law on damages for breach of contract, a close kinship can be detected between sale of goods cases involving a marine element and charterparty and carriage contracts. At numerous points, the law relating to sale of goods intersects with the law relating to charterparties and similar maritime contracts. In both contracts, the market plays a prominent part, and in both, too, the question of discounting damages in respect of post-termination contingencies has presented itself. Despite the plentiful case law, much of it located in the higher courts, there remains a considerable measure of uncertainty in the assessment of damages. Broadly, taking non-delivery as an example, damages may be set according to an abstract or a concrete approach. The abstract approach would look, not at any substitute transaction entered into by the disappointed buyer, but rather at the market value of the contract goods on the due date of performance in comparison with the contract price. The concrete approach, on the other hand, would look to a substitute purchase by the disappointed buyer and compare that with the contract price. The Sale of Goods Act favours the first of these approaches, although not without exceptions, and there is also some evidence in recent years of a diminishing judicial enthusiasm for the market rule. Article 2 of the Uniform Commercial Code and the UN Convention on the International Sale of Goods look first to any substitute transaction concluded by the buyer, before turning to the 'current' (market) value if no substitute transaction has been concluded. The two approaches have this in common: there is no positive requirement that the buyer conclude, or attempt to conclude, a substitute transaction.¹ The buyer is free, on a rising market, to cash in the contract, in effect converting a contract for physical goods into a market differences contract, and on a falling market to enjoy its good fortune in capturing an opportunity to enter into a more favourable market at a price lower than the contract price.

¹ I shall deal with mitigation of damages below.

1.2 Statutory provisions

We turn now to the location of the market rule in the Sale of Goods Act.² In sections 50 and 51, dealing with damages for non-acceptance by the buyer and non-delivery by the seller, liability is assessed in accordance with the first limb of the rule in *Hadley v Baxendale*,³ in accordance with direct and natural consequences flowing in the ordinary course of events from the breach. In both instances, the tacit assumption is that the contract has been terminated for breach. Presumptively, the Act then goes on to provide that this measure calls for damages to be assessed as the difference between the sale price and, if there is an available market, the market price prevailing on the due date of delivery. Apart from the two cases of non-delivery by the seller and non-acceptance of the goods by the buyer, there is no reference in the Sale of Goods Act to the market in other breach cases, namely, late delivery of the goods and non-conforming goods accepted by the buyer. In both instances, the contract remains on foot and, though no statutory reference is made to the market, the market rule plays a prominent part. Despite its location in the statute as a presumptive rule in non-delivery and non-acceptance cases, the market rule has in recent years been dismissed as a mere ‘technique’ for the settlement of damages.⁴ This does not do justice to the force of the rule or to its legitimate placement in the Act. A final introductory remark is that the Sale of Goods Act, while dealing with remoteness of damage, does not contain a rule on factual causation as opposed to legal causation (or remoteness). If the Act is taken at face value and the market rule is applied, then this could lead to damages where the plaintiff has suffered no loss. It is perfectly understandable that courts might balk at such an outcome, especially in view of the increasing emphasis being laid on the compensatory role of damages.

² The UK and Singapore statutes may for present purposes be treated as identical.

³ (1854) 9 Ex 341.

⁴ *Bunge SA v Nidera NV* [2015] UKSC 43, [2015] Bus LR 987, [2015] 2 Lloyd’s Rep 469, [16]; *Shri Bajrang Power & Ispat Ltd v Steel Corp Ltd* [2025] SGHC 107, [8]. See also *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm), [115], stressing that the market rule is not a free-standing rule.

2 The market: existence and alternatives

2.1 Supply and demand

The existence of a market, not of course to be understood as a physical location where there occurs face-to-face and open-outcry trading,⁵ turns upon a sufficiency of supply and demand. This has been expressed as ‘sufficient traders who are in touch with each other’, even if the goods are of a character so specialised that they are not traded on the exchange where goods of that generic type are traded.⁶ Taking the case of non-acceptance by the buyer, it has been said that the existence of one buyer on the day prepared to pay a fair price will suffice if the seller actually offers the goods for sale, but otherwise, there has to be a sufficiency of traders in touch with each other.⁷ Nevertheless, it has also been said that ‘[o]ne sale does not make a market, even if there was one such sale’.⁸ The notion of a fair price is not easy to pin down with exactitude, but it should not allow a plaintiff seller to dump unwanted goods at a distress price or a plaintiff buyer to pay an exorbitant price. A departure, in fact, by a plaintiff in distressed circumstances from a fair price would have to be justified with some difficulty in accordance with the rule of remoteness of damage.

It should not necessarily be thought that there is a sharp distinction between recourse to the market in an abstract sense and recourse to a concrete assessment of damages based upon an actual substitute contract. Where such a substitute transaction takes place, the difference between the market price and the contract price may be slight or non-existent. Indeed, it has been observed that ‘a reasonable substitute sale ... or purchase ... will generally be the basis of the compensatory damages available’.⁹

⁵ The latter is still conducted on the London Metal Exchange.

⁶ *ABD (Metals and Waste) Ltd v Anglo Chemical & Ore Co Ltd* [1955] 2 Lloyd’s Rep 456, 466 (zinc of this high level of purity not traded on the London Metal Exchange).

⁷ *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd (No 2)* [1990] 1 Lloyd’s Rep 441, 447.

⁸ *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd’s Rep 509, 530.

⁹ *Sharp Corp Ltd v Viterro BV* [2024] UKSC 14, [2024] Bus LR 871, [2024] 1 Lloyd’s Rep 568, [86]–[87]. In *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 2 Lloyd’s Rep 1, [70], an arm’s length deal in the market was considered the best evidence of market value, although it did not of itself fix the market value, likewise *Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc* [2022] SGHC(I) 15, [2022] 5 SLR 1, [4].

2.2 Fair price

What amounts to a fair price is far from easy to determine, but it ought to take some account of any difficult position in which the plaintiff has been placed by the defendant as a result of the breach and termination of the contract. Despite the market rule being presumptively set at the performance date, it has on at least one occasion been manipulated in dramatic circumstances in a sensible, pragmatic way in aid of determining a fair price. In *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No 2)*,¹⁰ the buyer of a large quantity of tin, including one contract for 7,755 tonnes, defaulted. At a later date, trading in the market was suspended. The tin market was in a state of crisis, which gave rise to what was termed an 'overhang' in the market, with supply greatly exceeding demand. On the date taken by the court as the due date of assessment, it was agreed between the parties that there was a market for the tin. Nevertheless, the requirement of a fair market price, in circumstances where a disposal of the whole would have severely depressed the price of the tin, required an account to be taken of the value of the tin if notionally disposed of over a period of weeks after negotiations. This was tantamount to a spreading of the date of reference to the market.

2.3 Date of reference

*Shearson Lehman*¹¹ thus displays a manipulation of the market rule insofar as it deals with the date of resort to the market on the so-called breach date, classically determined as the due date of performance or the last performance date in an established delivery range rather than the actual date when the defendant is in breach.¹² Further, well-established departures from the breach date include the plaintiff who reasonably presses for performance after the breach date,¹³ the non-performer who requests and receives forbearance,¹⁴ and the case of non-conforming goods, initially accepted, that are later rejected.¹⁵

¹⁰ Above (n 7).

¹¹ Ibid.

¹² The difference between these two dates may be seen in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 (HL), where the House of Lords, in a case involving a default clause, assessed damages as of the date immediately after the due delivery date.

¹³ *Carbopego-Abastecimento SA v AMCI Export Corp* [2006] EWHC 72 (Comm), [2006] 1 Lloyd's Rep 736; *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm).

¹⁴ *Hickman v Haynes* (1875) LR 10 CP 598.

¹⁵ *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459.

2.4 Spread dates

A further point about the market price is illustrated by a recent Singapore Court of Appeal decision. *The Maersk Katalin*¹⁶ makes the point that in market conditions, there will be no difference between a seller's price and a buyer's price. More complex issues are presented when the price in the contract is settled, as commonly is the case with oil contracts, to a spread of prices over a period related to the due date of delivery.¹⁷ A spread of prices over a date range may also be thought appropriate if the market rule is relaxed to allow for necessary delay caused by the nature of the market, or to make allowance for a plaintiff having to enter the market at short notice.¹⁸ In more normal circumstances, a spot price date focusing on a single notional transaction will be more appropriate.¹⁹

2.5 Whereabouts of market

Perhaps a more difficult point than timing concerns the whereabouts of the relevant market, which can also raise challenging issues about the identity of the contract goods. This is an issue that presents itself most acutely in cases where the plaintiff is an intermediate trader dealing with goods only in their disembodied, paper form. Three examples indicate the degree of difficulty presented here. *The Golden Rio*²⁰ concerned an insolvency clause in a contract triggered by an insolvency event. The contracts (seller to buyer and buyer to sub-buyer) had to be closed out 'at the market price then current for similar goods'. The contracts in question were on FOB terms for a quantity of soya beans shipped in July at the Brazilian port of Rio Grande and destined for Belgian discharge ports (Antwerp/Ghent). When the clause came to be implemented in late July, there was no longer an FOB Brazil July market, so no 'current' FOB price was available. Furthermore, FOB August goods were non-compliant with the terms of the contract. The arbitral board had earlier resisted the buyer's invitation to look at the futures market in Chicago, and the onshore market in Belgium was at no time

¹⁶ *Winson Oil Trading Pte Ltd v United Overseas Bank Ltd (The Maersk Katalin)* [2025] SGCA 42.

¹⁷ As reported by Platt's (now S&P Global Commodity Insights), a supplier of energy and commodity information, including benchmark prices. It is common in oil contracts for the price to be agreed in advance by reference to a future spread of prices in the market.

¹⁸ See *BV Oliehandel Jongkind v Coastal International Ltd* [1983] 2 Lloyd's Rep 463, 470. Or if the nature of the goods in sluggish market conditions require a lengthy postponement of the date: *Singapore Airlines Ltd* (n 9) (9-12 months for sale of airframe).

¹⁹ As in *The Maersk Katalin* itself (misdelivery by the carrier).

²⁰ *Esteve Trading Corp v Agropec International (The Golden Rio)* [1990] 2 Lloyd's Rep 273.

a considered possibility. Instead, the court did the next best thing to an impossible FOB July price. Since goods originally shipped on FOB terms were commonly at a later date resold in transit on CIF terms, the court turned to the relevant CIF price and stripped out the elements of insurance and carriage to arrive at an equivalent FOB value. It noted that a CIF cargo might be expected to arrive in Belgium at about the same time as an FOB cargo.

*The Caloric*²¹ is a CIF case where the court both declined to apply the market rule and also resisted a valuation of the contract goods on shore at the discharge port. The seller was the time charterer of the vessel carrying a CIF Beirut cargo of Argentine maize and was in breach for failing to present documents to the buyer. As charterer, the seller ordered the vessel away when, because of hostilities on shore in Beirut, the goods could not be discharged there. The demurrage payments due to it from the buyer were exceeded by the hire payments that the seller had to pay under the charterparty. The prevailing CIF market value of the goods was in excess of the contract price, and the onshore value of the goods in Beirut higher still. Confirming the arbitral board below, the court agreed that the goods to be valued were those actually on board the vessel, which, in the circumstances, were of no use to anybody. Taking account of future demurrage that the buyer would have had to pay the seller but for the seller's breach, the goods were valueless, and the buyer was entitled only to nominal damages. It should also be noted that, unless otherwise agreed, a CIF seller does not guarantee the discharge of the goods at the named port. Its duty is to secure a contract of carriage to the named port.²²

A more recent example, *Sharp Corp Ltd v Viterro BV*,²³ actuated by a firm commitment to the compensatory principle, concerned peas and lentils shipped in Vancouver on C&FFO terms for carriage to the private Indian port of Mundra. After landing the goods, the buyer repeatedly defaulted on payment and left the seller holding the goods in store in India. Prior to the buyer's final default, the Indian Government had introduced substantial customs duties, the effect of which was to increase the value of the contract goods in store. Unable to establish the availability of a similar C&FFO contract for goods to be shipped from Vancouver

²¹ *Pagnan (R) & Flli v Lebanese Organisation for International Commerce (The Caloric)* [1981] 2 Lloyd's Rep 675.

²² *Congimex Cia Geral SARL v Tradax Export SA* [1983] 1 Lloyd's Rep 250.

²³ Above (n 9). This was a default clause case, the court considering the clause as having the same effect as s 50 of the Sale of Goods Act.

at a later date than the contract date, the seller sought instead to use an FOB Vancouver price as the basis for establishing a market loss claim based on the 'actual or estimated value of the goods'.²⁴ In so doing, it sought to take the benefit of the customs windfall as well as the C&FFO measure (as modified) of market loss. This was refused, and the defaulting buyer was awarded the benefit of the customs measure when the court valued the goods in the seller's hands according to their onshore value.²⁵ The goods to be valued were those in the hands of the seller on shore even though it had not been the commercial purpose of the seller to deal with them on shore. Had it been a case of the seller defaulting, an appropriate basis for establishing damages could well have been the cost to the buyer, who was not an intermediate trader, of acquiring similar goods on shore.²⁶

2.6 No market

Where a reference to the market cannot be made in the absence of a sufficiency of buyers and sellers, as is the case with highly specialised goods too thinly traded for there to be a market in them, resort will be had to some other measure. A variety of possible approaches is evident here, including, in a case of non-delivery, the buyer's expected profit from the transaction.²⁷

3 The market rule and mitigation of damages

3.1 Mitigation rules

It is frequently said that the market rule embodies the principle of mitigation of damages,²⁸ which has been said, alongside compensation and working together with it, to be a fundamental principle of the law of damages.²⁹ Mitigation breaks down into three sub-rules: first, what the plaintiff should have done to avoid or abate a loss arising out of a breach of

²⁴ The language of the default clause.

²⁵ Because Mundra was 'the obvious market in which to sell the goods': above (n 9), [100].

²⁶ See the charterparty case of *Ströms Bruk Aktie Bolag v Hutchison* [1905] AC 515 (HL), where the carrier failed to lift a CIF Cardiff contract and the market reference was taken for goods on shore in Cardiff.

²⁷ For example, *Gatoil International Inc v Tradax Petroleum Ltd* [1985] 1 Lloyd's Rep 35 (Belayim crude oil); *Lesters Leather & Skin Co Ltd v Home and Overseas Brokers Ltd* (1948) 82 Ll L Rep 202 (CA) (snakeskins in London).

²⁸ *Sharp Corp Ltd* (n 9), [90], relying on *Bunge SA v Nidera NV* (n 4); *Stanford International Bank v HSBC Bank* [2022] UKSC 34, [2023] AC 761, [43].

²⁹ *Sharp Corp Ltd*, *ibid*, [83]; [86].

contract; secondly, what in fact the plaintiff did in response to the breach and whether this should be factored into the assessment of damages; and thirdly, whether the cost of any action taken by the plaintiff to minimise or avoid loss should be charged against the defendant. If the court were to take account of any substitute transaction concluded by the plaintiff, the second sub-rule might fairly be said to be engaged. Where no substitute transaction occurs, the first sub-rule comes into play if mitigation is considered to be the appropriate explanation of the market rule. Now, the market rule does not, as such, pass judgment upon what the plaintiff should have done. There is no requirement that a seller should, in fact, resell or that a buyer should, in fact, purchase alternative goods. In a sense, the market rule, when applied, fictitiously assumes that these actions have taken place.³⁰ There is a further odd feature of the market rule. It looks to the market on the date of due performance, taken to be the last date if there is a shipment range, and not on the first business day afterwards when the defendant can be considered to be in breach, or on a later date still, taking account of the time needed to make a sensible business decision whether to enter the market. In all, the assessment of damages according to the market in the Sale of Goods Act is not a good fit with mitigation of damages and a better explanation should be sought as will be seen below.

3.2 Anticipatory repudiation

An exceptional case where mitigation can with conviction be said to be in play is where the defendant repudiates the contract before the due performance date and the plaintiff, although entitled to stay its hand, terminates the contract. The effect of termination is not to vary the contractual performance date. The Sale of Goods Act makes no provision for this case. The date of assessment is brought forward, and the plaintiff is given time, not much time in an active market, to conclude a substitute transaction.³¹ But the plaintiff is not obliged to accept the anticipatory repudiation and may await the due performance date.³²

³⁰ *POP Holdings Pte Ltd v Teo Ban Lim* [2025] SGCA 51, [63].

³¹ *Kaines (UK) Ltd v Österreichische Warengesellschaft mbH* [1993] 2 Lloyd's Rep 1 (CA).

³² *Tai Hing Cotton Mill v Kamsing Knitting Factory* [1979] AC 91 (PC), 104.

3.3 Private speculation

Returning now to the second mitigation sub-rule, it might be thought a resale or a cover purchase concluded by the plaintiff should be assessed according to the circumstances in which the plaintiff was placed, so that time might be needed to effect the substitute transaction. The stretching of the market date in unusual circumstances referred to earlier³³ does not, as we have seen, provide a basis for a routine delay for a plaintiff to consider its position. Nor should the position be different if, in fact, the plaintiff makes a substitute transaction. In *Sharp Corp Ltd v Viterro BV*, Lord Hamblen JSC makes the point that even a reasonable delay arising from a business decision requires its consequences to be borne by the plaintiff: it is a 'voluntary and independent commercial decision and its consequences are irrelevant to the damages payable, however well or badly it works out'.³⁴ This obliquely brings into play what may be thought to be a better basis for the market rule. When a fixed date for its application is established, all that subsequently happens in the market is treated as a matter of speculation. The plaintiff who delays is pursuing a private speculation and cannot expect the defendant to pay for losses, nor be required to credit the defendant with any benefits, arising out of the delay. The mitigation approach works best when a loss may be diminished or even avoided altogether. But markets are not like a burning building calling for prompt action. They go both up and down, and the idea of speculation has considerable explanatory power.³⁵

This discussion of mitigation in sale of goods contracts is closely related to the rules of assessment in time charterparty cases. Note, however, that sale of goods contracts normally call for performance on a stated date or within an agreed range. Time charterparties call for continuing performance over a period, often a lengthy one. In such cases, where a charterparty has been terminated before running its course, damages will be assessed according to the market rate for the balance of the charterparty period.³⁶ Any delay in

³³ *Shearson Lehman Hutton Inc* (n 7).

³⁴ Above (n 9) [95].

³⁵ See *Bunge SA v Nidera NV* (n 4), [80] ('The speculation which way the market will go is the speculation of the claimant': Lord Toulson SCJ); *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC); *Glory Wealth Shipping PTE Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819 (Comm), [2011] 2 Lloyd's Rep 370, [17]; *POP Holdings Pte Ltd v Teo Ban Lim* [2025] SGCA 51, [62].

³⁶ *Koch Marine Inc v D'Aica Societa di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75, 87.

concluding a new charterparty will again be treated as a matter of private speculation.³⁷ The position is the same whether the repudiatory breach was committed by the shipowner or the charterer.³⁸ Reference to the market has nevertheless been described as ‘deemed mitigation’.³⁹ Where perhaps sale of goods and charterparty contracts part company is that the market approach in the latter case has also been explained as a matter of fairness between the parties.⁴⁰ Given the way the mitigation rule in general makes a considerable concession to contract breakers, even in those cases where they retain the capacity to perform, it may be thought that not too much should be made of this additional explanation.

4 The problem of uncertain future losses

4.1 Market rule and compensation

The market rule may have its attractions, in that it is credited with providing both certainty and ease of application,⁴¹ besides providing a way for dealing with traders doing business on a wide front with multiple co-contractants, so that it is difficult to match a sale contract with a particular onsale. There is, however, a degree of discomfort in reconciling the market rule with the compensatory role of damages.⁴² Two cases involving charterparties and sale of goods, both concerned with uncertain future losses and involving a repudiatory breach before the scheduled date for performance, indirectly pose a challenge to the market rule.

4.2 Charterparties and contingencies

The first of these cases is *The Golden Victory*,⁴³ where in substance the question was whether shipowners were entitled to damages representing the income stream that had now been dammed when they accepted a repudiatory breach committed by the defendant charterers. As seen earlier, the orthodox approach in this case would have been to compare the future

³⁷ Ibid, 89.

³⁸ *The Wren* (n 35), [16].

³⁹ Ibid, [18].

⁴⁰ *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353, [10].

⁴¹ *OneSteel Manufacturing Pty Ltd v Bluescope Steel (AIS) Pty Ltd* [2013] NSWCA 27, (2013) 85 NSWLR 1, [172]; *Shearson Lehman Hutton Inc* (n 7), 443 (‘certainty and objectivity’).

⁴² As is evident in a case concerning the late redelivery of a time-chartered vessel: *Hapag-Lloyd AG v Skyros Maritime Corp* [2024] EWHC 3139 (Comm), [2025] 2 Lloyd’s Rep 260 (appeal outstanding).

⁴³ *The Golden Victory* (n 40).

charterparty income stream with the market rate prevailing at the date the charterparty was terminated. This would have been equivalent to treating the shipowners' entitlement to this future income stream as though it were a type of capital asset instead of something to be earned by the continuing availability of the ship over the balance of the charterparty period.⁴⁴ The same issue would have arisen if this had been the case of a long-term contract for the supply of goods on an instalment basis. The market damages rule, when applied in its purest form in a case of this nature, would treat the plaintiff as having a right to damages crystallised at the date the contract is terminated for breach without looking into the future to see whether such damages represented the actual loss suffered by the plaintiff. Departing from this rule, the majority decision of a starkly divided House of Lords⁴⁵ accepted the need to take account of contingencies affecting the future performance of the contract by the plaintiff.⁴⁶ This was consistent with Lord Blackburn's view that damages should place a damages plaintiff in the position he occupied before the occurrence of a wrong.⁴⁷

4.3 Vested contingencies

*The Golden Victory*⁴⁸ concerned a time charterparty for seven years+/-, with a clause permitting the charterer to cancel in the event of war in Iraq. About a third of the way through the charterparty, when the market for chartered vessels was depressed, the charterers repudiated the charterparty, and the shipowners accepted the repudiation. In the course of a continuing arbitration, war did indeed break out about two-thirds of the way through the seven-year term. The charterers would then probably have cancelled so as to rid themselves of an expensive charterparty had they not already repudiated it.⁴⁹ The disagreement between the majority and the minority in *The Golden Victory* turned on whether the contingent

⁴⁴ In the Court of Appeal in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2005] EWCA Civ 1190, [2006] 1 WLR 533, [24], Lord Mance said: '[T]he owners were never entitled to absolute confidence that the charter would run for its full 7 year period. They never had an asset which they could bank or sell on that basis. There is no reason why the transmutation of their claims to performance of this charter into claims for non-performance of the charter should improve their position in this respect'.

⁴⁵ Following *Bwllfa and Merthyr Dare Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL). See also *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382 (HL), 392 (Lord Diplock); *The Wren* (n 35).

⁴⁶ See also *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA).

⁴⁷ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, the notion of a wrong being broad enough to embrace a contract claimant.

⁴⁸ Above (n 40).

⁴⁹ In the Court of Appeal in *The Golden Victory* (above, n 44), [23], Lord Mance said that the charterers would 'probably' have cancelled in the event of war.

outbreak of war at the breach date had to be taken into account if, in fact, it had come to pass by the time damages came to be assessed. This was one of two ways in which a contingency might be a factor in cases of this kind: it might still be prospective in a long-running contract when damages were finally assessed, or it might, as in *The Golden Victory*, already have vested at that time. The majority in the House of Lords, applying a well-established principle that the court should not close its eyes to what in fact had happened by the date of assessment,⁵⁰ favoured taking account of the outbreak of the war that had occurred, in which event the charterer would probably have cancelled the charterparty had it still been on foot. The minority, seeing a compelling need for certainty in commercial cases⁵¹ and concerned about delays in dispute settlement consequent upon defendants waiting upon events, would not have taken account of the outbreak of war as a vested contingency but would have considered the possibility of its occurrence *ex ante* as of the date the charterparty was terminated. Because of the unsettled conditions in the Middle East, the shipowners could hardly be confident that the charterparty would have run for the full seven-year term.

The majority were surely correct in not confining themselves to the position as of the date when the charterparty was terminated. The shipowners were entitled to their contractual expectancy, but that entitlement did not require them to be placed in a fictitious pre-breach position, benefiting from a rule that adverse future contingencies should be disregarded.

4.4 Non-vested contingencies

Less attention was paid in the case by the majority to the alternative possibility of contingencies that had not vested by the date damages were quantified. This was deemed to be the case by the minority when they disregarded the fact of an actual vesting of the contingency. There was common ground among all their lordships that, in a proper case, the market rule of damages, to be assessed once and for all on the date the contract was terminated for breach, might be set aside. The market rule is concerned with the characterisation and measurement of a present loss. But the extent to which prospective contingencies might be taken into account was expressed in different language by the

⁵⁰ *Bwllfa and Merthyr Dare Collieries (1891) Ltd v Pontypridd Waterworks Ltd* (n 45).

⁵¹ On the need for commercial certainty to yield to justice where the latter is preponderant, see *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2021] SGCA 97, [2022] 1 SLR 302, [143].

majority and the minority. Taking a stricter approach, the minority, prepared to take account of the outbreak of war as a prospective contingency as of the date of assessment, would have required more than an 'outside chance', seeking instead something that was at least 'likely but not certain'.⁵² The majority would have accepted the laxer standard of a 'real possibility'.⁵³ Neither majority nor minority would have countenanced considering outside, speculative contingencies. The majority approach, it is submitted, is the one that is most consistent with the treatment of contingencies in the general law.

4.5 Sale and contingencies

The issue of contingencies is less likely to present itself in sale of goods cases. The great bulk of reported cases do not call for performance over an extended period. In *The Golden Victory*,⁵⁴ doubts were expressed even by the majority about the application of the reasoning in that case to 'one-off' sale of goods contracts.⁵⁵ Nevertheless, the Supreme Court in *Bunge SA v Nidera NV* established in no uncertain terms that the approach in *The Golden Victory* applied also to sale of goods contracts, whether concluded as one-off contracts or on instalment terms.⁵⁶ In a case involving the sale of goods on CIF terms, where the buyer unlawfully refused to pay against a tender of conforming shipping documents and the seller

⁵² Above (n 40), [22] (Lord Bingham) with whom Lord Walker concurred. Both Lord Bingham, *ibid*, [22] and Lord Walker, *ibid*, [45], read the arbitrator's finding of the chance of war, judged as at the breach date, as one of a bare possibility when, it is submitted, the more natural way to read his finding was that war was less than a 50 per cent possibility. On prospective probability, a stricter approach is taken in other cases. See *The Mihalios Angelos* (n 46), 210 ('predestined to happen'); *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)* [2000] 2 Lloyd's Rep 37, 44 ('inevitably'); *North Sea Energy Holdings v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483 (CA), 496 ('predestined').

⁵³ Above (n 40) (Lord Scott, with whom Lords Brown and Carswell concurred); *Tele2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ 9, [75] ('more probable than not'). A broader and surely excessive approach was taken in *The Mihalios Angelos* (n 46), 196, by Lord Denning MR ('all contingencies which might have reduced or extinguished the loss').

⁵⁴ Above (n 40).

⁵⁵ *Ibid*, [35] (Lord Scott: 'In cases ... where the contract for sale of goods is not simply a contract for a one-off sale, but is a contract for the supply of goods over some specified period, the application of the general rule may not be in the least apt'). The invitation laid down by Lord Scott had prior to *Bunge SA v Nidera NV* been accepted in *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi Pvt Ltd* [2010] 1 SLR 573 but rejected in *Flame SA v Glory Wealth Shipping Pte Ltd (The Glory Wealth)* [2013] EWHC 3153 (Comm), [2014] QB 1080.

⁵⁶ Above (n 28). Cf *Classic Maritime Inc v Limbungan Makmor Sdn Bhd* [2019] EWCA Civ 1102, [2019] Bus LR 2854, [2020] 1 Lloyd's Rep 178. For an extensive discussion of *The Golden Victory* and *Bunge SA v Nidera NV*, see *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2021] SGCA 97, [2022] 1 SLR 302, [132]-[143]. For limits on the assessment of contingencies in the case of facts known to the appellate court but not to the trial courts, see *iVenture*, *ibid*, [144]-[152], where a reference to 'evidence of subsequent events which falsify basic assumptions common to both side' is said to be permissible.

accepted the buyer's repudiation,⁵⁷ Lord Diplock had earlier expressed the view that, if a claim could later have been made against the seller in respect of the goods themselves, then the damages thus recoverable by the defendant buyer should be offset against the seller's claim for the buyer's failure to take up the documents. It is an unusual feature of CIF contracts that the enforcement of a seller's physical duties, relating to the shipment of conforming goods, is held in suspense pending the documentary exchange, so that the buyer may not treat a breach of the seller's physical duty as a repudiatory breach justifying its own refusal to pay against conforming documents.⁵⁸ This encourages a seller to commit itself to the commercial risks involved in the shipment of goods for marine carriage. The seller's breach, in a case of this nature, is nevertheless a past breach. The significance of *Bunge SA v Nidera NV*,⁵⁹ however, is that it looks to the future in determining the extent of the defendant's liability in damages. The case concerned a seller that, by a matter of several days, had prematurely repudiated its duty concerning a single shipment of goods at a time when the Russian Government had announced the passing of a resolution prohibiting export during the future eight-day shipment range. The seller's action was premature in that the prohibition had not yet come into effect. The buyer had accepted the seller's repudiatory breach, and then the prohibition of export had been duly implemented. This contingency having occurred when performance would have fallen due under the contract, the seller had lost nothing as a result of the buyer's repudiatory breach. Damages were therefore to be assessed as a nominal amount. The decision was therefore in line with Lord Blackburn's well-known statement that a plaintiff is to be put in the position he occupied at the time the wrong occurred.⁶⁰

There is one final point to be made on contingencies. Unless a significant barrier is erected to entry into the world of discounting damages, all contracts involving future non-performance, for compensation purposes, may be converted into contracts for a chance. There is evidently a need for some threshold of probability to be crossed before damages are to be discounted for prospective contingencies in order to have a dampener on speculative litigation. This

⁵⁷ *Berger & Co v Gill & Duffus SA* (n 45) 392.

⁵⁸ *Ibid.*

⁵⁹ See above (n 28).

⁶⁰ *Livingstone v Rawyards Coal Co* (n 47) 39.

would hardly be desirable if the principle of the binding force of contracts is to be taken seriously.

5 Non-conforming goods and the market

5.1 SGA section 53

Section 53, dealing with damages for breach of warranty in the case of non-conforming goods, applies where the contract is not terminated for breach. Where, however, the breach is so serious that the buyer terminates the contract, this is treated as a case of non-delivery under section 51. Section 53 makes no reference to the market. It refers instead to the difference in value between what the goods ought to have been worth had they complied with the contract and what, in fact, they were worth at the time of delivery as a result of the breach of contract.⁶¹

5.2 Market approach and breach of warranty

Consider now two competing Court of Appeal decisions. In *Slater v Hoyle & Smith Ltd*,⁶² the buyers purchased unbleached cloth which turned out to be defective. Before purchasing the cloth, the buyers had contracted to onsell it as bleached cloth. The defect in the cloth remained after it had been delivered under the onsale contract as bleached cloth, but despite the complaints of their sub-buyers, the buyers retained the price that the sub-buyers had paid. The market price for unbleached cloth having fallen, the buyers recovered from the sellers damages representing the difference between the warranty value and actual value of the goods delivered. This was because the buyers were reselling bleached cloth, and so were not dealing in the same article supplied by the sellers.⁶³ Furthermore, the buyers were under no obligation to use the sellers' cloth in fulfilling the resales. A supporting reason was that the sellers should not be permitted to take advantage of the buyers' good fortune.⁶⁴ Conversely, the sellers of the unbleached cloth would not, as a matter of remoteness of damage, have

⁶¹ Section 53(3).

⁶² [1920] 2 KB 11 (CA). Extensively analysed in *Hapag-Lloyd AG* (n 42), [85] et seq and [110] et seq.

⁶³ *Ibid*, 15; 17 ('not for the identical goods').

⁶⁴ *Ibid*, 18; 23.

been responsible for any additional loss if the buyers had had to pay the sub-buyers damages greater than the market measure for unbleached cloth.

5.3 Departing from market approach

The contrasting Court of Appeal decision is *Bence Graphics International Ltd v Fasson UK Ltd*.⁶⁵ The sellers delivered to the buyers a large quantity of cast vinyl film used by the buyers in manufacturing decals for the container industry. The seller's film failed to survive in a legible state when the decals were installed on the containers, and so was worthless. The buyers received extensive complaints from shipping lines using the decals on containers long-leased to them by the sub-buyers, but took no steps to satisfy those complaints. The Court of Appeal, by a majority, held that resale contracts should be taken into account when assessing the buyers' damages for breach of warranty. One of the majority judges distinguished *Slater* on the ground that the goods sold on by the buyer (decals) were different from those bought by the buyer (vinyl film), whereas the goods sold on in *Slater* were the same goods.⁶⁶ This was an untenable distinction. Damages were therefore to be assessed by reference to the resale of the decals, which was sufficiently contemplated by the parties under the remoteness of damage rule for damages to be limited to a nominal amount. Hence, since the buyers had supposedly 'incurred' no liability for the decals resold, it followed that they should recover no damages for the film that was used in these sales.⁶⁷ The other majority judgment did not distinguish *Slater* on the facts but went further into the principles of damages recovery in arriving at the same conclusion. It added that the contemplation of resale losses displaced the presumptive value approach in section 53(3).⁶⁸

In cases like *Slater*⁶⁹ and *Bence*,⁷⁰ there are opposing approaches to consider. The first, exemplified by *Slater* and those cases adhering to the market rule, is that the systemic integrity of the rule counts for more than the need for accurate compensation in individual cases. The market rule is easier to administer than one that demands a close scrutiny of

⁶⁵ [1998] QB 87 (CA). Cf *Clark v Macourt* (2013) HCA 56, (2013) 253 CLR 1.

⁶⁶ *Ibid*, 98. Cf n 63.

⁶⁷ *Ibid*, 101.

⁶⁸ [1998] QB 87, 102–7. Heavy reliance was placed on the controversial decision of the Privy Council in *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (HL).

⁶⁹ Above (n 62).

⁷⁰ Above (n 65).

subsequent contracts, sometimes with a joinder of subsequent parties in a disposition chain, an expedient that may not be adopted in arbitration proceedings. Furthermore, it eases the forensic burden of a plaintiff who cannot be sure if and when it might be faced with a claim by sub-buyers, and it expedites litigation. It also means that different limitation periods for the two contracts do not give rise to the sort of problem where a buyer waiting for a sub-contract claim runs out of time for its own contract claim against the seller. When the high cost of legal services and litigation is cause for concern, there is merit too in the retention of a market rule that discourages lengthy proceedings and renders it comparatively straightforward to calculate the plaintiff's damages. Furthermore, if a buyer refuses to satisfy its customers, that is a matter for the buyer's business judgement. The opposite approach, favoured in *Bence*, is that damages in a case of that type should follow the normal approach to damages assessment and focus on the remoteness rule and the actual loss caused to the present plaintiff. The impulse to prevent unjustified enrichment may also provide some explanation for the course taken by the court in *Bence* if the view is taken that the buyers should not have recovered extensive damages from the sellers while retaining in full the benefit of the resales. But unjustified enrichment cuts both ways. What of the sellers who retain in full the price of worthless goods? Has this seller instead been improperly enriched?

5.4 Performance interest

Pursuing the matter further, there is the question whether the buyers in *Bence* had what has come to be called a performance interest that should have been vindicated.⁷¹ Consider the following example. A spaghetti manufacturer contracts to purchase a quantity of No 1 hard durum amber wheat at £200 per ton, and the seller instead supplies No 2 wheat, which has a lower protein count and commands a lower price of £150 per ton in the market. The buyer consumes the wheat in its manufacturing business by eking out the inferior wheat and mixing it with supplies of No 1 wheat already in store.⁷² The buyer's customers do not complain. If the decision in *Bence* is correct, the buyer's damages should be nominal. Yet, the seller has delivered to the buyer wheat priced at £200 per ton instead of £150. By paying too much for

⁷¹ See Friedmann (1995) 111 LQR 628; *Alfred McAlpine Construction Ltd v Panatown Ltd (No 1)* [2001] 1 AC 518 (HL).

⁷² Cf the buyer of the citrus pulp pellets in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44 (CA).

inferior goods, the buyer is £50 per ton worse off. This ought to be seen as a form of loss caused by the seller's breach. In *Bence* itself, there may not have been a market at all for the defective vinyl film supplied, since it was manufactured as a result of a mistake made by the sellers' own supplier, but there is no reason why the principle should be any different. The buyers in *Bence* paid too much and suffered loss to the extent of the overpayment.

5.5 Abatement

There is also the position of the buyer who has not yet paid to consider. Section 53(1)(a) of the Sale of Goods Act provides that in a breach of warranty case, the buyer 'may set up against the seller the breach of warranty in diminution or extinction of the price'. In other words, the buyer may reduce the price it tenders to the seller in fulfilment of its payment obligation. This example of common law abatement is close to the civil law price reduction mechanism, which calls for a modification of the contract price to fit the non-conforming goods actually delivered and is available even if the agreed price has been paid.⁷³ If the buyer had acquired the goods on credit before the fault was discovered, the plain language of the statute would have permitted the buyer to discount the price it was contractually bound to pay to a nominal amount. The result in *Bence*, therefore, turns upon the accident of payment before the breach of warranty was discovered by the buyer. Why should the outcome be starkly different if the buyer has, in fact, already paid for the goods?

5.6 'Skipped performance'

The Supreme Court in *One Step (Support) Ltd v Morris-Garner* has made it clear that damages may be awarded as a substitute for performance, and that the award of substantial damages in cases of 'skipped performance' (the facts of *Bence* amount to an *a fortiori* case of this) is compatible with the award of expectation damages.⁷⁴ In addition, *Bence* has been criticised in general terms,⁷⁵ and has not been applied to support a departure from the market rule in

⁷³ The *actio quanti minoris*, adopted in Art 50 of the Vienna Convention on the International Sale of Goods 1980 and in s 24 of the Consumer Rights Act 2015.

⁷⁴ [2018] UKSC 20, [2019] AC 649, [35].

⁷⁵ The decision in *Bence* received sustained criticism in the fraud cases of *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm), [183] et seq. A significant measure of doubt concerning *Bence* is also present in the Court of Appeal in *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778, [2016] 2 Lloyd's Rep 432, [45].

cases of non-acceptance and non-delivery.⁷⁶ Unless and until it is overruled, *Bence* draws a line between cases of non-delivery and non-acceptance, on the one hand, and defective and late delivery on the other hand.⁷⁷ For defective goods and late delivery, the presumptive market rule is displaced as a result of *Bence* when resales are within the reasonable contemplation of the parties at the contract date. In practice, if *Bence* is to be applied in such cases, much will depend upon the amount of information about resale activity possessed by the seller. General knowledge of the likelihood of a resale should not be enough since ‘everyone who sells to a merchant knows that he [buys] for resale’.⁷⁸ This should mean that *Bence* will be limited to those cases where the seller has detailed knowledge of the resale, establishing a close connection between the two contracts.⁷⁹ However broad or narrow the impact of *Bence* in warranty of quality cases turns out to be, the reasoning behind it could just as easily be applied to non-delivery and non-acceptance, even though *Bence* is not consistent with higher authority in non-delivery cases.⁸⁰ The market rule has been said to work well in general, despite the ‘superficial tension’ between it and the rule of remoteness of damage.⁸¹ But as we saw earlier, there is evidence in recent years of some softening of the market rule. Apart from this, if *Bence* and *Slater* were to come before the Supreme Court, *Slater* is to be preferred.

6 Late delivery and the market: a controversial case

The Sale of Goods Act contains no damages rules specifically framed to meet the case of late delivery, but it is generally understood that damages should be measured as the difference between the market prevailing on the due date of performance and the market on the date

⁷⁶ *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm), [204]–[209]; *Oxus Gold Plc v Templeton Insurance Ltd* [2007] EWHC 770 (Comm), [66]–[83]; *Vitol SA v Beta Renewable Group SA* [2017] EWHC 1734 (Comm), [2017] 2 Lloyd’s Rep 338, [70] (noting the seller’s lack of knowledge of the buyer’s business).

⁷⁷ This was the approach adopted in *Bear Stearns Bank Plc*, *ibid*. See also *Oxus Gold Plc v Templeton Insurance Ltd*, *ibid*, [82].

⁷⁸ *Kwei Tek Chao* (n 15) 489; *Louis Dreyfus Trading Ltd v Reliance Trading* [2004] EWCA Civ 525, [2004] 2 Lloyd’s Rep 323, [23].

⁷⁹ See also *Gimpex Ltd v Unity Holdings Business Ltd* [2015] SGCA 8, [2015] 2 SLR 686, [195]–[222].

⁸⁰ See MG Bridge, *The Sale of Goods* (4th edn, OUP 2019) [12.86] et seq.

⁸¹ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2007] EWCA Civ 901, [2007] 2 Lloyd’s Rep 555, [93], *revd* on different grounds at [2008] UKHL 48, [2009] 1 AC 61.

of actual delivery.⁸² The question whether it would be appropriate to do this in all cases and instead to look at sub-sale transactions instead of the market presented itself in an acute form in what is possibly the most difficult case arising for discussion, the controversial decision of the Privy Council in *Wertheim v Chicoutimi Pulp Co.*⁸³ The respondent sellers agreed on 13 March 1900 to sell 3,000 tons of Canadian moist pulpwood to the appellant buyers on FOB Chicoutimi terms. The price was equivalent to 25 shillings a ton. Delivery was to take place not later than 1 November 1900. The appellant buyers had earlier concluded a number of contracts in respect of this quantity for delivery onshore in England. The sub-sale prices of 65 shillings per ton were greatly in excess of the FOB price, the difference not being fully accounted for by the cost of carriage and related matters.

The sellers failed to deliver the pulpwood on time in Chicoutimi, a port located on the Saguenay in the Canadian province of Quebec. Delivery, therefore, had to be held over until 1 June in the following season because the port had become ice-bound for several months. Despite the delay, the buyers affirmed the contract and were successful in persuading their English sub-buyers to accept late delivery. The market price onshore at the expected arrival date for a timely shipment was 70 shillings; it had fallen to 42.5 shillings per ton by the date the pulpwood was belatedly received on shore.

The buyers contended that their damages should be calculated according to the difference between the market prices at the due and actual dates of arrival onshore in England. The sellers argued that the buyers had suffered no loss since they had been able to persuade the sub-buyers to accept late delivery of the agreed pulpwood. The court below⁸⁴ awarded as damages the modest and unaccountable amount of damages at the rate of 5 shillings per ton. This figure was confirmed by the Privy Council as ‘the highest rate at which [the buyers’ loss] could properly be fixed’.⁸⁵ The Privy Council, therefore, rejected the buyers’ contention that they ought to receive 27½ shillings as the difference between the two market prices (70

⁸² *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL) (Lord Pearce); *Borries v Hutchinson* (1865) 18 CB NS 445, 465; *Addax Ltd v Arcadia Petroleum Ltd* [2000] 1 Lloyd’s Rep 493; *Galaxy Energy International Ltd v Murco Petroleum Ltd (The Seacrown)* [2013] EWHC 3720 (Comm), [2013] 2 CLC 1007; *Hapag-Lloyd AG* (n 42), [84].

⁸³ Above (n 68), sternly criticised by Scrutton LJ in *Slater* (n 62), 23–4.

⁸⁴ The Court of King’s Bench (Appeal Side) of the Province of Quebec.

⁸⁵ Above (n 68), 307.

shillings—42½ shillings). It should not be forgotten, however, that the buyers made 27 shillings profit on the onshore contracts, as the difference between their purchase price, adjusted to include the expense of carriage to the English market, and the agreed resale prices onshore. An unresolved issue was why damages should be based on the onshore value of the goods in England when the seller's performance was for FOB delivery in Chicoutimi.

Little is known of the relationship between the sale contract and the sub-sale contracts. In particular, we do not know whether the FOB sellers were aware of the terms of the sub-contracts, which was unlikely, or whether the buyers had actually appropriated the 3,000 tons in the FOB contract to the sub-sale contracts, which again was unlikely.⁸⁶ Nor can it be known whether the buyers might have been able in the onshore market to buy in different pulpwood in satisfaction of their sub-sale responsibilities, so as to gain from substantial damages as buyers on the FOB contract and as sellers from a substantial gain as a result of the falling onshore market. The sellers were, however, aware that the buyers were not purchasing the pulpwood for personal consumption. In claiming market damages, the buyer was seeking to be put in the same financial position as if it had concluded an additional purchase contract, without, however, running the market risk of entering into such a second transaction.

*Wertheim v Chicoutimi Pulp Co*⁸⁷ was approved by Lord Dunedin in *Williams Bros v Edward T Agius Ltd*⁸⁸ on the ground that the outcome of events demonstrated the buyers' actual loss. Despite its departure from the market rule, the decision in *Wertheim* is correct for the following reason. In the case of non-delivery, the existing law, when referring to the market at the breach date, gives the buyer a market position instead of the goods. The buyer not receiving the goods has been deprived by the seller's breach of an opportunity to enter the market to resell them. In the normal case of late delivery, the buyer is complaining about the loss of an opportunity to enter the market at the preferred time, but not about being altogether denied the opportunity to enter the market with the agreed goods. If the goods in *Wertheim* had been delivered on time, the buyers could not have used the goods for both their sub-buyers and for additional buyers. They were seeking the best of both worlds in

⁸⁶ Appropriation, as an act of performance, has to relate to goods that have in fact been identified. But when persuading the sub-buyers to accept delayed performance, the FOB buyer was likely to have explained the reasons for the delay.

⁸⁷ Above (n 68).

⁸⁸ [1914] AC 510 (HL).

claiming damages that would, if granted, have given them an overall financial position substantially better than the position they would have been in if they had had to terminate the FOB contract for non-delivery. The buyers received the goods to fulfil their sub-contracts without suffering any loss and so should not be doubly compensated by recovering market damages as well. Let us also not forget that the Sale of Goods Act itself makes no provision for late delivery in the market.

7 Sub-sales and the market

7.1 Earlier sub-sales

We now come to cases of non-delivery where the question is whether damages against the seller should take account of the buyer's position in an onsale contract concluded before the due date of delivery in the sale contract. This is where the market rule is at its strongest by virtue of the high authority supporting it.

A reading of certain decisions, as we shall see, might induce the belief that the law dogmatically refuses ever to look at sub-contracts where a market reference is available, which is not the case. Some of our cases demonstrate that an unyielding reference to the market is quite capable of producing under-compensation or over-compensation in a given case. This is at odds with the increasing emphasis being placed on the compensatory role of damages.⁸⁹ Mitigation, as an explanation, cannot explain the position concerning pre-termination or even pre-contractual activity by a plaintiff buyer: there is no such thing as anticipatory mitigation. It is nevertheless a possibility that previously occasional departures from the refusal to look at sub-sales might in future become more common if the compensation principle is given further impetus.

7.2 A charterparty case

The case that sets the scene is *Rodocanachi, Sons & Co v Milburn Bros*,⁹⁰ which concerned an action against carriers for non-delivery of cargo when the ship sank because of its master's negligence. The plaintiffs had already sold the cargo on a 'to arrive' basis, a common provision

⁸⁹ See especially *Sharp* (n 9).

⁹⁰ (1886) 18 QBD 67 (CA).

in earlier times, and so were not liable to their buyers when the cargo failed to arrive. The sale price was below the market price prevailing at the expected date of discharge. Despite admitting that they could not have been held liable for the extra loss if the plaintiffs had sold above the market price, the carriers argued that their liability should be measured against the lower subcontract price. Deciding against the carriers, the Court of Appeal made it plain that damages rules should not be tailored to meet the peculiarities of individual cases, but rather should work approximate justice across the broad range of cases. As Lindley LJ put it: '[T]he rules as to damages can in the nature of things only be approximately just, and ... they have to be worked out, not by mathematicians, but by juries'.⁹¹ The plaintiffs' sale contract was an 'accidental circumstance' and ought to be disregarded, just as the damages of personal injury litigants at the time were not to be reduced when insurance moneys or other collateral benefits were released by the accident.⁹² Assuming that the carriers would not have been liable if the subcontract price had stood higher than the market, the decision in this case has a certain symmetry besides the appeal it presents for ease of administration.⁹³

7.3 Extension to sale

*Rodocanachi*⁹⁴ was extended to the sale of goods in *Williams Bros v Edward T Agius Ltd*,⁹⁵ which concerned the sellers' failure to ship a cargo of coal from a UK port CIF an Italian port at the price of 16.25 shillings per ton. The market price of the coal at the end of the delivery month stood at 23.5 shillings, but near the end of the previous month, the buyers had resold the same quantity of coal on identical CIF terms to sub-buyers at 19 shillings.⁹⁶ The question was whether the buyers' damages should be assessed by reference to the sub-contract price or to the market price. The *Rodocanachi* principle was applied so as to award the higher

⁹¹ Ibid, 78.

⁹² *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1, the case giving birth to the collateral benefits principle in personal injuries litigation.

⁹³ But see the charterparty case of *Andrew Weir & Co v Dobell & Co* [1916] 1 KB 722, which, for unexplained reasons, departed from *Rodocanachi*. The case involved a charterparty and sub-charterparty, where the charterer was able to exercise a cancellation right in the sub-charterparty.

⁹⁴ Above (n 90).

⁹⁵ Above (n 88).

⁹⁶ The umpire found that the buyers had 'appropriated' their November shipment to the sub-sale contract, but the expression was patently used in a very loose way. The cargo cannot have been appropriated in the CIF sense since no cargo was ever shipped.

measure of damages based on the market price. Lord Dunedin stressed the merits of a systemic rule that ignored the sub-sale price, whether it went up or down:

The buyer never gets [the goods], and he is entitled to be put in the position in which he would have stood had he got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price ... nor can he take benefit of the fact that the buyer has made a forward resale at under the market price.⁹⁷

Lord Dunedin went on to observe that there was no merit at all in qualifying liability under the head contract by reference to the sub-contract when the two contracts merely happened to deal in the same kind of goods.⁹⁸ As a matter of causal connection, taking the case of a commodities trader doing business on a wide front, this must be correct, for on what basis could it be said that any two contracts, one to buy goods and the other to sell goods, ought to be conjoined? Again, the difficulty of this exercise is emphasised if the contracts concern different quantities or the buyer is disposed to use the goods to fulfil various sub-contracts. The failure of the seller to deliver means that it can never be precisely known what the buyer would have done with the seller's goods.

Lord Dunedin also stated that, even if the head contract and the sub-contract concerned the 'identical article', it would be better to allow the rights and liabilities of buyer and seller under both contracts to be separately adjusted.⁹⁹ Where the buyer in the head contract secures special advantages under the terms of the sub-contract, a strong argument may be made that

⁹⁷ Above (n 88), 522–3.

⁹⁸ Ibid, 523. A case supporting *Williams* but expressing a preparedness to look at the terms of the sub-sale, if that particular contract had been contemplated at the contract date by the parties to the head contract of sale, is *Gimpex Ltd v Unity Holdings Business Ltd* (n 79), [195]–[222]. Support for looking at the sub-sale price where a particular sub-sale was contemplated at the date of the contract is also to be found in *Horne v Midland Railway Co* (1873) LR 8 CP 131; *Slater* (n 62) 20; *Kwei Tek Chao* (n 15), 489 (string contracts); and *Euro-Asian Oil AG v Credit Suisse* [2018] EWCA Civ 1720, [2019] 1 Lloyd's Rep 444, [73].

⁹⁹ Above (n 88). Moreover, the umpire's terms of reference allowed him to look only at the head contract and not to consider the overall effect of the liabilities in the distribution chain. Thus, the House of Lords declined to take into account a transaction between the sub-buyer and the head seller, by which either the November shipment was sold back to the latter, or the sub-buyer assigned to the latter the benefit of the sub-sale. This contract was concluded on 28 November, at a time, presumably, when the sellers knew they could not make the November shipment.

the buyer should not be deprived of such advantages. The market approach would preserve the head buyer's advantage, and the sub-sale approach would not.¹⁰⁰ A point that arose in the case was whether the buyer was entitled to the benefit of a release clause in the sub-contract if the seller failed to deliver. This depended on an evidential matter that was not settled in the case, but the adherence of the court to *Rodocanachi* suggests that this would not have made a difference.

A problem case is the decision of the House of Lords in *R & H Hall Ltd v WH Pim Junr & Co Ltd*.¹⁰¹ The case on unusual facts concerned a string of forward sales of Australian wheat. Pim agreed to sell at 51.75 shillings per quarter to Hall, who later agreed to sell the same quantity and type of wheat to Williams at 56.75 shillings. Williams subsequently contracted to sell the same type and quantity of wheat to Pim again at 59.25 shillings.¹⁰² All the contracts related to a shipment in the following January; it turned out that the market price at the date of delivery had fallen back to 53.75 shillings. Shortly before the end of January, Pim purchased from Rank a cargo on board the *SS Indianic* at 60 shillings. Pim then appropriated this cargo to the contract with Hall, and similar notices were passed down the string to Pim. This locked the Hall and Williams contracts into the same cargo of *Indianic* wheat. Pim then immediately resold the *Indianic* cargo back to Rank at a price securing the latter a modest profit, and the *Indianic* wheat disappeared from the market. The contract with Rank was therefore a means to an intended end.

7.4 Departure from sub-sale approach

Consequently, when Pim failed to deliver to Hall, Hall could not buy in to perform the contract with Williams. This was because the contract was now for *Indianic* wheat, no longer available. Williams, in turn, could not buy in to fulfil its contract with Pim. At the end of the string, Pim was therefore able to buy in at the market price, which was lower than its contract price with Williams, for Pim had correctly foreseen a fall in the market. Pim also argued that its liability to Hall at the head of the string should be assessed according to the market rate prevailing at the date of delivery, rather than the higher sub-sale price. But, of course, Pim had done

¹⁰⁰ See Bridge (n 80) [12.93].

¹⁰¹ (1928) 30 Ll L Rep 159 (HL).

¹⁰² See Lord Blanesburgh for an enlightening explanation of Pim's behaviour.

everything in its power to ensure that Hall could not, under the sub-contract, go to market for the wheat that Hall needed to deliver to Williams. What Pim had done was to try to reduce its liability as seller to Hall and also liberate itself from the higher price in the Williams contract so as to have the freedom to enter a lower market. In these circumstances, the House of Lords¹⁰³ had little difficulty in ruling that the Hall loss on the Williams contract came within the remoteness rule. The contract between Pim and Hall amply recognised the possibility of a sub-sale of the same goods by the notice of appropriation system. Indeed, the entire system of string CIF contracts is based on a principle of linkage so that no commodities dealer in the string is permitted to speculate unfairly in cargoes at the expense of another dealer in the string.¹⁰⁴

The decision in *R & H Hall Ltd*¹⁰⁵ was said to have greatly surprised informed commercial and legal opinion.¹⁰⁶ But two members of the Court of Appeal in *James Finlay & Co v NV Kwik Hoo Tong Handel Maatschappij*¹⁰⁷ seem to have thought it a correct decision, and the third,¹⁰⁸ while reluctantly accepting that it might be justified by the application of the remoteness rule to the particular facts, seems to have been more concerned at the failure of the House of Lords to reconcile its decision with its own earlier judgment in *Williams Bros v Edward T Agius Ltd*.¹⁰⁹ *R & H Hall Ltd* underlines the role of remoteness of damage and reminds us that the Sale of Goods Act reference to the market remains a *prima facie* rule, even if only occasionally departed from in non-delivery cases.¹¹⁰

¹⁰³ Including Lords Haldane and Dunedin, who had sat in *Williams Bros v Edward T Agius Ltd* (n 88).

¹⁰⁴ Which is why modern commodities forms contain a circle clause so that, once a party appears twice in the contractual string, the contracts are 'circled' out and settled at the date of identification of the circle as market difference contracts without further contractual performance.

¹⁰⁵ Above (n 101).

¹⁰⁶ '[It] astonished the Temple and surprised St Mary Axe': *James Finlay & Co v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400 (CA), 417. It is thought that Sir Frederick Pollock, as editor of the Law Reports, was responsible for the case not to be reported there.

¹⁰⁷ Ibid, Greer and Sankey LJ.

¹⁰⁸ Scrutton LJ.

¹⁰⁹ Above (n 88).

¹¹⁰ General support for *R & H Hall Ltd v WH Pim Junr & Co Ltd* (n 101) is to be found in *Kwei Tek Chao* (n 15) (late shipment).

7.4 Time charterparty overruns

A final case, not normally associated with the ones we have discussed, is *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*.¹¹¹ Recall that in *Williams Bros v Edward T Agius Ltd*,¹¹² Lord Dunedin stressed the even-handed character of the market rule. Sometimes it worked in favour of the plaintiff and sometimes in favour of the defendant. *The Achilles* is a very well-known charterparty case dealing with the liability of a time charterer for delay in redelivering a vessel after ordering it on a last voyage. The consequence of this was that the shipowner had to accede to a reduction, on a market that was not rising but falling, of the hire that it had earlier agreed with the follow-on charterer. There is a lively debate that I shall not deal with here as to whether Lord Hoffmann's views, that before the remoteness rule is applied, an account should be taken of sentiment in the trade as to whether guarding against a particular loss came within the scope of the duty assumed by the charterer. This would be a type of pre-remoteness screening in aid of Lord Hoffmann's preference for disposing of difficult questions of factual causation in favour of difficult questions concerning the scope of contractual duties. Suffice it to say that the court came down in favour of the difference between the charterparty hire rate and the market rate prevailing for the overrun period. The shipowner was not entitled to recover its losses under the follow-on charterparty despite the arbitrators' finding that these losses came with the reasonable contemplation of the charterer at the date of the charterparty. The time charterer at the date of the charterparty could not have known what the position of the shipowner would have been under a follow-on charterparty not yet concluded. That said, the rules of remoteness are supposed to be concerned with types of loss and not the quantum of loss,¹¹³ and sub-charter loss was surely something that a charterer could contemplate at the contract date if addressing its mind to late redelivery. *Williams Bros v Edward T Agius Ltd*¹¹⁴ was not cited in *The Achilles*,¹¹⁵ even

¹¹¹ Above (n 81).

¹¹² Above (n 88).

¹¹³ But note that what constitutes a type of loss may be manipulated to take account of quantum: *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA); *Horne* (n 98), both dealing with particularly profitable contracts.

¹¹⁴ Above (n 105).

¹¹⁵ Above (n 88).

though the result in the latter accorded with a market approach rather than a connected contract approach.

8 Conclusion: Uncertain state of market rule

It is hard to reach a coherent conclusion about the current standing of the market rule, given its spread across diverse types of breach of contract and the sheer difficulty of establishing a settling decision that would accord to the rule an established and predictable position. The tide of the compensation approach runs high, and the attractions of a rule that, at the expense of principle, seeks pragmatically to abridge the delays of litigation and to encourage pre-trial settlement seem to have lost their shine in modern times. Mitigation is likely to continue as an explanation of the market rule, even though it is an inexact fit, especially since mitigation may also explain a departure from the market rule when damages are measured by a subsequent transaction. Remoteness of damage, alongside factual causation, will surface from time to time in justifying a departure from the market rule if the plaintiff is seen not to have suffered a loss or to have suffered only a limited loss. Clarification of the law may well be delayed as a result of the settlement of disputes in the invisible world of confidential arbitration, where appeals to a court are available only in limited circumstances. There is some truth in what a senior judge once said to me about the rise of arbitration: the common law has gone underground.