LLOYD'S LAW REPORTS

Editor:
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[1981] VOL. 2] **Bunge v. Tradax** PART 1

HOUSE OF LORDS

Feb. 23 and 25, 1981

BUNGE CORPORATION
v.
TRADAX EXPORT S.A.

Before Lord WILBERFORCE,
Lord FRASER OF TULLYBELTON,
Lord SCARMAN,
Lord LOWRY
and Lord ROSKILL

Sale of goods (f.o.b.) — Notice of readiness to load — Buyers to give 15 days' loading notice — Whether notice given in time — Whether sellers entitled to hold buyers in default — Whether sellers lost right to hold buyers in default — GAFTA 119.

In January, 1974, the buyers agreed to buy from the sellers 15,000 tons 5 per cent. more or less of U.S. soya bean meal, shipment of 5000 tons in each of May, June and July, 1975, at U.S. $119.50 per tonne f.o.b. one U.S. Gulf port at sellers' option stowed and trimmed. The contract was made and written through Peter Marcy Inc. (Marcy) and Bunge Antwerp. The sellers, as was their normal custom, issued a separate contract in respect of the May shipment, which stated inter alia that the buyers were to give 15 days' loading notice and that the brokers were Marcy. The May shipment was sold on by the buyers to Warinco A.G., who sold on to Fribesco S.A. who in turn sold to Sosimage S.p.A.

The contract, which had been issued by Bunge Antwerp on behalf of the buyers, incorporated the terms of GAFTA 119, the material clauses of which provided inter alia:

> 7. Period of delivery: During ——— at Buyers' call. Buyers shall give at least ——— consecutive days notice of probable readiness of vessel(s) and of the approximate quantity required to be loaded . . .
>
> 20. Notices — Any Notices received after 16.00 hours on a business day shall be deemed to have been received on the business day following. A Notice to the Broker or Agent shall be deemed a Notice under this Contract. All Notices given under this Contract shall be given by letter or by telegram or by telex or by other method of rapid written communication. In case of resales all Notices shall be passed on without delay by Buyers to their respective Sellers or vice versa.
>
> 21. Non-Business Days — Saturdays, Sundays and the officially recognised and/or legal holidays of the respective countries and any days which the Grain and Feed Trade Association Ltd. may declare as Non-Business Days for specific purposes shall be Non-Business Days. Should the time limit for doing any act or giving any Notice expire on a Non-Business Day, the time so limited shall be extended until the first business day thereafter. The period of shipment shall not be affected by this clause.

Extensions under the contract and the sub-contract were claimed under cl. 8 which provided for a notice "not later than the next business day following the last day of the delivery period" so that in the event the May shipment became a June shipment.

No notice pursuant to cl. 7 was initiated by the buyers to any sub-buyers until 14 29 hours on June 16 when Sosimage sent a telex to the brokers between Fribesco and Warinco stating inter alia:

> . . . For the contract in object we nominate s.s. Sankograin ETA U.S. Gulf 23/25 June 1975 for T 5,000 5% M/L U.S. Soyabean meal. Waiting for shippers name/loading port.

The notice reached the buyers on the same day and was sent from New York at 11 03 hours to Bunge Antwerp. Marcy received the notice from Bunge Antwerp on June 17 at 08 46 hours and it was accepted by the sellers, that the notice on its way from Sosimage to Marcy had been passed on without delay, and that notification was given to the sellers when it was received by Marcy on June 17. On June 20, at 12 25 hours, the sellers sent the following telex to the buyers:

> . . . We refer to your telex of [17th] June by which you nominated the vessel Sankograin . . . We ask you to note that under the . . . contract you have the obligation to give a 15 day loading notice. On the other hand the extended period of

shipment will expire on 30th June. Under the circumstances your loading notice is late and we consider that you are in breach of the above contract in accordance with the default clause of the GAFTA Form n119. We hereby declare you in default and hold you responsible for any and all losses damage costs and expenses which we may suffer as a result of your default.

The dispute was referred to arbitration and the Board of Appeal of GAFTA stated their award in the form of a special case, the questions of law being: (1) whether on the facts found and upon the true construction of the contract the sellers were entitled by the telex sent on June 20, 1975, to hold the buyers in default of fulfilment and (2) whether the buyers were entitled to any and if so what sum or sums by way of (a) damages and (b) carrying charges.

The issues for determination by the Court were (1) did the buyers give notice under cl. 7 in time? (2) was the notice valid in content? (3) if the notice given was out of time, was the breach such as to entitle the sellers to hold the buyers in default? (4) if the notice was not valid in content was the breach such as to entitle the sellers to hold the buyers in default? and (5) if the buyers' notice was such as to entitle the sellers to hold the buyers in default had the sellers lost their right before they on June 20, sought to exercise it.

———*Held*, by Q.B. (Com. Ct.) (PARKER, J.), that (A) (1) since the contract for the May shipment issued by the sellers stated that the brokers were Marcy, gave their address and bore the sellers' receipt stamp, Marcy were therefore to be taken to be the brokers for the purposes of cl. 20 to the exclusion of Bunge Antwerp; the finding by the board that Marcy were together with Bunge Antwerp, brokers in the making of the contract could not prevail over the documents and where there were two brokers, one for each party, the reference in cl. 20 to *the* broker could only sensibly mean the broker for the party to whom the notice was to be given; a notice to a party's own broker, unless he also acted for the other party could not be regarded as giving notice to the other party and the notice to Bunge Antwerp was not notice to the sellers and in order to comply with the contract the buyers were obliged to give notice either to the sellers themselves or to Marcy;

(2) the methods listed for the giving of the notice in cl. 20, the emphasis on rapidity and the requirement for passing on notices without delay pointed to the giving of the notice meaning the dispatch of the notice; the provision as to the receipt did not indicate that giving and receipt were intended to be the same thing but the opposite and indications in the clause itself were that a notice was "given" when dispatched by proper means;

(3) since the time limit under cl. 8 necessarily expired on a business day, cl. 21 could have no application to a notice under that clause, but if cl. 21 was to have any content so far as notices were concerned it had to apply to notices under cl. 7, for, as GAFTA 119 was printed, there was no other notice provided for, to which it could apply; and it operated to extend the time in the case of the last day for giving notice under cl. 7 being a non-business day and there the last day for giving notice was either Saturday, June 14, or Sunday, June 15, but as both were non-business days time was therefore extended to Monday, June 16, and since notice was initiated on that day but was not dispatched to Marcy until June 17, it was still a day late;

(4) cl. 20 meant that provided the initial notice was in time and was passed on without delay it would be good as between first buyer and seller notwithstanding that as between them alone and in the absence of sub-sales it would have been late; the requirement of speed showed that in the case of string contracts the seller was prepared to accept an originally good notice provided it reached him without delay and since it was found that there was no delay and since the initial notice was, as a result of the operation of cl. 21, in time, the notice given to Marcy was in time;

(B) the notice was on the face of it defective in that it was not a notice of readiness to load but of ETA U.S.A. Gulf, and it did not declare the quantity but as there was an existing practice in the trade that the seller did not nominate the port until he had received a cl. 7 notice and therefore cl. 7 notices specified not expected readiness to load but ETA Gulf and neither party were clear as to the precise limits of this practice, if it was necessary to determine the notices' validity as to content the matter would have to be referred back to the board; and no conclusion would be reached on this issue;

(C) (1) the effect of cl. 8 was that cl. 7 could not be regarded as a condition during the initial delivery period since the buyer could claim an extension after the end of that period;

(2) the facts that the notice was to be of "probable readiness" and might be changed, the provisions as to passing on of notices and the fact that the sellers might in any event have to forego some part of the full 15 days waiting for their brokers or agents to pass a notice to them indicated that the clause was not intended to be one for the breach of which however slight the sellers were entitled to rescind; there were neither express words nor clear indications that the provision as to notice was intended to be a condition even to a limited effect and the clause was not a condition;

(3) the term was an innominate term; the object of the notice was principally to give the sellers time in which to assemble the goods for shipment and as notice was given at 08 46 hours on June 17, the sellers were left with 12 clear days or four-fifths of the stipulated period and this could not be regarded as sufficient to justify the sellers in rescinding; it did not come near to depriving them of substantially the whole benefit which it was intended they should obtain from the contract, and at the most, it deprived them of some small part of the time in which to assemble the goods;

(D) (1) since the time for giving of the notice was not a condition, the provisions as to content did not amount to a condition of the contract and was an innominate term;

(2) the failure to specify quantity did not by itself justify rescission and, even assuming the worst possible position against the buyers, breaches as to content would not justify the sellers in holding the buyers in default;

(E) issue 5 did not arise but if the earlier conclusions were wrong and there was a breach justifying the sellers in holding that the buyers were in default the sellers had not lost it; the buyers had failed to establish that the only possible conclusion in law from the lapse of time between the breach and purported exercise of the right was that the sellers had decided to affirm the contract despite the breach; and the board were entitled to hold that there was no unreasonable delay and thus no evidence that the sellers had decided to accept the nominations and thereby affirm the contract;

(F) the first question of law and the second question would therefore be answered in the negative;

(G) with regard to the second question, if the earlier conclusions were wrong, there were no findings that the buyers had made an offer after the sellers had declared default and that the sellers had unreasonably refused such offer; and if the sellers were entitled to damages on the basis of the difference between market price and contract price, the damages would have had to be assessed on the minimum quantity and not on the mean quantity; as against a wrongdoer, damages should be assessed on the basis that he would, had he not defaulted, have performed the contract in the manner which would have resulted in the lowest damages for the breach and since the buyers could have opted for the minimum quantity without being in breach it was upon that quantity that damages should be assessed.

On appeal by the sellers and cross-appeal by the buyers, the main issues being (1) whether or not the buyers were in breach of contract; and (2) if so whether that breach or those breaches was or were in respect of a term of the contract which was a condition.

———*Held*, by C.A. (MEGAW, BROWN and BRIGHTMAN, L.JJ.), that (1) there was no doubt that the buyers were under a contractual obligation to give notice of readiness at least 15 days before the expiry of the shipment period as extended, i.e., June 30; and the notice received by Marcy (the sellers' brokers) on Tuesday, June 17, was prima facie, too late;

(2) to make sense of the contract, the relevant time of the giving of notice was the time when it was given by the buyers or their agents to the sellers or their agents and not when it was first given by someone other than the buyers, by persons of whose existence and identity the sellers were unaware and had no means of ascertaining, and with no information to the sellers, or any means for them to find out, on what date the notice had been given as between two persons who were in contract with one another but neither of whom was in any relevant contractual relationship with the sellers;

(3) the notice had to be such that after it expired there was time within the shipment period for the goods to be loaded at the loading rates specified in the contract; and on that basis the notice given was clearly too late and the sellers could not be obliged to load cargo in July when the contract as extended provided for June shipment;

(4) the notice had therefore to be given before June 13 (by the buyers) and since it was not given until June 17, the buyers were in breach of contract in having failed to give notice of probable readiness by the latest date when, under the contract, it was required to have been given;

(5) since the obligation of the sellers to deliver the goods not later than June 30, 1975, was a condition of the contract, there was no reason why the buyers' contractual obligation to give the sellers notice of a length which the parties had agreed to be the reasonable time for the purpose of enabling the sellers to perform that condition, binding on them, should be any less a condition binding on the buyers;

(6) if time was of the essence of a contract then that provision as to time had effect as a condition; in mercantile contracts, i.e., f.o.b. contracts, stipulations as to time not only might be, but usually were, to be treated as being "of the essence of the contract" even though this was not expressly stated in the words of the contract;

(7) here the provision as to time was of the essence of the contract and the term was a condition;

(8) the test in the *Hong Kong Fir* case, that whether a term was a condition was whether every breach of such an undertaking had to give rise to an event which would deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract, was intended to be a literal, definitive and comprehensive statement of the requirements of a condition in all types of contracts and all types of contractual stipulations and was not part of the ratio decidendi of the *Hong Kong Fir* case.

Appeal allowed.

On appeal by the buyers and cross-appeal by the sellers:

———*Held*, by H.L. (Lord WILBERFORCE, Lord FRASER OF TULLYBELTON, Lord SCARMAN, LORD LOWRY and Lord ROSKILL), that (1) cl. 7 was intended as a term the buyers' performance of which was the necessary condition to performance by the seller of his obligations; it was clearly essential that both buyers and sellers should know precisely what their obligations were most especially because the ability of the seller to fulfil his obligation might well have been totally dependent on punctual performance by the buyers as here, since until the requirement of the 15 days' consecutive notice had been fulfilled the sellers could not nominate the "One Gulf Port" as the loading port (*see* p. 6, col. 2; p. 7, col. 2; p. 9, cols 1 and 2; p. 15, col. 2);

(2) in a mercantile contract when a term had 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 would in general be treated as a condition and the Court of Appeal, the Board of Appeal and the umpire all reached the correct conclusion and the appeal would be dismissed (*see* p. 6, col. 2; p. 7, col. 2; p. 8, col. 2; p. 9, col. 2; p. 15, col. 2);

————*Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Lloyd's Rep. 478 considered.

(3) the submission by the sellers, that the word "default" in cl. 22 meant "failure" or "want" or "absence" and since there had been a failure or want or absence of shipment by the sellers this was sufficient to enable the last sentence of cl. 22 to be invoked so as to require the sellers' damages to be assessed on the mean contract quantity, would be rejected in that the context in which the word default was used in cl. 22 was one of a breach of contract sounding in damages and not of non-performance without breach; default in the last sentence in cl. 22 meant default by the sellers in breach of their contractual obligations and that sentence had no application here and the cross-appeal would be dismissed (*see* p. 6, col. 2; p. 9, col. 2; p. 17, col. 1).

Per Lord SCARMAN (at p. 6): I wish, however, to make a few observations on the topic of "innominate" terms in our contract law. In *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* . . . the Court of Appeal rediscovered and reaffirmed that English law recognizes contractual terms which upon a time construction of the contract of which they are part, are neither conditions nor warranties but are . . . "intermediate". A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate or entitle the other party to terminate the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach.

Appeal and cross-appeal dismissed.

The following cases were referred to in the judgments:

Behn v. Burness, (1863) 3 B. & S. 751;

Bentsen v. Taylor, [1893] 2 Q.B. 274;

Boone v. Eyre, (1777) 1 Hy. Bl. 273;

Bowes v. Shand, (1877) 2 App. Cas. 455;

Bremer Handelsgesellschaft m.b.H. v. J. H. Rayner & Co. Ltd., (C.A.) [1979] 2 Lloyd's Rep. 216; [1978] 2 Lloyd's Rep. 73;

Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A., (H.L.) [1978] 2 Lloyd's Rep. 109;

Carapanayoti & Co. Ltd. v. Comptoir Commerciale Andre & Cie S.A., [1972] 1 Lloyd's Rep. 139;

Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. (The *Hansa Nord*), (C.A.) [1975] 2 Lloyd's Rep. 445; [1976] 1 Q.B. 44;

Comptoir Commercial Anversois v. Power, [1920] 1 K.B. 868;

Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., (C.A.) [1962] 2 Lloyd's Rep. 478; [1962] 2Q.B. 26;

Jackson v. Union Marine Insurance Co. Ltd., (1874) L.R. 10 C.P. 125;

McDougall v. Aeromarine of Emsworth Ltd., [1958] 2 Lloyd's Rep. 345; [1958] 1 W.L.R. 1126;

Mihalis Angelos, The, (C.A.) [1970] 2 Lloyd's Rep. 43; [1971] 1 Q.B. 164;

Moorcock, The, (1889) 14 P.D. 64;

Oppenheim v. Fraser, (1876) 34 L.T. 524;

Photo Production Ltd. v. Securicor Transport Ltd., (H.L.) [1980] 1 Lloyd's Rep. 545; [1980] A.C. 827;

Reardon Smith Line Ltd. v. Hansen-Tangen, (H.L.) [1976] 2 Lloyd's Rep. 621; [1976] 1 W.L.R. 989;

Reuter v. Sala, (1879) 4 C.P.D. 239;

Stach (Ian) Ltd. v. Baker Bosley Ltd., [1958] 2 Q.B. 130;

Tarrabochia v. Hickie, (1856) 1 H. & N. 183;

Toepfer v. Lenersan-Poortman N.V., (C.A.) [1980] 1 Lloyd's Rep. 143; [1978] 2 Lloyd's Rep. 555;

Toprak Mahsulleri Ofisi v. Finagrain Compagnie Commerciale Agricole et Financiere S.A., (C.A.) [1979] 2 Lloyd's Rep. 98;

Turnbull & Co. (Pty) Ltd. v. Mundas Trading Co. (Pty) Ltd., (Aust. Ct.) [1954] 2 Lloyd's Rep. 198;

United Scientific Holdings Ltd. v. Burnley Borough Council, (H.L.) [1978] A.C. 904.

This was an appeal by the buyers Bunge Corporation of New York from the decision of the Court of Appeal ([1980] 1 Lloyd's Rep. 294) allowing the appeal of the sellers Tradax Export S.A. from the decision of Mr. Justice Parker ([1979] 2 Lloyd's Rep. 477) given in favour of the buyers and holding inter alia that the provision as to the time limit in the contract was not a condition of the contract. The sellers

cross-appealed on the amount of damages awarded.

Mr. R. Buckley, Q.C. and Mr. Nicholas Merriman (instructed by Messrs. William A. Crump & Son) for the buyers; Mr. C. S. Staughton, Q.C. and Mr. M. Havelock-Allan (instructed by Messrs. Sinclair Roche & Temperley) for the sellers.

The further facts are stated in the judgment of Lord Wilberforce.

Judgment was reserved.

Thursday, May 7, 1981

JUDGMENT

Lord WILBERFORCE: My Lords, I have had the advantage of reading in advance the speech to be delivered by my noble and learned friend, Lord Roskill. I agree entirely with it and desire only to add a few observations on some general aspects of the case.

The appeal depends upon the construction to be placed upon cl. 7 of GAFTA 119 as completed by the special contract. It is not expressed as a "condition" and the question is whether, in its context and in the circumstances it should be read as such.

Apart from arguments on construction which have been fully dealt with by my noble and learned friend, the main contention of Mr. Buckley, Q.C., for the appellant was based on the decision of the Court of Appeal in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Lloyd's Rep. 478; [1962] 2 Q.B. 26, as it might be applied to cl. 7. Lord Justice Diplock, as he then was, in his seminal judgment illuminated the existence in contracts of terms which were neither, necessarily, conditions nor warranties, but, in terminology which has since been applied to them, intermediate or innominate terms capable of operating, according to the gravity of the breach, as either conditions or warranties. Relying on this, Mr. Buckley's submission was that the buyer's obligation under the clause, to—

> . . . give at least [15] consecutive days' notice of probable readiness of vessel(s) and of the approximate quantity required to be loaded . . .

is of this character. A breach of it, both generally and in relation to this particular case, might be, to use Mr. Buckley's expression, "inconsequential", i.e., not such as to make performance of the seller's obligation impossible. If this were so it would be wrong to treat it as a breach of condition: *Hong Kong Fir* would require it to be treated as a warranty.

This argument, in my opinion, is based upon a dangerous misunderstanding, or misapplication, of what was decided and said in *Hong Kong Fir*. That case was concerned with an obligation of seaworthiness, breaches of which had occurred during the course of the voyage. The decision of the Court of Appeal was that this obligation was not a condition, a breach of which entitled the charterer to repudiate. It was pointed out that, as could be seen in advance the breaches, which might occur of it, were various. They might be extremely trivial, the omission of a nail; they might be extremely grave, a serious defect in the hull or in the machinery; they might be of serious but not fatal gravity, incompetence or incapacity of the crew. The decision, and the judgments of the Court of Appeal, drew from these facts the inescapable conclusion that it was impossible to ascribe to the obligation, in advance, the character of a condition.

Lord Justice Diplock then generalized this particular consequence into the analysis which has since become classical. The fundamental fallacy of the appellant's argument lies in attempting to apply this analysis to a time clause such as the present in a mercantile contract, which is totally different in character. As to such a clause there is only one kind of breach possible, namely, to be late, and the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence, and secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole.

The test suggested by the appellants was a different one. One must consider, they said, the breach actually committed and then decide whether that default would deprive the party not in default of substantially the whole benefit of the contract. They invoked even certain passages in the judgment of Lord Justice Diplock in *Hong Kong Fir* to support it. One may observe in the first place that the introduction of a test of this kind would be commercially most undesirable. It would expose the parties, after a breach of one, two, three, seven and other numbers of days to an argument whether this delay would have left time for the seller to provide the goods. It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so. It would fatally remove from a vital provision in the contract that certainty which is the most indispensable quality of mercantile contracts, and lead to a large increase in arbitrations. It would confine the seller — perhaps after