JUDGMENT

By:

MR JUSTICE ADREW SMITH

Between:

Ramburs Inc

and

Agrifert SA

Mr Justice Andrew Smith:

1. The question for determination is whether the defendants, Agrifert SA, the buyers under a FOB contract of sale, validly nominated a vessel to take delivery of a cargo of maize. They claim that they did so by nominating a substitute vessel, the m/v "Sea Way". The sellers and claimants in these proceedings dispute this, and contend that they were therefore entitled to terminate, and validly terminated, the contract of sale because the buyers failed to make a valid nomination. The First Tier GAFTA Tribunal accepted this argument, but the Board allowed the buyers' appeal. The sellers appeal under section 69 of the Arbitration Act, 1996 on these questions of law:

    i. Where a Buyer of Goods FOB nominates a substitute vessel pursuant to its right under the GAFTA FOB Period of Delivery clause as appearing in GAFTA 49, is it required to comply with the terms of the contract of sale as to nomination and pre-advice in respect of the nomination of the substitute vessel?

    ii. On the facts found by the GAFTA Board of Appeal and a true construction of the contract dated the 3rd July 2012 between the parties, was the Defendants' (the Buyers') nomination of the m.v. "Sea Way" valid or were they in default so that their claim fails?

2. The buyers contend that their nomination complied with the contract of sale, but also sought to argue that, if it did not, it was not in breach of a condition of the contract and the breach did not entitle the sellers to terminate it. The sellers submitted that it is too late to introduce this argument, and the buyers should not be permitted to do so.

3. By a contract dated 3 July 2012 the sellers sold maize to the buyers on terms set out in a contract confirmation that the parties signed. The contract provided for GAFTA arbitration, and the terms included these:

    "Quantity

    25,000 metric tonnes 5% more or less in Buyers' Option and at contract price. One full cargo.

    Delivery

Between 15th March and 31st March 2013 both dates included. No extension. Buyers to present self-trimming bulk carrier. Loading berth(s)/pier(s) to be declared by Sellers upon nomination of a vessel.

Price

USD259.00 per metric ton, FOB Stowed/Trimmed/Fumigated. 1 safe berth 1 safe Panamax suitable port Ukraine to be declared on vessels nomination.

Pre-advice

Buyer shall serve to the Sellers (or the agent at loading) not less than 10 days pre-advice with the following information:

- *ETA*
- *Vessel's name*
- *Flag*
- *Dimensions of the vessel (LOA/BEAM/DM)*
- *DWT*
- *AIRDRAFT*
- *Demurrage/despatch rate.*

The Buyers or their forwarding agent, shall send to the Sellers and agents at loading the 8, 7, 6, 5, 3, 2 days and the 24 hours' precise Master's notices of the vessel's arrival at the loading port….

Demurrage/Dispatch

As per C/P rates; dispatch – half demurrage…

General Conditions

All other terms, conditions and rules not in contradiction with the above contained in Form 49 of GAFTA of which the parties admit that they have knowledge and notice, apply to this transaction and the details above given shall be taken as having been written into such form in the appropriate places."

4. GAFTA 49 provides:

"6. PERIOD OF DELIVERY

Delivery during *..... at Buyers' call.*

Nomination of Vessel. *Buyers shall serve not less than ..... consecutive day's [sic] notice of the name and probable readiness date of the vessel and the estimated tonnage required. The Sellers shall have the goods ready to be delivered to the Buyers at any time within the contract period of delivery.*

Buyers have the right to substitute the nominated vessel, but in any event the original delivery period and any extension shall not be affected thereby. Provided the vessel is presented at the loading port in readiness to load within the delivery period, Sellers shall if necessary complete loading after the delivery period, and carrying charges shall not apply. In case of re-sales a provisional notice shall be passed on without delay, where possible, by telephone and confirmed on the same day in accordance with the Notices Clause".

5. On 20 March 2013 the buyers sent a message nominating the m/v "Puffin" to load the cargo, giving at estimated time of arrival ("ETA") at Nikolayev of 26/27 March 2013. (The notice was therefore given fewer than ten days before the ETA of the "Puffin": the sellers argued in the reference that therefore it was invalid, but the Board held that the timing only meant that the sellers were not obliged to load until ten days after receiving the message. That is not challenged in these proceedings.) There followed exchanges between the parties which are not relevant for present purposes: the buyers complained that the sellers delayed in nominating the load port. On 26 March 2013 the buyers sent another message nominating the m/v "Sea Way" in place of the m/v "Puffin", giving an ETA of 28 March 2013. Later that day the sellers rejected the nominations of both vessels in this message:

> *"We refer to your emails of earlier today substituting originally nominated m/v 'Puffin' for 'Sea Way'… OBN or SUBS due to delay of the former,*
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> *First, in light of your substitution of the performing vessel it is now clear that your initial nomination of 'Puffin' with ETA 26-27 March 2013 on 20/03/2013 contained a misleading information purported to make so-called "Mickey Mouse" nomination to comply with the requirement of timely nomination, with a hope of making a substitution subsequently. As we explained to you in our correspondence of 20th March 2013 that apart from the matter of a suitable nomination the nominated vessel should have arrived at a loading port at such time so as to enable us to ship the cargo within the shipment period.*
>
> *Second, as regards your purported substitution we note that you nominated 'Sea Way' for intake of about 26,250 mts of cargo with ETA load port (i.e. Panamax suitable port Ukraine) on 28 March 2013. Apart from the matter of the validity of the substitution made both in terms of suitability and timing it is obvious that even if the vessel arrives at the loading port on 28th March which is highly unlikely, the Sellers will not be able to complete the loading within the shipment period ending 31/03/2013 12.00PM given the loading rate of 8,000 mts per weather working day SSHINC.*
>
> *In the premises, your nomination of the 'Puffin' and purported substitute 'Sea Way' represent a false nomination and in turn constitutes repudiatory breaches which we accept".*

The buyers replied on 27 March 2013 that they would buy a substitute cargo. They did so, and they claimed the difference in price of over $800,000.

6. It is convenient first to consider the procedural issue: whether the buyers should be permitted to advance a secondary argument that, if the nomination of the "Sea Way" was not in accordance with the contract, nevertheless they were not in repudiatory breach of it and the sellers were not entitled to terminate it. This question was raised, but not answered, in the judgment of Evans J at first instance in Cargill UK Ltd v Continental UK Ltd, [1989] 1 Lloyd's Rep 193, 197:

> *"The board's finding … that sellers are not dependent on the particular name of the carrying vessel in their preparations to deliver cargo, might provide grounds for arguing that a breach of the nomination provision in this non-essential respect does not entitle sellers to refuse to load, though they would be entitled to recover damages for any loss or expense caused by a late change of name. . . ."*

Mr Karia also drew to my attention a note on Cargill written by Professor Howard Bennett, where he described this suggestion as "undoubtedly correct" as a matter of general principle:

see H. N. Bennett, FOB Contracts: Substitution of Vessels, [1990] LMCLQ 446, 469. I agree with Professor Bennett.

7. CPR PD62 para 12.6 provides that, where a party seeks permission to appeal to the court against an arbitration award, a respondent who wishes to oppose the application for permission must file a respondent's notice which "sets out the grounds (but not the argument) on which the respondent resists the application", and "states whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and if so state the reasons (but not the argument)". A respondent's notice must be filed and served within 21 days after the date when he was required to acknowledge service and be accompanied by a skeleton argument, which must, inter alia, contain an estimate of how long the court is likely to need to deal with the application for leave to appeal on paper.

8. The buyers served a respondent's notice dated 4 June 2014, accompanied by a skeleton argument. The respondent's notice does not advance the secondary argument that the buyers now seek to make. The buyers' contend that the point was mentioned, however, in this paragraph of the skeleton argument, which explains why the reasoning of the Court of Appeal in the Cargill case [1989] 2 Ll Rep 290 is said not to apply here:

> *"… it should be noted that the Court of Appeal was considering a contract with an express right to terminate for breach of the nomination provisions. ("In the event of failure to give definite notice … buyer will be deemed in default and the provisions of the default clause will apply."). In the present case, the Sellers' case is that the Buyers were in repudiatory breach of the nomination and pre-advice clauses. The Board was entitled to find on all the evidence that they were not".*

The buyers go on to say that this argument echoes a point that they made in the reference, and refer to their written submissions to the Board:

> *"… the present case is different from the Cargill case because there was an express right to terminate the contract for breach of the vessel nomination provisions in the Cargill case. The clause in the Cargill case provided: 'In the event of failure to give definite notice … buyer will be deemed in default and the provisions of the default clause will apply …' …. But there is no such provision in the Contract".*

9. Accordingly Mr Chirag Karia QC, who represented the buyers, sought permission to amend the respondent's notice to include the secondary argument. Mr Michael Nolan QC, who represented the sellers, resisted the application: he argued that the buyers had not argued the point before the Board, that it is now too late to include it in the respondent's notice and that it is in any case an unsound argument. He also said that, if the point had been raised in the reference, the sellers could properly have adduced evidence about the consequences of the buyers' breach to support an argument that, even if the buyers were in breach of a so-called intermediate" or "innominate" term (see Chitty on Contracts (32nd Ed, 2015)), they were still entitled to terminate the contract of sale.

10. As I see it, the application to amend the respondent's notice and the grounds on which it was resisted misunderstand the Practice Direction. CPR PD62 para 12.6 is not concerned with a respondent's notice resisting an appeal once leave has been given, but about a respondent's notice opposing leave (or "permission"). That is clear from the wording of paragraph 12.6 itself, and put beyond doubt by the requirement that the accompanying skeleton argument provide an estimate for the time needed to deal with the application for leave. In this case, the court has granted leave, and the respondent's notice is spent. It is indeed too late to

amend it, but not for the reasons that Mr Nolan argued. A respondent to an appeal under section 69 is not obliged when resisting an application for leave to set out all the grounds on which he intends to resist the appeal: he is not obliged to oppose the application for leave (and serve a respondent's notice) at all.

11. However, this does not resolve the buyers' difficulty. The Award does not refer to the argument that the buyers seek to raise and I conclude that this is because it was not argued in the arbitration, and certainly not distinctly argued: the paragraph of the submissions on which the buyers rely is too oblique to show that it was. More importantly, the secondary argument is not a pure point of law but a mixed question of law and fact – hence Mr Nolan properly submitted that the sellers might properly have adduced relevant evidence. The jurisdiction of the court on appeals against awards is confined to questions of law: see CTI Group Inc v Transclear SA, [2007] EWHC 2340 at para 13. This is reflected, as Hamblen J pointed out in Cottonex Anstalt v Patriot Spinning Mills Ltd, [2014] EWHC 236, in PD62 paras 12.5 and 12.15 about what material can be put before the court on the hearing of an arbitration appeal. Accordingly, he said this (loc cit at para 35):

> *"What … is generally impermissible is to raise a new point of law which requires consideration of factual materials and in relation to which material findings might have been sought and made had the point been raised at the arbitration. Both the appellant and the respondent are confined to the findings made in the award. The respondent can argue new points of law based on those findings. If, however, the failure to argue the point which the respondent wishes to raise has the result that not all potentially relevant findings have been made then it should not be open to it".*

I conclude that it is not open to the buyers to pursue the secondary argument on this appeal.

12. It is generally a buyer's duty under a FOB contract to "name the vessel and give shipping instructions in time to enable the seller to send forward the goods so that they can be shipped in accordance with the instructions": Henderson & Glass v Radmore & Co, (1922) 10 Ll L R 727 per Bankes LJ. Subject to any contractual provisions to the contrary, a buyer who has nominated a vessel to load the cargo is entitled to withdraw the nomination and replace it with another, provided that the second nomination is in time to allow the vessel so nominated to fulfil the buyer's contractual obligations and is otherwise in accordance with the contract: Agricultores Federados Argentinos v Ampro SA, [1965] 2 Ll L R 157, 167. Mr Nolan does not dispute the buyers' prima facie right to change a nomination, but he contends, citing Benjamin's Sale of Goods (9th Ed, 2014) at para 20-055, that the "substitute nomination must itself be a valid one, that is to say it must be made in accordance with the requirements of the contract". He argues that this is established by the Cargill case (cit sup) and makes commercial sense.

13. In the Cargill case the Court of Appeal considered a contract which required the buyers to give the sellers a "provisional notice of 8 clear days of the date of the vessel's ETA at loading port..., such notice to show vessel name, itinerary and approximate quantity to be loaded"; and to give a further (final or definite) notice of four clear days of the date of the presentation of the vessel for loading. It also provided for a notice of readiness to be given "having complied with all the requirements" of the nomination clause. The buyers gave what was accepted to be a good provisional notice for the m/v "Cobetas", but when it turned out that she would not arrive in time, they purported to change the nomination to the m/v "FinnBeaver", but did so within eight days of the ETA and four days of the presentation of the vessel. The Court of Appeal decided that the nomination of the m/v "FinnBeaver" was invalid.

14. Parker LJ said this (at p.294):

> *"If parties specifically stipulate for the vessel's name and itinerary to be given eight clear days before e.t.a and nine running days before expiry of the shipping period to be followed by a definite notice six running days before such expiry and finally a notice of readiness to be given by the vessel having complied with such requirements I find it impossible to attribute to the parties the mutual intention that buyers could nominate another vessel with a different itinerary notwithstanding that it was too late to give either a provisional or final notice in respect of her. Buyers' argument must in my view involve, if right, the further consequence that having given provisional and definite notice under the nomination clause and a valid notice of readiness in respect of vessel A they could have actually tendered for loading another vessel. This in my judgment is unacceptable".*

15. Bingham LJ said this (at p.295):

> *"(1) The first sentence [of the nomination clause] requires a provisional notice of eight clear days of the vessel's estimated time of arrival at Hull. Such notice is to show the vessel's name. Notice of this length of the vessel's name need not have been required. The experienced trade arbitrators have held that the sellers did not need to know the vessel's name to prepare to deliver cargo. But there the requirement is. I do not think it can be properly circumvented. Commercial usages such as "or sub" or "TBN", however familiar in other contexts, cannot be regarded as giving notice of the name of a vessel. What is required is notice of the name of a particular vessel. If there were room for doubt about this it would be removed by the requirement to state the itinerary of the vessel. I do not see how this requirement can sensibly be applied otherwise than to a specific vessel, which is the vessel to be named.*
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> *(2) The second sentence requires a final or definite notice of four clear days of the date of presentation of the vessel for loading. There is no requirement that this notice should state the name of the vessel or its itinerary or the approximate quantity of cargo to be loaded. The reason for this omission is in my view that this information has already been given in the provisional notice and "the vessel" in the second sentence is plainly the named and identified vessel to which the provisional notice had related ….. When notice of readiness was given by Finnbeaver the buyers had not complied with all the requirements of the nomination clause in respect of that vessel. They had not complied with any. Having failed to give definite notice as required in respect of the vessel presented for loading the buyers were in default and the sellers were entitled to decline to perform."*

16. The third member of the court, Taylor LJ, said this (at p.297):

> *"… I am reluctantly driven to conclude that the notice of readiness clause … does exclude freedom to substitute and is therefore fatal to the [buyers] case".*

He continued:

> *"If one could properly construe the clause as leaving open the possibility of the vessel to be named in the notice of readiness being different from the vessel named earlier in pursuance of the nomination clause I would be disposed to find for the [buyers]. There was no express prohibition against substitution. These are the sellers' terms and the contract should be read contra proferentem. However, I find myself unable for two reasons to construe the clause in that way. First, although ungrammatical, it does, in my judgment, make clear that the vessel in respect of which notice of readiness is given must be the same vessel as that named in compliance with the nomination clause. Indeed it may have been the intention to emphasize that point which dictated the ungrammatical construction. The one word "vessel" is the identical subject of both limbs of the clause.*

Secondly one must I think have regard to the elaborate requirements of notice in the nomination clause. They show that the parties here, as opposed to those in the Ampro case, attached importance to providing at very specific times the name, itinerary and e.t.a of the vessel and its date of presentation for loading. If a substitute vessel could be put in at a late stage, too late to serve fresh notices, then the detailed requirements as to notices would be unnecessary".

17. Mr Karia submitted that the Court of Appeal authority does not apply in this case for two principal reasons:

    i. The contract in the Cargill case provided expressly that notice of readiness should be presented after all the requirements of the nomination clause had been complied with. Thus, it provided for the consequences of failure to comply exactly with the nomination clause in relation (as clearly was to be inferred) to the vessel which presented notice of readiness. There is no comparable contractual provision in this case.

    ii. The contract in the Cargill case did not expressly provide for a right to substitute the nominated vessel, and the buyers there relied on their common law or implied right to do so that the Ampro case recognised. Here the contract expressly provides for and defines the right.

18. I am not persuaded by Mr Karia's first point. As I read their judgments Parker and Taylor LJJ found for the sellers for two distinct reasons. One was that identified by Mr Karia, and I accept that it was apparently Bingham LJ's only reason. They also considered that the buyers' interpretation defeated the purpose of the nomination clause because it would be nonsensical for it to require details of a vessel that was not used to load the cargo and not details of the vessel that was to be so used. This view of the case appears to be taken by the editors of Benjamin (cit sup): they write at para 20-055: *"This substitution was ineffective since the eight days' notice required by the contract could no longer be given in relation to an arrival time of [m/v "Finn-Beaver"] within the shipment period. A fortiori, a substitution would be invalid where it was made in breach of a restriction imposed in a contract".*

19. As I see it, if the contract in this case had not, through the GAFTA 49 wording, expressly provided for the right to substitute a nominated vessel, then the pre-advice requirements would govern the nomination of any substitute vessel, and so, if the buyers failed timeously to provide the required details of the substitute vessel, then the substitute nomination would not comply with the contract. This leads to the question raised by Mr Karia's other distinction between this case and the Cargill case: does the GAFTA wording constitute a complete code defining and limiting the right to substitution, and so dispense with any requirement for pre-notice in respect of the substituted vessel?

20. Mr Karia argued that this is indeed the effect of the GAFTA wording: it provides that "the original delivery period and any extension shall not be affected by the buyer exercising the right", and that is the protection that the contract provides for the sellers against their arrangements being disrupted by late substitution: there is therefore no need for, and no scope for, further protection by way of pre-notice requirements. Moreover, he submitted, this intention is indicated by the structure of the Period of Delivery provisions about Nomination of Vessel: they first provide for notice of details of the original vessel, and then make discreet provision about substitution. Thus, Mr Karia submits that the Board was right that, "As a matter of construction of [the clause], the only restriction of the Buyers' right to substitute is that the delivery period shall not be affected by the substitute nomination".

21. I cannot agree. To my mind, the natural interpretation of the requirement in the first provision about nomination of Vessel in the GAFTA wording is that it refers to the vessel that is to load the cargo: that is the only vessel whose name and "probable readiness date" could possibly matter. It is true that the sellers are to have the goods "ready to be delivered to the Buyers at any time within the contract period of delivery", but that does not mean that they would not be interested in receiving information about when the vessel that was to carry the cargo would probably be ready. Similar considerations apply to the pre-advice provisions in the confirmation of contract: for example, the sellers might want the dimensions and draft of the vessel to arrange a safe berth. The Board considered that the identity of the nominated vessel did not much matter to the sellers, but in response I would echo what was said in the judgments in Cargill: where contracting parties have stipulated the information to be provided, what matters is the parties' agreement, not the views of arbitrators, even those as experienced as here.

22. Nor I am impressed by the view expressed by the Board that it would be "bizarre" for the right to substitute to be subject to the same requirement for 10 days' pre-advice as the original nomination. As I see it, it would be more bizarre to give the contract an interpretation that requires the buyers to give detailed pre-advice information, but for information about a vessel that was never used to suffice.

23. The interpretation that I favour leaves a sensible commercial purpose for the substitution provisions. It makes express the implied right to substitute recognised in the Ampro case, but goes on to qualify it in a way that deals with a question identified in Benjamin (cit sup) at para 20-055: does the seller have a remedy if the buyer changes the nomination after the seller has relied on it? As the editors of Benjamin observe, it is difficult to see a precise legal basis whereby the buyer could have redress, and the GAFTA wording provides that there cannot be a valid substitute nomination in these circumstances if it will cause problems over the delivery period.

24. I therefore conclude that the nomination of the m/v "Sea Way" was not made in accordance with the contract. I allow the appeal, answering the questions as follows:

    i. Where a Buyer of Goods FOB nominates a substitute vessel pursuant to its right under the GAFTA FOB Period of Delivery clause as appearing in GAFTA 49, he is required to comply with the terms of the contract of sale as to nomination and pre-advice in respect of the nomination of the substitute vessel?

    ii. On the facts found by the GAFTA Board of Appeal and a true construction of the contract between the parties, the Buyers' nomination of the m/v "Sea Way" was invalid, they were in default and their claim fails.