Legal Research Memorandum on the Law of Mitigation

Mila Tanaskovic
Faculty of Laws, University College London
mila.tanaskovic.25@ucl.ac.uk

Under the academic supervision of Dr. Franziska Arnold-Dwyer

Introduction:
Under the law of England and Wales, when does the time for mitigation action arise on anticipatory breach? How does the rule that avoided losses cannot be recovered apply to anticipatory breach? How does the rule allowing recovery of reasonable but unsuccessful mitigation expenses apply to anticipatory breach? What is the time of assessment of damages for loss or expenses incurred by the claimant in reasonably attempting to mitigate its loss following the defendant's breach? This memorandum will address these questions in turn via a general contract law lens in the hopes of determining whether it supports insurers making advance payments to policyholders for loss prevention measures under insurance contracts.

Q1: When does the time for mitigation action arise on anticipatory breach?
Hochster v De La Tour[1] sets out the foundational law on anticipatory breach, setting out two courses of action for the innocent party. The first being contract affirmation, under which the innocent party is entitled to demand performance so long as they have a 'legitimate interest'[2] in doing so. This occurs in situations where the innocent party believes there is still something to be gained from the contract that outweighs the risk of keeping it alive, knowing the other party might not be able to perform.[3] In this scenario, if by the specified date of performance the party in breach is still unable to perform, the innocent party can claim damages. This brings us to our second possible course of action: accepting the repudiation and suing, treating the contract as at an end.[4] The idea here is that the innocent party ought to be able to react immediately once it discovers a breach so as to protect its dealings. As per Lord Campbell CJ 'the man who wrongfully renounces a contract into which he deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured.'[5] The caveat to this rule however is that the innocent party must from the point of acceptance onwards take reasonable steps to minimise their losses so as to prevent the accumulation of avoidable damages. This caveat is known as the duty to mitigate.

The rule that an accepted repudiation brings the contract to an end is evidenced in contracts of repeat performance as well. Namely, where there has been an unequivocal acceptance of a repudiation the contract is effectively terminated. As per Earl Selborne, once the repudiation is accepted there is no way to justify 'the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered [good].'[6] He notes, however, that on the facts the innocent party did not act in such a way so as to 'shew an intention to renounce or repudiate the

[1] (1853) 2 E&B 678.
[2] *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] 1 C.L.C. 899 [44].
[3] H Beale (ed) *Chitty on Contracts* (36th edn, Sweet & Maxwell 2025) para 28-073.
[4] *Hochster* (n 1) 926. Mr. Justice Crompton's logic at 925 of arguing that the contract 'shall be at an end from this time; but I will hold you liable for the damage I have sustained' was fully accepted by Lord Campbell CJ at 926 who determined that 'the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it.'
[5] Ibid 927.
[6] *The Mersey Steel and Iron Co. (Ltd) v Naylor, Benzon & Co.* (1884) 9 App. Cas. 434 3.

contract'[7] as they had been operating on erroneous legal advice. This is of particular interest as it suggests that the acceptance of the repudiation must be clear, showcasing that the innocent party is aware of what they are doing. Nevertheless, before one gets to the point of being able to accept a repudiation in a contract of repeat performance, s31(2) of the Sale of Goods Act 1979 ought to be considered. The provision explains that:

> "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

Namely, as per *Maple Flock*, factors such as the likelihood of the breach repeating and the quantitative ratio of the effect of the breach on the entirety of the contract need to be weighed to determine whether repudiation of the contract as a whole is appropriate or whether a severable breach would suffice.[8] The Supply of Goods and Services Act 1982, on the other hand, holds that consequences and remedies for repudiatory breach are to be dealt with by common law. This is evidenced in s11F(1)(b) where it is explained that if a breach is material '[the innocent party is entitled] to reject any goods delivered under the contract and treat it as repudiated.' The wording of 'treat [...] as repudiated' in specific suggests that all standard common law steps are to follow. Moreover, I would argue that an acceptance of a repudiation does not in theory prohibit later contracting, it simply terminates the current contract with the inclusion of all future deliveries outlined in it. This is supported by the principle of freedom of contract.

There is little debate surrounding the temporal element of mitigation in anticipatory breach cases with the majority agreeing that the duty arises on acceptance. In fact, 'a claimant need not to take steps in mitigation until a wrong has been committed against them.'[9] This notion has been supported by Scott LJ in *Schering* who added that the duty 'can hardly arise until the person who is said to be the subject of the duty has become aware of the breach.'[10] If anything, it is this focus on knowledge that has led to some recent debates. Although *Schering* is an actual breach case, its focus on a duty to act reasonably suggests that once knowledge arises the innocent party ought to take prompt and reasonable steps to minimise the loss.[11] Such a rule could be particularly interesting in repudiatory breach cases as it begs the question whether the innocent party needs to react before having the repudiation explicitly communicated to them.

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[7] Ibid 4.
[8] *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148 1.
[9] J Edelman, J Varuhas, and A Higgins, *McGregor on Damages* (22nd edn, Sweet & Maxwell 2024) para 10-021.
[10] *Schering Agrochemicals Ltd v Resibel NV SA* (CA, 26 November 1992) 16.
[11] *Schering Agrochemicals Ltd v Resibel NV SA* (1992) WL 1351400 16.

Summers explains that the heightened focus on knowledge has led some to contend that a 'claimant might occasionally act 'unreasonably' by failing to take steps that would have enabled it to discover breach.'[12] I find this particularly difficult to apply to anticipatory breach cases as it suggests that the innocent party ought to be actively looking out for issues even when no risk has been communicated to them. There is no authority to suggest that there is a positive legal duty on either party to monitor the other. Summers adds that the majority of cases do require actual knowledge, but affirms that the position remains uncertain.[13] Stepping outside the bounds of contract law, Summers suggests that one might look for a parallel in the conception of legal responsibility. As per Joseph Raz:

> "conduct for which we are responsible is conduct which is the result of the functioning, successful or failed, of our powers of rational agency [...]. The abilities which we securely command determine the range of actions which fall within our domain of secure competence."[14]

Anchoring himself in reality, Raz utilises a workplace safety example to drive his point home. He explains that in order for responsibility of the injury to fall within the workplace's domain of secure competence there must have been 'information which indicated that the workplace [wa]s dangerous.'[15] Applied to the question at hand, this suggests that where the claimant suspects that there is an issue, the duty to mitigate might be able to arise on knowledge. Liu, for his part, suggests that it is not knowledge but 'reasonable inference' that plays an essential role.[16] 'Reasonable inference' is defined as a 'firm conclusion' as opposed to a 'mere suspicion.'[17] He explains that 'termination of contract on the ground of an anticipatory breach is justified by reasonable inference drawn from the circumstances at the time of termination. It is immaterial whether the inference is in fact correct or not.'[18] Such a theory presents an opening to enabling knowledge to play a pivotal role. Nevertheless, the difficulty remains that under the current legal framework, the right to elect affirmation trumps the knowledge requirement.[19] This is supported by the orthodox view of mitigation in which without actual awareness of the breach the claimant is unable to make a choice, which is the very basis of the duty to mitigate in repudiatory cases.[20] Based on Summers' knowledge-as-choice framework, it thus seems unlikely that the courts

[12] A Summers, *Mitigation in the Law of Damages* (OUP 2024) 134.
[13] Ibid.
[14] J Raz, 'Responsibility and the Negligence Standard' (2010) 30(1) Oxford Journal of Legal Studies 16-17. See 1-18 more generally for the development of the theory.
[15] Ibid 17.
[16] Q Liu, 'Inferring future breach: towards a unifying test of anticipatory breach of contract' (2007) 66(3) Cambridge Law Journal 574-604.
[17] *The Hermosa* [1982] Lloyd's Rep 570, 580.
[18] Liu (n 16).
[19] *Shindler v Northern Raincoat Co* [1960] 1 W.L.R. 1038 9.
[20] Summers (n 12) 135.

would turn to a more speculative view of what knowledge is, especially when mitigation has been established to be a question of fact rather than a question of law.

Thus under the current law, knowledge, although an important factor in the decision-making process, has not been held to be grounds for triggering mitigation in anticipatory breach despite there being a potential theoretical basis for its inclusion. As of now, it is only when an anticipatory breach has been accepted that such a duty can arise, for before that point the contract remains in full force.[21]

Q2: How does the rule that avoided losses cannot be recovered apply to anticipatory breach?

Under the classic rule of *British Westinghouse Electric*[22] a claimant is only required to act reasonably. When in the course of this action loss has been diminished 'the effect in actual diminution of the loss [...] suffered may be taken into account.'[23] However, for a gain to be deducted it must be caused by the breach. This is exemplified in the case of *The New Flamenco*[24] where a shipowner whose vessel was wrongly repudiated terminated the charter and subsequently sold the ship. The Supreme Court held that 'in determining whether a benefit received by a claimant was to be brought into account in assessing the damages [...] the essential question was whether there was a sufficiently close link between the benefit and the loss caused by the breach.'[25] The charterers argued that because the ship had been sold at a higher value than its projected worth that the owner had made a profit that ought to be deducted from the damages owed. However, it was determined that the sale of the ship was a separate and independent decision that was not legally caused by the charterer's breach, leaving the shipowner entitled to damages. As per Lord Clarke:

> "if the owners decide to sell the vessel, whether before or after termination of the charterparty, they are making a commercial decision at their own risk about the disposal of an interest in the vessel which has no part of the subject matter of the charterparty and had nothing to do with the charterers."[26]

The calculation of avoided damages is thus subject to both the effectiveness and causal influence of the mitigation, similarly as to how it would be in a case of actual breach. The main difference lies in the fact that damages for an actual breach are based on a specific failure while damages for a repudiatory breach cover the entire loss of the bargain. This presents a risk for the claimant

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[21] Save for where the defendant can prove that the claimant had no legitimate interest. Where proven, the court may restrict the claimant's claim for damages. The burden of proof lies with the defendant. See n 2.
[22] *& Manufacturing Co Ltd v Underground Electric Railways Co of London* [1912] A.C. 673 8.
[23] Ibid.
[24] *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2017] 1 W.L.R. 2581.
[25] Ibid 2.
[26] Ibid [32].

as unlike in an actual breach, repudiatory breach is muddled by the uncertainty of the temporal element of the calculation of damages (more on this later). This means that in the majority of cases any action taken by the claimant in speculation of the market will result in the risk being borne by them. Lord Toulson highlights that 'the speculation which way the market will go is the speculation of the claimant'[27] This notion fits well with the orthodox rule posited in *British Westinghouse Electric* as entering into a highly speculative venture inherently fails the test of reasonableness. Nevertheless, if the gamble pays off, the benefit accrued will be put against the direct loss and deducted from the total the claimants were previously entitled to so long as causally related. In order to determine this calculation, courts look at the position the innocent party ends up being in versus the position they would have been in had the contract been performed. Lourd Toulson highlights that this applies solely where 'the contract is readily replaceable by a substitute contract at a readily ascertainable market price, in which case it will ordinarily be right to measure the innocent party's loss [and inherently gain] by reference to the substitute contract.'[28]

It is important to note that courts will limit damages to the actual loss sustained, meaning that later events can in part contribute to the reduction of recoverable losses where avoided by circumstance. This notion is confirmed in *The Golden Victory* where, by a majority of 3-2, the House of Lords held that 'damages awarded should represent no more than the value of the contractual benefits of which the claimant had been deprived.'[29] On its facts, damages were reduced in *The Golden Victory* because although the repudiation of the contract by the charterers in returning the vessel had been unlawful, the war that broke out fourteen months later was a lawful termination of the contract. The idea here is to avoid overcompensation of the claimant, especially where the contract would have been legally forced to an end. I would argue that this is in part influenced by the notion that contract law is not meant to be punitive in nature but rather compensatory. Lord Bingham, on the other hand, grounding himself in a view of commercial certainty posits that:

> "if a party is compensated for the value of what he has lost at the time when he loses it, and its value is at that time for any reason depressed, he is fairly compensated. That does not cease to be so because adventitious later events reveal that the market at that time was depressed by the apprehension of risks that did not eventuate."[30]

That is to say, Lord Bingham believes that hindsight should not be used to alter the financial reality of the parties at the moment of breach. Although this powerful dissent remains of academic import, the current law continues to focus on the fact that damages ought to flow from actual loss, meaning that even circumstantially avoided losses cease to be recoverable.

[27] *Bunge SA v Nidera BV* [2015] UKSC 43 [80].
[28] Ibid [87].
[29] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 2.
[30] Ibid [22].

Thus, any avoided loss resulting directly from mitigating efforts against the breach or from circumstance will reduce the total damages owed to the claimant.

Q3: How does the rule that the claimant may recover damages for loss or expense incurred by it in reasonably attempting to mitigate its loss following the defendant's breach, even when the mitigating steps were unsuccessful or in fact led to greater loss, apply to anticipatory breach?

Generally speaking, the rule allowing recovery of reasonable but unsuccessful mitigation expenses operates on the basis that the innocent party need only act reasonably, not perfectly in order to fulfill their duty to mitigate. This is confirmed in *Lagden v O'Connor* where as per Lord Scott '[i]f the mitigating steps do not succeed in reducing the loss, but were, nonetheless reasonable steps in all the circumstances for the injured party to take… the injured party can add to his damages claim the cost of taking the steps in question.'[31] In theory, this rule is applicable to anticipatory breach, however there is little case law in the area. Accordingly, I will examine the issue by reference to the general principles governing actual breach and mitigation, and then address the case law directly in the domain.

From a logical perspective, once an innocent party accepts a repudiation, they have effectively terminated the contract, putting them in the same position they would be in had an actual breach occurred.[32] That is to say, they are no longer bound or protected by the contract and must mitigate. Such a position gives rise to the standard rules of mitigation and subsequently recovery of reasonable expenses. As set out in the seminal case of *Banco de Portugal v Waterlow and Sons*[33] as long as the claimant acts reasonably at the time of decision-making, the defendant cannot in hindsight criticize the chosen course merely because it proves to be unsuccessful. In *Banco de Portugal* the defendants were contracted by the claimants to print 500 escudo notes, 600,000 of which were put into circulation in Portugal. Tricked by a band of criminals, the defendants printed an unauthorised second batch (580,000) of these notes with the same serial numbers as the genuine notes. The notes were then introduced by the criminals into the general market. The bank upon hearing what had happened, called all the affected notes in, including both genuine and counterfeit, and replaced them with valid ones. This resulted in a massive financial loss as not only did they lose out on the printed notes, they now needed to print new ones. The bank then sued the printers for damages. In a decision of 3-2, the House of Lords held that the proper measure for damages was both 'the exchange value expressed in sterling of the genuine currency [...] [and] the cost of printing the genuine notes.'[34] Lord Atkin explained that

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[31] *Lagden v O'Connor (sub nom Burdis v Livsey)* [2004] 1 AC 1067 [78]. Also see *Pilkington v Wood* [1953] 3 W.L.R. 522.

[32] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 Q.B. 164 (1970) Mocatta J 13. See further discussion in Q1 and at n 6.

[33] [1932] A.C. 452.

[34] Ibid 2.

where one is 'compelled by the wrong of another to incur the liability, its damages are measured by the liability it has incurred.'[35] His view was supported by Lord MacMillan who went on to add that:

> "Where a sufferer from breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned difficulty. It is often easy after an emergency has passed to criticize steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency."[36]

This establishes that the claimant's attempts to mitigate, although perhaps questionable in hindsight, are generally protected by the courts so long as they are reasonable. The dissent, for their part, argued that the bank never actually lost the full face value of the notes and that the bank's true loss was restricted to the paper and printing costs.[37] The basis for this argument relies on the economic reality that a bank note theoretically has no value as it is a 'promissory note which is perpetually renewable [...] because it is never payable.'[38] They do not argue against the hindsight rule. Thus, the general rule posits that if the steps are commercially justified, the innocent party remains protected even where those steps failed. This stance is reinforced in *Sharp Corp Ltd v Viterra BV*, an anticipatory breach case, where Lord Hamblen explains that the general principle of mitigation 'requires the injured party to take all reasonable steps to avoid the consequences of a wrong. This means that [...] there is recovery for loss incurred in taking reasonable mitigating steps, even if that increases the loss.'[39]

That is not to say that there are no caps on recovery. As per Pearson LJ in *Darbishire*, the claimant 'is fully entitled to be as extravagant as he pleases but not at the expense of the defendant.'[40] He goes on to explain that 'in [his] view it is impossible to find from the evidence that the plaintiff took all reasonable steps to mitigate the loss, or did all that he reasonably could do to keep down the cost.'[41] Thus, where the expenses incurred by the claimant go beyond what is deemed reasonable[42] they are no longer recoverable. Reasonableness in these circumstances is best defined as an 'obligation to take any step which a reasonable and prudent man would [...]

[35] Ibid 18.
[36] Ibid 24-25.
[37] Ibid Lord Warrington 15.
[38] Ibid Lord MacMillan 26. In this section, Lord MacMillan provides a coherent outline of the defence's argument that was accepted by Lord Warrington and Lord Russell. Nevertheless, he proceeds to refuse it at 26, labelling it "fallacious."
[39] *Sharp Corp Ltd v Viterra BV (formerly Glencore Agriculture BV)* [2024] Bus L.R. 871 [85].
[40] *Darbishire v Warran* [1963] 1 W.L.R. 1067 7.
[41] Ibid 7.
[42] See *Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] WL 148764 1-2 on the necessity to act immediately to find a substitute where a market exists.

take in the course of his business.'[43] Such a position assumes that the reasonable person be assessed objectively with room to include specialist skills and background knowledge.[44] This reads in accordance with the rule set out in *Banco de Portugal* where reasonableness is determined at the moment of decision-making.

Therefore, the legal principles set out by actual breach are in theory transferable and set out that so long as actions are reasonable, expenses will be recoverable.

Q4: What is the time of assessment of damages for loss or expenses incurred by the claimant in reasonably attempting to mitigate its loss following the defendant's breach?
Prima facie, damages as a whole are to be assessed at the date of breach.[45] However, as per *Johnson v Agnew*[46] this is not an invariable rule. Lord Wilberforce quoting Megarry J from *Horsler v Zorro*[47] explained that 'there is no inflexible rule that common law damages must be assessed as at the date of breach'[48] instead it is left to the discretion of the court. Yet, once we factor in the idea of loss and expenses, the question becomes more difficult to answer.

In determining the time of assessment of damages, one must consider at what point factual loss is crystallized in an anticipatory breach case. Per the 'Bwllfa principle'[49] factual loss becomes obvious once the court assesses the difference between 'the claimant's breach and no-breach positions by taking into account all events that have happened between the breach and the trial.'[50] It is this beginning part of the timeline that poses an issue. Namely, cases differ as to whether damages ought to be calculated at the date of acceptance of the repudiation or the date of when the actual performance would have occurred. This is problematic to the Bwllfa principle as it causes uncertainty in determining what is pre and post breach. General principle suggests that:

> "Where there is an available market in which an adequate substitute can be obtained for goods or services of which the defendant's breach of duty deprived the claimant, damages are to be assessed as if the claimant entered the market and obtained such a substitute at the earliest reasonable opportunity whether or not the claimant in fact did so."[51]

However, as per *Melachrino v Nickoll*, although the cause of action arises on the date of acceptance 'damages [are to] be assessed with reference to the market price of the goods at the

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[43] *British Westinghouse* (n 22) 8.
[44] See *British Westinghouse* (n 22) on reasonable losses and *Banco de Portugal* (n 33) 25 on "reasonable and justifiable in the circumstances."
[45] See *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 Q.B. 164 (1970) 13.
[46] [1980] A.C. 367 (1979).
[47] [1975] Ch. 302.
[48] *Johnson* (n 46) 22.
[49] *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL) 431.
[50] Summers (n 12) 7.
[51] *Stanford International Bank Ltd v HSBC Bank PLC* [2022] UKSC 34 Lord Leggatt [43].

time when they ought to have been delivered under the contract.'[52] The underlying notion is that by labelling the date of contractual performance as the moment when one ought to assess damages, overcompensation is avoided. This is reinforced in *Tai Hing Cotton Mill* where their Lordships explain that if the market were to fall in the time leading up to the actual performance date, assessing damages at the date of breach 'would represent an important inroad on a fundamental principle of assessment of damages, namely, that they should be no more than compensatory.'[53] Nevertheless, in *Melachrino v Nickoll*, Bailhache J noted that where there is an available market that the claimant unreasonably fails to enter the defendant is 'none the less entitled to have damages assessed as at the date when a fresh contract might and ought to have been made.'[54] This notion falls in line with the necessity to act reasonably, and once again highlights the risk placed on the claimant by having to weigh the duty to mitigate against speculation. The position is nevertheless endorsed by many, including Bridge, who argues that 'the loss of a buyer who accepts the seller's repudiation is crystallised on the date he should have bought in.'[55] A similar stance is posited by Lord Hamblen in *Sharp* who explains that:

> "Provided there is an available market, the market price establishes the default price [at the date of breach] regardless of what the injured party actually does and even if a decision to delay in entering the market is a commercially reasonable decision. A decision to delay is the injured party's voluntary and independent commercial decision and its consequences are irrelevant to the damages payable, however well or badly it works out."[56]

The judgment delivered by Lord Hamblen is in part influenced by a GAFTA default clause that 'was to be understood like the approach to damages for non-delivery and non-acceptance at common law and under the Sale of Goods Act 1979.'[57] Specifically, he relied on *Benjamin's Sale of Goods*[58] to explain that the rationale of s50(3) and s51(3) of the Sale of Goods Act 1979 is to adhere to the compensatory principle 'which does not depend upon the action actually taken by the innocent party'[59] save for where there is an available market.[60] s50(3) and s51(3) themselves rely on the notion of an 'available market' being a determining factor in the ascertainment of damages.[61] Nevertheless, as per Lord Brown in *The Golden Victory*, this rule does not require

[52] [1920] 1 K.B. 693 (1919) 4.
[53] *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (A Firm)* [1979] A.C. 91 (1977) 10. Note that this is a Privy Council judgment.
[54] *Melachrino* (n 52) 3.
[55] M Bridge, 'Market damages in sale of goods cases - anticipatory repudiation and mitigation' (Mar 1994) Journal of Business Law 152-160.
[56] *Sharp* (n 39) [95].
[57] Ibid 2.
[58] 12th ed (2024), para 16-064.
[59] Ibid.
[60] *Sharp* (n 39) [96] - [97].
[61] Note that s50(3) deals with damages for non-acceptance, while s51(3) deals with damages for non-delivery.

courts to ignore subsequent events.[62] That is to say, if a supervening event occurs before litigation, damages are reduced accordingly. This once again reinforces the stance that the breach-date rule should not be allowed to override fair compensation.[63]

Thus, the date of acceptance of the repudiation is the presumptive date of assessment of damages subject to the fundamental compensatory principle that damages should reflect the loss actually suffered. Namely, the assessment date is subordinate to the compensatory principle, leaving the law in a position of not having an absolute assessment date.

[62] *The Golden Victory* (n 29) [78].
[63] See *The Golden Victory* in Q2 for the detailed case reasoning.

Please find a tabular representation of Q4 below:

When?	Applicable cases
Acceptance of the repudiation	*Johnson v Agnew* [1980] A.C. 367 (1979) *****note that it provides an exception where the court deems it necessary to use later information *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 Q.B. 164 (1970) Includes *Bunge SA v Nidera BV* and *Sharp Corp Ltd v Viterra BV* in circumstances where there is an available market at the date of acceptance of the repudiation.
Date of repurchase or entrance into a new contract	*Melachrino v Nickoll* [1920] 1 K.B. 693 (1919) 4. → 'at the date of repurchase' *Stanford International Bank Ltd v HSBC Bank PLC* [2022] UKSC 34 Lord Leggatt [43]. → including the date when repurchase should have occurred *Bunge SA v Nidera BV* [2015] Bus. L.R. 987 [87]. → where 'the contract is reasonably replaceable by a substitute contract at a readily ascertainable market price, in which case it will ordinarily be right to measure the innocent party's loss by reference to the substitute contract' *Sharp Corp Ltd v Viterra BV (formerly Glencore Agriculture BV)* [2024] Bus L.R. 871 [90] and [95] → 'provided there is an available market, the market price establishes the default price regardless of what the injured party actually does and even if a decision to delay in entering the market is a commercially reasonable decision' Bridge's case note (see n 55): *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren GmbH (formerly CGL Handelsgesellschaft mbH)* [1993] 2 Lloyd's Rep. 1.
Date of contracted performance	*Melachrino v Nickoll* [1920] 1 K.B. 693 (1919) 4. → 'or at the date when the goods ought to have been delivered when there is no anticipatory breach whether there is a repurchase or not' *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (A Firm)* [1979] A.C. 91 (1977)
At litigation	*****Johnson v Agnew* [1980] A.C. 367 (1979) 22. *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 *Melachrino v Nickoll* [1920] 1 K.B. 693 (1919) 4. → 'if the action comes to trial before the contractual date for delivery has arrived the Court must arrive at that price as best it can'