LMAA Spring Seminar 2 May 2012

Owners' Damages for Repudiation by Charterers (No Available Market)

Introduction

1. Where owners terminate a period time charter[1] for repudiation by the charterers, and there is an "available market"[2] on which the owners could re-fix the vessel, the measure (or normal measure, or *prima facie* measure) of owners' damages is the difference between the rate of hire that would have been payable under the repudiated charter and the rate of hire available in the market, applied to the unperformed balance of the period of the repudiated charter (which I shall refer to as the "repudiated period")[3]. That is the "contract – market measure" in this context.

2. Disputes arising out of the catastrophic price collapses in shipping markets of Q4 2008 have tested the limits of the available market measure. One important issue of principle to emerge is the "Subsequent Market Issue": does the contract – market measure only apply if there is an available market <u>when the repudiated charter is terminated</u>? Or if there is no available market then, and the owners (say) fix for a spot voyage or two by the end of which market conditions have normalised, should the contract – market measure then kick in to measure their loss for the remainder of the repudiated period?

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1 I assume a period time charter of a named vessel, but everything said here would apply equally to a consecutive voyage charter of a named vessel for a period, as in *The Kildare infra*.

2 I do not consider in any detail in this paper what this means. A working definition might be that there is an available market where that which has been lost can be satisfactorily (even if not exactly) replaced, at a price fixed by a functioning system of supply and demand: *The Arpad* [1934] P. 189, *Charter v. Sullivan* [1957] 2 Q.B. 117, *Shearson Lehman Hutton v. Maclaine Watson (No.2)* [1990] 1 Lloyd's Rep. 441, *Petrotrade v. Stinnes Handel* [1995] 1 Lloyd's Rep. 142.

3 For completeness, note that, if this arises, any part of that lump sum as represents a loss of future cash flow when damages are awarded (as opposed to an accrued, past loss), should in principle be discounted to a net present value as of the date of award. I do not consider that any further here – there is I think a full paper to be written on the point, as to the proper approach generally, and as to what David Steel J. said about it in *The Kildare infra* in particular.

3. This paper considers the Subsequent Market Issue, and in doing so disagrees with the answer so far given to it in the Commercial Court (in *The Kildare infra* (David Steel J.), which was followed in *The Wren infra* (Blair J.)). It also considers the practical upshot, if *The Kildare* is followed, of a finding that there is no available market against which to measure the owners' loss. How, then, is it to be measured; and in particular, what are arbitrators to do if asked to assess damages before, perhaps a long time before, the end of the repudiated period?

4. So as to set the scene, but also because in my view it leads to the answer to the Subsequent Market Issue, I start with the underlying analysis that explains and justifies the contract – market measure.

Underlying Analysis

5. First, let me identify the function performed by the market rate in the contract – market measure.

6. If, in an available market case, we calculate damages as **(C – M) x P** (where C is the repudiated charter rate, M is the market rate and P is the repudiated period), we do so (whether we are conscious of this or not) because: **(C – M) x P = (C x P) – (M x P)**.

7. The owners sue for damages because they will not earn **(C x P)**. That is what they have lost by reason of the repudiation, for which they demand compensation[4]. But they have gained freedom to employ the vessel afresh, as they are no longer bound to deploy her under the repudiated fixture. The value of that gain or benefit must be brought into account as a credit against the lost charter earnings when assessing the proper compensation to award. Thus, where damages are on the contract – market measure, **(M x P)** performs that valuation function. The market rate, M, is used as the means (multiplied across the repudiated period) of assessing the value to the owners of no longer having the vessel committed to the repudiated charter.

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[4] This is the point at which *The Golden Victory* [2007] UKHL 12, [2007] 2 AC 353 can come into play: the repudiated period, P, is the period for which the owners prove, on the balance of probabilities, that the repudiated fixture would have run, had the charterers remained ready, willing and able to perform; that need not be until the earliest redelivery date set by the primary period clause in the charter; for example if, as in *The Golden Victory* itself, an early cancellation right would have accrued and been exercised, that will limit P.

8. To ask whether, when or why, the contract – market measure should correctly apply is therefore to ask whether, when or why it is right to use the market rate, M, to assess that value. The Subsequent Market Issue is, in truth, but an instance of that question for a particular type of case where the owners make a post-repudiation trading decision to fix something other than a replacement period time charter for the (balance of the) repudiated period, with the result that they do not in fact earn at the market rate, M, but at a different actual earnings rate, call it A, during that period. When, if ever, should M be used to value the benefit accruing from the repudiation? When, if ever, should A be used?

9. In discussing the principles involved, I assume that A, the vessel's actual earning rate during the repudiated period, is itself the product of arms-length market fixtures at market rates[5]. I am not dealing with cases where the owners somehow earn more or less than a current market rate for the type(s) of fixture they in fact perform, only with the impact, for the assessment of damages, of decisions to fix business, at the market rate for such business, that is not "like for like" (save as to price) with the repudiated fixture.

10. Rules calling for damages to be assessed by reference to prices or values in an available market for goods or services of a relevant kind are of course not unique to time charters. For sale of goods cases, they have been statutory since 1893, the current provisions being sections 50(3) and 51(3) of the Sale of Goods Act 1979. There, the Statute makes it clear that the rules are intended only to give effect to, not to supplant, first principles. The measure of damages is "*the estimated loss directly and naturally resulting, in the ordinary course of events, from the … breach of contract*" (sections 50(2) and 51(2)). That measure of damages is *prima facie* to be ascertained, if there is an available market, by "contract – market", respectively "market – contract". The familiar formulae do not constitute or reflect some different or independent measure.

11. It is unsurprising, then, that the familiar formulae were never solely creatures of contracts for the sale of goods (see, e.g., for a well-known common law instance, *Jamal v. Moolla Dawood* [1916] 1 AC 175 (sale of shares; buyers' default)), or that Robert

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5 So, e.g., for *The Kildare infra* I pass over the point that for most of the repudiated period the vessel performed and was set to perform a pre-existing fixture.

Goff J. should have regarded them as instructive for a time charter case: *The Elena d'Amico* [1980] 1 Lloyd's Rep. 75 (owners' default)[6].

12. In *The Elena d'Amico*, a 3-year time charter came to end due to the owners' breach in March 1973, c.15 months after delivery. The charterers did not replace it, but sought damages for a loss of profits they could have made from the terminated charter calculated *inter alia* by reference to very high market rates that were seen in 1974. The arbitrator, Christopher Staughton Q.C., limited the charterers to damages calculated by reference to the market rate for a replacement charter that could have been obtained at the time of the repudiation and his decision was upheld. The arbitrator held that the charterers' conduct was reasonable – they took, and acted upon, a reasonable view of the market. However, he said "*the result of the Charterers' conduct seems to me unreasonable [a word which Robert Goff J. construed to mean "unacceptable"]. On their judgment of the market it was not right to replace the Vessel. But when that judgment is disproved by later events they seek to claim from the Owners the profits they would have made if they had judged differently …*" (*ibid*, at 85 rhc). Robert Goff J. said, at 87 rhc:

> "*In considering the submission that these lost profits are recoverable from the owners as damages, in my judgment guidance is provided … by cases concerned with the sale of goods. Taking … the case of non-delivery, where goods are not delivered on the due date, or the contract is repudiated, the buyer is placed in a situation where he has to decide whether or not to buy in and, if he is going to buy in, whether he should buy in immediately or wait for a time and buy in later. The position in law appears to be that, generally speaking, if there is an available market for the goods in question at the time when they ought to have been delivered, then if the buyer decides not to buy in on that date, which he is fully entitled to do, he cannot visit the consequences of that decision upon the seller. If he buys in later he may, of course, either buy in … at a higher price or at a lower price than the available market price at the date when they ought to have been delivered. But if he has to buy at the higher price he cannot, generally speaking, claim the extra cost from the seller; and if he makes a saving then that saving is not,*

[6] Indeed, a fully comprehensive analysis, or attempted synthesis, would probably require a detailed review of the sale of goods case-law that is beyond this paper (*cf* our comment in "*Time Charters*", 6th Edition, at para.4.43). There is a substantial article there for someone to write – or a detailed Case for the Supreme Court, perhaps, should the occasion arise.

generally speaking, to be brought into account to reduce the damages which are recoverable from the seller."

13. Robert Goff J. asked why this should be so and answered that (i) "*what is alleged to constitute mitigation in law can only have that effect if there is a causative link between the wrong in respect of which damages are claimed and the action or inaction of the plaintiff*" (88 rhc), (ii) "*… where … there is an available market and advantage is not taken of the available market then, generally speaking, the decision … not to take advantage of the available market is an independent decision, independent of the breach, made … on [the plaintiff's] assessment of the market. … It takes place in the context of a pre-existing wrong but it does not, to use Viscount Haldane's expression [in British Westinghouse [1912] AC 673 at 689], "arise out of the [broken] transaction"*" (89 lhc) and (iii) "*It does not matter … that his decision was a reasonable one, or was a sensible decision, taken with a view of reducing the impact upon him of the legal wrong committed by the [defendant]. The point is that his decision so to act is independent of the wrong.*" (89 rhc).

14. Thus the analysis is not that claimants are deprived of damages because they have acted unreasonably so as to increase their loss. Further, there is built-in mutuality: if a claimant does not take advantage of an available market, and rates move against him, his recoverable damages are not increased; but if they move in his favour, his recoverable damages are not reduced. Not replacing the contract in the market, where the claimant could have done so, is "*his own business decision independent of the wrong; and the consequences of that decision are his*" (*ibid* at 89 rhc); the failure by a claimant to take advantage of an available market "*is (in the vernacular) down to him: it is not a decision from which the [contract-breaker] can either suffer or profit*" (*Kaines v. Osterreichische* [1993] 2 Lloyd's Rep. 1, *per* Bingham LJ at 11 rhc), it is a "*speculation … for his own account whichever way the market goes*" (*ibid*, *per* Dillon LJ at 13 rhc).

15. Toulson J., in *Dampskibsselkabet "Norden" A/S v. Andre & Cie SA* [2003] EWHC 84 (Comm), [2003] 1 Lloyd's Rep. 287 at 292 rhc, derived from *The Elena d'Amico* "*The broad principle … that where a contract is discharged by one party's breach, and that party's unperformed obligation is of a kind for which there exists an available market in which the innocent party could obtain a substitute contract, the innocent party's loss will ordinarily be measured by the extent to which his financial position would be worse under the substitute contract than under the original contract*" (para.41) and added that (para.42):

> "*The rationale is that in such a situation that measure represents the loss which may fairly and reasonably be considered as arising naturally, i.e. according to the ordinary course of things, from the breach … . It is fair and reasonable because it reflects the wrong for which the guilty party has been responsible and the resulting financial disadvantage to the innocent party at the time of the breach. The guilty party has been responsible for depriving the innocent party of the benefit of performance under the original contract (and the innocent party is simultaneously released from his own unperformed obligations). The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction.*"

16. The "mutuality" involved, namely that lose or win the decision not to fix similar business when there was a choice to do so is for the innocent party's account, derives from a basic mutuality of English law concerning mitigation: a reasonable step taken in mitigation of loss may or may not have the intended effect of reducing the loss; if it does, it limits the damages – damages are not awarded for loss avoided by steps taken in mitigation; but if it does not, and the loss ultimately suffered is increased, the damages award is correspondingly enlarged – because the claimant acted reasonably in an effort to reduce the adverse financial impact of the breach, the breach is still sufficiently the cause of the increased loss for all of it to sound in damages.

17. It follows that where owners do not avail themselves of an available market in which the repudiated period could be re-fixed, making instead a perfectly reasonable trading decision to fix a different type of employment, concepts of mitigation and causation cannot be used to cap the owners' damages when the choice turns out well without allowing owners to recover their full actual loss when the choice turns out badly. Concepts of mitigation and causation offer a choice between measuring the loss in all cases as (C – M) x P and measuring it in all cases as (C – A) x P, i.e. irrespective of whether, on the facts as they turn out in any given case, A > M or A < M. The doctrine of the independent trading decision, or market speculation, articulated in *The Elena d'Amico* and other cases, is the rationalisation of choosing the former because it is better to allow recovery of (C – M) x P even where it might be said to exceed the "actual loss" than to require the contract-breaker to pay more than (C – M) x P.

18. Finally, before turning directly to the Subsequent Market Issue, I repeat that the role of the market rate, M, in the contract – market measure, when it is applied, is to value the benefit accruing from the termination, namely that the vessel is no longer committed to the repudiated charter. More completely, therefore, Toulson J. might have said (*cf* paragraph 15 above) that the available market enables "*a market valuation to be made of what the innocent party has [gained from the termination of the original transaction and therefore what, in net terms, he has] lost, and a line thereby to be drawn under the transaction*". Thus understood, I suggest, the innocent party in the available market case does suffer loss of (C – M) x P, and it is wrong, or at least over-simplistic question-begging, to say that he does not suffer that loss if he does not transact on the available market and in the event A > M. It is at least equally valid to say in that case that he suffers loss of (C – M) x P, but also makes a profit or (additional) loss of (A – M) x P. The question, of principle and policy, is whether the latter is to be brought into account, a question the law looks to answer by concepts of causation.

The Subsequent Market Issue

19. In the classic, simple, case of a one-off sale of goods where, wrongfully, either delivery is not made by the seller, or delivery is refused by the buyer, on the due date for performance, it is plainly sufficient for the application of the "available market" rule if a replacement purchase or sale (as the case may be) could have been secured straight away. But that is not necessary:

> (1) In *Petrotrade v. Stinnes Handel* [1995] 1 Lloyd's Rep. 142 (f.o.b. sale of gasoline, buyer's default), Colman, J., found that "*the limited demand for this product … meant that it would take two weeks to sell all of it*" and, more specifically, that whilst the contract had been for a single delivery of 10,000 m.t., "*a reasonable trader whose object was to dispose of this parcel with reasonable expedition would have done so within about two weeks of [the default] by offering it to the German market in small cargo loads of 1000 to 3000 tonnes [but] would probably not have been able to resell the cargo in one parcel within so short a time and … would not have attempted to do so.*" (152 rhc). That was still sufficient to establish an available market and for the *prima facie* rule of section 50(3) of the Sale of Goods Act 1979 to be applied. The price that could reasonably have been achieved by a series of part-sales spread over two weeks, as described by the judge, was the "market or current price" for that purpose.

(2) Where a re-sale after a buyer's default would have been a sale of the entire quantity and could have been achieved, but it would have taken several weeks to arrange, there was still an available market, although of course the "market or current price" thereon would then be the net price realisable by such a later sale (*The Azur Gas* [2005] EWHC 2528 (Comm), [2006] 1 Lloyd's Rep. 163).

20. The Subsequent Market Issue tests how far that flexibility goes. It arose for the first time in *The Kildare, Zodiac Maritime Agencies v. Fortescue Metals Group* [2010] EWHC 903 (Comm), [2011] 2 Lloyd's Rep. 360, a case concerning a 5-year consecutive voyage charter of a dry bulk carrier. The charterers, FMG, repudiated, and the owners, Zodiac, terminated the charter in early January 2009, with over 4 years left to run. Zodiac did not re-fix the repudiated period, but traded the vessel, at least initially, on the spot market. David Steel J. held that Zodiac could not have fixed the repudiated period in the immediate aftermath of the default, but it was common ground that they could have done so later (from when precisely was in issue, but does not matter for present purposes). Zodiac argued that from when the vessel could have been re-fixed for the (then balance of the) repudiated period, damages should be fixed by reference to rates on that market, ignoring what Zodiac had chosen to do or might in the future choose to do differently. FMG argued that the "available market" rule either applied, or not, once only, at the time of default and that, if there had then been no market, a subsequent market was relevant only if it were held that Zodiac could not reasonably fail to make use of it. David Steel J. agreed with FMG (at 368 rhc-369 lhc):-

> "*64. … Zodiac submits … that, where a market emerges at some later date on which a term charter covering the residual balance of the period could be fixed, damages for that remaining period should be assessed on the same basis since any alternative employment would constitute independent speculation.*
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> *65. The fact that a term market thereafter emerges for the (yet shorter) outstanding balance of the charter period does not in my judgment import with it the proposition that a decision not to take advantage of that market at that later stage becomes a business decision independent of the wrongful termination. The rationale is that acceptance of the market rate at the date of breach is deemed to constitute reasonable*

mitigation: Norden v. Andre [2003] 1 Lloyd's Rep. 287. [The judge here quoted from para.42 of Toulson, J.'s judgment, referred to in paragraph 15 above]

66. By this mechanism subsequent market movements are removed from the equation. It is simply a matter of chance when the vessel completes any spot voyages after the termination date. Indeed they may overrun the emergence of an available market. In short I see no basis for requiring the owner to go back into the term market at the end of every spot voyage or for that matter to disregard short time charters in case the market for longer charters emerges in the meantime."

21. In *The Kildare*, as it happens, A > M, so it was in FMG's interests (to the tune of c.US$20 million) to argue for a "once only" relevance of the "available market" rule. As David Steel J.'s reasoning implicitly acknowledges, however, that cannot affect the answer to the issue of principle. Thus, had Zodiac's decision not to re-fix the (remainder of the) repudiated period, when the opportunity to do so arose, turned out badly for them, on David Steel J.'s reasoning FMG's liability would have been enlarged by that decision[7].

22. That seems to me unsatisfactory. The available market rule, where it operates, truly measures loss[8], as indeed FMG accepted in *The Kildare*[9], and the rationale is <u>not</u> that "*acceptance of the market rate at the date of breach is deemed to constitute reasonable mitigation*". The essence of the available market rule is that the availability of a functioning market on which the innocent party can reasonably replicate what has been lost (save as to price) means that neither he nor the guilty party[10] can say that the wrongful repudiation caused the decision to fix dissimilar business. It is not a rule

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7 unless, I suppose, Zodiac acted unreasonably in deciding not to fix the period, but that would require a finding that no reasonable owner could have taken the view that the trading pattern in fact adopted would turn out the better over the period

8 See paragraphs 16-18 above for the analysis.

9 It was agreed at trial that had there been an available market at or about the date when the subject charter was terminated, then Zodiac's damages would have been (C – M) x P and the actual substitute trading of the vessel would have been irrelevant.

10 Which of them might wish to do so will of course depend on how the innocent party's decisions ultimately turn out.

requiring the owner to do anything (*cp* David Steel J. at [66]); it is a rule that if he freely chooses to fix dissimilar business, though he does so on a reasonable view that it will best minimise the impact of losing the repudiated charter, he is in truth speculating and since that should be for his own account if it turns out badly, so also if it turns out well.

23. The Subsequent Market Issue only arises at all if, as in *The Kildare*, there is no available market at the date of breach. The spot fixture Zodiac chose to take next[11] could only be regarded as caused by FMG, and not an independent speculation for Zodiac's account, because Zodiac had no choice but to fix dissimilar business. Since they had no choice but to fix dissimilar business, the causal effect of FMG's breach persisted and[12] prevented a market valuation being made initially of what Zodiac had lost, and a line thereby being drawn under the transaction then. Thus it was FMG's breach, not an independent trading decision of Zodiac's, that threw the vessel once more upon the market at or about the end of that first post-termination fixture.

24. The precise date on which the vessel was free to commence her second post-termination fixture may have had an element of uncertainty about it (*cf* David Steel J. at [66]); but that does not detract from the notion that FMG's breach, given the inability promptly to re-fix the repudiated period, operated to place the vessel in the market then. As it seems to me, there is no logical basis for drawing a distinction, as regards the "available market" rule, between Zodiac's position at that point and its position at the date of breach.

25. It is of course possible to envisage, in theory, circumstances in which, when the vessel is first in a position to take advantage of an available market for the then remainder of the repudiated period, so little of it remains that a fixture for that remainder is, in truth, too dissimilar to what was originally lost to be regarded as substantially comparable. In such circumstances, there will never be an opportunity for the available market rule to apply; but, I suggest, that is not a reason for rejecting its application where it can, and then to the extent that it can, sensibly operate.

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11 or any other business, *ex hypothesi* dissimilar to the repudiated charter, they might have chosen to take, so long as they acted reasonably

12 to paraphrase Toulson J., quoted in paragraph 15 above

26. An opportunity to steer away from *The Kildare* on this point arose before Blair J. in *The Wren, Glory Wealth Shipping Pte Ltd v. Korea Line Corporation* [2011] EWHC 1819 (Comm), [2011] 2 Lloyd's Rep. 370. A 36 month time charter, due to run until June 2011, was terminated for repudiation by the charterers in November 2008, giving a repudiated period of c.2½ years. It was held by arbitrators that there was then no available market to fix that period, but that by June/July 2009 there was an available market to fix the remaining c.2 years thereof[13]. The vessel in fact became free from initial post-breach spot trading in July 2009 and could have availed herself of that market, but did not do so. The owners claimed, and the arbitrators awarded, (C – A) x P for the first part of the repudiated period, to July 2009, and (C – M) x P for the remaining c.2 years.

27. Blair J. allowed an appeal by the charterers and remitted the award for the arbitrators to assess and award instead (C – A) x P throughout. He regarded *The Elena d'Amico* as setting out an authoritative analysis, but emphasised that it deals in terms (as indeed it does) only with the case where there is an available market at or about the date of breach. He agreed with David Steel J.'s reasoning in *The Kildare*, criticised above, and added that in his view, applying the available market rule by reference to a subsequent market (when there is no market at the date of breach) "*departs from the principle that damages recoverable by the injured party are such as will put him in the same financial position as if the contract had been performed*" (*per* Blair J. at [30], 377 lhc).

28. But, with respect, if *The Elena d'Amico* is the authoritative analysis, then the available market measure, when capable on the facts of application, truly measures the loss suffered by the innocent party. Its application therefore does not depart from the basic principle of putting the injured party in the same position as if the contract had been performed. Or to put it another way, if applying the available market rule by reference to a subsequent market would involve such a departure, that is not because it is being applied by reference to a subsequent market. Blair J.'s additional answer

[13] Thus, the theoretical extreme case I posited at paragraph 25 above did not arise; indeed, I suggest that if there had been a market for 2-year period fixtures at the date of termination, the finding would have been that there was a relevant available market at the outset and Blair J. would have had no criticism of (C - M) x P for the 2½ years of the repudiated period, with M the 2-year market rate.

therefore cannot stand, I suggest, unless *The Elena d'Amico* is to be rejected entirely for the same reason.

29. For different commercial reasons in each case, neither *The Kildare* nor *The Wren* went to the Court of Appeal. The Subsequent Market Issue plainly deserves attention there, whether the outcome would be to overrule both (as I respectfully suggest it should be) or to give us a better explanation of the results arrived at by David Steel J. and Blair J., if they are to be upheld as correct (which I have suggested would require a wholesale reconsideration of, and departure from, the reasoning in *The Elena d'Amico*). In the meantime, if an arbitration tribunal is persuaded that David Steel J. and Blair J. are indeed wrong, the question will be whether they are bound nonetheless to follow their decisions. That is an important question in its own right, on which those attending ICMA XVIII, Vancouver, later this month, will see I take a robust view in favour of arbitral autonomy.

Practicalities

30. Where damages are not being assessed by reference to an available market for an equivalent fixture, i.e. damages are to be (C – A) x P[14] rather than (C – M) x P, because there was no such market when the original fixture was repudiated and *The Kildare* is followed, or perhaps (though I suggest this will be a rarity) because there is still no such market even by the time damages are being assessed[15], the practical focus for arbitrators is likely to be on what they should find A to be.

31. To the extent that, when assessing damages, the unperformed period of the repudiated charter is in the past, A, the vessel's actual replacement earnings, is a matter of past fact, to be proved by evidence and voyage analysis of the vessel's actual employment in the meantime. If there is a suggestion – it would be for the defaulting charterers to raise it – that the owners had not done as well as they should have done, that likewise would need to be investigated and determined, like any other failure to

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[14] although see paragraphs 38*ff* below for some thoughts as to whether (C – A) x P must then be the measure

[15] I say this will be a rarity because conditions sufficiently extreme to justify a finding of no market at all, i.e. at the time of repudiation, are unlikely to last long enough still to prevail by the time damages are assessed in the resulting arbitration or litigation.

mitigate complaint, on the evidence, factual and expert. Did the owners make a reasonable attempt to find well-paying replacement employment? Did they make reasonable choices as between employment opportunities that they found? If the answer to either is no, to what extent, if at all, can the charterers show that the owners thereby reduced the vessel's earnings during what should have been the period of the repudiated fixture?

32. These questions may be more or less complex, on the facts of any given case. But there is no particular magic to them, i.e. there is nothing about them in principle different to any other fact-finding exercise that arbitrators may be called upon to perform where parties do not agree as to what has happened in the past.

33. More interesting, perhaps, and the main focus of this section of this paper, is what arbitrators should do in respect of such part of the repudiated period as may still lie in the future when the reference is otherwise ready to proceed to a final hearing, or determination on paper, and award. The general point to make is the same: this is a fact-finding exercise, to be conducted by reference to evidence. All that has changed is the target: it is not now to find what has happened in the past; but to make a finding as to what will happen in the future. The arbitrators must consider, and make a finding as to, what the parties' evidence has persuaded them will probably occur.

34. It is perhaps tempting to leave it there, somewhat at large, but some points to note do arise if the enquiry is considered in a little more detail.

35. The first stage in the enquiry will normally be to decide what employment the vessel will probably take for the remaining duration. Arbitrators will expect to have evidence of the vessel's actual employment since the repudiation, with associated evidence of the owners' reasons and trading intentions/preferences that led to any choices they have made between different (types of) available employment. There should also be expert evidence providing the arbitrators with informed, independent, views of the (types of) employment likely to be available to the vessel for the remaining duration. I do not believe more can then be said than that the arbitrators should consider what that evidence persuades them the vessel is likely to do and make a finding accordingly.

36. Such a finding having been made, the arbitrators can move to consider what the vessel will probably earn, as to which they will need assistance from the experts, they will undoubtedly recognise that no expert prediction can be truly reliable, and they can only do the best they can on the material presented to them.

37. That said, I identify two points of principle that may be important:

(1) Burden of Proof

Determining how much the vessel has earned since the repudiation, up to the date when damages are fixed, will rarely turn on the burden of proof, but the same might not be true when it comes to making findings about what will happen in the future. Is it the owners' burden to show that, and by how much, the vessel's actual earnings will probably fall short of the earnings she would have enjoyed under the charter? Or is it the charterers' burden to show what value (measured by probable actual earnings) should be attributed to the fact that the vessel is free of the repudiated fixture? I am not aware of authority on this, I can see things to be said for either view and I should be interested to hear what views others have taken, or are taking, on the point.

(2) Finality Required

Arbitrators under English law have no power, absent agreement, to award payments on account pending some later, final assessment. That is a form of provisional relief, power to grant which the parties are entitled to confer on the arbitrators under section 39(1) of the 1996 Act, but which in the absence of such agreement arbitrators do not enjoy (section 39(4)). Given arbitrators' general duty to avoid unnecessary delay (section 33(1)(b)), and whilst it would be a matter to be judged on the circumstances of any given case, usually, I suggest, it will not be appropriate to defer the resolution of a dispute that is otherwise ready for final determination on the ground that the repudiated period is still running. Proof on the balance of probabilities, and the concept of the burden of proof, are legal tools sufficient to enable arbitrators to reach a final decision; delaying because of concern that an assessment made now, as the best estimate arbitrators feel able to make on the evidence presented to them, may in due course compare poorly against what actually happens, is

not necessary for the governing arbitral purpose of finally resolving the dispute following a fair procedure.

38. The above discussion has all assumed that indeed (C – A) x P is the measure where (C – M) x P cannot be, for want of an available market on which to re-fix the repudiated period. I close by raising for debate two thoughts on whether that is necessarily so.

39. Firstly, what if, although there be no (physical) market on which the vessel could be re-fixed for the repudiated period, there is a functioning FFA market trading that period? It might be said that, by definition, the unpredictable actual future cash-flow could, if the owners so chose, be translated into a fixed-rate cash-flow by hedging. It might then further be said that the loss of the fixed-rate cash-flow of the repudiated fixture can and should be valued thereby, enabling a market-derived line to be drawn under the repudiated transaction. English law is still developing its thoughts on what to do with hedging transactions, actual or available, in damages assessments. But it will be recalled that we are essentially here dealing with the consequences of following *The Kildare*[16]. That involves the rejection, as irrelevant, of any market other than an available (physical) market, at or about the date of repudiation, for re-fixing the repudiated period, except for (a) the market in which the owners in fact choose to trade or (b) a market (if there be one) in which no reasonable owner could have chosen not to trade. But then the effective availability, via hedging, of a fixed rate for the repudiated period, would seem to be relevant only if the owners actually hedge, as part of their mitigation effort, or there is a finding that no owner could reasonably fail to do so.

40. Secondly, it might be suggested that the sale and purchase market could yield a different, but valid, valuation of the owners' loss. Suppose that when damages are assessed, there is an available S&P market for the vessel (a) as is, and (b) with the benefit of guaranteed earnings at the repudiated charter rate for the (balance of the) repudiated period. Would not (b) LESS (a), in substance, measure owners' loss? On analysis, I find a similar difficulty with this as I find with making use of the FFA market. If we are applying *The Kildare*, we are treating as irrelevant the market for period business for the (balance of) the repudiated period where the owners

16 see paragraph 30 and n.15 above

reasonably choose a different (type of) employment for the vessel. But I envisage it will be that market that allows the S&P market to put a calculated enhancement, under (b) above, on the S&P value of the ship, had the repudiated charter rate still attached. So to value the owners' loss in this way, via S&P valuations, may only be to use in a different way the market data *The Kildare* has told us not to use.

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2.5.12

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