JUDGMENT : Mr Justice Burton : Commercial Court. 2nd May 2008

1. This has been the hearing of an appeal, with the permission of Cooke J, from a First Final Award dated 11 September 2007 by Sir Brian Neill, as Arbitrator, pursuant to the terms (identical save as to dates) of three contracts, the first dated 29 June 2000 (which I shall take as the exemplar), and the second and third both dated 13 February 2001, between Stocznia Gdynia SA ("the Yard") as builder/seller and Gearbulk Holding Ltd ("the Purchaser"). The Yard agreed to construct and sell three bulk carriers, severally known as Hull 24, 25 and 26, by these three contracts, for repudiatory breach of each of which the buyer now claims damages against the Yard. The Arbitrator was appointed pursuant to Article 12.1 of the respective agreements, and by Article 12.2 each contract was to be governed in all respects by the laws of England. The Arbitrator resolved the issues before him in the First Final Award in favour of the Purchaser, which was represented by Mr Stewart Boyd QC and Mr Vernon Flynn QC. The Yard was represented by Mr Graham Dunning QC and Mr Edmund King. The same Counsel have appeared before me on this appeal, and the arguments have been presented powerfully and persuasively on both sides.

2. By reference to the first contract as exemplar, the relevant terms are set out below, so far as material:

"*2.1 Object of the Contract*

In consideration of the mutual covenants herein contained:

- *The Vessel shall be designed, built, launched, equipped, completed, outfitted and tested on behalf of the Seller by the Seller's Yard.*
- *The Vessel shall be delivered to the Purchaser by the Seller free and clear of any liens, charges, claims or mortgages or other debts and encumbrances whatsoever and with clean class and other regulatory certificates.*
- *The Purchaser agrees to buy, accept, pay for and take delivery of the Vessel where so completed and duly tendered for delivery.*

…

3.1 Time and Place

The Seller shall deliver the Vessel to the Purchaser safely afloat at a berth at the seller's Yard on 3rd March 2003 (subject to any permitted extension thereof pursuant to this Contract, the "Delivery Date"). …

5.2 Unless otherwise agreed upon between the Parties the Contract Price shall be paid by the Purchaser to Seller in five (5) instalments in the manner set out below [i.e. in Article 5.3(a) – (e)]

5.10 Refund Guarantee

(a) The instalments of the Contract Price paid by the Purchaser prior to delivery of the Vessel (being those specified in Articles 5.3(a), (b), (c) and (d)) shall be in the nature of advances to the Seller. In the event that the Purchaser shall exercise its right to terminate this Contract pursuant to any of the provisions hereof, the Seller shall forthwith refund to the Purchaser the aggregate amount of such instalments (to the extent paid by the Purchaser at the time of termination) together with interest thereon at the rate of 1 month LIBOR per annum.

(b) It is a fundamental term of this Contract that the Seller's obligation to make such refund of any of the pre-delivery instalments, with interest, shall be secured under and pursuant to the Refund Guarantee issued in favour of the Purchaser. [An agreed form of which was annexed to the contract as Exhibit E, to be issued by ABN Amro Bank.] …

10. DELAY IN DELIVERY AND DEFICIENCIES: SELLER'S DEFAULT

The Contract Price of the Vessel shall be adjusted by way of reduction in the event of any of the contingencies set out in this Article. Such adjustment shall be effected by way of reduction of the amount of the delivery instalment of the Contract Price referred to at (e) in Article 5.3 hereof (it being understood by the Parties that any such reduction of the Contract Price shall [be] *by way of liquidated damages and not by way of penalties).*

The Purchaser shall not be entitled to claim any other compensation and the Seller shall not be liable for any other compensation for damages sustained by reason of events set out in this Article and/or direct consequences of such events other than liquidated damages specified in this Article.

In case the total amount of liquidated damages claimed by the Purchaser under this Article exceeds five per cent (5%) of the Contract Price, the Purchaser's right to liquidated damages shall be limited to such amount equal to and not exceeding five (5) per cent of the Contract Price as specified in Article 4.1 of this Contract.

10.1 Delay in Delivery

(a) In the event that delivery of the Vessel should be delayed beyond the Delivery Date, the Contract Price shall be reduced as follows …

(b) If the delay in delivery of the Vessel shall comprise a period of more than one hundred and fifty (150) days beyond the Delivery Date then the Purchaser may, at its option, terminate this Contract.

(c) Without any prejudice to, and separately from, the foregoing, the Purchaser shall also be entitled, at its option, to terminate this Contract in the event that, for any reason whatsoever, the Vessel shall not have been delivered to the Purchaser hereunder on or prior to 15 August 2003 ["the drop-dead date"] …

10.2 Deficiency in Speed

…

(b) If a deficiency in actual speed of the Vessel … exceeds two-tenths …of one … knot below the Guaranteed Speed of the Vessel, the Contract Price shall be reduced as follows …

10.3 Fuel Consumption

(a) …if the fuel consumption of the Vessel's main engine … exceeds 177.45 grams per kW hour, the contract price shall be reduced …

10.4 Deadweight

…

(b) the contract price shall be reduced by the sum of $1,000 for each full metric ton of … deficiency in excess of 900 metric tons …

10.6 Seller's Default

The Purchaser shall also be entitled, but not bound, to declare the Seller in default and terminate the contract:

(a) if there is a major breach by the Seller of its obligation hereunder to proceed with the construction of the Vessel, such that, in the reasonable opinion of the Purchaser (supported by the opinion of the Classification Society), the Vessel cannot be completed and delivered to the Purchaser on or before the date specified in Article 10(1)(c) hereof [the drop-dead date] *…*

…

Upon the occurrence of any such event of default the Seller shall be entitled to terminate this Contract with the consequences hereinafter provided.

10.7 Effect of Termination

Upon termination of this Contract by the Purchaser in accordance with the provisions of Article 10 or any other provision of this Contract expressly entitling the Purchaser to terminate this Contract, the Seller shall forthwith repay to the Purchaser all sums previously paid to the Seller under this Contract, together with interest accrued thereon calculated at the rate of 1 month LIBOR per annum from the respective date(s) of payment of such sums until date of refund plus the original cost (invoice value) of the Purchaser's Furnished Equipment if any delivered to the Seller.

It is however further expressly understood and agreed upon by the Parties hereto that, if the Purchaser terminates this Contract under this Article, the Purchaser shall not be entitled to any liquidated damages under Article 10.1, 10.2, 10.3 or 10.4 hereof."

3. The yard was in considerable financial difficulty, and none of the three hulls was delivered by the delivery date, or within 150 days thereafter, or by the drop-dead date, or at all. The relevant findings and conclusions of fact of the Arbitrator can be drawn by reference to simply two paragraphs of the award:

"*4.6. The financial problems at the Yard had a very serious effect on the performance of the contracts for the construction of the three vessels, Hulls 24, 25 and 26. In addition the construction of Hull 23 was also greatly delayed. Work on Hull 24 ceased in January 2003 and work on Hulls 25 and 26 never progressed beyond the design stage. …*

6.5 … The Yard was unable and indeed unwilling to comply with their terms. At the respective dates of termination the Yard was quite unable to deliver a vessel on the contractual terms. The expiry of the Refund Guarantees was a further indication that the contracts as signed had come to an end."

4. The Purchaser sent, in the case of the first and second contracts, notices severally dated 7 November 2003 and 4 August 2004, in materially identical terms, and again I shall only quote the material parts of that relating to the first contract, for Hull 24:

"*Dear Sir*

…

The provisions of Article 3.1 of the above Contract provide that the Delivery Date of the Vessel was 3 March 2003. The provisions of Article 10.1(b) provide that if delivery of the Vessel is delayed beyond the Delivery Date by more than 150 days then we will be entitled to terminate the Contract. 150 days from 3 March 2003 was 1 August 2003. Accordingly from that date we have been entitled to terminate the Building Contract pursuant to the provisions of Article 10.1(b).

Further, the provisions of Article 10.1(c) provide that, in the event that the Vessel is not delivered by you to us on or prior to 15 August 2003 then we will be entitled to terminate the Contract. The Vessel was not delivered to us on or before that date and accordingly from that date we also have been entitled to terminate the Building Contract pursuant to the provisions of this Article.

We hereby give you notice that we hereby exercise our rights of termination under both of Article 10.1(b) and 10.1(c) and call upon you, in accordance with the provisions of Article 5.10 to repay to us immediately the predelivery instalment that we have paid to you in respect of this Vessel in the amount of US$1,323,400 … together with interest thereon calculated at the rate of 1 month LIBOR per annum, US$ 127,519.47."

The letter attached a schedule of the interest due on the repayment of the instalments, calculated at the contractual rate.

5. The third letter, sent in respect of the third contract in respect of Hull 26 on 30 November 2004, was in slightly different terms, the material parts of which I quote:

"*Dear Sir*

…

We refer to your communication of 23 November 2004 in which you advised that ABN Amro Bank have refused to extend the validity of their Refund Guarantee relating to the above newbuilding.

Consequently we now find ourselves, in respect of [Hull 26]*, in exactly the same position as we have previously found ourselves in respect of* [Hulls 24 and 25] *in an impossible and completely unacceptable situation. We want and need this newbuilding just as we wanted and needed the two earlier vessels.*

You have made no attempt whatsoever to comply with your contractual obligations under any of these three contracts. Indeed, in reality, you have behaved as if you had no obligations at all towards us under these contracts. We are in no doubt that your conduct under each of the contracts amounts to a repudiatory breach of the most flagrant nature imaginable.

As with [Hulls 24 and 25]*, so now with* [Hull 26]*, you have done nothing, in reliance upon and in the knowledge that we would ultimately have to take steps to terminate the contract in order to protect our position in respect of the paid pre-delivery instalments under the terms of the Refund Guarantee. Your behaviour in respect of these three contracts has not only caused us very considerable losses, it is wholly unacceptable to us.*

As with the two previous newbuildings, as we have made absolutely clear to you throughout, we do not want to terminate the contract, we want and wanted our ships. As with the two earlier ships, we are nonetheless, because of your conduct, left with no choice but to terminate.

Accordingly, we hereby put you on notice that we consider you to be and to have been in repudiatory breach of your obligations under each of the three contracts, which repudiation we hereby accept against full reservations of all our rights including, but not limited to, our entitlement to claim damages at large.

In respect of [Hull 26] *the provisions of Article 3.1 of the Contract provide that the Delivery Date of the Vessel was 31 March 2004. The provisions of Article 10.1(b) provide that if delivery of the Vessel is delayed beyond the Delivery Date by more than 150 days then we would be entitled to terminate the Contract. 150 days from 31 March 2004 was 28 August 2004. Accordingly, from that date we have been entitled to terminate the Building Contract pursuant to the provisions of Article 10.1(b).*

Further, the provisions of Article 10.1(c) provide that, in the event that the Vessel is not delivered by you to us on or prior to 12 September 2004 then we would be entitled to terminate the Contract. The Vessel was not delivered to us on or before that date and accordingly from that date we have also been entitled to terminate the Building Contract pursuant to the provisions of this Article.

We hereby give you notice that we hereby exercise our rights of termination under both Article 10.1(b) and 10.1(c) and call upon you, in accordance with the provisions of Article 5.10, to repay to us immediately the pre-delivery instalment that we have paid to you in respect of this Vessel in an amount of US$1,337,500 … together with interest thereon calculated at the rate of one month LIBOR per annum.

For the avoidance of doubt, as in the case of the termination notice given by us in respect of [Hulls 24 and 25]*, this exercise of our rights of termination is made without prejudice to our rights to claim damages from you by … reason of your repudiatory conduct.*"

6. The conclusion by the Arbitrator on the issues before him was set out at paragraph 9 of the Award:

"*9.1. I can state my conclusions in relation to each of the three contracts as follows:*

1. The contract was repudiated by the Yard.

2. The terms of the contract did not preclude Gearbulk from relying on that repudiation.

3. The provisions in Article 10 did not apply to the repudiation of the contract by the Yard.

4. By relying on the contractual provisions in Article 10 to recover instalments paid Gearbulk did not affirm the contract.

5. Neither did Gearbulk affirm the contract by any action taken or not taken before the letter of termination.

6. Gearbulk is entitled to claim damages at common law for the repudiatory breach of contract by the Yard."

7. The issues in respect of which Cooke J gave leave to the Claimant have been reformulated helpfully by Mr Dunning QC in the following terms:

i) Whether Article 10 is a contractual code which excludes all rights of termination in respect of the events that occurred here ("the first issue").

ii) Whether the exclusion clause in Article 10 of the contract excludes any claim for damages in respect of what has occurred ("the second issue").

iii) Whether the termination of the contracts pursuant to and in reliance upon the contractual termination provisions (coupled with the claim in each case made upon ABN Amro Bank under the refund guarantee) precludes the buyer from subsequently claiming to have terminated at common law ("the third issue").

8. I shall deal with each of these issues in turn. It is perhaps fair to say that the learned Arbitrator in his Award seems to have run his reasoning together in respect of the first and second issues, although they are of course discrete issues; and, indeed, the test as to whether a contract limits a contracting party to termination in accordance with its terms, thus excluding any right to terminate by acceptance of repudiation at common law, may be governed by a different test of construction from the question as to whether a particular claim or claim for damages is exempted by the terms of the contract (see below). It is also right to add that, if common law rights to terminate are excluded, then the question as to whether there is an exemption clause which would exclude some or all of the damages claimable in the event of common law repudiation does not arise. I am satisfied however that the two issues do need to be dealt with separately, as both Counsel encouraged me to do.

The First Issue

9. There is no dispute between the parties that the test of construction for a court to apply in ascertaining whether the parties intended to oust any common law or extra-contractual remedies, such as to constitute the terms of the contract as a complete code, is by reference to a requirement for "*clear words*". The authorities in this regard are ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*** [1974] AC 689 per Lord Diplock at 717H:

   "*In construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.*"

   and see to similar effect the words of Lord Goff in ***Stocznia Gdanska SA v Latvian Shipping Co*** [1998] 1 WLR 574 AC.

10. Mr Dunning QC submits as follows:

   i) Remedies, including the right of termination, in respect of non-delivery are clearly covered by Article 10, notwithstanding the absence of reference to non-delivery in the headings, and despite the fact that the heading of Article 10 as a whole is "*Delay in Delivery …*" because of the express dealing with the right of termination in respect of late delivery in Articles 10.1(b), 10.1(c) and 10.6. Once there has been delay in delivery by reference to those clauses, then there has been no delivery by those dates, such that by virtue of the exercise of the right of termination the vessel is never delivered, and there is thus non-delivery.

   ii) Article 10.6 plainly contemplates that the reason for delay can be a "*major breach*", i.e. a repudiatory breach, and, provided that the necessary opinion of the Classification Society (in this case DNV) can be obtained, that can be exercised at any time prior to the drop-dead date, provided that it can be shown that the vessel will not be ready by the drop-dead date.

   iii) There is no express reservation of the right to terminate at common law. Although Mr Dunning accepts that such is not necessary, given that the exercise is to decide, by reference to *clear words*, whether the presumption that there should be such rights has been ousted, nevertheless he refers to examples of cases in which the presence or absence of such reservation has been influential. In ***Hyundai Heavy Industries Co v Papadopolous*** [1982] Lloyds Rep 1 HL there was an express preservation of such rights (see p3). In ***Lockland Builders Ltd v John Kim Rickwood*** [1995] 77 BLR 42 CA, Russell LJ at 46 attached significance to the absence of such words as "*without prejudice to other rights and remedies*" in a relevant clause.

11. However, Mr Dunning's arguments were inevitably compromised by the fact that he was constrained early in his submissions to accept that Article 10 would not be apt to exclude what he called a renunciatory breach – the example of which he gave was of a party, such as the Yard, announcing that it had no intention of further performing the contract. Clearly a renunciatory breach which, in his example, was nothing more than an announced repudiatory breach, would be similarly exemplified by any repudiatory breach such as, for example, the Yard downing tools or simply in practice flagrantly failing to comply with any of its obligations. This really amounted to a renunciation by Mr Dunning of any attempt to argue that there were clear words in Article 10 which ousted remedies for a repudiatory breach. In ***Lockland*** itself where, on the facts, the builders' client had simply taken action in respect of non-repudiatory breaches without complying with the procedure laid down in the contract, it is plain that a repudiatory breach would, in the judgment of the Court of Appeal, not have been excluded. Hence at 46 Russell LJ said:

   "*My own view – returning to the facts of the instant case – is that Clause 2 and the common law rights to accept a repudiatory breach can exist side by side, but only in circumstances where the contractor displays a clear intention not to be bound by his contract, for example, by walking off the site long before completion … or … failing to comply with plans in a very fundamental way … But such cases are far removed from the instant one.*"

   Hirst LJ at 50 said: "*… this clause 2 did impliedly preclude Mr Rickwood from terminating the contract on the facts of the present case, otherwise than by the exercise of his rights under Clause 2 since the complaints made fell squarely within the scope of Clause 2, i.e. complaints as to the quality of materials and workmanship. However Clause 2 would not have done so in relation to breaches outside the ambit of Clause 2, e.g. by Mr Ryan walking off the site when the works were still substantially incomplete.*"

12. Mr Dunning attempted an argument that some, but not all, repudiatory breaches were excluded, and in particular not a repudiatory failure to deliver: some repudiatory breaches could be accepted if they did not lead to one of the *events*. But any acceptance by the Purchaser of the repudiation by the Yard would be likely to result in non-delivery.

13. The real difficulty that Mr Dunning has is that, in his findings and conclusions of fact, which are not, and were not sought to be, appealed, the Arbitrator did not conclude that this was a simple case of non-delivery. He made the findings set out at paragraph 3 above. This amounted effectively to a finding of repudiatory breach of all the Yard's obligations in Article 2.1, set out above.

14. I am entirely satisfied that the Arbitrator was in those circumstances entitled to conclude, in paragraph 7.16 of his Award, that he had "*been unable to find any clear words, to rebut the presumption that* [the Purchaser] *retained its common law rights arising for a repudiatory breach*" and that, in the light of the fact that there was such repudiatory breach, as found by him, the Purchaser was not precluded by Article 10 from accepting such repudiation, if that is what the Purchaser did (see the third issue).

15. Further, and by reference to the particular clauses of Article 10 relied upon by Mr Dunning:

i) As the learned Arbitrator said at paragraph 7.16(c) of his Award, Article 10.6 is concerned solely with an optional right to terminate in respect of a delay before 15 August 2003. I agree with the Arbitrator that it does not found an argument for exclusion of any right to terminate by accepting a repudiation.

ii) Most significant, in my judgment, is the wording of the very clause, Article 10.7, upon which Mr Dunning placed greatest reliance. This clause was said to be the lynchpin of the case that Article 10 ousted any other right to terminate. However:

a) It could easily have so provided, but instead limited itself in the second paragraph to ousting the Purchaser's right to the liquidated damages otherwise payable under the earlier clauses of Article 10 where the vessel was delivered late or defective, in the event of a termination under Article 10. It did not, as it could have done, limit or exempt a right to claim damages at common law.

b) As to the first paragraph, this made clear that the benefits for the Purchaser, such as they were, but in particular the right to a refund which, by Article 5.10, would then be recoverable under the Refund Guarantee from a third party bank, were only available "*upon termination of this contract by the Purchaser in accordance with the provisions of this Article 10 or any other provision of this Contract expressly entitling the Purchaser to terminate this contract*." The use of the word "*expressly*" is perhaps significant in the sense of suggesting that there were or might be available an implied right to terminate for a repudiatory breach of one of those provisions. But in any event, once again, the provision did not specify that it stood in lieu of any right at common law, but simply underlined that it only arose in the context of following the Article 10 route.

16. I entirely agree with the learned Arbitrator for the above reasons, and for the other reasons he gives, that the right of the Purchaser to accept repudiation, if appropriate, at common law, was not ousted.

The Second Issue

17. This is a question of construing the main clause within Article 10 upon which Mr Dunning relies, which for this purpose I repeat: "*The Purchaser shall not be entitled to claim any other compensation and the Seller shall not be liable for any other compensation for damages sustained by reason of events set out in this Article and/or direct or indirect consequences of such events other than liquidated damages specified in this Article.*"

18. Mr Dunning submits that the *clear words* principle referred to in paragraph 9 above does not apply to the construction of exemption clauses, by virtue of the more modern approach to such clauses by the courts, encouraged by the appellate courts, since the passage of the Unfair Contract Terms Act 1997 ("UCTA") rendered it, at any rate in relation to contracts to which UCTA applies, the less necessary for the courts to find a strained interpretation in order to seek to do justice between the parties.

19. The significance of this argument is not only that he submits that this leads to a different, and less sceptical, approach to exemption clauses from that adopted in relation to clauses which simply oust common law remedies, such as are referred to in paragraph 9 above, but he also relies upon the fact that the Arbitrator makes no such distinction. In dealing, as he effectively did, with the first and second issues together, notwithstanding the fact that they were argued separately, Mr Dunning submits that the Arbitrator fell into error when he concluded in paragraph 7.17 of his Award that "*there were no words, let alone clear words, excluding* [the Purchaser's] *rights in the event of a repudiatory breach.*"

20. Mr Dunning relies upon the words, in their speeches in ***Photo Production Ltd v Securicor Transport Ltd*** [1980] AC 827, of Lord Diplock, deprecating the "*very strained constructions* [which] *have been placed upon exclusion clauses*" (at 851B), and of Lord Scarman (at 853F), whereby he said that in relation to "*a commercial dispute between parties well able to look after themselves …what the parties agreed (expressly or impliedly) is what mattered; and the duty of the courts is to construe their contract according to its tenor.*" Mr Boyd QC however pointed to the words of Lord Wilberforce in his speech in the same case at 846E, whereby he referred to two "*cardinal rules of construction*", the first being the *contra proferentem* rule (not relevant here), and the second being that "*in order to escape from the consequences of one's own wrongdoing … clear words are necessary*".

21. In ***George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*** [1983] 2 AC 803, Lord Bridge (at 812) approved, in common with Lord Diplock at 810, the less sceptical post-UCTA approach of Lord Denning MR in the Court of Appeal ([1983] QB 284 at 296) towards exemption clauses – accepting their *natural plain meaning*: but on the other hand shortly afterwards at 813B-D Lord Bridge then cited, with approval, the passage in the speech of Lord Fraser of Tullybelton in ***Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*** [1983] 1 AER 101 at 105 referring to the "*specially exacting standards which are applied to exclusion … clauses*".

22. Mr Dunning points to the words of Lord Hoffmann in ***BCCI v Ali*** [2002] 1 AC 251 at 276, with his criticism of *clear words*, and (at paragraph 62) his statement that "*the disappearance of artificial rules for the construction of exemption clauses seems to me in accordance with the general trend in matters of construction, which has been to try to assimilate judicial techniques of construction to those which would be used by a reasonable speaker of the language in the interpretation of any serious utterance in ordinary life*": but then Mr Boyd points out that this was a dissenting speech.

23. Mr Boyd refers to the words of Lord Bingham in ***Dairy Containers Ltd v Tasman Orient Lines CV*** [2005] 1 WLR 215 at para 12 where, referring with obvious approval to the words of Lord Hobhouse in ***Homburg Houtimport BV v Agrosin Private Ltd*** [2004] 1 AC 715 at para 144, he said: "*The general rule should be applied that if a party,*

otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party."

But Mr Dunning points out that that dictum of Lord Hobhouse was expressly in the context of his spelling out what he called a "*basic rule of construction of contracts of carriage*", which is what were in issue in both ***Homburg*** and **Dairy Containers**.

24. Mr Dunning finally refers, so as to close the discussion, to the recent words of Moore-Bick LJ in ***Tradigrain SA and Others v Intertek Testing Services (ITS) (Canada) Ltd and Others*** [2007] EWCA Civ 154 at para 46: "*It is certainly true that English law has traditionally taken a restrictive approach to the construction of exemption clauses and clauses limiting liability for breaches of contract and other wrongful acts. However, in recent years, it has been increasingly willing to recognise that the parties to commercial contracts are entitled to apportion the risk of losses as they see fit and that provisions which limit or exude liability must be construed in the same way as other terms*."

However Mr Boyd points out that Moore-Bick LJ expressly cross-refers, as the foundation, or at any rate, as an exemplar, for such proposition, to ***Photo Production***, when in fact, in that case, it would appear that at any rate Lord Wilberforce, as set out in paragraph 20 above, with whom Lord Keith and, notwithstanding his dicta, Lord Scarman, expressly agreed, was not of the view that the "*cardinal rule of construction*" had changed.

25. It is in any event difficult to see why the test in respect of clauses which exempt any liability should necessarily be less stringent than the test in respect of clauses which simply oust common law remedies, as in paragraph 9 above.

26. I would venture only with reluctance into this narrow causeway between the Scylla of *clear words* and the Charybdis of *natural plain meaning*, particularly when it is difficult to see by whose dicta, if any, I am bound. However, it does seem to be common ground that what is now disapproved is any approach which requires a strained interpretation in order to oust the natural meaning of the words: but that it is still necessary to recognise that courts must be persuaded that it was indeed the intention of the parties that a wrongdoer's liability be wholly ousted. In the event, I have not found it necessary to elect for either of the suggested canons of construction or, put another way, I am satisfied that, whichever of the two is adopted, the answer would be the same in this case. Where I have been assisted is by Mr Boyd's pointing to another, and well established, canon of construction in commercial contracts, as articulated by Lord Diplock in ***The Antaios*** [1985] 1 AC 191 at 200-201, namely that "*If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense*".

27. If Mr Dunning is right, then, albeit he has lost on his first argument that termination for common law repudiation is not available in the facts of this case, yet any liability for damages for repudiatory breach is excluded by the clause which I have set out at paragraph 17 above, in the context of the contract as a whole. The position is as follows:

    i) The starting point is that, in the event of delayed delivery, the Purchaser is entitled to what is called liquidated damages, by reference only to a deduction, graduated according to the degree of delay, of up to 5% of the contract price, in accordance with Clause 10.1(a). If however the contract is terminated in accordance with Article 10 or (as Mr Dunning submits is the effect of the clause relied upon) in the event of acceptance of repudiation, the Purchaser does not receive any liquidated damages (not least because it never has to pay the reduced purchase price). So far as Article 10 is concerned, on termination by virtue of Clause 10.7 the Purchaser loses the right to such liquidated damages, but becomes entitled to the return of such monies as it has already paid, together with the benefit of the refund guarantee under Article 5.10.

    ii) Thus, in the event of acceptance by the Purchaser of a vessel delivered late, the Purchaser obtains compensation for its loss up to a maximum of 5% of the purchase price. If however the vessel is rejected, upon a termination by the Purchaser, in accordance with Article 10 (or, on the case for Mr Dunning, by an acceptance of repudiation) the Purchaser receives no compensation at all in respect of non-delivery. If this is unfair on the Purchaser (which Mr Dunning submits it may not be, if in fact the market has fallen) then there are corresponding unfairnesses to the Yard if, for example, the vessel was very nearly, but not quite, ready at the time when the right to terminate was exercised, yet (at any rate under Article 10.7) the Purchaser could recover back all monies that it had paid and not accept the vessel.

28. Whatever the respective unfairnesses, Mr Boyd's powerful submission is that the effect of Mr Dunning's interpretation is that in essence the Yard has in all circumstances, even in the event of a repudiatory breach, what cannot be characterised as any more than an option to build a vessel. If its maximum liability in the event of non-delivery is to pay back the instalments (if any) paid by the Purchaser under Article 5, then that means that the Yard is free, in repudiatory breach of contract, simply to choose to stop work on the vessel: or, more tellingly, the Yard could decide, in the event of an upturn in the market for vessels, simply to construct the vessel and sell it to someone else at a higher price, escaping any liability to the Purchaser other than paying back perhaps the first instalment. This, Mr Boyd submits, *flouts business common sense*.

29. I am satisfied that the answer lies in the careful construction of Article 10. There are indeed balancing fairnesses and unfairnesses within the provisions of Article 10. But what would flout business common sense would be if the provisions in Article 10, which exclude or limit liability in the *events* specifically provided for in Article 10, extended to exclude liability for repudiatory breach which, by virtue of my findings in relation to the first issue, stands outside and beyond the provisions of Article 10. Mr Dunning's effective submission is that the words in the clause under consideration, which render the Yard immune from liability "*for any other compensation for damages*

sustained by reason of events set out in this Article" are intended to cover any *event* of non-delivery. I am satisfied however that its intended purpose is only to explain or underline the effect of the operation of Article 10, which does indeed achieve the result that, in respect of delayed (but not rejected) delivery, there is a schedule of deductions from the purchase price, whereby in the event of termination pursuant to the provisions of Article 10, there is no entitlement to anything more than the return of instalments paid, guaranteed by reference to Clause 5.10. The Clause does not extend to exclude or limit liability in respect of damages for repudiatory breach, to which the provisions of Article 10 are inapplicable.

The Third Issue

30. Mr Dunning's submission here is that the terms of the letters terminating each of the contracts, as referred to in paragraphs 4 and 5 above, combined with the fact that the Purchaser claimed on the refund guarantee provided by Clause 5.10, have the effect that the Yard elected to terminate the contract in accordance with its terms, and in particular in accordance with the provisions of Article 10, and consequently elected against renouncing the contract by accepting its repudiation. Mr Dunning submits that, in the case of the first two contracts, this election was clear from the letters themselves, the terms of which appear in paragraph 4 above: with regard to the third contract the letter itself purported to keep alive both options, but the Purchaser then elected, when it immediately thereafter operated the refund guarantee, and in due course received the monies pursuant to it from the guarantor ABN Amro Bank.

31. Two irrelevant matters must be cleared out of the way at this stage, not because they are not important commercial matters, but because they have little or no impact upon the decision I have to make:

    i) It is quite apparent from the terms of the letters in relation to the first two contracts that those letters on their face purported to terminate in accordance with the provisions of Article 10, and made no mention of repudiation or acceptance of repudiation. On the basis of the authorities to which I shall refer, that is not determinative, and possibly not even relevant. Thus there is and was no need to consider the state of mind of those drafting or sending the letters at the time they were sent. Provided that in law the Purchaser is entitled subsequently to establish, by virtue of facts in place at the time, that it was in a position to accept repudiation, then it may, in accordance with the authorities to which I shall refer below, be entitled to say, retrospectively, that its action amounted to an acceptance of repudiation. It is in relation to that that the words of Rix LJ in ***Stocznia Gdanska S.A. v Latvian Shipping Co & Others*** [2002] 2 Lloyds Rep 436 CA ("***Stocznia CA***") at paragraph 88 have resonance:

    "*Where contractual and common law rights overlap, it would be too harsh a doctrine to regard the use of a contractual mechanism of termination as unequivocally ousting the common law mechanism, at any rate against the background of an express reservation of rights.*"

    ii) The other aspect is that the conduct of the Purchaser was obviously totally commercially understandable, namely that it should, whether belatedly and retrospectively or otherwise, attempt to seek to take the full benefit available under the contract of the refund guarantee (particularly in the context that the solvency of the Yard must inevitably have been in doubt) and still attempt to claim damages against the Yard for repudiatory breach. The question is not whether that conduct was commercially understandable, and a natural reaction to the conduct of a contract-breaker by the innocent party, but whether the Purchaser was entitled, as Mr Dunning would no doubt describe it, to 'have its cake and eat it'.

The Facts

32. By the letters in relation to the first and second contracts, which both referred only to Article 10, and that of the letter in relation to the third contract which, while giving notice under Article 10 purported to do so *against the background of an express reservation of rights*, both with regard to that contract and the earlier two, a claim was made, in each case, for the return of the instalments paid under Article 5, together with interest calculated in accordance with Article 10.7 (one month LIBOR per annum). The Purchaser then in each case claimed under the Refund Guarantee, which was described by Article 1.16 of the contract as meaning "*in relation to each of the Pre-delivery Instalments of the Contract Price … a guarantee in respect of such Pre-delivery Instalment issued or to be issued in favour of the Purchaser by the Refund Guarantor in a form to be mutually agreed upon by the Purchaser and the Seller*". It is provided for in Article 5.10, set out in paragraph 2 above, whereby such Refund Guarantee secures the Yard's obligations to make such refund, with the contractual interest, "*in the event that the Purchaser shall exercise its right to terminate this contract pursuant to any of the provisions hereof*".

33. The draft of the mutually agreed form of Refund Guarantee was set out in Exhibit E to the Contract and provided (in material part):

    "*In connection with the shipbuilding contract dated ... hereinafter called "Contract") made between the Seller and the Purchaser for the construction of one bulk carrier, the Purchaser shall make four advance payments to the Seller prior to the delivery of vessel. In certain circumstances in accordance with the terms of the Contract, the Purchaser shall become entitled to be refunded with such advance payments and that entitlement is to be secured by a bank guarantee.*

    Now we, ABN AMRO BANK V.V. Amsterdam hereby irrevocably and unconditionally undertakes to pay the Purchaser at their account with CHASE MANHATTAN BANK ..., on their first written demand irrespective of the validity and the legal effects of the above mentioned contract and waiving all rights of objection and defense arising there from any amount up to: USD 1,323,400.00 … plus 1 month libor per annum as quoted by London at 11.00 hours London time … upon receipt of the Purchaser's duly signed request for payment and the Purchaser's written confirmation

stating that the Seller has failed to fulfil their obligation in conformity with the terms of the above mentioned contract and that, as result thereof the Purchaser is entitled to claim reimbursement of their advance payment plus interest as aforesaid. The interest will accrue from the date of receipt of the advance payment in the Seller's account and shall not be compounded."

34. An example of one of the letters calling upon the Guarantee, dated 5 August 2004, being the day after the termination letter relating to the second contract, was included in the hearing bundle. After the formal recitals it reads:

"*The Yard has failed to fulfil their obligations under the Contract with respect to delivery of the vessel and as a result thereof Gearbulk is entitled to claim reimbursement under the Guarantee of the pre-delivery instalment, plus interest.*

Please therefore accept this letter as our written demand for refund of the pre-delivery instalment … in the amount of USD 1,357,500.00 … plus interest thereon calculated in accordance with the provisions of the Guarantee."

The Law

35. Thomas J in the Commercial Court at first instance in ***Stocznia Gdanska SA v Latvian Shipping Co and Others*** [2001] 1 Lloyds Rep 537 (**"*Stocznia (Comm Ct)*"**) had to deal with claims that six contracts in relation to the construction of hulls (Nos 1-6) had been repudiated. A notice was given in each case by the yard to terminate the contracts in accordance with their terms, although he held that only the first two notices had in fact been contractually compliant, and he found that, in relation to all six contracts, notwithstanding the service of such notices in compliance or purported compliance with the provisions of the contract, the yard was to be held to have accepted repudiation. He recited, at paragraph 163, the purchasers' contention that the yard had affirmed the contract, rather than accepting its repudiation:

"*It is said that in the way the yard chose to bring these contracts to an end, it affirmed the contract by operating the contractual termination provisions and did not accept the conduct as repudiatory and terminated the contract. But can it really be said that a party has made an irrevocable election to affirm the contract when he terminates the contract not by rescinding it on the basis of accepting the conduct of the guilty party as entitling him to do so, but wrongly relies upon a contractual right to rescind? I do not think so. A party entitled to terminate for breach can effectively terminate, even if he relies on grounds not open to him.*"

36. This related to the valid contractual notices. As for the notices which were in fact invalid:

"*177.* [The purchasers] *contended that if the yard was entitled to accept their conduct as a repudiation, then they had not done so as the rescission notices were invalid and had been intended to achieve a different result. The notices, if effective, would have triggered rights under cl.5 of the contract; they could not therefore be used for the wholly different purpose of terminating the contract and claiming damages at common law.*

*178. They relied on **Johnson v Milling** (1886) 16 QBD 460, **United Dominions Trust (Commercial) Ltd v Ennis** [1968] 1 QB 54 and **Decro-Wall International SA v Practitioners in Marketing Ltd** [1971] 1 WLR 361. None of these was helpful; in the first two cases, the point in issue in this case did not arise and the third case dealt with the converse situation, namely that a letter purporting to accept a repudiation could not operate as a notice to terminate under a contractual provision.*

179. It is clear that no particular form or formality is required for the acceptance of a repudiation. Although the letters referred to the termination under cl. 5 of the contract, they made it clear that the yard considered the contract at an end and neither party was under an obligation of any further performance. If the yard had a right to terminate for repudiation, the fact that they did not set that out does not in my view make any difference, as it is well established that a party terminating a contract can rely on grounds other than those he gives. The important matter is that the letters unequivocally stated that the contractual obligations were at an end. I therefore conclude that there was an acceptance by the yard."

37. Rix LJ, in ***Stocznia CA*** approved the words of Thomas J at paragraph 179 above, adding, at paragraph 32: "*It is established law that, where one party to a contract has repudiated it, the other may validly accept that repudiation by bringing the contract to an end, even if he gives a wrong reason for doing so or no reason at all.*"

38. I have already quoted, at paragraph 31(i) above, part of the further relevant passage in Rix LJ's judgment, at paragraph 88, immediately prior to which he states: "*I do not think that the use of a contractual mechanism for terminating the contracts is inconsistent with reliance on repudiatory conduct for effecting a common law acceptance of an anticipatory breach.*"

39. The same issue was dealt with by Christopher Clarke J in ***Dalkia Utilities Services plc v Seltech International Ltd*** [2006] 1 Lloyds Rep 599 at 632-3, in which he came to a similar conclusion in respect of the particular facts of the case in front of him, although it does not appear that ***Stocznia*** was cited. He deals with the issue however more fully, and with what I judge to be particular significance for the case before me, under the heading "*Conclusion on Acceptance*":

"*143. The same conduct may be such as to give rise to a contractual right to terminate and a common law entitlement to accept a repudiatory breach … In such a case, the innocent party can exercise either his contractual or his common law right of termination. Prima facie he can rely on both. He is not disentitled to rely on the latter on the ground that recourse to the former constitutes an affirmation of the contract since in both cases he is electing to terminate the contract for the future (i.e. to bring to an end the primary obligations of the parties remaining unperformed) in accordance with rights that are either given to him expressly by contract or arise in his favour by implication of law. If he can rely on both there is no reason in principle why, if he terminates the contract*

without stating the basis on which he does so, he cannot be treated as doing so under any clause which entitles him to do and in accordance with his rights at common law … Even if he refers to a particular clause upon which he relies, that would not inevitably mean that he was only relying on that clause. If that were so, an innocent party who, in the face of a repudiatory breach, terminated the contract by reference to a clause which was in fact inapplicable, might, on that account, find himself disentitled to terminate at all.

*144. The fact that service of a contractual notice of termination is not inconsistent with the acceptance of a repudiation does not, however, mean that in all cases such a notice amounts to such an acceptance. If a notice makes explicit reference to a particular contractual clause, and nothing else, that may, in context, show that the giver of the notice was not intending to accept the repudiation and was only relying on the contractual clause; for instance if the claim made under the notice of termination is inconsistent with, and not simply less than, that which arises on acceptance of a repudiation: **United Dominions Trust (Commercial) Ltd v Ennis** [1968] 1 QB 54, 65, 68. In the present case markedly different consequences would arise according to whether or not there was a termination under Clause 14.4 or an acceptance of repudiation. ... The same notice cannot operate to produce two so diametrically opposing consequences. In those circumstances it should take effect in, and only in, accordance with its express terms, namely as a termination under Clause 14.4.*"

40. As can be seen, Christopher Clarke J postulated circumstances in which it would be an act inconsistent with acceptance of repudiation to serve a notice enforcing a contractual provision. He referred to ***United Dominions Trust (Commercial) Ltd v Ennis*** [1968] 1 QB 54 ("**Ennis**"). In ***Ennis***, a hire purchase agreement was found by the Court of Appeal (Lord Denning MR, Harman, Salmon LJJ) to have been terminated, not, as was asserted by the hire purchase company, by the hirer pursuant to clause 10 of the contract but rather by the hire purchase company under clause 8, which entitled the company, in accordance with the provisions of another clause of the contract, clause 11, to a minimum payment by the hirer, which in the event the Court of Appeal found to have been a penalty. The hire purchase company sought in the alternative to contend that its termination of the contract was an acceptance of the hirer's repudiation. Even though, on either basis, the contract was terminated, the Court of Appeal held that the hirer had affirmed the contract, electing against acceptance of repudiation, by enforcing its terms (the minimum payment provision under clause 11), by treating the contract as (per Lord Denning) "*still continuing*" (by which he plainly meant enforceable in accordance with its terms) or "*binding*" (per Harman LJ).

41. Lord Denning MR at 65F-66D said as follows: "*There remains the alternative claim for repudiation. It is said that Mr Ennis repudiated the contract. I very much doubt myself whether his letters and his conduct should be considered as repudiation. He was simply asking for the agreement to be terminated. He was not repudiating it. But even if it be treated as a repudiation, it is clear that the repudiation was never accepted by the finance company. After receiving his letter, they treated the contract as being still continuing. They claimed under the minimum payment clause, which is a thing they could not possibly have done if there had been an acceptance of repudiation. By so doing, they elected to treat it as continuing. … The county court judge said they accepted the repudiation in November 1963, when they amended their pleadings. That was far too late. They had already evinced their intention to treat the agreement as continuing. I do not think they can rely on the alleged repudiation.* "

Harman LJ added at 68C-D: "*There clearly was no acceptance on the other side. The plaintiffs elected not to accept repudiation; they elected to treat the agreement as binding and to sue him under it and not to sue him for damages for its breach. Therefore they cannot rely on repudiation.*"

Salmon LJ agreed with both judgments.

42. Thomas J in ***Stocznia (Comm Ct)*** plainly treated the two contracts in which the purported contractual notices were valid and the four contracts in which they were not valid in exactly the same way, in each case holding that there had not been an election or an affirmation of the contract. The letters in this case did not, in relation to the first two contracts, incorporate any reservation of rights, such as Rix LJ indicated would be material in ***Stocznia CA***, although the third letter did so, and indeed sought to do so retrospectively in respect of the first and second contracts. In the light of ***Stocznia***, had the letters stood alone in this case, as the "*use of a contractual mechanism for terminating the contract*", it might have been arguable that such mechanism was not "*inconsistent with reliance on repudiatory conduct for effecting a common law acceptance of an anticipatory breach*", notwithstanding the reference to the *particular clause* of the contract.

43. However, it was plainly not simply a question of a use of a contractual mechanism for termination, but "*the making of a claim under* [and after] *the notice of termination which is inconsistent with that which arises on acceptance of a repudiation*" (***Dalkia*** at para 144). Mr Boyd points out that, upon rejection of the vessel by acceptance of repudiation, the Purchaser would have been entitled to the return of monies paid. He then refers to ***Sempra Metals Ltd v Inland Revenue Commissioners*** [2007] 3WLR 354 which establishes that, in relation to a claim for restitution, the Court has jurisdiction to award interest, indeed in that case compound interest. Further it can be pointed out that a claim in respect of monies expended can form part of a claim for damages for repudiatory breach of contract, such that repayment of the instalments could thus qualify within Christopher Clarke J's reference in paragraph 144 of ***Dalkia*** to a claim "*simply less than*" that which arises on acceptance of a repudiation. However:

i) Mr Dunning places considerable emphasis, and in my judgment rightly, upon the fact that this was not simply a claim for interest, but a claim, and a recovery, of interest expressly in accordance with the contractual provision for one month LIBOR per annum.

ii) Conclusive in my judgment is the fact that the Purchaser enforced a provision in the contract which was very significant to it. The Purchaser did not simply make a claim, and obtain recovery, against the Yard. It enforced

the contractual provisions under Clauses 10.7 and 5.10, which enabled it to obtain a secured sum, and one sought and obtained against a third party, the guarantor, by virtue of an entitlement only available under the contract.

44. The Refund Guarantee could only be enforced "*in the event that the Purchaser shall exercise its right to terminate this contract pursuant to any of the provisions hereof*", and in accordance with the agreed terms, at Schedule E, arose "*in certain circumstances in accordance with the terms of the contract* [whereby] *the Purchaser shall become entitled to be refunded ... and that entitlement is to be secured by a bank guarantee*." The guarantee, and the Purchaser's rights under it as against the solvent third party, ABN Amro Bank, could only be accessed by the Purchaser by enforcing the terms of the contract, which it did in each case after the termination notice and in accordance with its intention so to do, as spelt out in that notice. By doing so, the Purchaser affirmed the contract and elected against repudiation. It cannot therefore rely upon conduct, namely the sending of the relevant letters, antedating that election/affirmation, as constituting an acceptance of repudiation.

45. The learned Arbitrator referred in his Award to the judgments of Thomas J and Rix LJ in ***Stocznia***, and to that of Christopher Clarke J in ***Dalkia***. Referring to Christopher Clarke J's words in ***Dalkia*** at paragraph 144, he stated at paragraph 8.17 of his Award: "*If one applies those recent statements of the law to the facts of the present case it seems to me to be clear that the letter of termination dated 7 November 2003, though it referred only to the exercise of the contractual rights, was also effective as an acceptance of the repudiation of the contract by the Yard. This is not a case where the consequences of the acceptance of the repudiation were diametrically opposed to or inconsistent with the results of an exercise of the right under Article 10*."

46. In paragraph 8.18 he simply went on to say: "*Furthermore I am satisfied that by exercising its rights under Articles 10.1(b) and 10.1(c) Gearbulk did not affirm the contract*": and at paragraph 8.21 he concluded: "*The letter of termination (in respect of the third contract) relied on a repudiatory breach as well as on the contractual rights, but for the reasons I have given the reliance on the contractual rights did not amount to an affirmation of the contract*."

47. With respect to the learned Arbitrator, I do not understand his reference in paragraph 8.17 of the Award to the "*consequences of the acceptance of the repudiation*" not being "*diametrically opposed to or inconsistent with the results of an exercise of the rights under Article 10*". It is not of course in doubt that the consequences in general terms were the same, namely that both would result in a termination of the contract. But the learned Arbitrator did not address at all the issues to which I have referred in paragraph 43 above, nor did he address ***Ennis***. In my judgment, the claim for the contractual sums including contractual interest would, on its own, arguably have amounted to a claim which was "*inconsistent with, and not simply less than, that which arises on acceptance of the repudiation*", but taken together with the act, manifestly in accordance with the provisions of the contract and only available on that basis, of enforcing the guarantee, the matter is put beyond doubt. In any event, I regard myself as bound by ***Ennis***. In that case, although the conduct of the hire purchase company in enforcing the minimum payment clause in the end did them no good, because the provision was found to be a penalty, their conduct in doing so amounted to an election and an affirmation. In this case, the conduct of the Purchaser was successful in achieving payment under the guarantee, rather than being left to an uncertain claim against a possibly insolvent Yard. It was upon ***Ennis*** that Christopher Clarke J relied in paragraph 144, in the passage I have cited in paragraph 43 above, in concluding that there may be a claim made on termination which is inconsistent with acceptance of repudiation. This is just such a case.

48. Accordingly I find in favour of the Claimant on the third issue, and allow the appeal. I shall invite Counsel to address me on the precise terms of my order, but the substance of it will be that I conclude that the Defendant is precluded from claiming damages at common law for repudiation of the three contracts, by virtue of his having affirmed them and recovered monies plus interest from the Refund Guarantor in accordance with the provisions of the contracts.

Mr G Dunning QC and Mr E King (instructed by Eversheds) for the Claimant
Mr S Boyd QC and Mr V Flynn QC (instructed by Ince & Co) for the Defendant