Glencore Grain Rotterdam BV v Lebanese Organisation For International Commerce ("Lorico") (Buyers)
[1997] Int.Com.L.R. 06/25

CA on appeal from Commercial Court (Mr Justice Longmore) before Nourse LJ; Evans LJ; Sir Ralph Gibson. 25th June 1997.

LORD JUSTICE EVANS:

1. This appeal is from a judgment of Longmore J. in the Commercial Court, by which he upheld an Award of the Board of Appeal of GAFTA dated 17 October 1995, though on different grounds. It raises two issues of law. The first issue, put shortly, is whether the buyers under a sale contract on fob terms incorporating GAFTA form 64 were entitled to open a letter of credit in favour of the sellers which was restricted to payment against freight pre-paid bills of lading. The second is whether, if the buyers were not so entitled and were thereby in breach of contract, the sellers can rely on that breach to justify their own refusal and failure to ship the contract goods.

2. The judge has certified two questions of law of general public importance, pursuant to s.1(7)(b) of the Arbitration Act 1979, in the Schedule to his Order dated 19 April 1966. I should set them out here :-
"SCHEDULE
(1) What approach should the Court adopt on seeking to ascertain, by a process of implication, what terms of a letter of credit are contractual under an FOB sale which provides for payment to be made by an irrevocable and confirmed letter of credit but does not otherwise specify the terms which that letter of credit should contain?
(2) Whether the principle that a party, giving a wrong or inadequate reason for refusal to perform a contract, may justify his refusal by relying on some other reason not relied on at the time, is qualified by a further principle
(a) that such other reason is one which, if relied on at the time of refusal to perform, could not have been put right; and/or
(b) that a party who gives one ground for his refusal to perform may by his conduct be precluded from setting up a different ground if it would be unjust or unfair to allow him to do so".

3. The Board of Appeal found that the buyers were entitled to limit the letter of credit to payment for freight pre-paid bills of lading. They awarded the buyers damages totalling about $500,000 plus interest and costs for the seller's refusal and failure to ship. The sellers appealed to the Commercial Court with the leave of Colman, J. Longmore J. held that the buyers were not so entitled, but he upheld the Award on the ground that the sellers were precluded from relying on the buyer's breach, because they did not refer to the defect in the letter of credit at the time of their refusal to ship the goods, and in the circumstances it would be unfair and unjust to permit them to rely on the defect as a defence to the buyer's claim. He applied what he held was the underlying principle of the decision ***in Panchaud Freres (Panchaud Freres S.A. V. Et. General Grain Co.*** [1970] 1 Ll.R 53).

4. The objection based on ***Panchaud Freres*** made fleeting appearances both at the Board of Appeal hearing and before Longmore J., but it was not developed or made the subject of detailed submissions on either occasion. Mr Timothy Young Q.C. counsel for the sellers asked the judge, after his judgment was given but before his order was drawn up, to hear further submissions on the issue. The judge refused this application, but as already stated he certified the issue as the second question of law in the appeal.

The contract

5. The appellants, Glencore Grain Rotterdam B.V. (formerly Richco Commodities Rotterdam B.V.), agreed to sell 25000 m.t. of Turkish soft milling wheat at the price of US $135.00 per m.t. *"FOB stowed trimmed one safe berth Iskenderun"* for *"Shipment March 1993 M/V "Christinaki" - eta Monday 29.03.1993"*. The relevant terms as to payment were :-
"Payment : Cash at sight by an irrevocable letter of credit which shall be opened prior loading vessel M/V "CHRISTINAKI" ready to load Monday 29.03.1993. .....
Certificates of weight, quality and condition to be issued by T.M.O. and/or first class superintendence company. ....."

6. The terms and conditions of the T.M.O. (Turkish Grain Board) contract and of GAFTA form no. 64 (General contract f.o.b. terms for grain in bulk) were expressly incorporated. Clause 10 of the TMO terms contains certain more detailed provisions for payment by means of a letter of credit, but these are not relevant for present purposes, the issue being whether a letter of credit which required the Sellers to present *"freight pre-paid"* bills of lading was or was not in conformity with the sale contract.

7. The sellers and the buyers, each to the knowledge of the other, were in effect intermediaries between TMO, who were the suppliers and intended shippers of the wheat, and the Ministry of Supply and Internal Trade of the Syrian Arab Republic, known as "Hoboob", who were the ultimate buyers. The Board of Appeal found that each party was aware of the terms on which the other had bought and sold the wheat, from TMO and to Hoboob respectively. What became relevant was that the sellers' purchase from TMO required February shipment, TMO as seller having the right to cancel from 30th March in the event that the appellants, as their buyers, failed wholly or partly to take the contractual quantity, *"and also to ask a penalty of U.S.$7.00 per mt on the unlifted balance quantity"* (Award para.7). The respondents' sale to Hoboob was on c and f (cost and freight) terms which required them to provide a full set of bills of lading marked *"freight prepaid"*.

8. The sale contract was dated 22nd March 1993. It was apparent from the contract itself that the vessel would present itself for loading close to the end of the March 1993 shipment period. The terms included "*NOR to be given only in official working hours [defined as 08.00-17.00 Monday to Friday] in written form WIBON but customs cleared, passed inspection and granted free pratique. After acceptance of valid NOR, time starts to count .....* "(clause 8.2).

Letter of Credit

9. The Buyers having formally nominated the CHRISTINAKI (or sub) to load under the contract "*ETA Iskenderun 28th March*", their bank on 24th March sent a tested Letter of Credit telex to the Sellers'. *"It provided for shipment : "April 1993" and had a validity until 21st May. It required a full set of marine Bills of Lading marked (inter alia) "freight prepaid". It also required various certificates ..."* (Award para.16).

   On the following day, 25th March, *"the Sellers (through the brokers) acknowledged receipt of the Letter of Credit that day which, however, was not (they said) in accordance with the terms of the Contract. They therefore prepared their own draft L/C, the text of which they were sending on by fax separately and they asked the Buyers to open the L/C exactly as per the Sellers' draft"*. The Sellers' draft "*differed from that drawn by the Buyers in a number of minor points and in the following principal respects :-*

   "(a) .....

   (b) The Bills of Lading were to be marked "freight payable as per Charterparty" and

   (c) It provided :- "Shipment Period : latest 30.04. 1993"."

10. In addition, the sellers asked the Buyers to confirm that they had *"given your instructions to the Owners and Master of the "CHRISTINAKI" to unconditionally release all original bills of lading to (the Sellers) ..... on completion of loading of the vessel as per the wording requested by (the Sellers) ...."* (Award para.16).

11. The next communication between the parties regarding the letter of credit terms was on 29th March, when *".... the Buyers advised the Sellers that they had instructed their bank :*

    "To amend the L/C in a way to comply the maximum we can with sellers' requirements without affecting our need for docs. to comply also with our receivers' L/C requirements.

    B/L shall be released immediately upon completion of load and shall show freight pre-paid without any problem. Freight shall be paid prior to completion of load" (Award para.19)

12. Paragraph 20 of the award reads :-

    20. Later that same day, 29th March, the Buyers advised their bankers of amendments required to their Letter of Credit, which had already been opened, to meet the Sellers' requirements. These included deleting the requirements as to legalisation of certain documents by the Syrian Embassy and amending the shipment clause to read :

    "Shipment : April 1993 from Iskenderun"
    No change however was proposed to the endorsement to the bills of Lading as "freight pre-paid".
    A copy of these amendments was immediately faxed to the Sellers".

13. The Sellers did not acknowledge this communication and there are no further findings which refer to the letter of credit or its terms. It continued to specify "*freight pre-paid*" bills of lading. The Board found as a fact "that the shipment period under The Contract was by mutual agreement amended to April 1993" (para.63). There is no finding that the Sellers accepted or the parties agreed that the letter of credit, as it was opened, was in conformity with the contract.

Other communications

14. These were concerned on a daily basis with two main topics : the expected arrival of the vessel, which was discharging a previous cargo at Nemrut Bay, and a projected visit by a Syrian delegation to inspect the goods intended for shipment at the loading port. The Sellers were also in communication with TMO as required by their contract with them. Additionally, on 26 March there was a telephone conversation between Sellers and Buyers which resulted in the following telex message sent by the Buyers :-

    "We are ready to negotiate the request of Sellers for payment outside LC provided payment to be effected upon completion of loading and subject reaching an agreement with Sellers" [regarding inspection before loading]. (Award para.17).

15. On 29th March the vessel completed discharge and sailed from Nemrut Bay, the Master giving an ETA Iskenderun 31st March at 2000 hours. The Buyers advised the Sellers accordingly (Award para.22). The Buyers later encouraged the Master to arrive by 1700 hours on 31st March. This presumably was to enable him to give notice of readiness during working hours that day.

16. In the event, the vessel arrived on 31st March but not until 2315. She tendered notice of readiness which was endorsed as received by TMO on 1st April at 0900, and she was customs cleared between 09000 and 1000 that morning. However, she was rejected by SGS because of loose rust in all holds, which required sweeping, and she was not re-inspected and found ready to load until sometime on 2nd April, which was a Friday. TMO accepted the notice of readiness on Monday 5th April at 0800.

17. Meanwhile, there were further communications which have to be set out in full :-

    26. Just before 1900 hours that evening the Buyers sent a further telex to the Sellers complaining that their delegates had been in Turkey for 2 days and the Syrian delegates for 3 days, only to be told that afternoon that T.M.O. advised everybody that only SGS delegates were allowed to enter the silos to effect sampling and analysis. The Buyers expressed their disappointment and thereby put Sellers on notice that :

    "Unless the Syrian delegation/Buyers' delegations are allowed same as SGS delegation, cargo cannot be loaded and all parties shall face a situation of impossibility of execution of Contract."

27. On 31st March at 15.29 hrs. the Sellers telexed the Buyers stating that they had sold goods to be shipped with M.V. "CHRISTINAKI" vessel load ready in loadport on 29.03.93. Vessel (they said) did not arrive in loadport and the Sellers thereby informed the Buyers "that as per T.M.O. Contract conditions they have the option to debit us US $7-/mt or to cancel the Contract". There was to be a meeting that day in T.M.O. office where they would make a decision about this, but the Sellers meanwhile held the Buyers responsible for all the costs and consequences that would result from late arrival of the vessel in loadport."

31. On 1st April the buyers sent a telex reply to the Sellers' telex of 31st March at paragraph 27 above advising them to : "... note that M.V. "CHISTINAKI" arrived at Iskenderun and tendered its NOR on Wednesday 31.031993 at 23.15 local time which is as per contract terms."

The Buyers therefore rejected the Sellers' telex and asked the Sellers to advise urgently when they expected to load her "since as you know the Lebanese/Syrian delegation is already waiting to check the goods at loading since 2 days as per Contract/broker confirmation". The Buyers alleged that the Sellers "did not instruct T.M.O. about loading operation and did not pass to them documentary instructions which will delay the commencement of loading."

The teletex went on : "Re your proposition through brokers for prepayments of goods against a discount in the price (after the goods are completely checked in the silo and analysed by the delegation) as you are aware T.M.O. still not authorize this delegation to enter the silo."

They asked the Sellers to advise clearly their position towards the "CHRISTINAKI".

33. Later on 1st April the Sellers telexed the Buyers, further to their telex of 31st March as paragraph 27 above, to say:

"T.M.O. decided that vessel will be loaded under the condition that Buyers pay the US $7,-/m ton penalty before loading.

Therefore we request you to arrange that you pay us, together with the prepayment of the goods, this USD 7,-/m ton penalty, otherwise vessel will not be loaded."

35. The Buyers responded the same day to the Sellers' above telex of 1st April, completely rejecting it because of the following :

(1) There was no clause in The Contract that price was to be increased by US $7,-/pmt if the vessel arrived after 31/3/93

(2) Vessel arrived and tendered its Notice of Readiness on 31/3/93.

(3) Until now the delegation was not authorised by shippers to inspect the cargo according to The Contract terms.

(4) If the vessel failed inspection, time of cleaning would not count, but vessel could not be rejected. It was understood that another inspection was ordered for the following morning.

(5) The purchase was payment by Letter of Credit which the Buyers opened in due time.

Consequently, the Buyers held the Sellers fully responsible for not loading the vessel and would consider them to be in breach of contract if by the following morning loading operations had not started. .....

36. The Sellers responded shortly on 2nd April stating :

"Please note that we are only prepared to load M.V. "CHRISTINAKI" in case prepayment has been effected."

37. Later on 2nd April, solicitors acting for the Buyers sent an urgent letter to the Sellers referring to the Sellers' telexes of 1st and 2nd April in which the Sellers complained that the vessel arrived too late, and that the Buyers must pay a penalty of US £7 pmt together with prepayment of the goods as otherwise the vessel would not be loaded. The buyers' solicitors stated that these demands were completely in breach of contract and in their view amounted to a repudiatory breach of The Contract and the Buyers reserved all their rights. After dealing with the points raised in the Sellers' telexes, the Buyers' solicitors stated that, without prejudice to their position as explained in that letter, they called upon the Sellers as a matter of urgency to remedy their breaches by Tuesday 6th April 1000 hours local time Iskenderun by withdrawing their uncontractual demands on or before that deadline, time being of the essence, and by confirming the sellers' agreement to load as per The Contract.

38. The deadline of 1000 hours of Tuesday 6th April local time Iskenderun came and went without any response from Sellers, whereupon the Buyers' solicitors wrote again (6th April) to state that the Buyers accepted the Sellers' repudiatory breach of contract, thereafter bringing The Contract to an end but under full reservation of the Buyers' rights to claim whatever losses, costs and consequences arose out of the sellers' failure to perform."

18. Further negotiations followed, and a substitute shipment was made, but it is common ground between the parties that no goods were loaded under the relevant sale contract and that the contract was terminated on 6 April, if not before.

Appeal Award

19. This recorded that Arbitrators found the Sellers to be in breach of contract to the Buyers and that the parties were granted legal representation by counsel for the appeal (paras. 1 and 2).

20. The Board's findings were these :-

66. ..... WE FIND that the Buyers as FOB Buyers under the contract, who had time chartered the "CHRISTINAKI", to be perfectly entitled to demand that the Bills of Lading be issued as "freight pre-paid" provided that they did indeed ensure that such freight was paid by the completion of loading. Again, since the Sellers never began to load, the point never finally arose, but insofar as it is material, WE FIND as a fact that the Buyers were not in

default of allegedly failing to open a contractual Letter of Credit. The Buyers had opened a Letter of Credit which was in conformity with the Contract, in so far as The Contract specified any terms for the Letter of Credit ; the requirement of Certification of Invoices was a minor detail and the fees for such were for Buyers' account (see Payment terms, para 4 above) and it appears that freight pre-paid Bills of Lading were issued for the Rouen shipment without difficulty. The Sellers were wrong to refuse such Letter of Credit and in breach of contract for insisting instead on pre-payment of the goods."

68. Consequently, WE FIND AND HOLD the Sellers to be in default and in breach of contract for making uncontractual demands on 1st April namely that the Buyers should pay a penalty of US $7-mt and pre-pay the value of the goods prior to loading, notwithstanding the Letter of Credit, and asserting that unless these conditions were complied with, the vessel would not be loaded."

21. Two other passages for the Award were referred to in argument, but it is not necessary to quote them in full. Paragraph 59(b), under the heading ´Submissions and Contentions", records Mr Havelock-Allan Q.C. for the Buyers as having made certain assertions of fact, and Mr Timothy Young Q.C. for the Sellers before us relies upon these either as admissions made by the Buyers or as findings of fact by the Board. I do not think that, given the context, it would be right to treat them as either of these. Secondly, in paragraph 67 the Board made findings as to the commercial factors which, as they put it, drove the Sellers to make the proposals which they did on 1st April and to claim that the Buyers were in default, when in the opinion of the Board it was the Sellers rather than the Buyers who were in default (para.68). These findings, however, in my view do not foreclose the questions of law which are raised by this appeal. If the letter of credit did not conform with the sale contract and the Buyers were thereby in breach of contract, then regardless of their commercial motives (though subject to any waiver of the breach) the Sellers were entitled by reason of that breach to make non-contractual demands, including pre-payment of the price and payment of an additional amount, corresponding to the penalty which TMO was claiming from them. If they were not so entitled, then again regardless of their motives or reasons for acting as they did they undoubtedly themselves committed a repudiatory breach of contract which the Buyers were entitled to accept, as they did on 6 April, so bringing the contract to an end. In law, this was an anticipatory breach (***Heyman v. Darwins Ltd.*** 1942 A.C. 356). The Board regarded it as a default (para.68) and Mr Young suggested that by reason of that finding it should be regarded as an actual rather than an anticipatory breach. The distinction may be relevant for the purposes of legal analysis, and if it is, then in my view the correct legal categorisation of the refusal on 1 April should be anticipatory breach, for the sellers refused rather than failed to load and the period for loading, if it had begun, certainly had not expired.

The Judgment

22. Longmore J. held :- *"..... I fear I cannot agree with the Board of Appeal that in the circumstances it is right to imply an entitlement on the part of the buyers that payment under the letter of credit need only be made if the bills of lading were marked "freight pre-paid".*

23. He said this for two reasons. First, because such a term would be inconsistent with the operation of a FOB contract. Applying ***Green v. Sichel*** (1860) 7 C.B.N.S. 747 and Mr Justice Devlin's description of the parties' duties under a FOB contract in ***Pyrene v. Scindia Navigation*** [1954] 2 Q.B. 402 at 424, he held that the seller is normally obliged to procure a bill of lading from the shipowner and present it to the buyer, but he is not obliged to pay the freight. *"It is for the buyer to make and pay for such carriage arrangements as are made".* Therefore, the payment of freight was under the buyer's rather than the seller's control, and the buyer could not be entitled to insist upon the seller presenting a bill of lading "*if it is necessary to pay freight, in order to get the bill of lading".* He also referred to ***Benjamin's Sale of Goods*** (4th ed.) para. 20-020 where ***Green v. Sichel*** is so regarded.

24. The second reason was that the implied term found by the board, namely, that the buyers were entitled to demand freight pre-paid bills of lading" *provided that they did indeed ensure that such freight was paid by completion of loading",* was inconsistent with the seller's right to know that a letter of credit has been issued in accordance with the sale contract before he begins loading the goods. If the implied term was upheld, the seller would not know whether the freight had been pre-paid and whether the bill of lading would be endorsed accordingly until the loading was complete, and if the payment had not been made he would lose the security of the letter of credit for payment of the price.

25. The judge therefore turned to the second question, "*whether the sellers are entitled to rely on the non-contractual letter of credit as a justification for their refusal to load the vessel".* He recognised the general principle that a party can justify his refusal to perform the contract on a ground which he did not specify at the time, but he noted also that this is subject to two qualifications which are set out in ***Chitty on Contracts*** (27th ed.) para. 24-012.

*"However, a party cannot rely on a ground which he did not specify at the time of his refusal to perform ´if the point which was not taken could have been put right' (cf. **Heisler v. Anglo-Dal** [1954] 1 W.L.R. 1273). Further, in **Panchaud Freres S.A. v. ETS General Grain Co.** [1970] 1 Ll.R. 53 it was suggested that the rule was subject to the qualification that a party who at first gives one ground for his refusal to perform may, by his conduct, be precluded from setting up later a different ground where it would be unfair or unjust to allow him to do so".*

26. Longmore J. held that the buyers could not rely on the first qualification in the present case. A contractual letter of credit had to be in place before the first day for shipment, which was April 1st., and the sellers' refusal to perform was either on that date or later, when they "*took no steps to conform to the requirements of the buyers'*

solicitors' letter on or about 6th April". He concluded "*In fact, therefore, the buyers could not have put the position right at the time when the point could have been but was not taken*".

27. He then accepted Mr Havelock-Allan's submission that he should give effect to the "*wider principle*" set out in ***Chitty,*** and he held in the buyers' favour that the principle applied, because :- "*..... although the seller raised the point now relied on, on 25th March the buyers attempted to meet the point on 29th March and there was never any reply to that attempt. The fresh ground that led directly to the sellers holding the buyers in repudiation was that the vessel arrived late. That was the reason used by the sellers .... This was held not to be justified. It would, in my view, be unjust to allow the sellers to go back to an old ground which was not pursued at the time when it might have been possible for the buyers to do something further about it.*"

Issues

28. It is convenient to begin with a summary of the essential facts. The sale contract, as amended, called for shipment during April. The buyers were obliged to open a letter of credit in accordance with the contract requirements before the shipment period began, that is, by 1 April at the latest. The terms of the letter of credit which were notified on 24 March were not as required by the contract, and the sellers proposed different terms on 25 March. On 29 March the buyers said that they had instructed their bank to make certain amendments "*in a way to comply the maximum we can with sellers' requirement"* without affecting their own position vis-a-vis their own buyers. The amended terms were such that the sellers could not obtain payment under the letter of credit unless they presented bills of lading endorsed "*freight prepaid*". The vessel named in the sale contract failed to arrive at the loading port until 2315 on 31 March which was after business hours. It gave notice of readiness on 1 April but was not ready to load in fact until the following day, a Friday, and the notice was not accepted until Monday 5 April. Meanwhile, on 1 April the sellers under pressure from their own suppliers TMO made extra-contractual demands for pre-payment of the price and for an additional payment of $7 per ton. They gave as their reason the late arrival of the ship, which was rendered invalid as an excuse for their refusal and failure to ship the goods on and after 1 April by the Board's other findings. They relied in the alternative on the fact that the letter of credit opened by the buyers called for "freight pre-paid" bills of lading. That was not a reason which they gave at the time nor was raised until, at the earliest, during the appeal hearing before the Board.

29. The contractual analysis in my judgment is clear. The buyers claim damages for the sellers' refusal and failure to ship the contract goods, which under the contract as amended they were required to do in April. They refused to do so on 1 April, when they demanded payment on extra-contractual terms, and if their refusal was not justified then the buyers were entitled to accept it as an unlawful repudiation - strictly, an anticipatory breach - of the contract on 6 April, as they purported to do. But if the buyers were already themselves in repudiatory breach on 1 April, by reason of their failure to open a letter of credit which guaranteed payment in accordance with the agreed payment terms, then (subject to waiver) the sellers were entitled to refuse to perform the contract, as they did by refusing and failing to ship the goods (except at a later date and upon other terms, with which this dispute is not concerned).

30. The first issue, therefore, is whether the buyers under a sale contract on what are described as normal f.o.b. terms are entitled to open a letter of credit which requires the sellers to present "*freight pre-paid*" bills of lading if they are to receive payment from the buyers' bank. Absent any special agreement, the sellers are entitled to see a conforming letter of credit in place before they begin shipment of the goods, and then their obligation is to ship the contract goods on board the vessel provided by the buyers, for carriage on whatever terms as to freight and otherwise the buyers have agreed with the shipowner. The sellers are expressly free of any obligation to pay freight (special terms apart, f.o.b. is the antithesis of c and f - cost and freight) and in the normal course they cannot be sure before shipment that the shipowner will issue freight pre-paid bills of lading, unless they are prepared if necessary to pay the amount of freight themselves, or unless some other guaranteed payment mechanism is already in place. I would put the matter broadly in that way, because it may be that an undertaking from the shipowner himself, or a third party guarantee of the payment of freight following due shipment of the goods, would suffice. It is unnecessary to consider that aspect further in the present case, because all that was offered by the buyers was their own assurance that the freight would be paid, by them or on their behalf. It is abundantly clear, in my judgment, that the buyers' own assurance cannot be enough to serve as a guarantee to the sellers that "freight pre-paid" bills of lading will be issued when shipment is complete. That would mean, as the judge pointed out, that the security of a bank guarantee for the payment of the price, which is what the letter of credit mechanism provides, would be destroyed. I therefore agree with the judge's observations that the buyers' contention, that the letter of credit terms were in conformity with the contract, is contrary both to the underlying concept of the f.o.b. contract (subject always to what special terms may be agreed in a particular case) and to the essential commercial purpose of the letter of credit machinery.

31. The buyers' submission is that there were special features which entitled the Board to reach the conclusion that the buyers were entitled to require freight pre-paid bills in this case. In my judgment, the Board's conclusion that the buyers were so entitled *"provided that they did indeed ensure that such freight was paid by the completion of loading"* is open to the objections set out by the judge. More generally, Mr Havelock-Allan refers to certain specific facts. The sellers knew that Hoboob, the receivers and sub-buyers, had bought on c and f terms and themselves required freight pre-paid bills. The named vessel was time-chartered to the buyers, and so they were entitled to instruct the master to issue "*freight pre-paid*" bills (***The Nanfri*** [1979] 1 Lloyd's Rep. 201). The buyers gave their assurance (though not until 29 March, after the dispute had arisen) that the freight would be paid before the bills were issued

"*without any problem*". But none of this, in my judgment, justifies the implication of a term which, for the reasons stated above, would be wholly at variance with the express terms of the f.o.b. sale in fact agreed.

32. In this context, the buyers referred to the judgment of Robert Goff J. in ***Ficom v. Sociedad Cadex Ltda .*** [1980] 2 Lloyd's Rep. 118 at 131, which was quoted by the judge. This judgment distinguishes between implying a term in the sale contract and, on the other hand, establishing what the parties agreed should be the terms of the letter of credit issued or to be issued under that contract. The latter process may result in a letter of credit agreement which supplements or even varies the terms originally agreed. This is demonstrated in the present case by the agreement to vary the shipment date to include the month of April. But I do not consider that it is relevant to the question in issue. The freight pre-paid requirement, unless it was a term of the sale contract itself, was introduced by the buyers and immediately rejected by the sellers. The buyers maintained their requirement on 29 March and it is of the essence of their case that the sellers made no further reference to it before the contract came to an end. The sellers thereafter did not act inconsistently with their previous refusal, and their silence on this matter cannot be regarded as an acceptance of the buyer's demand : ***The Leonidas D*** [1985] 1 W.L.R. 925 per Robert Goff L.J. at 936-7. In short, the buyers cannot allege that there was a fresh agreement as regards this term of the letter of credit which had the effect either of supplementing or varying the requirements of the sale contract.

33. For these reasons, as well as those given more succinctly by Longmore J., in my judgment the buyers were not entitled to require the sellers to procure and produce freight pre-paid bills of lading in order to receive payment under the letter of credit opened by them. It follows that the buyers failed to open a letter of credit conforming with the sale contract and, subject to the question of waiver considered below, they were thereby in breach of contract. The second issue is whether the sellers can rely on that breach to justify their own refusal and failure to ship on the contract terms. They did not assert that they were relying on it at the time.

34. **Basic rule :** "It *is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not*". (per Greer J. in ***Taylor v. Oakes,Roncoroni & Co.*** (1922) 127 LT 267 at 269.

35. **First qualification -** ***Heisler v. Anglo-Dal Ltd.*** "*The rule is, however, subject to a proviso. If the point not taken is one which if taken could have been put right, the principle will not apply*". (per Somervell L.J. in ***Heisler v. Anglo-Dal Ltd .*** [1954] 1 W.L.R. 1273 at 1278).

36. The buyers' duty was to open a conforming letter of credit by the beginning of the shipment period (this is ***the prima facie rule*** : ***Ian Stach Ltd. v. Baker Bosley Ltd.*** [1958] 2 Q.B. 130). Under the sale contract as varied, therefore, they were required to do this by 1 April. The sellers demanded a price increase and insisted on more onerous payment terms on that day. Undoubtedly, the buyers were entitled to regard this demand as a refusal by the sellers to ship goods on the contract terms. They contend, however, that the sellers "*did not convey any acceptance of a termination. It made an extra contractual demand based on a false premise (that the vessel was late)*" (Skeleton argument para. 4.2), and that if the sellers had specified the letter of credit defect as a reason for their attitude, then they would or might have been able to dispense with the freight pre-paid requirement, after making some further arrangements with the receivers. The correct legal analysis, Mr Havelock-Allan submits, is that the contract remained in existence after 1 April, because it was not terminated; the sellers waived the buyers' breach, or alternatively they extended the time within which the buyers might open a conforming letter of credit ; therefore, they could or might still have remedied the defect, if it had been relied upon by the sellers in their message of 1 April.

37. Longmore J. rejected this submission, on the ground that a contractual letter of credit had to be in place "*strictly before the first day for shipment .... In fact, therefore, the buyers could not have put the position right at the time when the point could have been but was not taken*". He also said, however, that "*the refusal to perform was as early as 1st. April, or (perhaps more likely) when the sellers took no steps to conform to the requirement of the buyers' solicitors letter on or about 6th. April*". Mr Havelock-Allan submits that the later date, 6 April, should be preferred, and that the judge's conclusion therefore is not inconsistent with his waiver submission, as set out above.

38. In my judgment, however, the submission falls at the first hurdle. The sellers' demand for an increased price etc. on 1 April was undoubtedly a refusal to perform the contract, even though if viewed in isolation from the buyers' previous failure to open a conforming letter of credit it was an anticipatory rather than a actual breach . If the buyers' breach is included in the perspective, the refusal was justified by it and the sellers' failure to refer to it then does not necessarily preclude them from relying on it now (the basic rule). The ***Heisler v. Anglo-Dal*** qualification in my judgment does not apply, because by 1 April the time for contractual performance of the buyers' letter of credit obligation had passed. I do not see how the sellers' refusal to perform the contract could either extend the time for performance by the buyers or amount to a waiver of their right to refuse performance, if such a right existed.

39. I would add that in any event the buyers' language in their response on 29 March was peremptory ("*the maximum we can*") and there was no further indication from them, either before or after 1 April, that the freight pre-paid terms of the letter of credit could or might be deleted. On the Board's findings, therefore, the possibility of such a change was entirely speculative, and both Longmore J., and Colman J., when giving leave to appeal, decided against remitting the Award for further reasons (judgment p.15F).

40. Second qualification - waiver and estoppel

There has been much debate as to the basis of the ***Panchaud Freres*** judgment, which may represent a species of estoppel, perhaps embracing the broad "*requirement of fair conduct*" referred to by Winn L.J., or the application of the common law rule regarding the acceptance of non-contractual goods delivered under a sale contract which is now embodied in section 35 of the Sale of Goods Act. No one doubts, however, that what may be called the classic rules of estoppel and waiver can apply in circumstances such as these, so as to prevent a party who fails or refuses to perform the contract from relying upon conduct by the other party which would otherwise justify his doing so. The occasions when these rules may be invoked in these circumstances are limited, for example, by the fact that it is rarely if ever possible to imply an unequivocal representation of fact from a party's silence on the relevant issue. The buyers do not suggest that these rules apply in the present case, and therefore I need say no more about them.

41. Third qualification - acceptance of goods (s.35 S.G. Act)

This explanation of ***Panchaud Freres*** was adopted by Robert Goff J. ***in B.P. Exploration v. Hunt (No.2)*** [1997] 1 W.L.R. 783 and it is preferred also by the editors of ***Benjamin's Sale of Goods*** (4th ed.) para. 19-139. Section 35 reads as follows :-

"35(1) The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or .... when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

42. The authorities cited in ***Chalmers Sale of Goods*** (18th. ed. p.195) for the last proposition include ***Fisher Reeves & Co. v. Armour & Co.*** [1920] 3 K.B. 614 where Scrutton L.J. said this :-

"*When one party to a contract becomes aware of a breach of a condition precedent by the other he is entitled to a reasonable time to consider what he will do, and failure to reject at once does not prejudice his right to reject if he exercises it within a reasonable time*" (p. 624). (This was an ***obiter dictum*** but nevertheless it is of undoubted authority, more particularly because it is the rule enacted in section s.35.)

43. It should be noted that the deemed acceptance under section 35 is based simply on the buyer's retention of the goods which have been delivered to him and his failure to intimate to the seller that he has rejected them. If these facts are established, then the buyer cannot thereafter raise a ground for rejection, however valid it may be, and the "***basic rule"*** in ***Taylor v. Oakes Roncoroni*** does not save him. He is precluded from raising even a valid ground, not because he failed to raise it at the time but because he retained the goods and did not reject them on any ground. (The basic rule could apply, of course, if he did reject the goods, though giving an invalid reason for doing so.)

44. The facts in ***Panchaud Freres*** were that c.i.f. buyers accepted the documents of title to goods, by retaining them without claiming to reject them on the grounds of late shipment which appeared sufficiently from the documents themselves, and subsequently they claimed to reject the goods on that same ground. The c.i.f. buyer has a separate right to reject the goods when they are physically delivered to him (***Kwei Tek Chao v. British Trades and Shippers Ltd.*** [1954] 2 Q.B. 459 at 480-1). The decision of the Court of Appeal was that the buyers could not reject the goods for a reason which had been available to them when they accepted documents which disclosed a non-contractual shipment.

45. I would hold that "*acceptance*" of goods in the circumstances specified in section 35 may bring about a further (third) qualification to the basic rule that a party can rely upon a matter which he did not raise at the time. I would also hold that this provides an acceptable basis for the decision in ***Panchaud Freres .*** The effect of the decision is that the c.i.f. buyer's right to reject non-contractual goods is not entirely separate from his right to reject the documents, if they are non-contractual also.

A further qualification - "unfair and unjust"?

46. Giving the leading judgment in ***Panchaud Freres ,*** Lord Denning M.R. based the decision squarely on the principle of estoppel by conduct, which he stated as follows :- "*The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct*" (p.57).

47. He applied the principle to the particular facts of that case by reference to the c.i.f. buyer's acceptance of documents which gave him "*the full opportunity of finding out ... what the real date of shipment was*". He could not thereafter reject the goods by reason of their late shipment. Cross L.J. saw it as a question of fact and degree, and pre-eminently one for the Board of Appeal to decide (p.61). Winn L.J. expressed his entire agreement with Lord Denning, adding :-

"In my own judgment it does not seem possible in this case to say affirmatively that there was here ... anything which, within the scope of the doctrine as hitherto enunciated, could be described as an estoppel ... what one has here is something perhaps in our law not yet wholly developed as a separate doctrine - which is more in the nature of a requirement of fair conduct - a criteria of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct" (p.59).

48. What Winn L.J. saw as an emerging "*separate doctrine*" has received no support, in my judgment, from any of the later authorities. Counsel have tended to invoke this passage from his judgment, as Robert Goff J. noted in ***B.P. Exploration v. Hunt ,*** "*as an argument of last resort when they find it difficult to bring their case within the established principles of estoppel, waiver or election*" : [1979] 1 W.L.R. at 811F.

49. Lord Denning referred to it subsequently as "*a kind of estoppel. He cannot blow hot and cold according as it suits his book*" (***Toepfer v. Cremer*** [1975] 2 Lloyd's Rep. 118 at 123), where Orr and Scarman L.JJ. agreed with him. (126,128). Lord Denning held that a similar estoppel by conduct arose in different circumstances in ***Ismail v. Polish Ocean Lines*** [1976] 1 Q.B. 893 at 903C. In ***Berg v. Vanden*** [1977] 1 Lloyd's Rep. 499 he referred to ***Panchaud Freres*** as *"a case where there was a waiver by one person of his strict right - or an estoppel - whatever you like to call it - whereby a person cannot go back on something he has done"* (pp. 502-3). The same case gave Roskill L.J. an opportunity to comment on what he called "*the so-called principles laid down by this Court in the* ***Panchaud*** *.... . this Court then laid down no new principles of law. It merely applied well-established principles of law to the particular facts of that case, and those principles .... are no more than if in the course of the working out of a contract one party by his conduct leads the other party to think that he will not insist on the strict performance of a particular term in the contract so that the other party alters his position, the former party will not be permitted to resile and to seek to insist upon strict performance - at least without notice"* (p.504). Lawton L.J. supported these remarks, adding trenchantly that merchants and brokers in the international grain trade should not be regarded as "*fragile characters"*, and *"There must be more robustness in the application of the* ***Panchaud*** *principle"* (p.505).

50. In the leading case of ***Bremen v. Vanden*** [1982] 2 Lloyd's Rep. 109 the House of Lords upheld Mocatta, J.'s judgment, including his finding that a plea of waiver was established. There is no express reference to ***Panchaud Freres*** in the judgment or in any of the speeches, and the decision turned on the questions whether an unequivocal representation could be spelled out a series of "*no less than 10 communications*" between the parties and whether the other party had acted upon it (per Lord Salmon at 126-7). This is the conventional analysis of estoppel and waiver, and soon afterwards it was hailed by Lord Denning as "*a most important decision on waiver. As Mr Davenport said, it is the final step in the series",* citing ***High Trees House*** [1948] KB 130 and ***Panchaud Freres .*** He stated the principle as applied to GAFTA cases thus :-

"*If a buyer, who is entitled to reject goods or documents on the ground of a defect in the notices or the timing of them, so conducts himself as to lead the seller reasonably to believe that he is not going to rely on any such defect - whether he knows of it or not - then he cannot afterwards set up the defect on a ground for rejecting the goods or documents when it would be unfair or unjust to allow him to do so*" (***Bremer v. Mackprang*** [1979] 1 Lloyd's Rep. 221 at 226).

51. In that case, Stephenson L.J. dissented on the question whether an unequivocal representation had been made (p.229), but Shaw L.J. agreeing with Lord Denning saw no difficulty "*in distilling from the stream of telexes sent by the buyers in the circumstances which then obtained coupled .... with their delay in rejecting the documents a strong indication that they waived their right to treat the sellers as being in default*" (p.230).

52. These authorities were reviewed and extensively quoted by Hirst J. in ***The Manila (Proctor & Gamble v. Peter Cremer)*** [1988] 3 All E.R. 843. He concluded :-

"Perhaps the best lesson to be drawn from all this subsequent commentary is that no distinctive principle of law can be distilled from the ***Panchaud case ....*** *Counsel for the sellers invited me to accept the interpretation in* ***BP exploration Co. (Libya) Ltd. v. Hunt ,*** *but if I have to choose, I should feel bound to prefer the estoppel explanation, since it has the greater weight of authority behind it."* (p.852g).

53. In my judgment, the following conclusions can now be drawn :-

(1) ***Panchaud Freres*** is authority for the application of the common law rule of acceptance, now established in section 35 of the Sale of Goods Act, in the comparatively limited circumstances of a case where a c.i.f. buyer accepts documents but rejects or purports to reject the goods.

(2) The decision can equally be said to represent a form of "*estoppel by conduct*", but there is no "*separate doctrine*" derived from ***Panchaud Freres*** alone.

(3) Like all other forms of estoppel or waiver, the facts must justify a finding that there was an unequivocal representation made by one party, by conduct or otherwise, which was acted upon by the other.

(4) When the facts do justify that finding, it is likely to be regarded as "*unfair and unjust*" for the party which made the representation to a contrary effect, to rely upon its contractual rights.

(5) Without such a representation, no estoppel or waiver can arise, and there is no general rule that what the Court or Tribunal may perceive as "unfairness or injustice" has the same effect.

(6) ***Panchaud Freres*** and subsequent cases illustrate the possible scope of an estoppel or waiver in circumstances such as these, but they do not reveal a further exception to the basic rule, that a party is entitled to rely upon his contractual rights.

(7) Unfairness and injustice, however, will always be relevant where the Court is required to exercise a discretionary power e.g. where a party seeks leave to raise a fresh matter by way of amendment or at a late stage of the proceedings before it (see the example given by Lord Denning M.R. in ***Panchaud Freres*** at p.57).

Conclusion

54. The judge held that it would be unjust to allow the sellers (appellants)*" to go back to an old ground which was not pursued at the time when it might have been possible for the buyers to do something about it"* (page 19B). This conclusion might be criticised on the narrow semantic ground that it does not sit easily alongside the judge's earlier finding that the ***Heisler v. Anglo-Dal*** qualification did not apply because "*the buyers could not have put the position right at the time when the point could have been but was not taken"* (page 17B). I would however put the matter more broadly. There was no finding by the Board or by the judge of any unequivocal representation by the sellers that they relinquished or would relinquish their rights arising out of the buyers' failure to open a letter of credit in the form required by the sale contract. Nor in my judgment could any such finding be justified by the facts found by the Board. The buyers made their position clear on 29 March, saying that no further changes were possible. This was immediately over-shadowed by the ship's failure to meet the contractual e.t.a. on 29 March and, in the event, to arrive and give valid notice of readiness before the amended loading period began on 1 April. The fact that the sellers made no further reference to the letter of credit issue after 29 March cannot be said to have misled the buyers into believing that the *"freight pre-paid*" requirement was no longer important to them, nor so far as we know is there any evidence to that effect.

55. In my judgment, the judge was wrong to hold that the sellers were unable to rely upon the buyers' breach as a defence to the claim for damages for refusal and/or failure to load. I would answer the certified questions of law accordingly, and as stated in this judgment, and I would allow the sellers' appeal, and dismiss the cross-appeal.

SIR RALPH GIBSON:

I agree that the appeal of the sellers should be allowed, and that the cross-appeal should be dismissed, for the reasons given by Lord Justice Evans.

LORD JUSTICE NOURSE:

I also agree.

Order: appeal allowed and cross-appeal dismissed with costs; counsel to lodge an agreed minute of order; leave to appeal to the House of Lords refused.

MR T YOUNG QC (instructed by Messrs Richards Butler, London EC3) appeared on behalf of the Plaintiffs.
MR M HAVELOCK-ALLAN QC (instructed by Messrs Turner & Co., London EC3) appeared on behalf of the Defendants.