Neutral Citation Number: [2021] EWHC 793 (Comm)

Case No: CL-2020-000218

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 31/03/2021

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

A	**Claimant**
- and –	
B	**Defendant**

- -
- -

Michael Nolan QC (instructed by **W Legal Limited**) for the **Claimant**
Angharad M Parry (instructed by **Studio Legale Associato Ridolfi Ghigi Longanesi**) for the **Defendant**

Hearing date: 16 December 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 31 March 2021 at 10:30 am

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Claimant ("***Sellers***") sold a cargo of Ukrainian feed corn under a contract dated 13 December 2017 (the "***Contract***") to the Defendant ("***Buyers***"). A dispute arose, which the parties referred to a GAFTA tribunal, who decided in favour of the Buyers. The Sellers appealed to a GAFTA Board of Appeal (the "***Board***"). The Board issued an award dated 19 March 2020 (the ***"Award"***) in favour of the Buyers. The Sellers now appeal, pursuant to permission granted by Teare J, on five questions of law under section 69 of the Arbitration Act 1996 (the ***"Act"***). There is also a challenge to the Award under section 68(c) and (d) of the Act on the ground that the Board did not deal with two issues put to it.

2. For the reasons set out below, I have concluded that the Award should stand and that the challenge and the appeal under sections 68 and 69 of the Act should be dismissed.

(B) BACKGROUND TO THE DISPUTE

(1) Contract and Vessel Nomination

3. By the Contract, the Sellers agreed to sell to the Buyers 25,000 mt +/- 5% at Buyers' option Ukrainian Feed Corn in Bulk, crop 2017, FOB 1 safe berth/1 safe Ukrainian port, Yuzhny, Odessa or Chernomorsk. The Contract included the following provisions:

> *"PORT OF LOADING TO BE DECLARED NOT PRIOR 8 DAYS TO THE DELIVERY PERIOD AND LATEST UPON NOMINATION OF THE PERFORMING VESSEL. BUYERS PRESENT SINGLE DECK, SELF TRIMMING BULK*

CARRIER, SUITABLE FOR LOADING AT SELLER'S BERTH."

"DELIVERY PERIOD:

1st APRIL 2018 TO 15TH APRIL 2018, BOTH DATES INCLUDED, NO EXTENSION"

"C/P:

IF REQUIRED, BUYERS SHALL SEND BY EMAIL/FAX/COURIER A WORKING COPY OF THE C/P OR BOOKING NOTE DULY SIGNED AND STAMPED TO SELLERS AT THEIR FIRST REQUEST"

"PRE-ADVICE:

BUYERS SHALL SERVE TO THE SELLERS NOT LESS THAN 8 DAYS' PRE-ADVICE WITH THE FOLLOWING INFORMATION

- *ETA*
- *VESSEL'S NAME AND AGE*
- *FLAG*
- *DIMENSIONS OF THE VESSEL (LOA/BEAM/DM)*
- *OWNERS NAME*
- *DWT*
- *AIRDRAFT*
- *DEMURRAGE/DESPATCH RATE*
- *IMC*
- *COUNTRY OF DESTINATION*
- *ESTIMATED QUANTITY TO BE LOADED"*

***"GENERAL CONDITIONS**:*

ALL OTHER TERMS, CONDITIONS AND RULES, NOT IN CONTRADICTION WITH THE ABOVE CONTAINED IN FORM 49 OF GAFTA … 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 Form 49 clause 6 ("*Period of Delivery*") provides:

> "**Delivery during** .....at Buyers' call.
>
> **Nomination of Vessel**. Buyers shall serve not less than .....consecutive days' 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. The Buyer has the right to substitute any nominated vessel. Buyer's obligations regarding pre-advice shall only apply to the original vessel nominated. No new pre-advice is required to be given in respect of any substitute vessel, provided that the substitute vessel arrives no earlier than the estimated time of arrival of the original vessel nominated and always within the delivery period. 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. Notice of substitution to be given as soon as possible but in any event no later than one business day before the estimated time of arrival of the original vessel. …."

5. The Buyers nominated the M/V "*Tai Hunter*" ("the ***Vessel***") on 20 March 2018. The nomination gave an ETA of 1 April 2018 AGW WP (all going well, weather permitting) and the destination as Egypt. The nomination failed to provide the owners' name as required by the Pre-Advice clause in the Contract.

6. The Sellers were informed by a third party that day that the Vessel had berthed at the Olimpex Terminal in Odessa and was due to complete loading on 21 March 2018. The message indicated that the Vessel was then due to sail directly to Ireland without going via any Ukrainian ports: as indicated below, the Board found that information to be incorrect.

7. In view of this information, the Sellers, via the parties' respective brokers, asked the Buyers for a copy of the charterparty in respect of the prospective voyage. The Buyers stated that the message had been sent up the contractual chain to their sub-buyers, and they would revert once they had received the answer. The Buyers asked the Sellers to nominate the load port and agents.

8. The next day, the Sellers' agents sent another message to the Buyers indicating that they had doubts over the genuineness of the nomination. The agents added that they were confident that the Sellers' silence in not nominating the loading port would not cause any harm, since it appeared that the Vessel would not be in Ukrainian Black Sea waters on 1 April 2018.

9. Over the following days, the parties exchanged further messages, with the Sellers demanding sight of the charterparty for the Vessel and the Buyers demanding the nomination of load port and agents. On 26 March 2018, the Sellers purported to terminate the contract for repudiatory breach:

> "Your continuous refusal and failure to provide the charterparty in respect of the m/v Tai Hunter, coupled with her current position and itinerary, supports our allegation that your nomination of the referred vessel was a fanciful nomination after all. I[n] turn, fanciful nomination constitutes a repudiatory breach which we hereby accept."

10. On 28 March 2018, following continued dialogue between the parties, the Buyers purported to nominate a substitute vessel, the M/V "*Mariana*", with an ETA of 5 April 2018 AGW WP. The nomination gave the destination as Portugal and asked for details of the load port, load port agents and surveyors.

11. The Sellers did not accept the revised nomination of the *Mariana*:

> "The reference is made to your email of this afternoon with the nomination of a substitute 'Mariana' (OBN or Sub) with ETA 05.04.18 and destination of Portugal. For the reasons set out in our previous correspondence of 26th and 27th March the relevance of this nomination is unclear. We would wish to remind you that after effects of the acceptance of the repudiatory breach was termination of the contract no.: CORN-196.131217 dated 13/12/17. Hence we fail to understand the rationale behind your new nomination.
>
> Even if you are not in an agreement with us as to lawfulness of the steps taken towards the contract cancellation, you are reminded of your duty to mitigate damages and losses."

12. Also on 28 March 2018, the Buyers sent a further message to the Sellers substituting MV "*Mariana*" with MV "*Deribas*" with an ETA of 8 April 2018 AGW WP. The nomination gave the destination as Portugal and asked for the load port, load port agents and surveyors. On 29 March 2018 the Sellers responded that in the light of their response to the substitute nomination of "*Mariana*", the relevance of Buyers' message relating to "*Deribas*" was unclear.

13. By 3 April 2018, both parties accepted that the contract was at an end, and the Buyers wrote that:

> "……
>
> We take issue with your rejection of the MV Mariana, as well as with your refusal to declare the loadport in your email of 26 March. Your emails of 26 and 28 March [are] both constitutive of an anticipatory breach and/or renunciation to the contract. So, we take the contract as terminated.
>
> We will purchase equivalent goods against you and will claim the price difference along with any additional expenses we may suffer."

14. The parties provisionally settled their dispute the following day by an agreement (the "***Settlement Agreement***") under which the Buyers purchased the corn at an increased price of US$190 pmt but otherwise on the same terms. Clause 3 of the Settlement Agreement provided for a price variation in the event of a dispute under the original contract:

> "3. In the event parties decide to contest or reconfirm, as the case may be, the lawfulness of the old contract termination by [the Sellers] through arbitration at Gafta, then depending on the outcomes of such arbitration the new Purchase Price of the new contract shall be adjusted in the following way:
>
> a) in the event final and unappealable arbitration award finds that [the Sellers] unlawfully terminated the old contract then the new Purchase Price payable to [the Sellers] under the new contract shall be reduced up to USD177.59 per mt and [the Sellers] shall reimburse the overpaid amount to [the Buyers] at first request
>
> b) in the event final and unappealable arbitration award finds that [the Sellers] lawfully terminated the old contract then the new Purchase Price payable to [the Sellers] under the new contract shall be increased to USD202 per mt and [the Buyers] shall pay the difference of USD12.00 per mt to [the Sellers] at first request."

(2) The Award

15. In the Award, the Board considered five issues:

> "10.1 Were Buyers in breach of contract for nominating a vessel which was unlikely or impossible to arrive at the contractual range of load ports by the ETA given by Buyers.
>
> 10.2 If this was a breach of contract then was it a breach of a condition, as argued by Sellers, which entitled them to terminate the Contract?
>
> 10.3 Were Buyers in breach of contract by the nominated vessel not yet being chartered by Buyers or sub-buyers?
>
> 10.4 Were Buyers in breach of contract by their failure to send a copy of the charterparty of the vessel?
>
> 10.5 Were Sellers, by terminating the Contract and accepting the repudiatory breaches, discharged from any further liability and were the messages substituting the original nomination valid?"

16. The Board found that the nomination of the Vessel was not manifestly false in the sense described in *Texaco v Eurogulf ('The Giray')* [1987] 1 Lloyd's Rep 541, a

decision of Hirst J to which I return below. In *Texaco* it had been physically impossible for the vessel to reach the loadport during the delivery period. The Board stated, after referring to *Texaco*:

> "11.8 We contrasted this with the nomination of MV "Tai Hunter" which was loading in Odessa at the time of nomination for onward shipment of goods to Egypt. Sellers may have been acting on the information provided by Odemara at the time of the nomination in the respect that they were told that the MV "Tai Hunter" would be destined for Ireland. Given that information, it would have been more probable that the nomination would have been "manifestly false" but that information was not correct as the vessel's destination was Egypt.
>
> 11.9 Given the time scale, it would, however, be entirely possible that the MV "Tai Hunter" would be ready to load by the end of the contract delivery period. She was nominated on 20 March 2018 and the last day of the delivery period was 15 April 2018. This was not at all similar to the "Giray" [in *Texaco*] whose passage time from Istanbul to Milford Haven would have ensured that the contract delivery period was exceeded by the time she presented. However, but for serious congestion, MV "Tai Hunter" would have been able to return to Odessa, Yuzhny or Chernomorsk by the end of the contract delivery period. In our opinion, the performance of MV "Tai Hunter" was not self-evidently impossible and was not manifestly incapable of fulfilment as was the "Giray" in the Texaco v Eurogulf. We do not, therefore, consider that the nomination was "manifestly false in the sense that it could never possibly be fulfilled". We do, however, go onto discuss the validity of the nomination (as opposed to being manifestly false) in more detail below."

17. The Board then referred to the facts in more detail regarding the Vessel's movements, including the Sellers' submission that Egyptian ports are notorious for congestion, and the fact that, on the date the Vessel reached Egypt, information received from the Alexandria Port Authority indicated that the delay there was between 24 and 43 days. Ultimately, having presented notice of readiness at Alexandria on 26 March 2018, the Vessel did not in fact depart from there until 21 days later, on 16 April 2018, after the expiry of the contractual delivery period.

18. The Board concluded that the Buyers' nomination on 20 March 2018 of the *"Tai Hunter"* was invalid because the ETA provided was unreasonably ambitious:

> "11.4 It is a buyer's duty under an FOB contract to name the vessel and give shipping instructions in time to enable the seller to deliver contractual goods so they can be shipped in accordance with those instructions. Buyers are, therefore, obliged to nominate a vessel which allows the seller to deliver contractual goods before the end of the shipment period and to

give suitable pre-advice so that the seller can have goods available and ready to load.

…

11.17 Sellers adduced Scrutton on Charterparties (23rd Edition) Art 67 and argued the need for certainty over the time of arrival of a vessel. Although this is a text on charterparties, the Board agreed with Sellers that an estimated time of arrival from a shipowner (and therefore a buyer in string) should be given honestly and on reasonable grounds and that a vessel should depart for a load port in such time as to enable her to arrive by the ETA.

11.18 An FOB seller has to make goods ready for delivery onto the vessel nominated by a buyer and the date of delivery given by a buyer is one which is required to give certainty to enable a seller to meet their obligations to the buyer. It follows, therefore, that the ETA (or "probable readiness date" contained at clause 6 of Gafta 49) is a date which needs to be honestly given and a seller can rely upon.

11.19 The Board considered at length whether the nomination of MV "Tai Hunter" was a valid nomination. Whilst there was some sympathy with the view that the nomination was in fact valid, ultimately, we considered that it does not amount to commercial business sense that a buyer can nominate a vessel which is incapable of performance on the date given, even if that date is an "estimated" or "probable" date. The Board considered that the estimated or probable readiness date was incorporated to provide for disruption from weather and other such events. In our view, a nomination which contained ambitious or incorrect information was not valid as it did not give the correct information to enable the Seller to perform the contract. Buyers' nomination gave an ETA of 1 April, however, since congestion in Egypt was predicted to prevent the vessel's return to Odessa within the delivery period, the ETA given was unreasonably ambitious. The nomination given on 20 March was therefore invalid.

11.20 Buyers had sent the nomination down the string in good faith but, in the words of Mr Justice Hirst [in *Texaco*], this was neither here nor there. By sending a nomination for a vessel which was not valid, Buyers left themselves open to a challenge on that nomination.

11.21 The Board therefore FINDS that a nomination must be valid for a performing vessel at the time of the nomination and Buyers did not give a true and accurate probable or estimated time of arrival which would enable Sellers to deliver the

> contractual goods so they could be shipped in accordance with Buyers' instructions."

19. The Board did not, however, consider that this was a breach of condition which entitled the Sellers to terminate the contract:

> "11.22 Having considered the submissions and evidence WE FIND THAT that Buyers' failure to provide a valid nomination was not a breach of condition upon which the contract could be terminated. Whilst the parties require certainty in the nomination of a performing vessel which gives rise to an interdependence of obligations, Buyers had further time to make a valid nomination with sufficient pre-advice before the end of the delivery period. In addition, the wording of clause 6 of Gafta contract 49 provided a "probable readiness date" and "estimated time of arrival" and this wording was not unequivocal and did not indicate to us that a breach was that of a condition and would go the root of the contract.
>
> 11.23 The Board, however, did accept the wording of Roskill, LJ in that we should not be over ready to construe a term as a condition rather than a term which gives right to damages. Contracts are made to be performed and not to be avoided and, in the view of the Board, it makes commercial business sense to treat a nomination clause as a warranty, not a condition. Thus, a technical breach by Buyers would not allow Sellers the opportunity to terminate the contract.
>
> 11.24 The Board considered that Sellers' remedy for an invalid nomination would be to reject the nomination. Instead, Sellers chose to assert that Buyers' declaration constituted a repudiatory breach of contract which they accepted which led to the contract being terminated. A rejection of the original nomination would have the effect of allowing Buyers the opportunity to provide a further but valid nomination and in doing so, allow the contract to be performed."

The reference in § 11.23 to Roskill LJ was to his judgment in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.* ("*The Hansa Nord")* [1976] Q.B. 44, [1975] 2 Lloyd's Rep. 445 (CA).

20. Accordingly, the Board concluded on this issue:

> "11.28 In the absence of an express term to substitute a vessel, it is always open for an FOB buyer to substitute the vessel. In this Appeal, clause 6 of Gafta 49 gives a right of substitution but this clause does not refer to the validity of the original nomination. It follows that for a substitution to be made then the original nomination has to be valid. We have found that Buyers had breached the terms of the contract by not providing a valid original nomination and, this simply had the effect of

> that nomination falling away. This was curable by Buyers providing a proper and valid nomination to Sellers within the terms of the contract. Buyers had ample time to do so as the contract period did not expire for another 18 days after Sellers' notification of accepting Buyer's renunciation on 28 March 2018.
>
> …
>
> 11.32 Accordingly, Sellers were obliged to nominate a load port. The nomination was to be at the latest on the nomination of the performing vessel. We have found the performing vessel to be MV "Marinas" substituted by MV "Deribas" and it follows that Sellers were obliged to nominate a load port at that time. Sellers chose not to do so citing that they had already terminated the contract. Buyers accepted this as an anticipatory breach of contract on 3 April 2018.
>
> 11.33 WE FIND THAT whilst Buyers' invalid nomination of MV "Tai Hunter" was a breach of contract, it was not, however, a breach of a condition of the contract such that would bring the contract to an end. Sellers had no right to terminate the contract and hence, Sellers' refusal to accept a valid nomination of MV "Mariana" substituted by MV "Deribas" was a breach of contract.

21. As to whether the Vessel had been chartered by the time of nomination, the Board said:

> "11.34 We do not have sufficient evidence to make a finding on whether MV "Tai Hunter" was fixed at the time of nomination. We do, however, uphold the view of the First Tier Tribunal that a buyer is obliged to nominate only a ship which had either been fixed or had a reasonable expectation of being fixed."

22. The Board found that the Buyers were in breach by their failure to send a copy of the charterparty of the Vessel, as they were under a contractual obligation to provide the charterparty *"at their first request"*, but not entitled to damages. The Board noted that the Buyers had by 26 March 2018 not provided a copy of the *Tai Hunter* charterparty following the Sellers' request on 21 March. The Board continued:

> "11.36 It was, however, a contractual obligation for Buyers (although not Buyers' sub-buyer in string) to provide a copy of the charterparty or booking note of the performing vessel. In the Board's view, there was no merit to Buyers' argument that the string was long as it was evidenced that it contained only six parties. In the view of the Board, the charterparty was required to be passed by Buyers to Sellers "at their first request" for MV "Tai Hunter" as this was a vessel which

> Buyers had nominated and by their failure to do so then Buyers were in breach of contract.
>
> 11.37 Sellers did not claim any damages specific to this breach. We have found that Sellers terminated the contract by accepting Buyers' nomination as a breach of condition and, further, by their failure to accept a valid nomination (or substitution) and failure to nominate a load port. Hence, whilst Sellers have succeeded on this point, Buyers are not liable to them in damages."

23. Accordingly, the Buyers were successful in their claim and were awarded US$ 325,762.50. An issue then arose about interest:

> "11.42 The Settlement Agreement made no provision for interest to be made. Pursuant to §49(3) of the Arbitration Act 1996, the Board may award interest from such dates, at such rates and with such rests as it considers meets the justice of the case.
>
> 11.43 Clause 18(c) of Gafta 49 states that the damages payable shall be based on the difference between the cont[r]act price and either the default price or on the actual or estimated value of the goods on the date of default. Buyers had accepted Sellers' breach of contract on 3 April 2018 and the next business day was 4 April 2018. The Board therefore awards interest on the amount of USD 325,762.50, at the rate of 4% per annum, compounded at three monthly rests, from 4 April 2018 until payment has been made."

(3) The Appeal and the Challenge

24. The questions of law on which the Sellers were given permission to appeal are as follows:

i) Is the obligation on the buyer of goods FOB not to make a false nomination of a vessel (i.e. one of a vessel that, at the date of nomination, is incapable of arriving at the loadport at or around the ETA provided or within the delivery period) a condition, breach of which entitles the seller to terminate the contract?

ii) On a true construction of the Contract, were the Buyers obliged to nominate a vessel which had been chartered by them or by their sub-buyers at the date of nomination?

iii) Was the obligation of the Buyers to provide a copy of the Charterparty, by which the vessel nominated had been chartered, to the Sellers "*at their first request*" a condition, breach of which entitled the Sellers to terminate the Contract?

iv) Can a Tribunal lawfully exercise its discretion under section 49 of the Arbitration Act 1996 by awarding interest to run from a date earlier than the date when the losing party's obligation to pay the principal sum found due arose and, if so, in what circumstances?

v) Having found that the Sellers were liable to the Buyers under the terms of the Settlement Agreement, was the Board wrong in law to award interest from the 4 April 2018 rather than from the date when, according to the Settlement Agreement, that sum became due to the Buyers?

25. The Buyers point out that the court's approach on a section 69 appeal should be a cautious one. The court's starting point should be to show deference to the arbitral tribunal. The Award should be read "*in full in a fair and reasonable way and should not be subjected to minute textual analysis. The courts do not approach awards with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults or with the object of upsetting or frustrating the process of arbitration*." (see, e.g., *Progress Bulk Carriers Limited v Tube City IMS L.L.C* [2012] EWHC 273 (Comm) §13, quoting *Pace Shipping Co v Churchgate Nigeria* [2010] 1 Lloyds Law Rep page 183 § 16).

26. There is also a section 68 appeal on the following grounds:

i) the Board did not answer the question set out at 24.iii) above; and

ii) the Board failed to answer the question of whether the Buyers were in repudiatory breach of contract or renounced the contract by, cumulatively, (a) making a nomination of a vessel which was false, (b) failing to name the owners of the Vessel when they nominated it, (c) nominating a vessel which neither they nor their sub-charterers had chartered and (d) failing to provide a copy of the charterparty at the Sellers' first request.

(C) APPEAL QUESTION 1: WAS THE MAKING OF A "FALSE" NOMINATION A BREACH OF CONDITION?

27. The Sellers say that the Board was correct to find that the ETA should have been given honestly and on reasonable grounds and that the nomination of the *Tai Hunter* was accordingly '*not valid'*; however, the Board should further have concluded that that obligation was a condition, breach of which entitled them to terminate. The failure so to conclude was, the Sellers submit, contrary to authority.

28. The Buyers accept that where time is of the essence, strict compliance with the time for performance is a condition of the contract, any breach of which will entitle the innocent party to elect to terminate the contract. However, where the obligation is to perform within a timeframe, a party whose performance is defective is entitled to correct that performance provided that it does so *within* the contractually allotted period (see, e.g., Apps, "*The Right to Cure Defective Performance"* (1994) LMCLQ 525).

29. It is well established that where an ETA is incorporated as a term of a sale contract, there is a breach of condition if that ETA has not been given honestly and on reasonable grounds.

30. For example, in *Sanday v Keighley Maxsted* [1922] 10 Lloyd's Rep 738, buyers refused to take up shipping documents on the ground that the contracts of sale had provided that the goods would be *"[e]xpected ready to load late September"*. The goods were not ready, and the issue was whether the buyers were entitled to terminate the contract on that basis. Counsel for the respondents submitted that there were three possible meanings of the term: first, (objectively) that the vessel was in a position to load in late September; secondly, (subjectively) that "*expected means expected by the seller and does not refer to expectation by the shipping world generally or any reasonable man who knew the circumstances*"; or, thirdly ("*even more subjective"*) that the seller honestly but perhaps without any ground whatever expected the vessel to be ready to load late September (p740 LHC). The Master of the Rolls concluded:

> "I think the second is the right view, and that the clause is to be interpreted as meaning that in view of the facts as known to the sellers at the time they made the contract, and made the statement 'Expected ready to load', the expectation was one which was made … honestly and upon reasonable ground." (p740 rhc)

31. Similarly, Christopher Clarke J in *The Azur Gaz* [2006] 1 Ll. Rep. 163 § 42 followed *Sanday* and *The Mihalis Angelos* (see below) in holding that the seller's obligation under a CIF contract to give the ETA (stated as a term of the contract) of the named vessel at the loadport honestly and on reasonable grounds is a condition.

32. The same principle applies to ETAs set out in charterparties. In *Evera SA Comercial v North Shipping Company Ltd* [1957] 2 Lloyd's Rep 367, Devlin J said:

> "A charterer manifestly wants, if he can get it, a fixed date for the arrival of the ship at the port of loading. He has to make arrangements to bring down the cargo and to have it ready to load when the ship arrives, and he wants to know, as near as he can, what that date is going to be. On the other hand, it is to the interest of the shipowner, if he can have it, to have the date as flexible as possible. Because of the inevitable delays due to bad weather or other circumstances that there might be in the course of a voyage, he can never be sure that he can arrive at a port on a fixed and certain day. Therefore, in order to accommodate these views as far as possible, it has been the general practice for a long time past to have a clause under which the shipowner, without pledging himself to a fixed day, gives a date in charterparty of expected readiness, that is, the date when he expects that he will be ready to load. The protection that is afforded to that charterer under that clause is this. As was clearly settled in *[Sanday v Keighley Maxted]* he is entitled to have that statement of position, as it is called, – the statement of expectation as to when the ship arrives or is likely to arrive – made honestly and made on reasonable grounds." (p370)

33. In *The Mihalis Angelos* [1971] 1 QB 164 a vessel was chartered to carry mineral ore from Haiphong to a North European port. The vessel was described in the

charterparty as '*expected ready to load under this charter about July 1 1965*'. The charterparty provided for an option to cancel the contract should the vessel not be ready to load on or before 20 July 1965. The vessel remained at Hong Kong between 23 June and 17 July 1965, when the charterers purported to cancel the charterparty on grounds of *force majeure.* The owners purported to accept that cancellation as a repudiation of the contract. The Court of Appeal held that the expected readiness clause was a condition, which the owners had broken on 25 May 1965 when they could not reasonably have expected that the ship would be ready to load on 1 July. In those circumstances it was conceded that the charterers had been entitled to treat the contract as having come to an end on 17 July (despite having purported to cancel on different grounds). Lord Denning MR said:

> "The question in this case is whether the statement by the owner: "expected ready to load under this charter about July 1, 1965," is likewise a " condition." The meaning of such a clause is settled by a decision of this court. It is an assurance by the owner that he honestly expects that the vessel will be ready to load on that date and that his expectation is based on reasonable grounds: see *Samuel Sanday & Co. v. Keighley Maxted & Co*. (1922) 27 Com.Cas. 296. The clause with that meaning has been held in this court to be a "condition" which, if not fulfilled, entitled the other party to treat himself as discharged: see *Finnish Government v. H. Ford & Co. Ltd*. (1921) 6 Ll.L.Rep. 188. Those were sale of goods cases. But I think the clause should receive the same interpretation in charterparty cases. It seems to me that, if the owner of a ship or his agent states in a charter that she is " expected ready to load about July 1, 1965," he is making a representation as to his own state of mind; that is, of what he himself expects: and, what is more, he puts it in the contract as a term of it, binding himself to its truth. If he or his agent breaks that term by making the statement without any honest belief in its truth or without any reasonable grounds for it, he must take the consequences. It is at lowest a misrepresentation which entitles the other party to rescind: and at highest a breach of contract which goes to the root of the matter. The charterer who is misled by the statement is entitled, on discovering its falsity, to throw up the charter. It may, therefore, properly be described as a "condition."'"
>
> I am confirmed in this view by the illustration given by Scrutton LJ himself in all the editions of his work on charterparties:
>
> > "A ship was chartered 'expected to be at X about December 15 … shall with all convenient speed sail to X.' The ship was in fact then on such a voyage that she could not complete it and be at X by December 15. *Submitted*, that the charterer was entitled to throw up the charter."
>
> See, e.g., *Scrutton on Charterparties*, 17th ed, (1964), p. 79, case 4." (p194B-F)

34. It is evident that the Master of the Rolls made his finding on two bases: misrepresentation and repudiation. However, it is clear from the other judgments that the expected readiness clause was regarded as a condition. Edmund Davies LJ put it thus:

> "On these grounds, and particularly having regard to the importance to the charterer of the ability to be able to rely upon the shipowner giving no assurance as to expected readiness save on grounds both honest and reasonable, I would be for holding that clause 1 in the present case imported a condition. That the owners were in breach of it is common ground. It is equally undisputed that if, as I think, the circumstances entitled the charterers to repudiate on July 17, the fact that they did so by reliance on an untenable plea of force majeure does not invalidate their act of cancellation. In the result, I would be for reversing the finding of the arbitrators and of the judge on the first question and for holding that on July 17, 1965, the charterers were entitled to cancel the charterparty, as they in fact purported to do. If I am right in so holding, that is an end of this case. ..." (p.200 B-D)

35. Megaw LJ made essentially the same point:

> "In my judgment, such a term in a charterparty ought to be regarded as a condition of the contract, in the old sense of the word "condition": that is, that when it has been broken, the other party can, if he wishes, by intimation to the party in breach, elect to be released from performance of his further obligation under the contract; and he can validly do so without having to establish the fact of particular case the breach has produced serious consequence which can be treated as 'going to the root of the contract' or as being 'fundamental', or whatever other metaphor may be thought appropriate for a frustration case." (p205A-C)

36. Thus, where a party to a charterparty provides an ETA as a term of the charterparty, it is a condition that he does so on honest and reasonable grounds.

37. The cases relating to the situation where a buyer is required to nominate a vessel *pursuant to* a term of a sale contract, where the possibility of substitution nomination arises, have developed somewhat differently.

38. In *Agricultores Federados Argentinos Sociedad Cooperative Limitada v Ampro SA Commercial Industrielle et Financiere* [1965] 2 Lloyd's Rep 157 ("*Ampro*") the sellers sold the respondent buyers 2000mt maize fob for delivery between 20 and 29 September 1960 without extension. The buyers nominated the vessel *Oswestry Grange* due on 26 September. However, it appears that, in circumstances that are somewhat unclear, the vessel had not arrived by 29 September and was due to arrive only the next day. The buyers, thinking that this was only slightly outside of the delivery window, were largely unconcerned. However, coincidentally, there was a rise in the market and, at the last minute, on 4pm on 29 September, the sellers informed

the buyers that the sellers intended to cancel the contract owing to the inability of the *Oswestry Grange* to load in contract time. In a somewhat fortuitous turn of events, by 4.30pm the buyers had made arrangements for a new vessel, the *Austral*, to receive the cargo that same day. Widgery J held that that was a valid nomination:

> "There is nothing expressly in this contract to provide the circumstances in which a particular vessel shall be nominated, and the rights of the parties are to be regulated by the general law as it applies to an f.o.b. contract. As I understand it, the general law applying in such a contract merely is that the buyers shall provide a vessel which is capable of loading within the stipulated time, and if, as a matter of courtesy or convenience, the buyers inform the sellers that they propose to provide vessel A, I can see no reason in principle why they should not change their minds and provide vessel B at a later stage, always assuming that vessel B is provided within such a time as to make it possible for her to fulfil the buyers' obligations under the contract." (p167rhc)

It will be noted, though, that that reasoning proceeded on the footing that there was no express obligation to nominate a vessel, the nomination being no more than a courtesy.

39. In *Bremer Handelsgesellschaft M.B.H v. J. H. Rayner & Co. Ltd* [1978] 2 Lloyd's Rep 73, the sellers sold the buyers 6800 tonnes of Brazilian soya beans for shipment July 1974. The contract incorporated the terms of the standard FOB contract of ANEC (the Brazilian Grain Exporters Association), § 7 of which provided for the buyers to nominate the vessel *"to Sellers in writing in time for Sellers to receive with minimum 15 days*' *notice of earliest readiness of tonnage at…port of loading"*. The ANEC form in turn incorporated the GAFTA 64 terms, § 7 of which provided that *"Should Buyer not tender suitable tonnage within contract time he shall be in default unless he gives notice to the Seller ... not later than the last day of the specified period for the delivery that an extension is claimed"*.

40. On 15 July, the buyers nominated a vessel (the *Nestos*) to lift part of the cargo, with ETA 27 July, i.e. giving less than 15 days' notice. On 19 July the buyer nominated another vessel to lift part of the cargo with ETA 3 August, i.e. outside the July 1974 shipment window, and by separate letter sought an extension under GAFTA § 7. On 22 July the sellers rejected both nominations as not being in accordance with § 7 of the ANEC form, and treated the contract as having come to an end.

41. At first instance, Mocatta J noted that the major question of law in the case was whether the extension provisions of GAFTA § 7 formed part of the contract between the parties, but he also made a number of findings on other matters. He stated:

> "There was no difference between Counsel as to the general principles applicable under an f.o.b. contract as to the respective duties at common law of the sellers and buyers. If the contract names a date for shipment of the goods, there is an obligation upon the buyers to tender a ship on which the sellers can place the goods by such a date as would enable the sellers

> to complete putting the goods on board by the end of the period named in the contract of sale. Furthermore, as common sense demands, the buyers must give adequate notice to the sellers of at least the expected readiness date at the named port of shipment of the vessel nominated by the buyers to lift the goods which he has agreed to purchase from the sellers." (p.87)

42. Mocatta J continued:

> "In the present case, unless cl. 7 of GAFTA 64 applies, the elaborate provisions in relation to the "nomination of vessel" in cl. 7 of the Anec form apply. I have earlier in this judgment set out the terms in full of that clause, but I would emphasise that under it the buyer has to nominate his vessel to the seller in writing in time for the Seller to receive at least 15 days notice of earliest readiness of tonnage at first port of loading. This of course can only be a notice based on the best estimate possible bona fide arrived at by the buyer on the information reasonably available to him at the time that he gives the notice. The latter is apparent from the second sentence of Anec cl. 7 where that sentence provides for what further action is to be taken in relation to documentary instructions to be given by the buyer at least 10 days before the "estimated" arrival of the vessel.
>
> > The words "expected ready to load" by a certain date mean that in view of the facts known to the promissor when making his contract he honestly expects that the vessel will be ready as stated and that his expectation is based on reasonable rounds. This obligation is a condition, and any breach will entitle the charterer to terminate.
>
> I take this passage from Scrutton on Charterparties, 18th Ed., at p. 77. It is based upon the authority of the Court of Appeal in *The Mihalis Angelos*, [1970] 2 Lloyd's Rep. 43; [1971] I Q.8. 164."

43. Mocatta J then referred to *Finnish Government (Ministry of Food) v H Ford & Co* (1921) 6 Lloyd's Rep 188, where the Court of Appeal had held that a term of a sale contract that the buyers would ship by steamers *"expected ready to load February and/or March 1920"* was a condition of the contract. Mocatta J noted that that case had been followed in *The Mihalis Angelos*, and also cited *Tradax Export v Andre & Cie* [1976] 1 Lloyd's Rep 416 (where Lord Denning MR had stated that the words "*without delay*" in clause 21 of GAFTA 100, dealing with *force majeure*, denoted a condition of the contract). Mocatta J concluded that in the light of these authorities it was:

> "impossible to reach the conclusion that a failure to comply with the provisions of cl. 7 of the Anec form is not a failure to comply with a condition of the contract as distinct from a mere warranty" (p89rhc)

unless the buyers were saved by a finding the arbitrators had made regarding trade custom (which, Mocatta J held, they were not).

44. Finally for present purposes, Mocatta J concluded on this issue:

> "I therefore consider that it was a condition precedent of this contract that a proper nomination pursuant to cl. 7 of the Anec form should have been given in relation to the Nestos. I have also given my reasons for thinking that the bad nominations given in respect of that vessel before the buyers terminated the contract were capable of being withdrawn and substituted by a good nomination. On the other hand, the facts in relation to the Nestos are extremely mysterious as the matters to which I have earlier drawn attention both in this passage and at an earlier stage in this judgment demonstrate. It is for the buyers who are claiming damages in respect of a non shipment of goods upon the Nestos to prove their case. On the material before me I am quite unable to find that even if the sellers had repudiated the contract, which is the basis upon which I am dealing with this matter, the buyers would by not later than 15 days before Aug. 21 have given a prior notice nominating the Nestos in accordance with the provisions of cl. 7 of the Anec form. For this reason I consider in any event that the buyers' claim against the sellers for damages in respect of the non-shipment of 2000 tonnes upon the Nestos must fail." (p94)

45. Mocatta J's decision in *Bremer v Rayner* was reversed on other grounds, the Court of Appeal concluding that the buyers could rely on the extension provision ([1979] 2 Ll. Rep. 216). However, in the context of damages the Court of Appeal nonetheless had to consider whether the buyers could and would have replaced their initial bad nomination with a good one. Bridge LJ recorded Mocatta J as having held that *"it was a condition of a valid nomination of any vessel under c. 7 of the Anec form that a full 15 days' notice of her earliest date of readiness to load should be given at the time of nomination by the buyers to the sellers".* After quoting the passage quoted in § 44 above, Bridge LJ continued:

> "In this Court we heard an interesting and elaborate argument on both sides as to whether it was indeed a condition of the validity of a nomination under this contract that at the time of nomination the buyers should have given the full 15 days' notice to the sellers of the nominated vessel's earliest date of readiness to load. Having regard to the conclusion I have reached on another point on which the validity of Nestos claim for damages depends, I find it unnecessary to express a concluded opinion on that matter. I content myself with saying simply that as at present advised I am not persuaded by Mr. Rokison's argument that the learned Judge was wrong in the conclusion he reached on the point. Mr. Hallgarten for his part accepted, and in my judgment rightly accepted, the Judge's view that, assuming the original nomination of Nestos to have

> been bad, there was nevertheless nothing to prevent the buyers in due course from substituting a good nomination." (p.224lhc)

46. Bridge LJ thus made clear that an initial bad nomination, giving insufficient notice, could be cured by a subsequent good nomination. That view was also reflected in his conclusion on the question of damages:

> "The Nestos in fact arrived on Aug. 21. So that between the date July 29, when the buyers accepted the sellers' repudiation of the contract, and the date when, as it turned out, Nestos was first ready to load, there would have been ample opportunity for the buyers to give a valid notice complying with the provisions of cl. 7 of the Anec form. … It seems to me that when the evidence rested in the state in which it did at least an evidential burden was then cast on the sellers to lead evidence to show, if they could, that if they, the sellers, had not repudiated the contract, the buyers would nevertheless still have failed before Aug. 21 to give a due and timely nomination under cl. 7 of Nestos to arrive at Rio Grande on Aug. 21. The sellers, in my judgment, fail to discharge that evidential burden." (p.224 rhc)

47. Similarly, Templeman LJ concluded, as to damages, that it was sufficient for the buyers to show that, as at the date (29 July) on which they accepted the sellers' repudiation of the contract, it remained possible for the buyers to fulfil their contractual obligations by a valid nomination of the *Nestos* in time for delivery on 21 August, and that they intended to take delivery on that vessel on the first day she became available (p.228 lhc). Megaw LJ did not find it necessary to decide whether clause 7 of the Anec form was a condition; but even assuming that it was, he concluded that at the time the sellers' repudiation of the contract occurred and was accepted, there was ample time for the defective nomination of the *Nestos* to be replaced by a valid nomination of a vessel to lift the relevant part of the cargo (p.229 rhc).

48. Subsequently, in *Bunge v Tradax* [1981] 1 WLR 711 Lord Roskill endorsed Mocatta J's conclusion on the nature of clause 7 of the Anec form:

> "The relevant clause 7 in that case will be found in the judgment of Mocatta J, at p. 85:
>
> "7. Nomination of Vessel. Buyer to give nomination of vessel to seller, in writing, in time for seller to receive with minimum 15 days' notice of earliest readiness of tonnage at first or sole port of loading."
>
> Mocatta J. held at p. 89 of his judgment that the finding which I have just quoted did not preclude his reaching the conclusion that that clause was as a matter of construction a condition, a breach of which entitled the innocent party to rescind. His decision was reversed on appeal on a different point: see [1979] 2 Lloyd's Rep. 216. But Bridge L.J. at p. 224 was at pains to

> say that as then advised he was not persuaded that on this question the learned judge had reached the wrong conclusion: see also the judgment of Megaw L.J. at p. 229. With resect, I think that Mocatta J. was plainly correct in his conclusion on this question." (p.730D-E)

It was unnecessary for Lord Roskill to consider any issue relating to substitute nomination.

49. The Sellers rely on the general statements of principle in *Bunge* as to when a stipulation as to time will be a condition of a contract. In that case, the sellers sold 15,000 tons of soya bean meal on GAFTA terms requiring 15 days notice of readiness of vessel(s). The issue was whether the giving of timely notice of readiness was a condition, the House of Lords concluding that it was. Lord Roskill, who gave the leading judgment, stated:

> "My Lords, I venture to doubt whether much help is necessarily to be derived in determining whether a particular term is to be construed as a condition or as an innominate term by attaching a particular label to the contract. Plainly there are terms in a mercantile contract, as your Lordships' House pointed out in *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109, which are not to be considered as conditions. But the need for certainty in mercantile contracts is often of great importance and sometimes may well be a determining factor in deciding the true construction of a particular term in such a contract.
>
> To my mind the most important single factor in favour of Mr. Staughton's submission is that until the requirement of the 15-day consecutive notice was fulfilled, the respondents could not nominate the "one Gulf port" as the loading port, which under the instant contract it was their sole right to do. I agree with Mr. Staughton that in a mercantile contract when a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a single loading port, the term as to time for the performance of the former obligation will in general fall to be treated as a condition. Until the 15 consecutive days' notice had been given, the respondents could not know for certain which loading port they should nominate so as to ensure that the contract goods would be available for loading on the ship's arrival at that port before the end of the shipment period.
>
> It follows that in my opinion the umpire, the Board of Appeal and the Court of Appeal all reached the correct conclusion and for the reasons I have given I would dismiss the appellants' appeal. It will have been observed that I have reached this conclusion as a matter of the construction of the relevant clause. I have thus far paid no regard to the finding in

> paragraph 5 of the special case that "This term in an f.o.b. contract is regarded in the trade as of such great and fundamental importance that any breach thereof goes to the root of the contract." Naturally, though the crucial question of construction is a matter of law for the court, the court will give much weight to the view of the trade tribunal concerned." (p. 727E-730A)

50. Lord Wilberforce added:

> "…(1) … the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) broadly speaking time will be considered of the essence in "mercantile" contracts….
>
> …In this present context it is clearly essential that both buyer and seller (who may change roles in the next series of contracts, or even in the same chain of contracts) should know precisely what their obligations are, most especially because the ability of the seller to fulfil his obligation may well be totally dependent on punctual performance by the buyer." (p. 716E-F)

51. Lord Lowry said this:

> "The second general point which I desire to mention concerns stipulations as to time in mercantile contracts, in regard to which it has been said that, broadly speaking, time will be considered to be of the essence. To treat time limits thus means treating them as conditions, and he who would do so must pay respect to the principle enunciated by *Roskill L.J. in Cehave N.V. v. Bremer Handelsgesellschaft m.b.H*. [1976] Q.B. 44, 71A, that contracts are made to be performed and not to be avoided.
>
> The treatment of time limits as conditions in mercantile contracts does not appear to me to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen, just the kind of thing which Bowen L.J. could have had in mind when framing his classic observations on the implied term in *The Moorcock* (1889) 14 P.D. 64, 68…
>
> …
>
> In order to identify an implied term (concerning which both parties to the contract, being men of business, would say, "of course; it goes without saying") one must construe the contract in the light of the surrounding circumstances and, to understand how that is done, we cannot do better than read the passage from Lord Wilberforce's speech in the *Reardon Smith* case

[1976] 1 W.L.R. 989, 995E-997C to which my noble and learned friend, Lord Scarman, has already referred your Lordships.

The law having been established, why should we regard the term here in question as a condition? I start by expressing my full agreement with the reasons given in your Lordships' speeches. Among the points which have weighed with me are the following:

(1) There are enormous practical advantages in certainty, not least in regard to string contracts where today's buyer may be tomorrow's seller.

(2) Most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions.

(3) Decisions would be too difficult if the term were innominate, litigation would be rife and years might elapse before the results were known.

(4) The difficulty of assessing damages is an indication in favour of condition: *McDougall v. Aeromarine of Emsworth Ltd.* [1958] 1 W.L.R. 1126, 1133.

(5) One can at least say that recent litigation has provided indications that the term is a condition. Parties to similar contracts should (failing a strong contra indication) be able to rely on this: *The Mihalis Angelos* [1971] 1 Q.B. 164, 199F per Edmund-Davies L.I.

(6) To make " total loss " the only test of a condition is contrary to authority and experience, when one recalls that terms as to the date of sailing, deviation from a voyage and the date of delivery are regarded as conditions, but that failure to comply with them does not always have serious consequences.

(7) Nor need an implied condition pass the total loss test: see (6) above.

(8) If the consequences of breach of condition turn out to be slight, the innocent party may treat the condition as an innominate term or a warranty.

(9) While the sellers could have made time of the essence, if it were not so already, this would require reasonable notice, which might well not be practical either in a string contract or at all.

> (10) In *Tarrabochia v. Hickie* (1856) 1 H. & N. 183, 188 upon which the appellants strongly relied, Bramwell B. said:
>
> > " No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intend to do it. Since, however, they could have done it, those who construe the instrument should be chary in doing for them that which they might, but have not done for themselves."
>
> But in that very case both Pollock C.B. and Bramwell B., without the benefit of any express term, said that, where the agreement was that a ship should sail on a particular day, that was a condition precedent.
>
> (11) To accept the argument that conditions ought not to be implied "because the parties themselves know how to describe a term" would logically condemn the entire doctrine of implied terms.
>
> (12) Arbitrators and courts might if the term were innominate, give different answers concerning the effect of a breach in very similar transactions, and parties could never learn by experience what was likely to happen in a given situation. So-called string contracts are not made, or adjudicated on, in strings." (p. 719E-721B, paragraph breaks interpolated)

52. The Sellers make three main submissions of principle based on *Bunge:*

    i) The pre-advice clause is a time clause in a mercantile contract in respect of which there is a need for certainty. The court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this will fulfil the intentions of the parties.

    ii) There was an interdependence of obligations: until the Buyers had performed their obligation to nominate the vessel, the Sellers were not able to make arrangements to load the vessel and ultimately to load her when she arrived.

    iii) The Contract was part of a string, which underlines or augments the need for certainty so that all parties can know where they stand.

53. The Sellers add that a false nomination is liable to put the seller to unnecessary expense, moving the goods to a particular port by the ETA, and is also liable to erode the trust between the parties: if an unreliable or '*unreasonably ambitious'* nomination and ETA are given, what reason is there to believe the next nomination will be any better?

54. In principle I am inclined to agree that, for the reasons the Sellers put forward, it is a condition of the contract that the buyer has provided a valid nomination by the

requisite time, thus enabling the seller to make the necessary arrangements with the goods. It does not follow, however, that (a) the pre-advice obligation also imports a negative obligation, viz not to make any prior 'false' nomination, or (b) that any such implied negative obligation is itself a condition of the contract. I leave on one side the category of cases referred to in *Texaco* (considered below) as 'Mickey Mouse' nominations, i.e. nominations not made in good faith of vessels which very obviously could not possibly reach the loadport on time. A nomination of that kind may be renunciatory and entitle the seller to treat the contract as at an end for that reason. Those cases apart, I am not persuaded that either the case law or considerations of principle require the nomination of a vessel in good faith but, objectively, without reasonable grounds, to be treated as a breach of condition entitling the seller to bring the contract to an end even in circumstances where a valid replacement nomination could in practice still be made.

55. I note that the Apps article cited earlier suggests, quoting a statement by Professor Goode, that *"a justifiable loss in confidence in the seller resulting from the initial defective tender"* may entitle a buyer to treat the contract as at an end: followed by a summary of *Texaco v Eurogulf*. The present Sellers suggest that the same reasoning may be applied to a buyer who has made an invalid nomination of a vessel. In my view that is the case only if and to the extent that the nomination is such as to evince a refusal or inability to perform the contract: see above.

56. It is true that a nomination made without reasonable grounds has the potential for putting the seller to unnecessary expense. Benjamin's *"Sale of Goods"* (11th ed.) § 20-056 considers whether the seller might have a remedy in such circumstances:

> "Even where no objection can be taken to the original nomination on this ground, it is questionable whether the buyer would be entitled to make a substitute nomination where the seller had acted in reliance on the original one. Suppose the buyer nominates a ship for loading on a day early in the shipment period and the seller acts in reliance on the nomination by getting the goods to the docks ready for shipment on that day. If the buyer could with impunity withdraw the ship and nominate another to load on a different day, much later in the shipment period, the seller could be gravely prejudiced: e.g. if he had to pay storage charges, or if the goods deteriorated. It has been suggested that the seller can recover damages for such loss but that the precise legal basis for such a claim is by no means clear; however, this may be clarified by express provision in the contract for the method, and/or the effect, of a substitution."

57. Be that as it may, there is an inherent risk in any event that the buyer may make a last-minute substitution, even where the first nomination is valid, either through choice or because the vessel first nominated has unexpectedly turned out to be unable to meet the lifting deadline. The contractual timetable for the buyer's vessel nomination will be designed to give the seller sufficient time to arrange the provision of the goods. Provided a valid nomination is ultimately given by the applicable deadline, it should be possible for the contract (and the other contracts in any string) to be fulfilled without difficulty.

58. The possibility that a prior invalid nomination will cause additional expense to the seller also exists in cases such as *Bremer v Rayner* of 'non-contractual' nominations, yet did not in that case result in the seller being entitled to bring the contract to an end. The Sellers in the present case contend that a non-contractual nomination of that kind can simply be ignored, and thus will not put the seller to additional trouble or expense. However, the Sellers are constrained to accept that the position is the same where an apparently valid nomination is given (honestly and on reasonable grounds) but unforeseen circumstances result in a substitute nomination having to be given; or indeed where a valid nomination is given which the buyer simply chooses to substitute. It might be argued that those situations too can be distinguished, based on the greater culpability of a buyer who (as in the present case) gives a 'false' nomination honestly but without reasonable grounds. However, whilst there may be a case for regarding such a nomination as a breach sounding in damages, I do not believe that either authority or considerations of principle require it to be regarded as a breach of condition: provided, always, that a valid nomination is ultimately given in accordance with the contractual timetable.

59. There is also some force in the Buyers' point that the Sellers' contention would lead to the odd result that a buyer who makes an honest but over-ambitious initial nomination, and then substitutes it immediately with a valid nomination capable of timely performance, would be treated more harshly than a buyer who makes a valid initial nomination which is falsified by events yet who leaves it to the last moment to substitute it (or, one might add, a buyer who at the last permissible minute simply elects to nominate a replacement vessel and ETA).

60. Much of the argument at the hearing before me centred around the decision of Hirst J in *Texaco v Eurogulf* [1987] 2 Lloyd's Rep 541. There, the contract stipulated that the vessel's nomination by the buyers, Eurogulf, must be acceptable to the sellers, Texaco. The buyers nominated the *Giray* on 5 February 1986 and the sellers accepted that nomination the next day. The buyers on 7 February provided an ETA of 11-13 February at Milford Haven. However, on 10 February it was ascertained that the vessel was at Istanbul. On 11 February the buyers telexed the sellers advising that they had been a victim of fraudulent misrepresentation by their own buyers and would be unable to perform the contract:

> "Re our conversation, I am telexing to advise that we have been victim of fraudulent misrepresentation by our buyer and consequently cannot perform under our contract. We were advised of this situation by Mr. Geerts, a senior employee of Holdifima, part of a major group who was represented as a major investor of a newly formed company which the Benelux Bank also had a stake and was handling the supply of J.P.I.A. to a major U.S. oil company ..." (p. 543 lhc)

61. The sellers regarded that telex as a repudiation, which they accepted, and subsequently sought summary judgment against the defendants. Hirst J rejected a submission that the sellers had renounced the contract by a previous telex, and concluded that the buyers' telex quoted above was repudiatory. Hirst J also went on to consider the sellers' alternative argument, that the *"manifestly false nomination"* of the *Giray* was itself a breach which gave rise to a right to terminate:

> "Even if the above conclusion is wrong, Mr. Hirst has a second string to his bow, namely, he submits that the defendants made a manifestly false nomination of the Giray on Feb. 5 and 7. In using the word "false" he makes it clear that for O. 14 purposes he accepts that the fault lay entirely with the defendants' sub-buyers, but he submits, nonetheless, that this was a nomination manifestly incapable of fulfilment because of the position of the vessel." (p. 544)

62. It was common ground that it was physically impossible for the *Giray* to reach Milford Haven by 13 February. The buyers submitted that the nomination was valid on its face, not self-evidently impossible and not known at the time to be other than good. In any event, the buyers argued, they had a right to withdraw the nomination and substitute a different vessel so long as the substitute could be tendered in accordance with the contract. Particular reliance was placed on the *Ampro* decision which I have considered above. That argument was rejected:

> "… if Mr. Gaisman can establish an arguable case, Mr. Hirst would not be entitled to succeed under O.14 [summary judgment] under this heading. But, in my judgment, Mr. Gaisman's case under this heading also is without substance.
>
> Firstly, I consider that the nomination was manifestly false, though, of course, through no fault of the defendants. Mr. Gaisman accepts that, to use his words, a "Mickey Mouse" nomination would amount to a repudiation; whether or not this particular nomination merits the Walt Disney epithet I need not decide, but I am quite satisfied that it was false in the sense that it could never possibly be fulfilled, and the fact that the parties only discovered this subsequently to the actual making of the nomination I consider to be neither here nor there.
>
> Secondly, the notion of a substitute nomination by Mr. Robinson is on the facts of this case wholly artificial and fanciful, and without any conceivable practical reality, as the telex of Feb. 11 plainly demonstrates.
>
> The *Argentinos* case [*Ampro*], dealing with a true and proper nomination of vessel A, which was unfortunately slightly but critically delayed, and then a real, actual and potentially effective substitution of vessel B, is wholly distinguishable on its facts, and, in my judgment, of no assistance in the present context.
>
> As a result, Mr. Hirst would have been entitled to succeed on his alternative case also." (p. 545 lhc)

63. The Sellers in the present case submit that the principle to be extracted from *Texaco* is that it is a condition that any nomination is not *false*, i.e. that a nomination is made honestly and on reasonable grounds. Falsity in that sense, the Sellers contend, is to be distinguished from (a) a non-contractual nomination i.e. one which did does contain

the information required by the contract, or fails (as in *Bremer v* Rayner) to give the notice period required by the contract, and (b) a nomination which is correct when given but is falsified by subsequent events.

64. I do not, however, consider *Texaco* to be authority for the proposition that a false nomination in the sense indicated above is *per se* a breach of condition which entitles the seller to treat the contract as having come to an end, precluding the buyer from any possibility of replacing it with a valid nomination. As the Buyers point out, the buyers in *Texaco* had evinced an intention not to be bound by the contract, by both the manifestly false nomination and by their telex saying expressly so. Further, Hirst J concluded that, on the facts before him, any question of a second, valid, nomination was fanciful. In distinguishing *Ampro*, Hirst J pointed out that in that case there had been a real, actual and potentially effective substitution of a second vessel. Hirst J did not state, or in my view imply, that any second nomination would have come too late if the seller had by then purported to accept the initial false nomination as bringing the contract to an end.

65. More recently, in *Ramburs v Agrifert* [2015] EWHC 3548 (Comm) Andrew Smith J said:

> "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…." (§ 12)

66. The relevant issue in *Ramburs* was the validity of the replacement nomination, but insofar as the passage quoted above expresses the general point that a nomination once made can be replaced so long as the second nomination is timely, it supports in my view the points made in § 58 above.

67. Counsel for the Buyers informed me that, following *Ramburs*, GAFTA revised its nomination clause to confirm that pre-advice terms for an original nomination do not apply to a substitute vessel: thus seeking to facilitate the making of substitute nominations.

68. The Buyers also cite the statement in Benjamin § 20-57 that:

> "Where a nomination which is not in accordance with the contract is followed by one which is in accordance with the contract, the second nomination is good and the seller is bound to load in accordance with it. Thus, where the buyer nominated a ship to load at the wrong port and then (within the shipment

> period) nominated the same ship to load at the right port the second nomination was held good"

69. The general proposition thus stated is in my view supported by the *Bremer v Rayners*, as discussed earlier, as well as *Ampro*. For completeness, however, I note that Benjamin also cites in support *Modern Transport Co Ltd v Ternstrom and Roos* [1924] LLR 345. The claimants in that case sold the defendants a shipment of coal FOB Hull, Grimsby or Immingham. The parties had separately sought to arrange another contract for the sale of coal to be shipped at Goole, though no contract had been finalised, and the ship *Hernodia* had been mentioned in that context. The buyers then telegraphed the sellers to '*load Hernodia contract 35 confirm'*. In due course the *Hernodia* arrived at Goole. The issue was whether that telegram was a valid tender of the vessel. Rowlatt J held that it was:

> "I think that telegram means: "As we cannot do a deal for the Hernodia at Goole we will send the Hernodia to Hull, Grimsby or Immingham, and load her under the contract there." I do not think it can possibly mean anything so silly as to say: "We are going to tender her at Goole." I do not think it means that. I think it means: "This ship, the Hernodia, which we offer, and ask you to load at Goole, shall come to you for the contract Goole," and the proper answer to that would have been: "Well, which port would you like her to come to, Hull, Grimsby or Immingham?" But the sellers reply: "Regret absolutely impossible now to arrange Hernodia, even against contract. We cannot arrange to load her at Goole independently of the contract, and we cannot arrange to ship at Hull, Grimsby or Immingham under the contract, as the time is too short." I think the arbitrator was right in holding that the tender was not a bad one, but was a good one, and that his award must be confirmed with costs." (p. 346 rhc)

70. I cannot see that this decision addresses the proposition for which the editors of *Benjamin* cite it: it sheds no light on the matter either way. Nonetheless, as indicated earlier, the proposition stated in *Benjamin* is in my view correct.

71. I conclude that the relevant principles are as follows:

i) Where a contract of sale requires the buyer to nominate a vessel by a particular date (including by stipulating a notice period and a shipment period), then it is (subject to any contrary intention expressed in the contract) a condition of the contract that the buyer provide a valid nomination by the relevant deadline. That is a stipulation as to time in a mercantile contract in relation to which the parties should be taken to have intended time to be of the essence.

ii) Accordingly, if by the latest date on which a valid nomination could be made the buyer has failed to provide one, then there is a breach of condition that will entitle the seller to treat the contract as being at an end.

iii) A valid nomination is one made honestly and on reasonable grounds, and otherwise in accordance with the contract terms.

iv) A valid nomination may be preceded by an initial nomination that is or becomes invalid, because either (a) it is 'non-contractual' in the sense of failing to provide the contractually stipulated notice period, or stating an ETA outside the contractual shipment window, (b) it is not made both honestly and on reasonable grounds, or (c) it becomes invalid due to subsequent events e.g. unforeseeable delays.

v) The giving of the initial invalid nomination is not in itself a breach of condition: no breach of condition occurs provided that a valid and timely nomination is given in due course.

vi) An initial invalid nomination made otherwise than honestly and in good faith (e.g. of a vessel which the buyer knows could not possibly meet the contractual lifting deadline) may evince an intention not to perform the contract, and thus entitle the seller to treat the contract as having been renounced by the buyer.

vii) It is unnecessary to decide in the present case whether, and if so in what circumstances, a prior invalid nomination could amount to a breach of contract sounding in damages, no such claim having been advanced or arising on this appeal.

72. I therefore consider that the Board in the present case was entitled to reach the conclusion to which it came. As the Board found, the Buyers had further time to make a valid nomination before the end of the delivery period; and the Buyer in due course did so. The initial nomination of the "*Tai Hunter*" was not a breach of condition entitling the Seller to treat the contract as having come to an end.

73. Accordingly, I dismiss this aspect of the section 69 appeal.

(D) APPEAL QUESTION 2: OBLIGATION TO NOMINATE A VESSEL ALREADY CHARTERED

74. The Sellers submit that the Contract required the Buyers to nominate only a vessel that they or their sub-buyers had already chartered. They say that this is clear from the obligation to provide a copy of the charterparty *'at first request'*. If the vessel nominated had not been chartered, that obligation could not possibly be complied with.

75. The Buyers say that the question is moot. As noted earlier, the Board held that it did not have sufficient evidence to make a finding as to whether the *Tai Hunter* was fixed at the time of nomination. Teare J struck out the Sellers' section 68 challenge alleging a failure by the Board to deal with the issue of whether the Buyers were in breach (including breach of condition or repudiatory breach) by nominating a vessel that had not been fixed to them or their sub-buyers at the date of nomination. Teare J noted that *"where the tribunal says that there is no sufficient evidence to support the fact alleged, there is no real prospect of establishing a serious irregularity within section 68"*.

76. In these circumstances, I agree with the Buyers that the determination of the question of law could not affect the outcome of the case, because the position would remain

that no factual basis for the alleged breach had been established. It would not therefore be appropriate to remit the Award (or any part of it) to the Board or *a fortiori* to vary or set aside the Award (or any part of it).

77. For completeness, however, I go on to consider the Board's conclusion on the point of law. They held that "*a buyer is obliged to nominate only a ship which had either been fixed or had a reasonable expectation of being fixed"* (Award § 11.34). Neither the Board nor the parties cites any authority on the point.

78. The Sellers object, first, that a 'reasonable expectation' might be of fixing in a week, a month or three months. Conversely, however, the buyer might have every reason to expect that the intended charterparty is on the verge of being fixed. The Seller's construction of the Contract would mean that that buyer was nonetheless in breach of condition. In my view the critical question is what needs to happen in order for the contract to work and for the parties to have the requisite degree of certainty about how it is to work. The seller's essential need in this context is for a valid and timely nomination to be given, and for the nominated vessel then to arrive on time ready to lift the cargo. The buyer's obligation to bring that about in itself requires sufficiently timely and effective steps to be taken to secure the vessel. I do not consider it possible to infer that the parties intended to go further by requiring, as a condition of the contract, that the charterparty actually be fixed at the time of the nomination.

79. Secondly, the Sellers make the related point that if the vessel has not yet been fixed, then the Buyer will be unable to provide a copy of the charterparty at the Seller's *"first request"* as required by the Contract. I consider this latter obligation in section (E) below, concluding that the requirement to provide a copy of the charterparty is not a condition of the contract. I do not consider that the obligation to provide a copy of the charterparty on the Seller's *"first request"* leads to the conclusion that the charterparty must have been fixed by the date of the nomination. Rather, where the charterparty remains to be fixed, the obligation must be construed as being to provide, following the Seller's request, a copy of the charterparty as soon as the fixture has been made.

80. I therefore dismiss the section 69 appeal on this point too.

(E) APPEAL QUESTION 3/FIRST SECTION 68 ISSUE: OBLIGATION TO PROVIDE COPY CHARTERPARTY

81. In this section I consider the section 69 appeal on this point, and the first of the two section 68 challenges.

82. The Sellers' primary case is that the Board failed to consider whether the failure to provide a copy of the charterparty at first request was a condition; and that that amounted to a serious irregularity being a *"failure by the tribunal to deal with all the issues that were put to it"* (section 68(d)) and/or a *"failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties"* (section 68(c)). The parties had agreed to arbitration in accordance with the GAFTA Arbitration Rules (no.125) incorporated into the Contract, which provide that the Board will *"determine all the issues put before them"*. The Sellers submit that the Board's conclusion *"whilst Sellers have succeeded on this point, Buyers are not liable to them in damages"* begs the question of whether the obligation was a condition.

83. By way of comparison, the Board stated the issues in relation to the *nomination* questions in this way:

> "Were Buyers in breach of contract for nominating a vessel which was unlikely or impossible to arrive at the contractual range of load ports by the ETA given by Buyers."
>
> "If this was a breach of contract then was it a breach of a condition, as argued by Sellers, which entitled them to terminate the Contract?"

84. By contrast, the issue about failure to send a copy of the charterparty was simply stated as *"Were Buyers in breach of contract by their failure to send a copy of the charterparty of the vessel?"*

85. The Buyers say it is nonetheless tolerably clear that the Board concluded that the term was not a condition, and suggest that the Sellers are taking a meticulous and overly minute approach to the Award. In considering the nomination obligation, the Board found that it was *"not a breach of condition*": that language is to be contrasted with the Board's statement that the failure to provide a copy of the charterparty was *"a breach of contract"*, implying that the Board did not regard it as a breach of condition. Further, the Sellers asked the Board to clarify the Award under section 57 of the Act, receiving the response that the question had been answered *"either expressly or by referral to those issues within the body of the Award".*

86. The Board's reasoning on this issue is set out in Award §§ 11.36 and 11.37, quoted in § 22 above.

87. The references in Award § 11.37 to the Sellers having purported to terminate the Contract on the nomination ground, and to their failure to accept a substitute nomination or to nominate a load port, appear to indicate that the Board thought any question of the Buyer's failure to provide a copy charterparty being a breach of condition would be moot. The Buyers point out that it is not a serious irregularity for arbitrators to decide a logically anterior issue such that the further issue does not arise: see *Home Secretary v Raytheon* [2014] EWHC 4375 § 33(x). On that approach, however, it would have been necessary to decide that the copy charterparty issue was indeed moot in light of the Board's conclusion on the nomination issue. By the date on which the Sellers purported to bring the Contract to an end, 26 March 2018, the Buyer had failed to provide the copy charterparty for the *Tai Hunter*, and so if that were a breach of condition then the Sellers would have been entitled to rely on it. Indeed, the Sellers' message of that date did rely on that failure, and the fact that they did so as evidence of repudiation rather than as a breach of condition may not have mattered (cf *Chitty on Contracts*, 33rd ed., § 24-014 *"No reason or bad reason given"*).

88. As the Sellers point out, parties are entitled to see some words in an award that indicate how an issue has been addressed and the reasons for deciding it in the way in which it was decided. On balance, I am persuaded that the Board failed to address this particular issue.

89. The Sellers submit that in those circumstances I should remit the issue to the Board, citing Popplewell J's statement (summarising existing authority) in *Reliance Industries v Union of India* [2018] 1 Ll. Rep 562 § 14(7) that:

> "(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

90. In the present case, however, the Sellers have raised the same issue by an appeal under section 69 of the Act, for which permission has been given. In those circumstances, I do not consider it necessary or proportionate for the court to decline to determine the point.

91. No authority has been cited as to whether or not an obligation promptly to provide a copy of the charterparty for a nominated vessel is a condition of the Contract. Moreover, the issue in the present case would be whether a failure promptly to provide the copy charterparty relating to an initial invalid nomination is a breach of condition, even if the buyer was in a position in due course to make a timely valid nomination and to provide a copy of the charterparty relating to that fixture. In my view the answer to that question is no.

92. A cogent argument could be made that it is a condition of the contract that a copy charterparty for the effective nomination must at least at some stage be provided. As the Buyers point out, under GAFTA § 6 (quoted earlier) a buyer who has made a valid nomination (at least) has the right to make a substitute nomination at any time up to one business day before the estimated time of arrival of the original vessel. An argument might be advanced that failure to provide the copy charterparty by that date would amount to a breach of condition, in light of the likely commercial consequences of the failure (e.g. the seller remaining uninformed of the charterparty provisions relating to matters such as demurrage).

93. However, it is unnecessary to resolve that point in the present case. On any view, it would be clearly illogical to hold that the buyer could be in breach of condition for failing promptly to provide a copy of the charterparty relating to what might well turn out not to be the effective nomination. Moreover, as the present Buyers point out, there is an obvious risk in chain transactions that delays may be incurred in passing copy documentation down the chain. I very much doubt that commercial parties would have intended any such delay to render the contract liable to immediate termination.

94. The Sellers point out that it would likely to be difficult to assess damages for breach of the obligation to provide a copy of the charterparty, and such difficulty was listed by Lord Lowry in *Bunge* as an indication in favour of a term being a condition (citing *McDougall v Aeromarine of Emsworth* [1958] 1 WLR 1126, 1133). That factor would, however, apply to a great many contractual terms, many or most of which

would not be regarded as conditions. It is likely to have weight only when set alongside other considerations pointing in favour of the term in question being a condition. There are in my view no such considerations here.

95. I conclude that failure to provide a copy charterparty immediately upon the seller's request following nomination of a vessel is not *per se* a breach of condition; and, specifically, that the failure to provide a copy charterparty for the *Tai Hunter* prior to the date on which the Buyers nominated a substitute vessel was not a breach of condition.

96. In these circumstances, the Board's failure fully to address the copy charterparty issue has not caused and will not cause substantial injustice to the Sellers, and thus does not constitute a serious irregularity within section 68 of the Act. I therefore dismiss both the section 68 challenge and the section 69 appeal on this issue.

(F) SECOND SECTION 68 ISSUE: CUMULATIVE EFFECT OF BREACHES

97. The basis of this challenge is set out in § 26.ii) above.

98. The Board in its section 57 response, on this point too, took the view that all issues put to it had been addressed, either expressly or by referral to those issues within the body of the Award.

99. The Buyers point out that the Sellers sought permission to appeal on a question of law corresponding to this section 68 ground. Teare J refused permission on the basis that it was not a point of general public importance and:

> "It is unclear that the tribunal reached a decision on this point. If they did and concluded that the conduct of the Buyer was not repudiatory that was a decision of mixed fact and law and does not appear to be obviously wrong."

100. The Buyers submit that the Sellers should not be allowed to circumvent that decision via a section 68 challenge. However, Teare J's conclusion that any finding in Buyers' favour was not obviously wrong does not mean that the decision was bound to go in the Buyers' favour.

101. I am not persuaded that the Board did in fact address its mind to the distinct question of whether, taken together, the four matters relied on by the Sellers in this context (and recited in Award § 9.1) amounted to repudiation/renunciation; nor, in any event, that the Board gave reasons for any conclusion on that point. In practice I think it inconceivable, given the conclusions the Board did reach, that they would have found the cumulative effect of these four matters amounted to repudiation or renunciation: but that does not meet the point, save insofar as it is relevant to the question of substantial injustice.

102. In order to succeed on the "*substantial injustice*" test, the Sellers need not show that they would have succeeded on the issue with which the tribunal failed to deal, but only that their position was reasonably arguable: cf *Vee Networks Limited v Econet Wireless International* [2005] 1 Lloyd's Rep 192 § 40; *Home Secretary v Raytheon* (cited above) and *Konkola Copper Mines v U & M Mining Zambia (No.2)* [2014]

EWHC 2374 § 19. Though a failure to deal with issues is an irregularity, and will often be a serious irregularity, that is not the case where the claimant's contentions on that issue are not reasonably arguable, so that it cannot be said that any substantial injustice has occurred (see, for an example, *Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm)).

103. The position in summary on each of the four matters, on which the Sellers rely cumulatively, is:

i) the nomination of the *Tai Hunter* was, the Board found, invalid because the ETA was overly ambitious and the nomination was not made on reasonable grounds: however, the Board found that the Buyers still had ample time to make a valid nomination (and in due course did so);

ii) the initial nomination of the *Tai Hunter* failed, it appears, to state the name of that vessel's owners: however, that failure was of no consequence because the *Tai Hunter* nomination could still be (and was) replaced;

iii) there was no finding of breach in relation to the allegation that the *Tai Hunter* had not been fixed, by the date of its nomination, by the Buyers or their sub-buyers; and

iv) the Board found the Buyers' failure to provide a copy of the charterparty relating to the *Tai Hunter* at the Sellers' first request to be a breach of contract: however, that failure was also of no consequence for the same reason as indicated in (ii) above.

104. A series of individually non-repudiatory breaches can cumulatively amount to a renunciation or repudiation of a contract (see, e.g., *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051 § 87); but it remains necessary to establish that the cumulative effect of the various breaches actually passes the threshold for repudiation or renunciation.

105. As to repudiation, *Chitty* § 24-041 states *inter* alia:

> "The bar which must be cleared before there is an entitlement in the innocent party to treat himself as discharged is a "high" one. A number of expressions have been used to describe the circumstances that warrant discharge, the most common being that the breach must "go to the root of the contract". It has also been said that the breach must "affect the very substance of the contract", or "frustrate the commercial purpose of the venture", and, at the present day, a test which is frequently applied is that stated by Diplock L.J. in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [[1962] 2 QB 260]:
>
> > "Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"" (footnotes omitted)

106. Renunciation requires a refusal to perform, or acts/omissions such as to lead a reasonable person to conclude that the party no longer intends to be bound by the contract's provisions; and it must be plain and unequivocal (see, e.g., *Chitty* §§ 24-018 and 24-019).

107. In my judgment it is not reasonably arguable that the matters referred to in § 103 above amounted to repudiation or renunciation of the Contract, particularly in circumstances where the Board did not find the nomination of the *Tai Hunter* to have been made in bad faith, and the Board found that, as at the date of the Sellers' purported termination, the Buyers had ample time to make a valid nomination in its place. I do not consider that the Board could, on any remission, properly hold to the contrary.

108. I therefore consider that the irregularity did not cause, and will not cause, substantial injustice and therefore does not amount to a serious irregularity within section 68 of the Act. I accordingly dismiss the second section 68 challenge.

(G) APPEAL QUESTIONS 4 AND 5: INTEREST

109. The interest questions can be taken relatively succinctly. The Sellers say that the Board's conclusion that interest should run from 4 April 2018 was obviously wrong as the payment to the Buyers only arose *"in the event [of a] final and unappealable arbitration award"*. That time has not yet arrived and accordingly, they say, the Buyers are not yet entitled to interest. The Sellers make the following points:

    i) Interest is awarded not to punish the defendant but to compensate the claimant for being kept out of the money it is owed: *BP Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783, 845-846.

    ii) The basic rule is that interest is awarded from the date of loss: *Kuwait Airways v Kuwait Insurance* [2000] Ll. Rep IR 678, 685-686 (where the learned judge goes on to cite three main exceptions to this rule, all of which involve payment from a *later* date than the date of loss).

    iii) Here, the Buyers have not been kept out of their money until the Board's decision becomes unappealable, and certainly not since 4 April 2018. Under § 3(a) of the Settlement Agreement (quoted in § 14 above), the Sellers did not become due to make any payment to the Buyers until their *"first request"* following the arbitration award becoming final and unappealable. That time has not yet arrived. Accordingly, no interest should have been awarded.

110. The Buyers say that this is a question of construction of the Settlement Agreement, and that the Board was well placed to address such questions against the relevant background having heard and considered all the evidence (see *Russell on Arbitration* 8-140).

111. In my view, the natural construction of the Settlement Agreement leads to the conclusion that interest should run from 4 April 2018.

112. Clause 3(a) provides that, if the Sellers are found unlawfully to have terminated the Contract, then the Buyers will be considered to have *"overpaid"* and will be

"reimburse[d]". *"Overpaid*" is in the past tense and *"reimburse"* connotes repayment of a sum previously paid over. Both expressions tend to suggest that the parties recognised that in such circumstances the Buyers would have been kept out of their money as from the original payment of the price. That view also reflects the commercial reality of the situation. The parties were not replacing a damages claim with future contractual rights: they were in essence varying the purchase price paid on 4 April 2018. The adjustment mechanism in § 3 will reflect that reality only if interest is backdated so as, as nearly as possible, to put the Buyers in the position in which they would have been had the appropriate price been paid at the time.

113. Accordingly, I do not consider that the award of interest is in any way punitive. It simply reflects the real loss suffered by the buyers. The Board had a broad discretion to award interest from such dates, at such rates and with such rests as it considered met the justice of the case (section 49(3) of the Arbitration Act 1996); and I do not consider that its decision discloses any error of law or approach. On the contrary, it reflects in my view a sensible construction of the Settlement Agreement.

(H) CONCLUSION

114. It follows that I dismiss all of the section 69 and 68 challenges and uphold the Award.