- JUDGMENT -

Before:

MR JUSTICE EDER:

Introduction

1. This is an appeal by the claimants (the "sellers") against Appeal Award No 4328 (the "award") issued by the GAFTA Board of Appeal (the "Board") on 8 August 2013. The appeal is brought pursuant to section 69 of the Arbitration Act 1996 and permission was granted by Teare J. It concerns a short point of construction of a "Notices" clause which appears in numerous GAFTA standard forms. At the outset, I should express my thanks to both counsel for their helpful written skeleton arguments which I have, where appropriate, used in this judgment in summarising the points raised and expressing my conclusions.

2. The relevant facts appear from the award and can be summarised as follows. By a contract dated 4 October 2010 (the "contract") the sellers agreed to sell 38,000 mt of French feed barley to the defendants (the "buyers") on fob terms. The terms of GAFTA 64 were incorporated and provided in material part as follows:

   "6. PERIOD OF DELIVERY
   …
   In case of re-sales all notices shall be passed on without delay, where possible, by telephone and confirmed on the same day in accordance with the Notices Clause.
   …

   8. EXTENSION OF DELIVERY

   The contract period of delivery shall be extended by an additional period of not more than 21 consecutive days, provided that Buyers serve notice claiming extension not later than the next business day following the last day of the delivery period. …

   19. NOTICES

   All notices required to be served on the parties pursuant to this contract shall be communicated rapidly in legible form. Methods of rapid communication for the purposes of this clause are defined and mutually recognised as: - either telex, or letter if delivered by hand on the date of writing, or telefax, or Email, or other electronic means, always subject to the proviso that if receipt of any notice is contested, the burden of proof of transmission shall be on the sender who shall, in the case of a dispute, establish, to the satisfaction of the arbitrator(s) or board of appeal appointed pursuant to the Arbitration Clause, that the notice was actually transmitted to the addressee. In case of resales/repurchases all notices shall be served without delay by sellers on their respective buyers or vice versa, and any notice received after 1600 hours on a business day shall be deemed to have been received on the business day following. A notice to the Brokers or Agent shall be deemed a notice under this contract." (Emphasis added.)

For the sake of convenience, I will refer to the words underlined in bold in clause 19 (which appear at line 141 of the standard form) as the "deemed notice provision".

3. The original agreed delivery period was 10 November to 10 December 2010 at the buyers' option. 10 December 2010 was a Friday and it is common ground therefore that "the next business day following the last day of the delivery period" on which any notice claiming extension under clause 8 had to be served was Monday 13 December 2010. In the event, the buyers' nominated vessel was delayed and the buyers tendered a notice claiming extension at 17.09 on 13 December 2010. However, given that the notice was served after 16.00 on that day, the sellers took the position that, pursuant to the deemed notice provision, the notice was deemed to have been received the following day, ie Tuesday 14 December 2010; and that it was thus out of time. Accordingly, the sellers refused to perform. The buyers disputed that the deemed notice provision was applicable on the basis that it was concerned only with cases of "resales/repurchases" which was not the present case; and claimed damages against the sellers for non-performance in the amount of US$1,003,891.

4. As appears from the award, the sellers advanced two main counter-arguments before the Board. First, the sellers submitted that the deemed notice provision fell into two separate parts which were separated in the middle by a comma immediately followed by the word "and"; and that therefore the 16.00 deadline in the latter part applied generally and was not limited to cases of "resales/repurchases". Secondly, the sellers submitted in the alternative that, on the facts of the case, the buyers were reselling the goods to Saudi receivers; that the present case was therefore one of "resale" within the meaning of the first part of the deemed notice provision; and that the 16.00 deadline therefore applied.

The award

5. In relevant respect, the Board concluded that the deemed notice provision in clause 19 did not apply; that under clause 8, the buyers had until midnight on 13 December 2010 to serve the notice claiming the extension; that therefore the notice served by the buyers at 17.09 on 13 December 2010 was valid; that the sellers had wrongfully repudiated the contract; and that the buyers' claim for damages succeeded in the sum of US$570,000 plus interest and 80 per cent of the buyers' costs. In summary, the Board's reasons were as follows:

(i) The deemed notice provision applies only to resales/repurchases and not to any other notices which may be required under the contract [award, para 7.7].

(ii) On the facts of this case, the goods were not resold on back-to-back terms and therefore the deemed notice provision was inapplicable [award, para 7.10].

6. As to the latter conclusion, the Board held at para 7.9 as follows:

"The commercial reality was that the provision 'resales/repurchases' could only apply in cases where the goods had been resold on similar terms, and this is well understood by the Trade. If Buyers had resold the goods to Saudi Arabian receivers on FOB terms then they would, on the facts of this case, have been in a position

where they would have been passing on a Notice of Extension received from their buyers. However, the goods were sold on to the Saudi receivers on CIF terms and it was Buyers themselves who were responsible for presenting a vessel to load within the delivery period, or calling for an extension. The contemporaneous exchanges show that the Sellers were well aware that the goods had not been resold by Buyers on back-to-back terms and that it was Buyers themselves who were responsible for putting in a vessel to lift the goods."

The question of law

7. The question of law identified in the claim form, in respect of which permission to appeal was granted, is:

8. "In clause 19 of GAFTA 64, do the words in line 141, namely, 'any notice received after 16.00 hours on a business day shall be deemed to have been received on the business day following' apply to all contracts or only in case of resales/repurchases?"

Respondents' (buyers') notice

9. By a respondents' notice, the buyers indicated their intention to contend that the award should be upheld in any event for a reason not expressed (or not fully expressed) in the award, namely that the words "in case of resales/repurchases" in clause 19 of GAFTA Contract No 64 mean in case of contracts that are themselves resales/repurchases; and that since the contract between the sellers and the buyers was not itself a resale/repurchase, the deemed notice provision did not apply.

Sellers' submissions

10. Mr Russell QC on behalf of the sellers submitted that what seems to have happened here is that the Board simply looked at clause 19 as a matter of first impression without conducting any proper analysis of the structure and wording of the clause and the possible commercial consequences of the rival submissions. However, he accepted that as a matter of grammar and syntax the construction favoured by the Board is a possible or an available construction. Notwithstanding, he submitted that the sellers' construction is also an available construction. In particular, he submitted that the sentence can be read (with numbering added for clarity) as either:

"(1) In case of resales/repurchases all notices shall be served without delay by sellers on their respective buyers or vice versa, and (2) any notice received after 16.00 hours on a business day shall be deemed to have been received on the business day following" (the sellers' construction);

or

In case of resales/repurchases (1) all notices shall be served without delay by sellers

on their respective buyers or vice versa, and (2) any notice received after 16.00 hours on a business day shall be deemed to have been received on the business day following" (the buyers' construction).

11. In summary, Mr Russell QC submitted that the Board was wrong in its conclusion and that the sellers' construction was right both: (i) as a matter of the structure and wording of the sentence; and (ii) as a matter of business common sense.

12. As to the structure and wording of the sentence, Mr Russell QC advanced three main points. First, he emphasised that the two parts of the deemed notice provision are separated by the comma immediately before the word "and"; that if it had been the draftsman's intention that the words "in case of resales/repurchases" were to govern both parts, the comma could and should have been omitted; and that the Board gave no weight to the comma, when they should have done. Secondly, he drew attention to the fact that different wording is used to identify which notices are being referred to in each part of the sentence; that in the first part, "all notices," are referred to; that in the second part, the wording, "any notice," is used; that this suggests a difference is being drawn between the two parts; and that the proper reading is that the service without delay provision in the first part is applicable to all notices in the case of resales/repurchases, whereas the deemed service provision in the second part is applicable to *any* notice whether or not in the case of a resale/repurchase. Thirdly, he submitted that there is no wording in the second part that refers back to the first part; that if it had been the intention of the draftsmen that the second part was only concerned with notices in the case of resales/ repurchases then the obvious and natural thing to do would have been to say, "any *such* notice …" at the start of the second part; that that would have made the sentence entirely unambiguous; that the fact that the word "such" has not been used strongly suggests that the draftsmen intended the two parts of the sentence to be separate; that this is particularly so when one notes the frequency with which "such" is used elsewhere in the GAFTA No 64 form: see eg lines 9, 23, 59, 61, 62, 77, 83, 113, 114, 121, 127, 131, 153, 154, 162, 196, 197, 198 (specifically referring to "such notice"), 200 (again, "such notice"), 202, 218, 219, 225, 226; and that the fact that the use of "such" is so common in the form suggests that its omission in line 141 was deliberate.

13. As to business common sense, Mr Russell QC submitted that even if, contrary to the sellers' argument set out above, the court considered that the structure and wording of the clause favoured the buyers' construction, the business common sense argument is so strong that the sellers' construction must prevail. In support of that argument, Mr Russell QC drew my attention to: (i) *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 paras 21 and 30 to the effect that where a term of a contract is open to more than one interpretation then the court is entitled to prefer the construction which is more consistent with business common sense and to reject the other and that it is generally appropriate to adopt the interpretation which is most consistent with business common sense; (ii) the statement by Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB (No 2) (The Antaios)* [1985] AC 191 at page 201 that if "… semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense"; and (iii) the statement of Lord Reid in *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235, page

251: "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear". In particular, Mr Russell QC submitted that this last citation is of particular relevance here, given that, had the draftsmen intended the clause to mean what the buyers say it means, it would have been so easy to make that intention abundantly clear, merely by adding "such".

14. Mr Russell QC submitted that there were two particular reasons why the conclusion reached by the Board flouts business common sense and must therefore yield to the construction advanced by the sellers.

No commercial reason?

14. First, Mr Russell QC submitted that there is no commercial reason why service after 16.00 should be valid "same day" service in a case not involving resale/repurchase but only count as "next day" service in a case of resale/repurchase. To the recipients of a notice (the sellers in this case), it can (he submitted) make no difference whatsoever that the givers of the notice had contracted down the chain on back-to-back, as opposed to non-back-to-back terms: there is no commercial justification or explanation for saying that if the buyers had sold to the Saudi Arabian receivers on fob terms the 17.09 notice would have been invalid, but it is valid because they sold on cif terms and no such justification or explanation has been suggested by the Board in their award.

Uncertainty?

15. Secondly, Mr Russell QC submitted that the Board's conclusion will lead to unsatisfactory uncertainty. In particular, he submitted that it is crucial that the parties know whether an extension of time in relation to the delivery period is valid or not as recognised (for example) by Hamblen J in *PEC Ltd v Thai Maparn Trading Co Ltd* at paras 9 to 11; and that the problem with the Board's construction is that the recipient of a notice may well not know whether or not the contractual position of the giver of the notice is such as to mean that it is a case of resale/repurchase. Although the Board found as a fact that in this case the sellers were aware that the buyers had not resold on back-to-back terms, Mr Russell QC submitted that there are likely to be many cases in which one party does not or may not know what the other party's on-contract position is; and that this is further compounded by the uncertainty inherent in the Board's construction of "resales/repurchases". In that context, Mr Russell QC drew particular attention to para 7.9 of the award where the Board referred to these words as applying where "goods have been resold on similar terms" but in para 7.10 the Board held that they applied "only to the resale/repurchase of goods on back-to-back terms in string". This, he submitted, begs many questions: there will be very few, if any, contracts where the terms are entirely "back-to-back": at least the price is likely to be different. Just how "similar" or "back to back" contracts have to be before they fall within the Board's definition of "resales/repurchases" is, Mr Russell QC submitted, unclear. In particular, Mr Russell QC posed a series of rhetorical questions. For example, would it be sufficient if the buyers' on-sale was simply on fob terms, but not incorporating GAFTA 64? What if GAFTA 64 was incorporated, but with amendments? Or if

most terms were back-to-back but, for example, the delivery periods were not? Mr Russell QC submitted that just as the recipient of a notice may not have any knowledge as to the nature of his counterparty's on-contract, a fortiori he may not have sufficiently detailed knowledge to be able to assess whether or not the contracts are on "similar terms" or are on "back to back terms in string" for the purposes of line 140.

16. Mr Russell QC bolstered these submissions by a number of further specific points which were summarised in his skeleton argument as follows:

(i) The stated uncertainty does not matter much if line 141 (ie the second limb of the deemed notice provision) is construed separately from line 140 (ie the first limb). The obligation in line 140 that notices shall be served "without delay" is properly construed as an innominate term, not a condition, and so it would be a rare case in which a breach could lead to a termination of the contract and thus an important contemporaneous decision. Therefore, uncertainty as to whether the case was one of "resales/repurchases" would only very rarely be critical. By contrast it is obviously highly unsatisfactory that the validity of an extension notice should turn on whether it is a case of "resales/repurchases" with the result that the recipient of a notice may simply not know whether or not he is obliged to perform the contract. The Board's construction may, in many cases, put the recipient of such a notice in a highly unfair and prejudicial position.

(ii) There is no scope for uncertainty if the deemed service provision applies in all cases as the sellers contend.

(iii) A construction which gives rise to dangerous commercial uncertainty in relation to a fundamental term is a very unreasonable one. As per Lord Reid in *Wickman*, such a construction should only be adopted if the language of the clause makes it "abundantly clear" that that was what was intended. That is not the case here.

(iv) The uncertainty created by the buyers' construction is not limited to notices given pursuant to clause 8. The uncertainty would, for example, apply equally to notices claiming an extension in the event of strikes under clause 18, and to notices closing out the contract in the event of insolvency pursuant to clause 23.

(v) Further, the party giving notice may be afflicted by the uncertainty, as well as the recipient, given the difficulties set out above.

(vi) Moreover the party giving the notice could be caught out, quite unfairly. Suppose the sellers in this case had, unbeknownst to the buyers, themselves bought in the goods on essentially back-to-back terms from another contracting party, before selling on to the buyers on different terms. If that constituted a case of resale/repurchase the buyers would be caught by the deeming provision without realising it. If the buyers' construction is right, buyers may well have no way of knowing whether or not a notice has to be served by 16.00.

Analysis

17. Mr Russell QC advanced these submissions with great skill and cogency but I am unable to accept them for the reasons set out below.

18. The starting point in all cases of construction is the wording of the document itself: see *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416 at para 24. Here, I am prepared to accept that it is *possible* to construe the words used in different ways. Indeed, on first reading, it was my initial impression that the first part of the third sentence imposes an obligation, in the case of resales/repurchases, to pass on notices without delay, and that the second part (ie the deemed notice provision) affords protection to the party required to pass on the notice, by saying that if a notice which has to be passed on is received after 16.00 it is deemed to have been received on the following business day. However, it would seem that such meaning was not one contended for by either the sellers or the buyers – nor considered by the Board; and, on reflection, I accept that that there are (or may be) sound reasons why such construction is wrong.

19. Be all this as it may and recognising fully the dangers of an over-zealous semantic and syntactical analysis, I am persuaded that of the two constructions advanced by the parties, the more natural is the one advanced by the buyers and adopted by the Board for the following reasons.

20. First, it seems to me important to read the important third sentence including the deemed notice provision in the context of clause 19 read as a whole. In that context, it is to be noted that clause 19 consists of four sentences. The first is expressly concerned with "[a]ll notices required to be served pursuant to this contract …"; the second defines the methods of rapid communication that the first requires; the third (including the deemed notice provision) is the main focus of this appeal; and the fourth is a general deeming provision to ensure that valid notice can be given to a broker or agent. Against that background and as submitted by Mr Jarvis on behalf of the buyers, the seller's construction would seem to cut across the overall structure of clause 19. On the sellers' construction the second "part" of the third sentence is a general deeming provision which applies to *all* notices required to be served pursuant to the contract. That construction posits that the draftsmen intended the first, second and fourth sentences to be of general application, with the deemed notice provision being divided into two halves, the first of specific and the second of general application. However, as submitted by Mr Jarvis, if that had been intended, the second part of the deemed notice provision would be in a separate sentence; and if it was to be made part of another sentence, it would have been made part of the fourth sentence (which *is* a deeming provision of general application).

21. Secondly, turning to the language of the third sentence itself, I am not persuaded that the existence of the comma immediately before the word "and" has the significance attributed to it by the sellers. As submitted by Mr Jarvis, it seems to me that the comma is probably there, not to split the sentence into two independent provisions (which a full stop would have done) but to indicate that the words "or vice versa" belong to the first part of that sentence.

22. Thirdly, I accept Mr Jarvis's submission that if the deemed notice provision were to be read as a separate provision (as the sellers contend) it would more naturally refer to "*all* notices" (as in the first sentence of clause 19); that in that sense, the reference to "*all* notices" in the first part of the third sentence and "*any* notice" in the second part serves to underline the fact that the notice referred to in the second

part is that in the first; that the reading of "any notice" is perfectly clear without the word "such" (as in "any *such* notice"); and that there is no need to look for words in the second part of the third sentence which refer back to the first part of that sentence since the word "and" serves that reflexive purpose.

23. Fourthly, I also accept Mr Jarvis's submission that the substance of both "parts" of the third sentence is germane to the case of resales/repurchases. It is common ground that notices that have to be passed up or down a chain must be served by each respective seller or buyer (as the case may be) "without delay". Mr Jarvis then posed the rhetorical question: why should only notices that have to be passed up or down a chain have to be served "without delay"? The answer, he submitted, is obvious: because intermediary sellers or buyers in the chain may be prejudiced if the notice is not received in time for it to be passed on. He then posed a further rhetorical question: why should notices that have to be passed up or down a chain have to be served before 16.00 if they are to avoid being deemed to be served on the following day? In response, he submitted that the same answer applies and that it must follow that the fact that both parts of the third sentence are germane to the case of resales/repurchases confirms that the opening words of that sentence govern the whole of that sentence. Mr Jarvis accepted that had the two parts of the third sentence dealt with wholly different aspects of the giving of notices (eg if the fourth sentence of clause 19 had been substituted for the second "part" of the third sentence) there *might* have been a case for saying that they should be construed as independent provisions; but, as he submitted, that is not this case.

24. Fifth, it seems to me that Mr Jarvis is right in his further submission that the construction adopted by the Board is the more natural in the context of the GAFTA Contract No 64 form when construed as a whole. Under clause 6 vessel nomination notices must, "[i]n case of re-sales" (see lines 45 and 46), be passed on, where possible, by telephone and then confirmed *on the same day* in accordance with the Notices Clause (viz clause 19). As submitted by Mr Jarvis, there is thus a clear scheme within GAFTA Contract No 64 (which extends beyond the Notices clause) for notices in the case of resales/repurchases; that scheme seeks to ensure (so far as possible) that intermediate sellers/buyers are in a position to pass such notices on the same business day – hence the requirement, in case of resales/repurchases, for notices to be passed on, in some cases, by telephone and, in all cases, in writing by 16.00 on the same day.

25. For all these reasons it is my conclusion that the construction advanced by the buyers and adopted by the Board is the one to be preferred not only as a matter of language, punctuation and overall internal structure of clause 19 itself but also having regard to the structure and wording of the contract as a whole.

Business common sense

26. I have already summarised the sellers' submissions to the effect that the construction advanced by the buyers and adopted by the Board flouts business common sense and is to be rejected for that reason. This was hotly disputed by the buyers. In particular, Mr Jarvis submitted that the buyers' construction did not lead to an uncommercial result and did not give rise to any relevant uncertainty. On the contrary, he submitted that where there is a string of resales/repurchases, the need for contractual notices to be passed on by the intermediate sellers/buyers without

delay and during business hours is obvious; in particular, that where there are resales/repurchases it makes good sense to require that the notice be received before 16.00 because intermediate sellers/buyers may not otherwise see it until the following day (hence the deeming provision); that, by contrast, in cases where there are no "resales/repurchases" (ie the facts of this case), no deeming provision is necessary because there is no notice to pass on and in this case it is sufficient that the notice be received that day (ie before midnight). Further, as to the sellers' submission that it can make no difference whatsoever that the givers of the notice had contracted down the chain on back-to-back, as opposed to non-back-to-back terms, Mr Jarvis submitted that this ignores the fact that GAFTA Contract No 64 is a standard contract which may be (and often is) incorporated into sale contracts between parties at the end of a chain as well as between intermediate parties; that therefore whilst it may not matter to the seller (or the buyer) at the end of the chain whether the chain is on back-to-back terms, it *will* matter to intermediate sellers/buyers that there are mutual obligations to pass contractual notices up (or down) the line without delay (viz by telephone and confirmed by a notice in writing received before 16.00 on the same day); and that this is reflected in the third sentence of clause 19 where "*s*ellers" and "*b*uyers" are referred to without capital letters. Equally, Mr Jarvis disputed the argument that there was any relevant or sufficient uncertainty which would undermine the construction advanced by the buyers and adopted by the Board.

27. I confess that I have found these arguments difficult to evaluate. As it seems to me, the arguments advanced by Mr Russell QC both with regard to business common sense and uncertainty potentially carry at least some force; and Mr Jarvis's counter-arguments are not, in my view, as clear-cut as he would like them to be. However, as submitted by Mr Jarvis, there is no overriding criterion of construction to the effect that an interpretation that makes more business common sense is to be preferred: *BMA Special Opportunity Hub Fund v African Minerals Finance* at para 24 per Aikens LJ and *Cottonex Anstalt v Patriot Spinning Mills Ltd.*

28. Further, there can be no doubt that, as appears from the face of the award, the sellers put forward their submissions with regard to business common sense and uncertainty in support of their case before the Board; and they were obviously insufficient to persuade the Board to adopt the sellers' construction. It is fair to say that the Board did not deal specifically with such submissions in the body of its award and Mr Russell QC strongly criticised the Board for failing to do so. Indeed, he submitted that the award contains no reasoning at all to support the construction which the Board favoured; and that the Board failed to consider the commercial consequences. Whether or not that latter criticism is well founded, I do not know. However, the fact is, as I have stated above, that there can be no doubt that the sellers put forward their submissions with regard to business common sense and uncertainty in support of their case before the Board; and the fact that they did not persuade the Board to accept the sellers' construction is entitled to at least some weight even absent any specific reference in the award in relation thereto. At the very least, in the circumstances of the present case, I am not persuaded that the sellers' construction makes "more" business sense. Moreover, even taking the arguments with regard to business common sense and uncertainty into account, I do not consider that they are such as to override or to displace what I consider to be the proper construction of clause 19.

Conclusion

29. For all these reasons, I would answer the question of law posed as follows: "In clause 19 of GAFTA 64, the words in line 141, namely 'any notice received after 16.00 hours on a business day shall be deemed to have been received on the business day following' do not apply to all contracts but only in case of resales/repurchases". I would therefore uphold the award. In such circumstances, it is unnecessary to consider the separate argument raised by the respondents' (buyers') notice. Accordingly, counsel are requested to draft an order for my approval and to seek to agree all consequential matters, failing which I will, of course, deal with any outstanding matters.