COMPLETE JUDGMENT

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/12/2013

Before :

MR JUSTICE WALKER

- -

Between :

Bunge SA	**Claimant (Appellant)**
- and -	
Nibulon Trading BV	**Defendant (Respondent)**

ARIZON ABOGADOS

- -

Andrew Baker QC and Dr Malcolm Jarvis (instructed by **Reed Smith LLP**) for the **Claimant**
John Russell (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing date: 22 November 2013

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Judgment

Mr Justice Walker:

A. Introduction: the appeal and the outcome

1. This is an appeal by Bunge SA ("buyers") from an award dated 22 February 2013 by a board of appeal of the Grain and Feed Trade Association ("GAFTA"). The board held in favour of Nibulon Trading BV ("sellers") that buyers' claim was time barred.
2. In this regard the board reversed the decision of arbitrators ("the tribunal") in an award dated 6 January 2012. The board accordingly allowed sellers' appeal from that decision

without the need to examine whether the tribunal had been right to hold on the merits that buyers succeeded in their claim for default damages arising from non-performance of a contract dated 21 June 2006 for Ukrainian wheat.

3. At the hearing before me Mr Andrew Baker QC and Dr Malcolm Jarvis appeared on behalf of buyers and Mr John Russell appeared on behalf of sellers. I am grateful to the legal teams on both sides for their succinct and forceful written skeleton arguments and oral submissions. My conclusion is that crucial elements in the submissions for buyers are right. The result is that the appeal must be allowed, and the matter remitted to the board so that it can consider the merits of sellers' appeal from the tribunal's award. My reasons are set out below under the following headings:

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B. The questions on appeal

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4. The time bar was held by the board to have arisen under rule 4.10 of the relevant arbitration rules. These were GAFTA no. 125, Arbitration Rules effective for contracts dated from 1st January 2006, which I shall refer to as "the 2006 rules". Under rule 4.10 the general position is that a claim lapses if neither party submits documentary evidence or submissions within one year from the date of the notice claiming arbitration. Rule 4.10 also, however, enables either party to extend the time limit by notice served during the thirty consecutive days prior to the expiry date. This may be done for successive periods of a year, but not so as to exceed 6 years from the date of the notice claiming arbitration.

5. The board, disagreeing with what was said at paragraph 5.5 of the tribunal's award, held that a second renewal notice given by buyers on 31 October 2008 was too early and thus ineffective. Accordingly the time bar in rule 4.10 applied. Under rule 21(a) the tribunal was given a discretion to admit a claim, even though it would otherwise be time-barred. However the board held that this discretion had not been exercised by the tribunal. The board made other findings concerning this discretion and concerning whether sellers had waived their rights to rely upon the time bar.

6. Buyers accepted the board's conclusion as to the meaning of clause 4.10, and accordingly also accepted the consequence that the renewal notices were premature. However they contended that what the board said as regards the discretionary power to admit the claim was obviously wrong. In these circumstances His Honour Judge Mackie QC granted leave to appeal under section 69 of the Arbitration Act 1996 on two questions of law. They were:

(1) Is the meaning and effect of paragraph 5.5 of the First-Tier Award that the first-tier tribunal exercised its discretion to admit the Buyer's claim under rule 21(a) of GAFTA No. 125 Arbitration Rules?

(2) Upon the proper construction of the aforesaid rule 21(a), does the first-tier tribunal have discretion to admit a claim only where it is satisfied that the circumstances of the claim were outside the reasonable contemplation of the parties at the time of the contract?

33. I shall refer to these questions as "Question (1)" and "Question (2)" respectively. Leave was sought on Question (2) because of what was said in paragraph 6.13 of the board's award. The passage in question stated that under the provisions of rule 21(a) the only basis upon which the tribunal would have been able to exercise their discretion to admit a claim "was if the circumstances of the claim were outside the reasonable contemplation of the parties at the time of the contract". Buyers said this was plainly wrong, for it overlooked a second set of circumstances in which the discretion could be exercised and which constituted the circumstances which the tribunal plainly had in mind.

34. In their response to the application for leave to appeal sellers agreed with buyers that the answer to Question (2) must be, "no". This was because rule 21(a) plainly did not confine the tribunal's discretion only to the set of circumstances identified in Question (2). Sellers had always accepted that rule 21(a) identified two sets of circumstances in which the tribunal had discretion to admit a claim: the first was that identified in Question (2), and the second was when the conduct of one party made it unjust to hold the other party to the strict terms of the relevant time limit. However, sellers then went on to assert that Question (2) had only been posed because buyers had misunderstood what had been said by the board. Sellers' analysis, amplified and clarified at the hearing before me, involved three stages. First, they said that the two sets of circumstances identified in rule 21(a) involved what I would describe as "threshold" criteria: only if one or other of them were satisfied could the tribunal go on to consider whether to exercise discretion in buyers' favour. Second, they said that they were entitled to appeal to the board on the question whether these threshold criteria were met. Third, they said that they did indeed appeal to the board on the question whether these threshold criteria were met, and that when paragraph 6.13 was read in context the board had reached a conclusion of fact that neither threshold criterion was made out. Accordingly, submitted sellers, the board had found that the tribunal had no discretion and Question (1) did not arise.

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35. Buyers replied that if there were such a conclusion on the part of the board, then permission should be granted for a proposed third question of law:

(3) Is the board of appeal entitled to overrule the admission of a claim by the first-tier tribunal under Rule 21(a) by reference to the board's view whether 'the circumstances were outside the reasonable contemplation of the parties when they entered into the contract and it would be just to extend time' or 'the conduct of one party makes it unjust to hold the other party to the strict terms of the time limit in question'?

10. As to this proposed third question, His Honour Judge Mackie QC directed that the judge hearing the appeal would consider whether to grant permission.

C. The 2006 rules

11. The rules referred to by the parties in their skeleton arguments were rules 4.10 and 21. I consider that rules 10 and 12 have potential relevance as well. I begin with rule 4.10, which stated:

    4.10 Lapse of Claim
    If neither party submits any documentary evidence or submissions as set out in this Rule or as ordered by the tribunal, within 1 year from the date of the notice claiming arbitration, then, the claimant's claim shall be deemed to have lapsed on the expiry of the said period of 1 year unless before that date the claim is renewed:
    (a) by a notice served by either party on the other, such notice to be served during the 30 consecutive days prior to the expiry date, or
    (b) by the service of documentary evidence or submissions by either party,
    in which case the claim and counterclaim are each renewed for a further year.
    The claim may be thus renewed for successive periods of 1 year, but not to exceed more than 6 years from the date of the first notice served in accordance with Rule 2. Wherever a claim is renewed any counterclaim is also deemed to be renewed.

12. Rules 10 and 12 can be taken together:

    10. Right of Appeal
    10.1 Save as provided in Rules 6.4, 8.1(b), 8.2, 19 and 21, either party may appeal against an award to a board of appeal provided that the following conditions are complied with:
    …
    12.4 An appeal involves a new hearing of the dispute and the board of appeal may confirm, vary, amend or set-aside the award of the tribunal. In particular (but not by way of restriction), the board of appeal may;
    (a) vary an award by increasing or reducing the liability of either party,
    (b) correct any errors in the award or otherwise alter or amend it,
    (c) award the payment of interest,
    (d) award the payment of costs, fees and expenses of and incidental to the hearing of the arbitration and the appeal. Such costs, fees and expenses will normally follow the event.

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13. Rule 21 is complex. I have found it helpful to identify separate provisions in the rule by using numbers in square brackets. Broken down in this way, the rule provides:

    21. NON-COMPLIANCE WITH TIME LIMITS AND RULES
    [1] If any time limit or provisions imposed by these Rules are not complied with, and when such matters are raised as a defence to the arbitration claim,
    [2] then, subject only to the discretion of the tribunal or board of appeal conferred by this rule,
    [3] the claimant's claims and/or appellant's appeal as the case may be, shall be deemed to be waived and absolutely barred, except: -
    (a) [4] where the tribunal may in its discretion admit a claim
        [5] if
        [5A] satisfied that the circumstances were outside the reasonable contemplation of the parties when they entered into the contract and that it would be just to extend the time, or

[6] when
[6A] the conduct of one party makes it unjust to hold the other party to the strict terms of the time limit in question.
[7] Otherwise the tribunal may determine that the claim is waived and barred and refuse to admit it.
[8] There shall be no appeal to the board of appeal against the decision of the tribunal to exercise its discretion to admit a claim.
[9] If a tribunal decides not to admit the claim, then the claimant shall have the right to appeal pursuant to Rule 10, and the board of appeal shall have the power [9A] in its absolute discretion [9B] to overturn that decision and to admit the claim;

(b) [10] upon appeal if any of the provisions of rules 10 to 20 have not been complied with, then the board of appeal may, [11] in its absolute discretion, [12] extend the time for compliance (notwithstanding that the time may already have expired) or dispense with the necessity for compliance and may proceed to hear and determine the appeal as if each and all of those rules had been complied with. Any decision made pursuant to this rule shall be final, conclusive and binding.

14. I have included breaks at [5A] and [6A] because it was suggested in argument that these are alternative ways of structuring clause 21. To my mind the clause reads better, as a matter of English, by ignoring the breaks at [5A] and [6A]. There are various possible ways in which to structure this part of the clause, but both sides agreed that they would not affect the result. What in my view is clear is that provision [4] is explaining that there are sets of circumstances where the tribunal may in its discretion admit a claim. Provisions [5]/[5A] and [6]/[6A] explain that there are two such sets of circumstances. In effect, as it seems to me, this part of clause 21 works grammatically if one puts in a colon after provision [4]:

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(a) [4] where the tribunal may in its discretion admit a claim:
[5] if satisfied that the circumstances were outside the reasonable contemplation of the parties when they entered into the contract and that it would be just to extend the time, or
[6] when the conduct of one party makes it unjust to hold the other party to the strict terms of the time limit in question.
[7] Otherwise the tribunal may determine that the claim is waived and barred and refuse to admit it.

D. The tribunal's award

15. The notice of arbitration was served on 1 December 2006. It was common ground that a first renewal by buyers on 2 November 2007 was within the stipulated period of 30 days prior to expiry of the one year period. Subsequent renewal notices were given on 31 October 2008, 30 October 2009 and 22 October 2010. Those dates were each within thirty days of expiry of one year after the date of the previous renewal notice. Earlier versions of the GAFTA arbitration rules had stated expressly that this was the period within which a renewal notice must be given. The tribunal held, in the initial part of paragraph 5.5 of its award, that this remained the case under the 2006 rules. In the remaining part of paragraph 5.5 the tribunal added:

… Furthermore, even if we were to accept Sellers' interpretation [of Rule 4.10], the fact remains and is not disputed that Sellers were kept fully aware of Buyers'

intention to maintain their claim, albeit that later notifications may have been sent too early by a matter of days. Even so, we note that Sellers at no time prior to their submissions appear to have objected to any of the Buyers' renewal notices and as such waived any alleged right to object at a later stage. Therefore, had Sellers' interpretation prevailed [i.e. if Buyers' later renewal notices were slightly premature], the Tribunal would in any case have exercised its discretion to admit buyers' claim. Accordingly WE FIND THAT Buyers' claim is admitted.

16. Earlier in their award (at paragraph 4.1), when describing buyers' submissions that they had complied with the time requirements in clause 4.10, the tribunal noted additional contentions by buyers that:

    "Sellers suffered no prejudice as they were undoubtedly aware that buyers had renewed the claim and at no time complained. ... should the tribunal find against buyers on this point, the circumstances warrant that [the] tribunal should use its discretion to admit the claim nonetheless."

17. Although the tribunal did not say so, the reference to "its discretion" in both paragraph 4.1 and paragraph 5.5 was undoubtedly a reference to rule 21(a).

18. At paragraph 4.11 the tribunal summarised contentions by sellers to the effect that the renewal notices had not been given within the periods specified by rule 4.10. There was no mention of any contention by sellers as to the discretion under rule 21(a).

E. The board's award

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19. The board's award noted at paragraph 4.1 that relevant submissions by sellers were advanced under three heads: construction, waiver and discretion. Paragraphs 4.2 to 4.8 summarised various submissions by sellers under the heading, "Construction". No point now arises on those submissions. At paragraph 4.9 a further submission on construction was noted: this was that the concept of waiver did not apply to rule 4.10.

20. Under the heading "Waiver", the board at paragraph 4.10 summarised submissions by sellers in support of a contention that mere receipt of a renewal notice, or silence, cannot of itself constitute waiver.

21. There was then a heading "Discretion". Under that heading paragraphs 4.11 and 4.12 summarised two aspects of sellers' contentions:

    (1) Paragraph 4.11 noted a contention by sellers that the rule 21(a) discretion "is not absolute and is subject to clearly stipulated criteria," none of which was satisfied. Among other things, sellers said that buyers could not point to conduct on sellers' part making it unjust to hold buyers to the strict terms of the time limit. Buyers had explained that they were waiting for a court decision which would have a bearing on the dispute, but they could not ask for discretion to be applied in their favour simply because, in their keenness to wait, they got their renewals wrong. It was submitted that it was buyers' own conduct which made the exercise of discretion unjust.

    (2) Buyers had argued that under rule 21 the board had no power to reverse the exercise of discretion by the tribunal [see provision [8] in rule 21, prohibiting an

appeal from a decision of the tribunal to exercise its discretion to admit a claim]. Paragraph 4.12 noted that sellers accepted that this would be true if the tribunal had exercised their discretion but said that, in fact, the tribunal did not. The second to last sentence, and the start of the last sentence, of paragraph 4.12 constituted the board's summary of what sellers said in order to justify their contention that the tribunal did not exercise its discretion. I set out that summary, adding square brackets so as to clarify what I believe was intended as a summary of sellers' arguments in support of this contention:

> To suggest that the … tribunal's comment[,] that they would have exercised discretion in buyers' favour[,] was sufficient [to amount to an exercise of discretion], from which there would have been no appeal, is to place too heavy a burden on a very slender and tentative sentence. There was no exercise of discretion; …

(3) In the remainder of the last sentence of paragraph 4.12 the board recorded sellers returning to the point it had summarised in paragraph 4.11:

> … there could not have been any such exercise of discretion because the criteria to be established, which were nowhere mentioned in the [tribunal's] award, simply did not apply.

22. The board's award at paragraphs 4.13 to 4.17 summarised buyer's contentions on the question of construction. Paragraphs 4.18 and 4.19 summarised buyers' remaining submissions under two headings as follows:

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Discretion
4.18 Buyers argued that, in any event, the board had discretion to admit the claim and were urged so to do; the … tribunal had indicated that they would have done so. This statement operates as a use of the tribunal's discretion and is thus unappealable under rule 21. Alternatively, buyers asserted that the board also had the right to exercise their own discretion to admit and were urged to do so on a number of points: …
Waiver
4.19 Furthermore, sellers raised no contemporaneous objection to the renewals which makes it therefore unjust to hold buyers to the strict terms of the contract. On the contrary, buyers were themselves prejudiced by sellers' conduct in being denied the opportunity to rectify perceived errors, if any, in the service of their notices of claim renewal. To await the outcome of a similar and relevant GAFTA case in the courts was both reasonable and understandable: had that case failed, this case would not have proceeded, with resulting cost savings to all concerned and, finally, the amount at stake is significant.

23. Paragraphs 6.1 to 6.8 of the board's award set out its reasons for upholding sellers' contentions on construction, with the consequence that under rule 4.10 buyers' claim was deemed to have lapsed at the end of the last valid renewal period of one year, i.e. on 30 November 2008.

24. At paragraph 6.9 under the heading "Discretion", the board's award recapitulated the arguments summarised earlier at paragraphs 4.18 (buyers) and 4.11 and 4.12 (sellers). Paragraph 6.10 set out the terms of rule 21. The reasoning of the board on points

which it considered appropriate to classify under the headings "Discretion" and "Waiver" was then set out in this way:

> [paragraphs under the heading "Discretion" in addition to paragraphs 6.9 and 6.10:]
> 6.11 The scope of any discretion available to a tribunal or board of appeal is set down in the preamble in which it is stated "…subject only to the discretion of the tribunal or board of appeal conferred by this rule…". Sub-paragraph (a) then defines the discretion available to tribunals and sub-paragraph (b) defines the discretion available to boards of appeal. Outside these limits of discretion any claim "…shall be deemed to be waived and absolutely barred…".
> 6.12 It has been put to us that since the first tier tribunal considered that the renewals had been timely and that, if necessary, they would have exercised their discretion to admit the claim, we, the Board of Appeal are bound by their decision since, in accordance with Rule 21(a) there shall be no appeal against a decision of a tribunal to exercise its discretion to admit a claim. Since we take issue with the tribunal on their initial finding that the renewals were timely, we must now examine whether, or not, they exercised the discretion available to them to admit the claim. Referring to their interpretation of the 30-day renewal of claim restrictions, which concurred with that of the Buyers, the tribunal stated "Therefore, had Sellers' interpretation prevailed, the Tribunal would in any case have exercised its discretion to admit buyer's claim." We do not consider this to be an unequivocal exercise of discretion: the tribunal had already found that buyers had complied with the requirements of renewal of claim – with which we disagree – and that their willingness to admit the claim was founded, not on a discretionary basis, but on a finding of fact. Their reference to discretion was conditional on their having found differently on the facts. Accordingly WE FIND THAT discretion to admit was not exercised by the tribunal and that we are not thereby bound to admit the case on the basis of the tribunal's exercise of discretion.
> 6.13 Further, under the provisions of Rule 21(a) the only basis upon which the tribunal would have been able to exercise their discretion to admit a claim was if the circumstances of the claim were outside the reasonable contemplation of the parties at the time of the contract. This point was not addressed by the tribunal but it is our opinion that nothing before us, in terms of compliance with the GAFTA Arbitration Rules, could be seen to fall outside the parties' contemplation. Both are highly experienced traders and are familiar both with the Rules and the need to observe them. It is by no means unusual for arbitration proceedings to be instituted in the event of a contractual dispute which cannot be settled amicably and under such circumstances it is equally to be expected that the arbitration rules applicable to the contract will be followed unless specifically provided otherwise.
> 6.14 We carefully considered whether we, the Board of Appeal, had discretion in our own right to admit the claim. Our scope for exercising discretion is defined and restricted by Rule 21(b) above wherein it is stated "upon appeal if any of the provisions of Rules 10 to 20 have not been complied with, then the board of appeal may, in its absolute discretion, extend the time for compliance…" Rules 10 to 20 are procedural rules which have no bearing on a board of appeal's discretionary rights in terms of non-compliance with time limits, such rights being restricted by the terms of Rule 21, but are the only Rules under which a board of appeal may be permitted to exercise its discretion. Consequently WE FIND THAT, even if we were so minded, the Arbitration Rules No. 125 of GAFTA do not confer on us the power to exercise discretion to admit this claim.
> Waiver

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6.15 It was put to us that Sellers had waived their rights to rely on a defence based on time bar since they made no contemporaneous comment to Buyers that successive notices of renewal were served out of time; furthermore that at all times Sellers were well aware that it was Buyers' intention to continue to pursue the claim once the outcome of the *Soufflet v Bunge* case was known. We were unable to support this contention. It is trite law that mere silence does not suggest or confer any acceptance of a contractual party's error. Neither was any evidence adduced to show that Buyers had in some way relied on Sellers' action, or lack thereof, to make them believe that Sellers had no objection to any error on the part of Buyers. On the contrary, Buyers made clear that their delay, of some years, in serving submissions was caused by their desire to await the outcome of legal action elsewhere. It is our view that, having decided to try to postpone their action in arbitration for their own purposes it was for Buyers to ensure that they complied with the GAFTA Rules in order to preserve their action. Buyers are a large and experienced trading house with ample access, both internally and from outside sources, to sufficient resources to ensure that their action was properly maintained.
6.16 We have found at paragraph 6.6 above that as a result of Buyers' failure to conform to the requirements of the GAFTA Arbitration Rules, in order to prevent the lapse of their claim, that their claim for arbitration is deemed to have lapsed on 1st December 2008. We have further found that we have no discretion under the same Rules to admit the claim even if we were so minded. Consequently WE FIND THAT Buyers' claim has lapsed for the reasons given.

F. Overview: sub-issues (1) and (2) to (4)

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25. The board was fully entitled to take the time bar issue first. If sellers were right on the issue, then time and expense would be saved, as there would be no need to examine and adjudicate upon submissions on the merits.

26. The time bar issue, in the light of the submissions by the parties before the board, can be broken down into four sub-issues:
    (1) Did the renewal notices comply with rule 4.10? If so, buyers were entitled to proceed with the arbitration, but if not:
    (2) Did the legal concept of waiver prevent sellers from relying on any defect in the notices? If so, buyers were entitled to proceed with the arbitration, but if not:
    (3) Did the tribunal admit the claim in its discretion under rule 21(a)? And:
    (4) What consequences flow from the answer to sub-issue (3)?

27. Sub-issue (1) is not in controversy on this appeal. It raised a question of great importance to GAFTA members: were sellers right to say that the 2006 rules had changed the previous requirements for a renewal notice? The parties took a great deal of trouble to ensure that the board had full submissions on this question. Their submissions were carefully and thoroughly analysed by the board. It examined the tribunal's reasons for finding against sellers on this point, and what had been said by market practitioners on the topic. I pay tribute to the clarity of the board's reasoning on this point. It is compelling reasoning which is no doubt why no appeal arises on the point.

28. Sub-issues (2), (3) and (4) were subsidiary to sub-issue (1). They were not separately identified by the parties as clearly as they might have been. Nor were the parties' submissions, as recorded by the board, as detailed and well structured as they had been

on sub-issue (1). These factors are likely to have hampered the board in its consideration of the rival submissions affecting sub-issues (2) to (4).

G. Sub-issue (2): waiver

29. The tribunal's award, when describing buyers' submissions, makes no mention of any contention relying on legal doctrines of estoppel or waiver. If a contention of this kind could have been made with a real prospect of success, then there is no reason to doubt that it would have been made. Success on such a contention would have been a complete answer to the allegation of time bar. However any such contention would face considerable hurdles, in particular because sellers' response to the renewal notices had been one of silence.

30. The first and only mention of waiver by the tribunal appears to have been in paragraph 5.5 of its award. It is in the third to last sentence of that paragraph, in the passage dealing with the discretion to admit. Sellers were later to complain that neither in this passage nor elsewhere in the award did the tribunal mention the criteria under rule 21(a). It is true that the tribunal's award did not expressly set out the two sets of circumstances identified at passages [5]/[5A] and [6]/[6A] of rule 21(a). However it was not essential to do this. All concerned were well aware of what rule 21 said.

31. Mr Russell submits that the third to last sentence of paragraph 5.5 was ambiguous. It was unclear, he said, whether the tribunal was saying that buyers could rely on the legal doctrine of waiver, or whether they were saying that what they described as waiver was a factor leading them to admit the claim in discretion under rule 21(a). In my view it may be unfortunate that the tribunal used the expression "waived any alleged right", as it is an expression which to a lawyer connotes a particular legal concept. However I am not persuaded that, on analysis, there is any room for doubt as to what the tribunal intended. In my view it is clear that the tribunal was concerned in this passage with discretion under rule 21(a), and not with the legal concept of waiver. There had been no submission by buyers relying on the legal concept of waiver. What buyers had said was that they had been proceeding on the footing that the 2006 rules continued the previous position as regards time for renewal notices, that sellers suffered no prejudice and had at no time complained, and that the circumstances warranted admitting the claim in discretion. The latter part of paragraph 5.5 plainly was concerned with discretion under rule 21(a). To my mind there can be no doubt that when the tribunal said that sellers "waived any alleged right" it was saying that the matters relied upon by buyers did indeed warrant admitting the claim in discretion. Nor can there be any doubt as to the part of rule 21(a) which the tribunal had in mind. Buyers had not submitted that the passage at [5]/[5A] applied. Their submissions, as recorded at paragraph 4.1 of the tribunal's award, were relevant to the provision at [6]/[6A]. The same, to my mind, is true of what the tribunal said in the latter part of 5.5.

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32. On appeal to the board, it seems from paragraph 4.10 of the board's award that the sellers moved directly from contentions on sub-issue (1) concerning construction, to contentions on sub-issue (2), and the legal concept of waiver. The unstated assumption appears to have been that waiver was now relied upon by buyers as a legal concept. Accordingly relevant propositions of law were relied on by sellers to demonstrate that the requirements of this legal concept were not met.

33. Buyers' submissions on waiver were recorded by the board at paragraph 4.19. They do not address the legal principles cited by sellers. The points made were not directed to those legal principles. What buyers sought to do was to show that it would be unjust to hold them to the strict terms of the contract. Thus what was addressed at paragraph 4.19 was highly germane to provisions [6]/[6A] in rule 21(a), and to buyers' submissions that the board should, if necessary, exercise its own discretion to admit.

34. At paragraph 6.15 the board's award set out its discussion of waiver. Mr Russell submitted that this discussion was concerned to show that the criteria at provision [6]/[6A] of rule 21(a) were not met. However, paragraph 6.15 is under a different heading and separate from the board's discussion of rule 21. It is plain from this fact, and from the reasoning in paragraph 6.15, that the board was dealing in this regard with the legal concept of waiver, and not with any sub-issue which might arise under rule 21.

35. In this and other respects Mr Russell reminded me of what was said by the Court of Appeal in *MRI v Erdenet* [2013] 1 Lloyd's Rep 638. Three principles in the *MRI* case were relied upon in particular:

> As a matter of general approach, the courts strive to uphold arbitration awards.
> The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it.
> Furthermore not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid.

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36. The observations made by the Court of Appeal in *MRI* are guiding principles of fundamental importance. However, they are not intended to, and do not, enable the court to give to an award a meaning which plainly was not intended by its authors. I give full force and effect to the *MRI* principles. Even so, in relation to what was said in the board's award about waiver, for the reasons given above, I do not accept that paragraph 6.15 was an examination of whether the criteria at provision [6]/[6A] of rule 21(a) were met.

37. Accordingly I conclude that paragraph 6.15 of the award was an examination of whether the legal concept of waiver applied, and not an examination that had anything to do with rule 21. It has not been suggested that the board's conclusion as to the legal concept of waiver was wrong. It is less clear to me that the buyers were in truth relying upon the legal concept of waiver. That does not matter for present purposes. What matters is that the board in paragraph 6.15 was not concerned with any aspect of rule 21. The importance of this conclusion will be explained in section J below, dealing with sub-issue (4).

H. Sub-issue (3): discretion

38. Question (1) of the two questions for which permission was given by His Honour Judge Mackie QC is phrased in a way which asks me to decide sub-issue (3). Mr Baker submitted that the clear meaning and effect of paragraph 5.5 of the tribunal's award was that it did exercise its discretion to admit buyers' claim under rule 21(a). It said so expressly: "WE FIND THAT buyers' claim is admitted". The words "is admitted" used

the language of rule 21(a). That decision to admit the claim can only have been an exercise of the discretion under rule 21(a). The language used earlier in paragraph 5.5 was conditional ("…had sellers' interpretation prevailed, the tribunal would in any case have exercised its discretion to admit buyers' claim"), but there was nothing wrong with that. Moreover, similar language had been interpreted as an exercise of discretion by both Bingham J and the Court of Appeal in *Bremer Handelsgesellschaft m.b.H v Raiffeisen Hauptgenossenschaft eG* [1985] 1 Lloyd's Rep. 335.

39. Turning to the board's reasons for reaching a different view, it had said in paragraph 6.12 that what was stated by the tribunal did not amount to an unequivocal exercise of discretion. Mr Baker submitted, however, that as in *Bremer v Raiffeisen*, the tribunal exercised its discretion in the event that it was wrong to reject sellers' interpretation of the time bar provision. The board then said that the tribunal's willingness to admit the claim was founded, not on a discretionary basis, but on a finding of fact. However the tribunal's conclusion that the renewal notices were valid was a conclusion of law, not a finding of fact, and even if it were fact was not the basis of a "willingness to admit the claim". The words "in any case" made it clear that the claim was admitted whether the tribunal were right or wrong about rule 4.10. The final reason given by the board was that the tribunal's reference to discretion was conditional on it having found differently on the facts. This, submitted Mr Baker, repeated the fallacy underlying the first reason.

40. There was a further submission by Mr Baker which I will return to shortly.

41. Mr Russell in his skeleton argument advanced a primary case that it was unnecessary to examine whether the board was right or wrong on Question (1), as the board had held, as a matter of fact, that the tribunal did not have a discretion to exercise at all. I will return to this submission in section J below.

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42. On the merits of Question (1), the first contention advanced in sellers' skeleton argument is that saying "I would do x, if y" is conceptually different from saying "I do x". Sellers submitted that the tribunal could have, but did not, say, "in the alternative, we exercise our discretion in buyers' favour." I disagree. When read in context, the second to last sentence of paragraph 5.5 is plainly saying that if the tribunal is wrong on its construction of rule 4.10, then it exercises its discretion in buyers' favour. I initially thought that this part of the skeleton argument was intended to assert that a conditional exercise of discretion would not suffice. Mr Russell clarified orally, however, that a valid exercise of discretion could be conditional.

43. The second contention advanced in the skeleton argument was that paragraph 5.5 was in three parts. The first part was the finding in relation to the proper construction of rule 4.10. The second part was the observation that if the tribunal had reached a different conclusion on construction they would have exercised their discretion in buyers' favour. The final part was the last sentence, "accordingly WE FIND THAT buyers' claim is admitted." It was submitted that, properly analysed, "accordingly" in the last sentence must refer back to the finding in the first part. I disagree. The natural meaning of the word accordingly is that it encompasses what was said in the immediately preceding sentence.

44. The third contention was that the tribunal did not even conditionally purport to exercise a discretion, but merely observed what it would have done in different circumstances. This contention seems to me to be wrong for reasons I have given in relation to the first contention.

45. The fourth contention was that *Bremer v Raiffeisen* provided little if any assistance as it concerned a different award in a different case, and predated modern thinking on the interpretation of words in a document. In the latter regard the skeleton argument cited *ICS v West Bromwich* [1998] 1 WLR 896 at 912:

    (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

46. Similarly it was said that construction involves ascertaining what a reasonable person would have understood the document to have meant: *Rainy Sky v Kookmin* [2011] 1 WLR 2900 paragraph 14. I acknowledge that *Bremer v Raiffeisen* involved a different award in a different case. However it demonstrates something which the tribunal were given little help on in the parties' submissions, namely that an exercise of discretion can be conditional. Moreover, the principles of construction which it applied appear to me to be entirely in accordance with modern thinking. Mr Russell himself submitted, in the context of criticisms of the board's award, that there is a need to read an arbitration award in a reasonable and commercial way, adopting the *MRI* principles under which courts strive to uphold arbitration awards. As was observed by His Honour Judge Mackie QC when granting permission to appeal, the approach which Mr Russell rightly says should be taken to the board's award applies equally to the tribunal's award. The *MRI* principles needed to be applied by the board in the present case because the board had to determine, by construing the tribunal's award, whether or not the tribunal had exercised a discretion to admit. Whether or not those principles would apply in other circumstances is a question which I do not decide and upon which I express no opinion.

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47. The final point made in the sellers' skeleton argument was stressed by Mr Russell in his oral submissions. It is that in this case a board comprising five market practitioners unanimously understood the tribunal's award to mean that it had not exercised any discretion in buyers' favour, and that that was the best possible indication as to the proper construction of the tribunal's award. The force of that point, however, seems to me to be considerably diminished in a case where the parties' submissions had not drawn attention to *Bremer v Raiffeisen,* nor to the applicability of the *MRI* principles to any consideration of whether the tribunal's award should be upheld.

48. Accordingly I conclude that, on analysis, the points made by Mr Russell do not answer the powerful contentions advanced by Mr Baker on behalf of buyers.

49. I mentioned earlier that Mr Baker relied upon a further point. Buyers' skeleton argument submitted that the board's interpretation of paragraph 5.5 of the tribunal's award would lead to a serious lacuna. In the present case, if the tribunal is taken not to have exercised its discretion to admit the claim under rule 21(a), then the board's decision on rule 4.10 has deprived buyers of the ability to pursue the claim on the merits. Yet in a case where rule 4.10 would bar the claim, rule 21(a) is supposed to afford claimants the opportunity to have the claim admitted by the tribunal, the tribunal's decision to admit the claim is supposed to be incapable of reversal by the board, and this particular tribunal said it would admit the claim if its view on the construction of rule 4.10 were wrong. In oral submissions Mr Baker acknowledged that rule 21(a) conferred a second discretion. That second discretion, like the discretion

conferred in rule 21(b), was conferred on the board, and it gave the board an absolute discretion, so that the board would not be limited to the two sets of circumstances identified at provisions [5]/[5A] and [6]/[6A]. But, submitted Mr Baker, that second discretion only arose under provision [9] if the tribunal decided "not to admit the claim", which had not happened here. Again submitted Mr Baker, there would be a lacuna.

50. I do not need to decide this additional point, and I do not propose to do so. I observe only that I have reservations about it, and that those reservations may have an impact upon the board's reasoning in paragraph 6.14 of its award. Under rule 10, subject (among other things) to rule 21, a party may appeal against an award provided that certain conditions are complied with. Under rule 12.4 an appeal involves a new hearing of the dispute and the board may confirm, vary, amend or set aside the tribunal's award. It seems to me to be at least arguable that in a case where the tribunal has been asked to exercise discretion under rule 21(a), the 2006 rules envisage that the position will be clear cut: either the tribunal will in its discretion have admitted the claim, or it will not. If the tribunal's decision is equivocal, and for that reason is held by the board not to be a decision exercising discretion admitting a claim, then it is arguably a decision "not to admit the claim" within provision [9], which would then give the claimant the right to appeal pursuant to rule 10. To the extent that any of the provisions of rule 10 would operate to prevent such an appeal, the board would arguably have discretion under rule 21(b) to dispense with those provisions. An alternative potential argument might arise if neither provision [8], concerning a decision of the tribunal to exercise its discretion to admit a claim, nor provision [9], where the tribunal decides not to admit the claim, was engaged because the tribunal's decision was equivocal. In that event a potential argument would be that in such circumstances rule 21 did not modify in any way the ability of a claimant to appeal under rule 10, and accordingly the claimant could ask the tribunal under rule 12.4 to vary, amend or set aside the tribunal's award. Again, insofar as any of the provisions of rule 10 might be an obstacle to such a course, the board could arguably use rule 21(b) to dispense with the provision in question.

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51. Before leaving sub-issue (3) I note an observation in Mr Russell's skeleton argument. This is that at first blush the question of whether or not the tribunal exercised a discretion sounds like one of fact, not law. Sellers were prepared to concede that it was at least a mixed question of fact and law. I am satisfied that the board's conclusion on this point was influenced by three errors of law. First, it did not appreciate that a conditional decision to admit the claim as a matter of discretion could be a valid decision. Second, the board did not appreciate that the subjunctive "would" appearing in the tribunal's award could properly be read as a conditional exercise of discretion. Third, the board did not apply to the tribunal's award the principles identified in the *MRI* case. I add that if the parties in their submissions had clearly identified these points then I am sure that these errors would not have been made.

[There is no section I]

J. Sub-issue (4): consequences

52. The application for permission to appeal proceeded on the premise that if the tribunal indeed exercised its discretion to admit the claim, then the board's award (determining

that buyers' claim was barred) must be set aside. The board had no standing to review a decision by the tribunal, in its discretion, to admit the claim.

53. In a respondent's notice, and in their skeleton argument opposing permission to appeal, sellers disagreed with this premise. They submitted that, on a proper and fair reading of the board's award, the board decided that the tribunal had had no discretion to exercise because the board made findings of fact that neither of the two sets of discretionary criteria was made out. Mr Russell developed this response in oral submissions. The opening sentence of paragraph 6.13 of the board's award was not, he submitted, a pronouncement as to the true meaning of rule 21. It was inherently improbable that the board should have made such an error. It could be explained, he submitted, because the board had reached the conclusion, albeit set out later in the award, that what the tribunal had said about waiver was wrong and therefore there could be no exercise of discretion under provision [6]/[6A]. It was for that reason, submitted Mr Russell, that paragraph 6.13 said that the only basis upon which the tribunal would have been able to exercise discretion was if the requirements of provision [5]/[5A] were met. Having examined those requirements in paragraph 6.13 and found that they were not met, it followed that the board found that it was not open to the tribunal to exercise any discretion in favour of buyers.

54. In section G above I dealt with Mr Russell's particular submission on paragraph 6.15 and explained why, applying the *MRI* principles, I cannot accept that anything in the board's discussion of waiver was written with rule 21 in mind. When considering the more general submission I continue to have the *MRI* principles in mind. I am not persuaded that they can justify the contention now advanced.

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55. To my mind relevant paragraphs in the award mean precisely what they say. There is no good reason to conclude that the board meant something different.

56. The starting point is to consider what ruling the board understood the sellers to be seeking. There had been a contention by sellers that buyers could not point to anything falling within the two sets of criteria under rule 21. As the board said at paragraph 4.12:

> This [that the board had no power to reverse the exercise of discretion by the tribunal], they [sellers] said, would be true if the tribunal had exercised their discretion but, in fact, they did not.

57. What is here recorded is that the sellers themselves, in their submissions to the board, acknowledged that if the tribunal had exercised its discretion then the board had no power to reverse that exercise of discretion. There was no submission of the kind now advanced by Mr Russell, asserting that the bar in provision [8] was far more limited than the words of that provision suggested, with the result that the board would have power to reverse the exercise of discretion if it disagreed with the tribunal on "threshold" criteria.

58. Thus the sellers' submissions, as recorded by the board, made it clear that if the board concluded that the tribunal had exercised its discretion then sellers accepted that their time bar point failed. In order to avoid that consequence, what sellers sought from the board was a decision that the tribunal had not in fact exercised discretion.

59. Consistently with this approach, the board in paragraph 6.12 considered relevant arguments of the parties and concluded that the discretion to admit was not exercised.

60. Under the heading "Discretion", the board dealt with two further matters. At paragraph 6.13 the board made a comment. It was no more than a comment. It was certainly not a ruling that even if the tribunal had exercised discretion, nonetheless the board could reverse that exercise of discretion because threshold criteria were not met. The comment was premised on an observation that would have been correct if the word at the end of provision [5] had been "and" rather than "or". The board's error in this regard is not the first occasion on which "or" has wrongly been interpreted as "and", nor will it be the last. In these circumstances I cannot accept Mr Russell's contentions that the board was addressing the question whether the tribunal had jurisdiction to embark upon an exercise of discretion and holding that it did not. If, however, it was doing this, then its conclusion was vitiated, because the board was wrongly proceeding upon the basis identified in Question (2) on which His Honour Judge Mackie QC gave permission to appeal.

61. The only other thing dealt with by the board under the heading "discretion" was in paragraph 6.14. This concerned whether the board had discretion in its own right to admit the claim. I have dealt with this in section H above, when commenting upon Mr Baker's additional point.

K. Conclusion

62. It is common ground that the answer to Question (2) must be "no". For the reasons given above I conclude that the answer to Question (1) is that the board erred in law in concluding that the tribunal did not exercise its discretion to admit buyers' claim under rule 21(a). I do not accept sellers' contention that unappealed parts of the award have the consequence that the board's decision must stand. That being the case, there is no need for me to consider whether to grant permission on the proposed third question. In that regard I observe only that Mr Russell's suggested interpretation of rule 21 would, in practice, have the surprising consequence that provision [8] in that rule would rarely, if ever, bar the board from re-examining the basis of a decision by the tribunal to exercise discretion in order to admit a claim.

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