October 17, 1967. LORD REID. My Lords, by charterparty of October 15, 1960, the respondents chartered the appellant's vessel, Heron II, to proceed to Constanza, there to load a cargo of 3,000 tons of sugar; and to carry it to Basrah, or, in the charterer's option, to Jeddah. The vessel left Constanza on November 1, 1960. The option was not exercised and the vessel arrived at Basrah on December 2, 1960. The umpire has found that "a reasonably accurate prediction of the length of the voyage was twenty days." But the vessel had in breach of contract made deviations which caused a delay of nine days.

It was the intention of the respondents to sell the sugar "promptly after arrival at Basrah and after inspection by merchants." The appellant did not know this, but he was aware of the fact that there was a market for sugar at Basrah. The sugar was in fact sold at Basrah in lots between December 12 and 22, 1960, but shortly before that time the market price had fallen, partly by reason of the arrival of another cargo of sugar. It was found by the umpire that if there had not been this delay of nine days the sugar would have fetched £32 10s. 0d. per ton. The actual price realised was only £31 2s. 9d. per ton. The respondents claim that they are entitled to recover the difference as damage for breach of contract.

The appellant admits that he is liable to pay interest for nine days on the value of the sugar and certain minor expenses but denies that fall in market value can be taken into account in assessing damages in this case.

So the question for decision is whether a plaintiff can recover as damages for breach of contract a loss of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from a breach of contract causing delay in delivery. I use the words "not unlikely" as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.
I do not think it useful to review the authorities in detail but I do attach importance to what was said in this House in R. & H. Hall Ltd. v. W. H. Pim (Junior) & Co. Ltd.

In that case Pim sold a cargo of wheat to Hall but failed to deliver it. Hall had resold the wheat but as a result of Pim's breach of contract lost the profit which they would have made on their sub-sale. Three of their Lordships dealt with the case on the basis that the relevant question was whether it ought to have been in the contemplation of the parties that a resale was probable. The finding of the arbitrators was:

"The arbitrators are unable to find that it was in the contemplation of the parties or ought to have been in the contemplation of Messrs. Pim at that time that the cargo would be resold or was likely to be resold before delivery; in fact, the chances of its being resold as a cargo and of its being taken delivery of by Messrs. Hall were about equal."

On that finding the Court of Appeal had decided in favour of Pim, saying that, as the arbitrators had stated as a fact that the chances of the cargo being resold or not being resold were equal, it was therefore "idle to speak of a likelihood or of a probability of a resale."

Viscount Dunedin pointed out that it was for the court to decide what was to be supposed to have been in the contemplation of the parties, and then said:

"I do not think that 'probability' . . . means that the chances are all in favour of the event happening. To make a thing probable, it is enough, in my view, that there is an even chance of its happening. That is the criterion I apply; and in view of the facts, as I have said above, I think there was here in the contemplation of parties the probability of a resale."

He did not have to consider how much less than a 50 per cent. chance would amount to a probability in this sense.

Lord Shaw of Dunfermline went rather further. He said:

"To what extent in a contract of goods for future delivery the extent of damages is in contemplation of parties is always extremely doubtful. The main business fact is that they are thinking of the contract being performed and not of its being not performed. But with regard to the latter if their contract shows that there were instances or stages which made ensuing losses or damage a not unlikely result of the breach of the contract, then all such results must be reckoned to be within not only the scope of the contract, but the contemplation of parties as to its breach."

Lord Phillimore was less definite and perhaps went even further. He said that the sellers of the wheat knew that the buyers "might well sell it over again and make a profit on the resale"; and that being so they "must be taken to have consented to this state of things and thereby to have made themselves liable to pay" the profit on a resale.

It may be that there was nothing very new in this but I think that Hall's case must be taken to have established that damages are not to be regarded as too remote merely because, on the knowledge available to the defendant when the contract was made, the chance of the occurrence of the event which caused the damage would have appeared to him to be rather less than an even chance. I would agree with Lord Shaw that it is generally sufficient that that event would have appeared to the defendant as not unlikely to occur. It is hardly ever possible in this matter to assess probabilities with any degree of mathematical accuracy. But I do not find in that case or in cases which preceded it any warrant for regarding as within the contemplation of the parties any event which would not have appeared to the defendant, had he thought about it, to have a very substantial degree of probability.

Referring Principles:
VII.2 - Principle of foreseeability of loss