CA on appeal from an order of Mr. Justice Brandon, before Edmund Davies LJ; Megaw LJ; Cairns LJ. 23rd May 1974.

LORD JUSTICE EDMUND DAVIES:

1. The plaintiffs, who were time-charterers of the M.V. "Brimnes", appeal against the decision of Mr. Justice Brandon of July 28th, 1972, whereby he dismissed their claim against the defendant ship-owners (Reinante Transoceanica Navegacion S.W.) for damages for wrongful withdrawal of the vessel. The sole question is whether or not in all the circumstances the owners were entitled to withdraw the vessel because of the charterers' undoubtedly late payment of the charter-hire which fell due on April 1st, 1970. Mr. Justice Brandon held that they were, but he so held only by virtue of Clause 5 of the charter-party, and that late payment of hire by the charterers did not of itself entitle the owners to regard the charter-party as repudiated and so confer on them the right to withdraw independently of its express provisions. Not only do the charterers appeal against the dismissal of their claim, but the owners cross-appeal from the finding as to repudiation.

I. INTRODUCTION.

2. "Brimnes" originally belonged to the charterers, but in November, 1968, they agreed to sell her to the shipowners on terms that she would immediately be time-chartered back to them. The shipowners borrowed the purchase price from their bankers, Morgan Guarantee Trust Co. of New York (hereinafter called "M.G.T."), repayment of the loan and payment of the interest thereon being secured (a) by a mortgage of the ship, and (b) by an absolute assignment of the charter-hire by the shipowners to M. G.T. That assignment was effected on December 16th, 1968, and on the same day the owners, pursuant to Section 136 (1) of the Law of Property Act 1925, gave notice to the charterers of the assignment.

3. The charter-party had been made on November 22nd, 1968. It was for 24-26 months, the hire was at the rate of U.S. $ 3.80 per ton deadweight per calendar month. Clause 5 provided:

4. *"Payment of said hire to be made in New York in sash in United States currency to Morgan Guaranty Trust Co. of New York, 23 Wall Street, New York, for the credit of the account for Reinante Transoceanica Navegacion S.W. of Panama re m.v. 'Brimnes', monthly in advance, and for the last half month or part of the same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers."*

5. Pursuant to the charter-party "Brimnes" was delivered to the charterers on December 18th, but the first monthly period of hire was treated as being from December 16th, 1968, to January 16th, 1969. Later that year the monthly hire period was treated as beginning on the first day of the month, and it is undisputed that the charterers' obligation at all times material to this appeal was to pay the hire on that day each month.

6. For the first year of the charter-party the shipowners' agents were S.G. Embiricos Ltd., but from December 1st, 1969, they were replaced by Embiricos Shipping Agency Ltd. of Cheapside ("'Embiricos S.A."'). The hire was paid by the charterers instructing Hambrcs Bank Ltd. of Cheapside each month to transfer the amount due to M.G.T., New York, for the credit of the shipowners* "Brimnes" account. For this purpose the charterers' accountant, Mr. Sanders, would fill in a form issued by Hambros, get it signed by two directors, and then send it along to Hambros at Cheapside. He would also send a letter to Embiricos S.A. showing his calculation of the hire due and stating that it had been paid or transferred.

7. On receipt of their clients' instructions, Hambros took steps to implement them. In relation to twelve out of the sixteen monthly payments with which we are concerned they used what the learned judge called the "direct" method. This was feasible only because, as it happened, Hambros themselves had an account with M.G.T., New York. What they did was to send by Telex an order to M.G.T., New York, to pay into the owners' "Brimnes"' account the amount the charterers had instructed them to pay. This order would include a statement of the "value *date*", meaning thereby the date for the delivery of the United States dollars under exchange sale involved. Hambros would then send to the charterers their *"Exchange Sale Advice*"', informing them of what they had done and showing the sterling amount debited to the charterers' account with them.

8. The "*indirect"* method of payment was used on only three occasions (February, March and August, 1969). It differed from the more general *"direct;"* method, in that Hambros' order to pay the hire was sent to a New York bank other than M.G.T., and this other bank, acting as correspondents for Hambros, then sent a bankers' cheque to M.G.T., New York, for the credit of the owners' "Brimnes" account.

9. Whichever method was used, there is no doubt that on numerous occasions the monthly hire was paid late, and certainly from August, 1969, onwards it was never paid on the first day of the month. But it was not until January 2nd, 1970, that Mr. Patsalides, a director and also the secretary of Embiricos S.A. telephoned Mr. Sanders (the charterers accountant) and complained about late payments. On February 3rd Mr. E.G.E. Embiricos (the managing director) wrote asking the charterers to "*ensure that all future payments of hire are effected on the first day of the month",* and for that month payment was in fact three days late.

10. The position was unsatisfactory to the owners, particularly as the freight market had from their point of view improved in January. As March 1st, 1970, was a Sunday, their agents were content if payment was made on March 2nd, but the owners instructed them that they were to withdraw the ship if payment was not duly made on that date. Mr. Embiricos thereupon telephoned Mr. Valli, an assistant treasurer of M. G.T., New York, and

enquired of him what was the earliest time when M.G.T. could be, sure that payment of the hire had or had not been paid on the first day of the month. Mr. Valli replied that a definite answer could not be given until 11.00 hours New York time (or 17.00 hours B.S.T.) on the 2nd day of the month. On learning this, Mr. Embiricos wrote to Mr. Noble of the London office of M.G.T. on February 26th, asking them to inform Embiricos S.A. as soon as possible whether or not the next hire Payment was made by March 2nd, and on the latter date he sent a telex to M.G.T., New York, saying:

".... essential you telex advise us soonest after close business New York today, 2nd March, and in any case before 5 p.m. London time, 3rd March, whether hire 'Brimnes' paid .... before close business New York on Monday 2nd March. We must emphasise that what you must advise us is whether you have received the funds and not whether the funds have been credited to vessel's account, since payment to you constitutes payment ...."

11. This evoked a telegram to the owners' agents that payment of hire had been duly made from *"Hambros London order of Tenax"*. So much for the March hire.

12. On March 31st the owners' agents wrote to M.G.T., London, and also sent a telex to M.G.T., New York, in the same terms, mutatis mutandis, as those used by them regarding the March hire. The charterers for their part were taking steps to make "punctual" payment of the hire due on April 1st and to this end Mr. Sanders completed on March 31st Hambros' form of application, requesting them to transfer to H. G.T., New York, for the benefit of the "Brimnes" account U.S. $ 51,210.95, being the amount of the April hire. But there occurred some delay in his obtaining the necessary signature of two directors, and it was not until 10.53 B.S.T. (or 04.53 New York time) on April 2nd that Hambros sent off to M.G.T., New York, a telex; which read:

"Value 2/4. Pay Reinante Transoceanica Navegacion account m.f. 'Brimnes' order Tenax Shipping Company Ltd. London U.S. $ 51,210.95. All charges forward".

13. This payment was, on any view, not "*punctual*". But Mr. Embiricos lacked this knowledge and, as Mr. Valli of New York had earlier informed him, it would not be forthcoming until 17.00 hours B.S.T. on April 2nd. To ensure that they received the information at the earliest moment, the owners' agents sent a telex to M.G.T., New York, at 14.06 B.S.T. which read:

"M.V. 'Brimnes'. Kindly do not fail to advise us by telex before 5 p.m. London time today whether charter hire on m.v. 'Brimnes' received before close of business yesterday in New York."

14. But by 5 a.m. B.S.T. the owners' agents had received no answer. Mr. Embiricos therefore telephoned Mr. Noble at M.G.T.'s London office and asked for news. Following upon a telephone call by Mr. Noble to M.G.T., New York, he telephoned back to Mr. Embiricos and informed him that no hire had been paid on April 1st. Mr. Embiricos then telephoned one of the owners' directors, who confirmed his authority to give notice of withdrawal, he dictated a notice of withdrawal to Miss Rangecroft, his secretary, she typed it on a telex tape and she sent it to the charterers. Mr. Embiricos also dictated a confirmatory letter and this Miss Rangecroft sent off by registered post on her way home the same day. One of the crucial questions in this appeal related to the time of despatch of the telex withdrawal, and this must be considered later. What seems beyond doubt, however, is that at 18.00 hours Mr. Embiricos received over the telephone from S.G. Embiricos Ltd. a telex message intended for Embiricos S.A. which Mr. Valli had sent off from M.G.T., New York, at 17.30 B.S.T., informing them that the hire due on April 1st had been *"received by M.G.T. this morning April 2nd, 1970"*.

15. On April 3rd, the charterers informed the owners by telex that they were "shocked" by the notice of withdrawal and inaccurately accusing the owners of attempting "to exploit the fact that the hire was only transferred to your account on the 2nd April, instead of on the first .... The transfer has apparently been delayed somewhat". The fact, of course, was that no payment had been made before April 2nd and there was accordingly no question of a mere delay in transfer. On the 6th April the shipowners' agents wrote repudiating the charterers' protest, reiterating the owners' withdrawal of the vessel, and ending:

"Owners advise that the sum paid by you to their account with Morgan Guarantee Trust Company of New York on April 2nd, 1970, will be provisionally held by Owners as a payment on account of Owners' claim for damages against Charterers for Charterers' breach of contract".

16. The primary question in the appeal is whether the learned judge was right in holding, as will presently appear, that notice of withdrawal was effectively given to the charterers before they made their payment of the April hire. Mr. Goff concedes for the appellants that, if the learned judge was right about this, the appeal must fail. As the charterers were admittedly late in making that payment, I would have thought, as Mr. Anthony Evans submitted, that the owners were thereby prima facie entitled to give notice of withdrawal on April 2nd unless the charterers could establish that they were disentitled. But the correctness of that approach needs to be considered in the light of the decision of this court in ***Empress Cubana v Lagonisi*** (1971 1 Q.B. p.488), commonly referred to as the ***"Georgios C" Case,*** which must be considered later.

IX. WITHDRAWAL

17. The notice of withdrawal amounting to an election by the owners to disaffirm the contract, Mr. Goff submits that we are concerned to determine the time at which the charterers received the notice: ***Scarf -v- Jardine*** (1882 7 A.C. p.345, per Lord Blackburn at pp. 358-562), and ***The"Georgios C"*** (ante), per Lord Denning, Master of the Rolls, at p.504G. The matter was considered below and before us under two heads:

(A) When was the telex notice of withdrawal sent?

(B) When is it in law to be regarded as having been received by the charterers?

18. **(A)** The evidence regarding the despatch of the withdrawal telex was prolonged and was analysed at length by the learned judge, and I do not propose to repeat the process. I have already related in outline that given by the charterers' agents. Miss Rangecroft gave 17.20 hours B.S.T. as the probable time she sent off the withdrawal telex. The evidence of Mr. Embiricos that it must have gone off shortly before 17.30 was contrasted with a letter dated April 13th, 1970, in which the owners' solicitors wrote "that it was sent to the charterers some time before 6 p.m. London time ....", and with Mr. Embiricos' own letter of January 26th, 1971, that it was sent off "very shortly after 5.50 p.m. B.S.T." There was on the other side the important evidence of Mrs. Sayce, a responsible member of the charterers' staff, who was in charge of their telex machine, which was never switched off. She testified that on April 2nd it was after 6.50 p.m. when she went home, that before leaving she would have checked the telex machine, and that it was not until the following morning that for the first time she saw the withdrawal telex on the machine and took it straight to Mr. Sanders.

19. Such, in essence, was the conflicting testimony. That of Mr. Embiricos, in particular, was severely attacked below by Mr. Goff and strongly criticised before us. But it has to be said that, as Mr. Justice Brandon put it (p.23F), the staff of the owners' agents had more reason to remember what happened on April 2nd than did those in the charterers' office, to whom it was "an uneventful day". There is the further point of paramount importance that the trial judge "thought that the evidence of the shipowners' witnesses, taken as a whole, was better and more convincing than that of the charterers' witnesses". He therefore rejected the evidence of the latter and expressed himself as satisfied that the telex withdrawal arrived at the charterers' office before 18.00 hours. Doing, as he put it, the best he could, he said, "I think a reasonable estimate, on the whole of the evidence, is that the notice was sent and arrived at about 17.45, and I so find." For my part, I am not prepared to disturb that finding.

20. **(B)** But the question remains as to whether this was sufficient to constitute communication of the withdrawal notice to the charterers, a point which Mr. Anthony Evans accepts it is for him to establish. He submits that, by leaving the telex machine working, the charterers in effect represented that any message so transmitted to them during ordinary business hours would (as Mrs. Sayce herself concedes) be dealt with promptly. That **Scarf v Jardine** (ante) does not have universal application is shown by ***Car & Universal Finance Co. v Caldwell*** (1965 1 Q,.B. p.55), where one party to a contract had done all he could to evince to the other party his intention to rescind it. Then what more could the owners' agents in the present case reasonably have been expected to do than they did? In ***Entores Ltd. v Miles Far East Corporation*** (1955 2 Q.B. p.527), where this court was dealing with a contract said to have been concluded by telex communication between the parties, Lord Denning, Master of the Rolls, held that it was not until the telex massage of acceptance was received by the offeror that the contract was complete. He said (p.335):

    ".... the ink on the teleprinter fails at the receiving end, but the (offeree's) Clerk does not ask for the message to be repeated, so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance - yet the sender of it reasonably believed it has got home when it has not - then I think there is no contract."

21. The learned judge held here that the notice of withdrawal was sent during ordinary business hours, and that he was driven to the conclusion either that the charterers' staff had left the office on April 2nd *"well before the end of ordinary business hours"* or that, if they were indeed there, they "*neglected to pay attention to the telex machine in the way they claimed it was their ordinary practice to do.*" He therefore concluded that the withdrawal telex must be regarded as having been "received", as required by the ***"Georgios C"*** (ante), at 17.45 hours on April 2nd and that the withdrawal was effected at that time. I propose to say no more than that I respectfully agree with that conclusion, and this particularly as the case for the charterers throughout was that Mrs. Sayce, the member of their staff specially charged with attending to telex messages, did not leave the office until after 18.30 hours, and that they advanced no reason why a telex message received on their machine at 17.45 hours should not have been noted by her before she left the office, as she insisted, not less than 45 minutes later.

III. PAYMENT.

22. Two matters call for consideration in relation to the payment of the charter-hire:
    (A) The charterers insist, rightly or wrongly, that it is necessary to determine who was beneficially entitled to payment.
    (B) Whatever be the decision in relation to (A), a conclusion must be arrived at as to the time when payment was effected. I proceed to consider these matters.

(A) Who was the payee?

23. Under the charter-party, the charterers were obliged to pay "*to Morgan Guaranty Trust Co. of New York .... for the credit of the account for Reinante .... re m.v. "Brimnes" ..." By the absolute assignment of December 16th, 1968, M.G.T. secured an assignment of "all hire moneys and any other moneys now due or to become due by the Charterers to the Shipowners under and pursuant to the said Time Charter Party".* It is convenient to note at this stage that by Clause 5 thereof the owners also covenanted, *".... that they will perform all the obligations and conditions arising under the Time Charter and will not seek or permit a variation of the terms and conditions or stipulations or a cancellation or determination thereof without prior written approval of the Assignees."* The Section 136 (1), notice of the same date duly informed the charterers of that assignment to M.G.T., New York.

24. Mr. Goff submitted that, in the result, M.G.T. became the only creditors of the charterers, and that they alone could sue the charterers for any arrears. At the same time, he accepted that the owners remained the persons to give a notice of withdrawal in the event of a late (or non-) payment of hire to M.G.T., though by reason of Clause 5 (supra) they would first have to secure the consent of M.G.T. to such notice being given. Submitting that the assignment remained at all times binding on all three parties concerned therein, he urged that it bore directly upon the time of payment, the matter next to be dealt with.

25. Consideration of the effect of the assignment was embarked upon only at a late stage in the hearing before Mr. Justice Brandon, and then by way of yet further amendment of the re-amended Statement of Claim. His conclusion (p.15D) was that,

"In practice, the three parties concerned behaved in all respects as if the assignment had not been made. The reason for this was that M.G.T. regarded the assignment as being no more than a security for the performance of the shipowners of their obligations under the loan agreement between M.G.T. and them, and had no intention, so long as the shipowners were not in default, of enforcing their rights under it .... Parties to a transaction may always, by mutual arrangement, waive temporarily the strict legal rights arising under it, and, if they do so, they are thereafter estopped, until appropriate notice has been given, from insisting on such rights. I think that is what happened in this case."

26. The learned judge accordingly concluded that payments of hire should be treated as payments by the charterers to the shipowners through M.G.T., and not as payments by them to M.G.T. direct. Is this correct? The Hambros/M.G.T., New York, payment telexes were regularly in a form which directed the latter to "*Pay Reinante Transoceanica Navegacion account M.V. Brimness Order Tenax Shipping Co. Ltd. London .... All Charges forward*". Hambros' Exchange Sale Notes addressed to the charterers confirmed their sale to the charterers on the value date stated and that they had instructed their correspondents, M.G.T., New York, to pay the sum specified in dollars "*to Reinante .... for account of m.v. Brimness by debit to your account*". So much for how the charterers and their bankers dealt with the obligation to pay under the charter-party. For enlightenment as to the way in which the owners regarded the matter, reference may be had to the letter of February 26th, 1970, sent by their agents, Embiricos S.A., to the London branch of M.G.T. in relation to the March payment which would shortly be accruing due. I had better read the greater part of it:

"We confirm to-day's meeting between our Mr. E.G. Embiricos and your Mr. W.A. Noble in which we advised you that Owners of the M/V. 'Brimnes' .... have instructed us to withdraw the M/V 'Brimnes' from above mentioned Time Charter, as per their rights pursuant to Clause 5 of subject Time Charter Party, if the hire for the month of March 1970 is not paid by the close of business in New York on Monday the second of March 1970, said hire being due on the first of March, 1970. It is therefore essential that you advise us as soon as possible after the close of business in New York on the second of March, and in any case before five P.M. London Time on the Third of March, whether the hire of the M/V 'Brimnes', amounting to approximately U.S. Dollars fifty-eight thousand and twenty-seven and fifty-seven cents .... was received by your New York Office before the close of business in New York on Monday the second of March. We must emphasise that you must advise us whether your New York Head Office has received the funds and not whether the funds have been credited to the vessel's account, since, in this instance, you being our agents, payment of the funds to you constitutes payment, and the time at which the vessel's account is credited is immaterial. You appreciate, of course, in view of the proviso in this matter, it is imperative that the greatest care be exercised on your part to avoid any mistake, for it would be most serious indeed for owners if the "Brimnes" were to be withdrawn from time charter under the mistaken belief that hire was unpaid at the close of business in New York on the 21st March, 1970."

27. I would make the following comments: (1) Throughout the letter the owners' agents treat the right to withdraw the vessel as a matter to be determined solely by the owners and as one which is in no sense under the control of M.G.T. (2) The owners' agents emphasise therein that, in the matter of payment, M.G.T. are acting as the owners' agents. (3) Neither to that letter nor anywhere in the extensive documentary or oral evidence is there any suggestion that M.G.T. considered that the owners were acting In contravention of any of the rights passed to N.G.T. by virtue of the assignment of December, 1968, and there is no hint of a suggestion that, in accordance with Clause 3 thereof, the owners must secure their *"prior written approval"* before any withdrawal notice was given.

28. The inference I accordingly draw from the entirety of the evidence is that, it being open to M.G.T. as assignees to give the charterers such directions as they deemed fit in relation to the matter in which payments under the charter-party were to be effected, all three parties proceeded upon the basis that the terms of the charter-party were to be adhered to. I therefore agree with Mr. Justice Brandon in accepting the owners' contention that the assignment should be regarded as for this purpose irrelevant and that we should follow the three parties concerned in treating the payment of hire as being due by the charterers to the shipowners and, furthermore, as leaving unaffected the latter's right to withdraw the vessel if the charter-party terms as to payment were breached.

(B) At what time was payment effected?

29. There is no contest that, where the indirect method of payment was resorted to, payment was, as the learned judge held, effected when the bankers' cheque issued by the other New York bank was received by M.G.T., New York (J.4B). But we are here concerned with the direct method employed in relation to mo3t of the payments, and in particular that falling due on April 1st, 1970, and this gives rise to questions of considerable difficulty.

30. But the charterers submit that the position is perfectly simple. Relying upon the absolute assignment, they assert that the payee at all material times was M.G.T. Clause 5 required payment to be made "in New York in cash in United States currency ". But the owners" contention that the tendering of the commercial equivalent of cash would suffice found favour with the trial judge. In particular, he concluded that any transfer of funds to M.G.T. for the credit of the owners' account so as to give them the unconditional right to the immediate use of the funds transferred was good payment (J.18A). In my judgment, this was clearly right, and if the parties had used different banks, delivery and acceptance of a banker's draft or equivalent document would have constituted the time payment. But acute complications arise where, as here, the transfer is sought to be effected by telex instructions and, further, where it is given to the charterers' bankers who are also the bankers of the owners. Before the "Georgios C" case, the facts of the present case would not have given rise to the same difficulty, as, until that decision, the simple fact that the April hire was not tendered or paid on the due date was regarded as of itself entitling the owner to withdraw the ship even though belated payment was tendered before withdrawal. But, in the light of the charterers' contention that the decision governs the present case, an attempt must be made to discover with as great precision as possible at what time on April 2nd the hire for that month was paid.

31. On their basic submission that, consequent upon the assignment and the Section 156 (1) notice, M.G.T. became the creditors, the charterers (relying, mistakenly in my judgment, upon ***Tankexpress A/S v Compagnie Financiere Belge des Petroles S.A.*** (1949 A.C. p.76), contend that payment took place when the payment telex reached M.G.T. at 04.53 New York time, alternatively at 09.00 when they opened for business and so could be expected to deal with the telex, either of which times would have been well before the time of withdrawal as found by Mr. Justice Brandon. Indeed, the charterers go further and submit that, even had there been no assignment, under Clause 5 of the charter-party M.G.T., New York, were the designated payees, that the time of payment was accordingly the time when payment was made to them, and that again this was either 04.53 hours or 09.00 hours.

32. The owners challenged this and successfully contended that payment was effectively made when, in what was called the processing by M.G.T., New York, of Hambros' order to pay, the stage was reached when a decision was made to debit Hambros' account with the amount instructed and to credit the owners' account with a like amount. The charterers contend that, the payment telex having reached M.G.T., New York, it is unthinkable that the internal machinery of M.G.T. should thereafter postpone the time of payment until a "decision" to credit the owners' account was made. But so to say is to equate the telex instruction with a payment in cash or a cheque, and, further, to assume that it was an irrevocable instruction. Neither equation nor the assumption is, to my way of thinking, acceptable. The telex was not a negotiable instrument and, if revoked, that revocation would not, unlike in the case of a cheque, of itself create a cause of action.

33. Again, it has to be remembered that neither the owners nor M.G.T. were responsible for the mode of payment adopted by the charterers' bankers. At times, as we know, they effected payment through other New York Bankers and, had they wanted, that method could have been resorted to throughout. But, as Hambros happened to have an account with M.G.T., New York, they chose at the material time to effect payment by giving the latter such instructions as have already been described. In these circumstances, it is clear, in my judgment, that in implementing those instructions M.G.T. must be regarded as the sub-agents of the charterers. I should, however, add for the sake of completeness that, even had I taken the view that, by virtue of the assignment and the Section 136 (1) notice, M.G.T. were to be regarded as the payees, I would have accepted Mr. Anthony Evans' submission that the assignment was irrelevant to the question of the time when payment was made, and that in these circumstances also the relevant question would be, "*When was the 'decision made?"*.

34. The learned judge described with great clarity and in detail the evidence of Mr. Felton, a Vice-President of M.G.T., regarding the practice of that bank in dealing with such telex transfer orders as that with which we are presently concerned, and I do not propose to cover the same ground. The effect of it is that the "decision" to debit Hambros' account with the amount of the April hire and to credit the owners' account with a like amount was made some time between 11.37 and 12.57 New York time on April 2nd. So far from accepting the assertion in paragraph 2 (g) of the Notice of Appeal that "*no such decision was ever made, there being merely a continuous processing of the relevant telex transfer from the time of its arrival until the time when the relevant accounts were debited and credited*", the evidence was all the other way. The charterers called no evidence to support their contention as to the time of payment, whereas that adduced by the owners afforded strong support for their contention that receipt of the telex transfer was merely the start of the process culminating in the "decision" which crystallised the legal position as between owners and charterers. That "decision" was signified by the physical act of marking the appropriate document by the appropriate member of the M.G.T. staff. Until then the owners had no unconditional right to the amount specified in the telex transfer.

35. Although calling no evidence as to banking practice in such circumstances as the present, Mr. Goff submitted that the requests for information as to payment sent by Mr. Embiricos to M. G.T., already referred to, showed that the owners' agents accepted that receipt by M.G.T. of Hambros' telex transfer constituted of itself payment to the owners. However, and if one makes the assumption that the state of mind of Mr. Embiricos in this regard has some relevance to the case, I accept the view of Mr. Justice Brandon that he "*was not trying to find out at what time, if any, on the 2nd of March or 1st of April the hire was paid. He was only trying to find out whether it had been paid at any time on those two days at all. In these circumstances, he was not, by what he said, treating the time of receipt of the funds by M.G.T. as the time of payment to the shipowners; he was only treating the day of such receipt as the* day of payment, in preference to the day following when the shipowners' account would be credited". Force is added to these observations when one recalls that Mr. Embiricos' enquiries were being made before the litigation

leading to the "***Georgios C"*** Case was even instituted, and therefore when it was generally thought that a ship could be withdrawn even after tender of the charter-hire, provided only that such tender was made after the due date.

36. Adopting, as I respectfully do, the view of Mr. Justice Brandon that the time of "decision" has to be regarded as the time of payment on April 2nd, there remains the question as to when that decision was made. The evidence is obscure about this - and understandably so, for but rarely can precision on such a matter be called for. Having regard to the evidence, principally that of Mr. Felton, the learned judge concluded that there was nothing to show precisely when between 11.57 and 12.57 New York time the decision was made. He therefore took the mean time of 18.07. While appreciating the difficulty in which the learned judge found himself, I have been much concerned as to whether he was entitled simply to halve the difference as he did, or whether he ought not to have said that the problem was insoluble. The effect of the latter attitude would have been that, having held that withdrawal was notified at 17.45 B.S.T. and payment made some time between 17.57 and 18.57 B.S.T., the court would have confessed its inability to decide whether withdrawal preceded or followed upon payment. In that eventuality, the payment being admittedly out of time, I would (for the reasons earlier indicated in this judgment) have been inclined to take the view that, the burden of proving a sufficiently timeous payment being upon the charterers, withdrawal should be regarded as having preceded payment. But my brethren have evinced less difficulty than I in accepting the learned judge's approach and have gone some distance towards satisfying me that the mathematical probabilities are in favour of the owners' contention that the charterers received the withdrawal notice before the M.G.T. "decision" was made. I am not prepared to disagree with that mathematical approach, and, both in accordance with it and for the reason which I have separately expressed, I would not disturb the finding of Mr. Justice Brandon that withdrawal preceded payment.

37. If that be right, the charterers concede that their appeal must fail. But if it be wrong, two further points call for consideration.

IV. *THE "GEORGIOS C"* CASE.

38. If, on the true construction of the charter-party and in the light of all the facts, payment (though belated) should, contrary to the foregoing, be regarded as having been made before exercise of the right of withdrawal resulting from the fact that it was not timeously made, were the owners still entitled to withdraw? Subject only to the matter of waiver, which next falls to be considered, the learned judge indicated that, had that question called for an answer, his would have been in the affirmative.

39. In submitting that the question called for a negative answer, the charterers strongly rely on the decision of this court in the ***"Georgios C"*** Case. There a charter-party provided for payment of hire half-monthly in advance, and *"in default of payment"* the owners had a right of withdrawal. A payment due on March 3rd was not tendered until March 5th, and later that day the owners purported to give notice of withdrawal. Counsel for the owners contended that it was an effective notice, for upon any default in payment the right to withdraw accrued and could be lost only by waiver. But this court held that it was ineffective, Lord Denning, Master of the Rolls saying (at 504D):

"A default in payment does not automatically give the other a right to determine it. Usually it does not do so. It only does so if there is an express provision giving the right to determine, or if the non-payment is such as to amount to a repudiation of the contract ... Then does the clause itself give the shipowners the right to withdraw? I think it does, as the ***Tankexpress*** *case shows -provided always that they exercise the right before payment is made or tendered. I think in this clause the words 'in default of payment' mean 'in default of payment and so long as default continues'. It means that the owners have the option - so long as the charterers are in default - to withdraw the vessel. But, once the charterers remedy their default, by paying the instalment or tendering it, the owners have no right to withdraw."*

40. The court was there affirming Mr. Justice Donaldson, who had, however, been careful to stress the words employed in the charter-party, and said (at p.494H): *"The words are* ***'in default of'****, which I construe as* ***'in the absence of'****. If the owners wanted the right for which they now contend, some such words as 'In default of punctual payment) would have been more appropriate."*

41. It will be recalled that Clause 5 of the "Brimnes" charter-party confers a right of withdrawal "failing the punctual and regular payment of the hire", and a substantial part of the eleven days this appeal lasted was devoted to considering whether its difference in wording from that in the ***"Georgios C"*** Case had significance. For the charterers the undesirability of slight differences in the wording of commercial documents in common use leading to substantial differences in their operation was stressed. But, while I am alive to that factor, the basic task of the court must always be to construe the words which the parties have actually and of their own choice employed in the document under consideration. Mr. Goff submitted that no material distinction exists between the wording of the "***Georgios C"*** charter-party and that in the present case and that there should accordingly be a similar outcome. In this context, our attention was drawn to ***"The Langfond"*** (1907 96 L.T. p.559 - P. C), where the provision was for advance payment in cash on the 11th day of each month in New York, *".... and in default of such payment or payments as herein specified"* the owners became entitled to withdraw. The only question determined by Mr. Justice Fortin in the Quebec Superior Court was whether a notice of withdrawal on the ground of failure to pay punctually for an October hire was waived by the owners' acceptance of that hire later in the month, and he held that it had. Affirming that decision in the Privy Council, Sir Arthur Wilson said (at p.560):

".... there was no withdrawal of the steamer until that effected by the master on October 4th. And on that date there was nothing to justify a withdrawal; for there was nothing in arrear, the full hire for the month ending the 11th of October having been paid and received."

42. We were also referred to ***Tankexpress v Compagnie Financiere Belge S.A.*** (ante), where the charter-party provided for payment in cash monthly in London, and that "*In default of such payment the owners shall have the faculty of withdrawing the said vessel ....*" It was simply held that, the charterers having paid in the way which had become accepted by the parties, they were not in default.

43. While Mr. Goff submits that all these various provisions as to payment are indistinguishable from that contained in the "Brimness" charter-party, Mr. Anthony Evans (who reserves his right to challenge the decision hereafter} submits that in the ***"Georgios C"*** Case "*punctual*" payment was not called for and could not be implied, nor was it essential to defeat the right to withdraw, the owners' right there being dependent on the absence of payment and not (as here) on the absence of *"punctual"* payment. In my judgment, Mr. Evans is right in contending that some meaning must be attached to that adjective and that it cannot be equated with unpunctual payment. Were we to ignore it, the court would be making a new contract for the parties. As Lord Finlay said, though in an admittedly different context, in ***Maclaine v Gatty*** (1921 A.C. p.376, at p.388): *".... the expression **'punctual payment'** is perfectly applicable to a provision for payment on a particular day, and that then it emphasises the necessity of payment being made on that day, and not on a subsequent day. Instead of diluting the meaning of the provision for payment on that day it emphasises it."*

And, in my view, the last words that need to be said on this matter were those of Lord Shaw, who observed in the same case (at p.393): *".... my mind cannot comprehend the elasticity of punctuality. I know of no method of construction of a contract by way of contradiction of it."*

44. In the light of the foregoing, I find myself in respectful disagreement with the view expressed obiter by Lord Wright in the ***Tankexpress*** Case (ante, at p.94) that a provision for *"regular and punctual payment"* added nothing to the obligation to pay on the date specified. On the contrary, I share the view expressed by Mr. Justice Donaldson in ***the "Georgios C"*** case, already referred to, that a different decision might there have been called for had the provision required *"punctual payment"*. I therefore conclude that Mr. Justice Brandon was right in holding that this case is to be distinguished from ***the "Georgios C",*** and that, the right to withdraw having undoubtedly arisen, it was exerciseable by the owners notwithstanding a preceding (but belated) payment of the April hire by the charterers. But this conclusion is subject to the last matter raised by the charterers, and to that I now turn.

V. WAIVER.

45. The problem arising under this head may be shortly stated. Assume that, as is undoubtedly the case, a right to withdraw the vessel arose by reason of the charterers' failure to pay the hire due on April 1st. But assume also that on April 2nd payment of the month's hire was both tendered to and accepted by the owners or their agents before notice of withdrawal was given to and received by the charterers. On those facts, must the owners be regarded as having waived their right to withdraw in respect of that default in punctual payment?

46. Turning from assumptions to facts, when the payment of the April hire became known to the owners, they decided to retain it, and, to the charterers' comment on April 10th (see letter 151) that "*such retention is quite inconsistent with withdrawal",* the owners' solicitors replied (letter 153) that, "*they are proposing to retain on account as security for their claim for damages for breach of contract, by virtue of the fact that the vessel is still in the course of a voyage for charterers' account.*" And this they did, despite the protest of the charterers on April 14th (letter 154) that, "*since the payment was made in respect of hire, your client cannot appropriate it to any other account claim.*"

47. The charterers contend that only so much of the April hire as had become payable up to the time of withdrawal on April 2nd was retainable by the shipowners and that the remainder was immediately repayable. Reliance is placed on the statement in Scrutton on Charterparties (17th Ed., p.354), that, *"If the shipowner withdraws, he cannot recover any hire for the period after withdrawal even though withdrawal takes place in the middle of a period, hire for which is payable in advance, nor is the position if **'re-delivery'** does not take place immediately upon notice of withdrawal*", a statement which, founded as it is on ***Wehner v Dene S.S. Co.*** (1905 2 K.B. p.92}, Mr. Anthony Evans accepts. The charterers contend that by accepting, through the agency of the M.G.T., the whole month's hire, the owners did an unequivocal act inconsistent with the subsequent exercise by them of any right to withdraw. The authorities cited in support of this decision are summarised by the learned judge and I do not propose to go over them again. In their light, he held that "*there is an inconsistency between shipowners accepting hire payable in whole or in part in respect of a period after a right to withdraw has to their knowledge arisen (even though, because hire is payable in advance, it has already accrued due) and then later, after such acceptance, exercising such right .... I think the commonsense view of the matter is that the acceptance of the advance payment for the whole month is an unequival act inconsistent with withdrawing the ship during that month for cause already known. If that is correct, it follows that such acceptance is, as a matter of law, a waiver of the right to withdraw for such cause.*"

48. Yet Mr. Justice Brandon ended up by holding that there had been no waiver. This he did as a result of adopting the argument for the owners that in accepting payment M.G.T. were acting in a merely "ministerial" capacity, and that only at 17.00 hours B.S.T. did the owners know that a right to withdraw had arisen, by which time the process of payment had started and could not be interrupted. In his opening submissions Mr. Goff submitted that the finding that M.G.T. filled simply a "ministerial" role failed to take into account the fact that on December 16th,

1968, they had become assignees of the charter-party; alternatively he submitted that they should be treated not as assignees but as the owners' agents to accept hire and, in the absence (as here) of any instruction or request to M.G.T. by the owners to refuse belated payment, they were clearly authorised (and, indeed, under a duty) to accept payment whenever made.

49. The only facts relied on by the charterers as constitutine waiver were the acceptance of payment by the owners through M.G.T. and their failure to instruct M.G.T. not to accept belated payment. Although the matter was specifically raised during the course of argument before us, the charterers adhered to paragraph 11B of the re-re-amended Statement of Claim as containing the only grounds relied upon in this regard, and these are confined to the simple act of acceptance, after failure by the owners to give contrary instructions. In these circumstances, it is perhaps idle for me to say that, in my judgment, a further relevant factor might well be that, in addition to accepting, the owners insisted upon retaining the full month's hire. Mr. Evans relied upon ***Tonnelier v Smith*** (1897 2 Com-Cas. p.258) as authority for the proposition that on April 2nd payment of hire for the full month of April was overdue. But he cited none which justified the retention by the owners, despite the protest of the charterers, of the whole amount paid. He submitted that any unearned portion of hire would be repayable to the charterers on termination of the charter-party and that the owners' conduct would be inconsistent with a right to withdraw only if they refused to recognise an obligation to repay any balance due to the charterers. On reflection, and this because of the charterers' reliance solely on paragraph 11B of their pleading, it may be regrettable that the effect of retention by the owners of the whole amount paid to them was not explored. But in the circumstances it must suffice to say that I am at present far from satisfied that the owners were entitled to act as they did, and that it might well turn out that (had the point been taken against them) their retention of the whole sum, with full knowledge of why it was being paid, constituted a waiver of their right to rely on the failure to pay punctually as a ground for withdrawing the vessel.

50. Be that as it may, my conclusion is that the first approach of the learned judge to this question of waiver was the right one, but I do not find it possible to agree with him that the acceptance by M.G.T. of payment was a merely "ministerial" act which left unaffected the owners' right to withdraw. I think Mr. Gaff was right on this part of the case, and, had I concluded that payment preceded withdrawal, I should have allowed this appeal. I would only add that if, as Mr. Goff submitted, payment was being made to M.G.T. because under the assignment they had become creditors of the charterers, I agree with Mr. Evans' submission that acceptance by M.G.T. could not constitute waiver by the owners of their right of withdrawal which Mr. Gaff conceded continued notwithstanding the assignment, and apparently regardless of the requirement imposed by Clause 3 thereof that they should not determine the charter-party "without prior written approval of the assignees".

VI. REPUDIATION.

51. It remains to deal with the owners' cross-notice. This relates to Mr. Justice Brandon's rejection of the plea contained in paragraph 13 of the Defence that the charterers' failure to pay the April hire punctually, following as it did on persistent late payments and notwithstanding the owners' protests in January and February, 1970, "constituted a breach of condition and/or a repudiation and/or fundamental breach of the charter-party", which entitled the owners to rescind by withdrawing the ship. Mr. Anthony Evans evinced no enthusiasm in supporting this plea and that, I think, was wholly understandable. Mr. Justice Brandon said that,

52. *"In order to justify a decision that the charterers' conduct was repudiatory, it would be necessary to find that they evinced clearly by it an intention not to be bound by the terms of the contract."*

53. He declined to hold that they had, and, on the whole of the evidence, I agree with him.

VII CONCLUSION.

54. I would dismiss this appeal on the ground that the owners effectively gave notice of withdrawal before payment of the overdue April hire, a finding which the charterers concede is fatal to their case.

55. Had I concluded that payment preceded withdrawal, I should have held that the owners' right to withdraw (a) was not affected by the decision in the ***"Georgios C"*** Case, but (b) had been waived by their unqualified acceptance on April 2nd of payment of hire for the whole month of April, 1970.

56. I would dismiss the owners' cross-notice.

LORD JUSTICE MEGAW:

57. The parties had by their contract expressly agreed that failing punctual payment the owners should be at liberty to withdraw the vessel. There was a failure of punctual payment. The owners withdrew the vessel. The charterers say they were not entitled to do so. The dispute thus arising gave rise to a hearing of 14 days before Mr. Justice Brandon and of 11 days in this court. Much of the argument was concerned with detailed submissions and counter-submissions, involving questions of fact and of law, as to the precise hour of the day at which a payment, effected by a credit transfer transaction between bankers in London and in New York, is to be deemed to have been made; and as to the precise hour of the day when a notice of withdrawal, conveyed by a telex message, is to be deemed to have been given. As this case demonstrates, in modern complex business transactions, such questions, if indeed the law is such as to require their decision, give rise to difficulty, and, it may be, to legitimate differences of opinion as to the answers.

58. I propose to state at once my conclusions on the several main issues, in the order in which I propose to deal with them.

59. On the ***"Georgios C"*** question, I think the relevant contractual provision in the charterparty with which we are concerned is materially different from the ***Georgios C*** provision. It follows that, in my judgment, even if the payment of the April charter hire was made before the notice of withdrawal was effectively given, that fact would not in itself prevent the notice of withdrawal from being effective.

60. On the waiver question, I take the view that one ought first to determine whether or not the assignment of charter hire by the owners to M.G.T. is to be treated as operative. In my judgment, the charterers are not estopped from relying on the assignment. On that basis, I conclude that, on the special facts of the case and on the pleadings, the charterers' contention that there was a waiver by the owners of their right to withdraw the vessel does not succeed.

61. It follows that, in my judgment, agreeing with Mr. Justice Brandon, though not in all respects for the same reason, the time question - that is, the question whether he was right in holding that the payment was made 22 minutes after the notice of withdrawal was given - does not arise for decision. Nevertheless, I think that I should express my views, with reasons therefor, on each of the two aspects on the time question. I would hold that, if that question should arise, the conclusion of the learned judge that the payment was made after the notice of withdrawal was right. It would thus follow that, if I am wrong on the ***"Georgios C"*** question, or on the waiver question, or both, I should nevertheless hold that the appeal fails.

THE "GEORGIOS C" QUESTION

62. The owners desire to challenge the ***"Georgios C"*** decision (***Empresa Cubana de Fletes -v- Lagonisi Shipping Co. Ltd.*** (1971 1 Q.B. p.488). The owners accept, however, that in this court we are bound by that decision; and, as I understand it, they accept that the decision on its true interpretation applies even though the notice of withdrawal were to be given after tender of payment, but before the owners knew or could reasonably have known that belated tender of payment had been offered.

63. The relevant clause in the ***"Georgios C"*** was: *"in default of payment the owners have the right of withdrawing the vessel from the service of the charterers ...."*

64. It was held that *"In default of payment"* meant "*in default of payment and so long as default continues"*. (See 1971 1 Q.B. at p.504, per Lord Denning, Master of the Rolls.) The clause with which we are concerned in the present case contains the words *".... failing the punctual and regular payment of the hire .... the owners shall be at liberty to withdraw the vessel from the service of the charterers*".

65. While the charterers are entitled to emphasise the desirability of avoiding the introduction of fine distinctions arising out of differences of wording in similar clauses in commercial contracts, I am unable to accept that the words "failing punctual payment" can properly be read as meaning that, although there had been a failure to make punctual payment, nevertheless the resulting right of withdrawal is defeated by a payment which ex hypothesi is unpunctual. The charterers' contention would, I believe, be fairly put (though, no doubt, the charterers would prefer to put it differently) by saying that the words ought to be read as though they were "*failing payment whether punctual or unpunctual'*.

66. It is true, as counsel for the charterers stresses, that in the ***Tankexpress case*** (1947 A.C. at p.94) Lord Wright, referring to "*a dictum or decision*" of Mr. Justice Bingham in ***Nova Scotia Steel Co. Ltd. v Sutherland Steam Shipping Co. Ltd.*** (5 Com. Cas. p.106), said that the adjectives, in the phrase "regular and punctual payment", "add nothing to the stringency of the simple and unqualified language in the charter before this House". That charter used the words "in default of such payment"; and "such payment" had, on the findings of the arbitrators, to be treated as referring to payment, each month, on a particular day. But it is to be observed that what Lord Wright was concerned to emphasise in this passage of his speech was that it would be wrong to hold that "a certain latitude was permissible so that payment made two days after the due date did not constitute a default in payment". I do not think that Lord Wright's dictum should be treated as applicable, or that he would have intended it to apply, to the effect of the word "punctual" in relation to the very different question which arises here by reason of the ***"Georgios C"*** decision, which may be regarded as having brought about some dilution of the general principle which Lord Wright was concerned to emphasise. In that context, and if the ***"Georgios C"*** decision is right, I think that the adjective *"punctual*" does, indeed, "*add stringency",* so as to make a material distinction between the ***"Georgios C"*** wording and the wording with which we are concerned.

67. Therefore I agree with the learned judge's view that if the charterers were right on the time question they would nevertheless fail so far as the ***"Georgios C"*** question is concerned.

THE ASSIGNMENT.

68. Before dealing with the waiver question, I shall consider whether, as the learned judge held, the charterers were estopped from relying upon the effect of the assignment of charter hire.

69. It is an odd situation. The belated pleading by the charterers of the assignment was, as I understand it, directed towards supporting their contention as to the time of payment, because they desired to submit that, since as a result of the assignment the hire payment was a payment due to M.G.T. and not to the owners, that fact strengthened their contention that the time of payment was the time of the receipt by M.G.T. of Hambros' telex. However, the owners say that if, contrary to their primary submission, the charterers are not estopped from relying an the assignment, then, when one comes to the question of waiver, the existence and the legal effect of the assignment defeat the charterers' contention as to waiver.

70. I accept in their entirety the arguments put forward by the charterers against the learned judge's decision that the charterers are estopped from relying upon the assignment. I see nothing in the documents which gives rise to an estoppel against the charterers. In particular, I do not think that there is any significance in this context in the fact that the instructions which were given for effecting payment referred to payment to a named account, the title of which included the name of the owners and the name of the vessel. As was demonstrated by counsel for the charterers, it is clear from M.G.T's documents and the evidence that M.G.T. were, and intended themselves to be, and were understood by the owners to be, in effective control of the operation of that account. I see nothing to suggest that the parties, or either of them, if they turned their minds to the matter at all, thought, or were led by anything done by anyone else to think, that the legal position created, to their knowledge, by the notice of assignment, was not effective. With very great respect, statements in letters written by the owners' agents to M.G.T., of which the charterers knew nothing, in which the owners' agents refer to M.G.T. as being "agents" of the owners, cannot operate to create an estoppel against the charterers. Nor could the provisions of Clause 3 of the agreement between M.G.T, and the owners be of any relevance in this context, for there is no reason to suppose that the charterers ever knew of the terms of that agreement. If the charterers did not turn their minds to the matter at all, or if they had indeed at an early stage forgotten all about the notice of assignment, I do not see how that would give rise to an estoppel against them.

71. Once it is accepted, as I think it should be accepted, that the owners have failed to show the existence of an estoppel against the charterers when they seek, by their pleadings, to rely on the assignment, I think it must follow that the assignment must be given its legal effect in respect of the claim of waiver. The charterers cannot plead and rely on it for one purpose and ignore it for another purpose - in respect of an issue on which the onus of proof admittedly rests on the charterers.

THE WAIVER QUESTION.

72. The acts relied upon by the charterers as constituting waiver by the owners of their right to withdraw the vessel are set out in paragraph 11B of the Statement of Claim. They are: (1) the acts done by M.G.T. in dealing with Hambros' telex instructions - in effect, the acceptance of payment; "and/or"' (ii) the omission by the owners to instruct M.G.T. in advance not to accept payment. Those acts, or that omission, are said to be inconsistent with an intention, by reason of late payment of the April hire, thereafter to withdraw the vessel and thereby to put an end to the charterparty contract.

73. Whatever might be the answer to the waiver question if it were not for the pre-existing assignment of the hire payments to M.G.T., in my judgment, the assignment prevents the charterers from being able successfully to rely upon the alleged waiver.

74. The primary legal consequence of the assignment (which it is conceded was an absolute assignment) is that which is pleaded in the last sentence of paragraph 2A of the Statement of Claim, as follows: *"In the premises the New York Bank" (that is, M.G.T.) "was and at all material times remained the creditor of the plaintiffs" (that is, the charterers) "in respect of hire payable by the plaintiffs under the said charterparty*."

75. In accordance with Section 156 (1) of the Law of Property Act 1925, from the date of the notice of the assignment duly given to the charterers the legal right to the debt or thing in action (the instalments of hire) and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor, passed to the assignee, M.G.T.

76. Perhaps because of the very late stage at which the question of the assignment was first introduced into the pleadings, the possible effect, in law, of the assignment upon the "liberty to withdraw" may not have been fully explored. There is no suggestion in the charterers' pleadings that the contractual terms of the charterparty, as between the owners and the charterers, were affected or altered by reason of the assignment, other than in the single respect that the charterers were thereby freed from their obligation to make the payments of hire to the owners. There is no suggestion that the contractual right given to the owners of withdrawal of the vessel failing punctual payment was expressly or impliedly abrogated or varied. It might, I conceive, have been pleaded or argued - it is unnecessary to consider with what prospect of success - that as a result of the assignment, the owners no longer being the payees, the owners' right of withdrawal for late payment had lapsed. That argument, if right, would have brought a speedy end to this case. It does not fall to be considered. It might have been pleaded, but was not pleaded, that as a result of the assignment the right of withdrawal, as against the charterers, by implication passed to M.G.T. That argument, also, if successful, would have been the end of the case; for M.G.T. did not purport to exercise the right of withdrawal. It does not fall to be considered. It might have been pleaded, but was not pleaded – though, if I understood correctly, some such proposition was sought to be raised in argument - that as a result of the assignment, though the right of withdrawal still remained with the owners, yet it had somehow been varied (in some unpleaded fashion) so that it could be validly exercised only with the consent of M.G.T. If and in so far as that submission was based on Clause 3 of the contract between the owners and M.G.T., it might have had some substance in a dispute between the owners and M.G.T. as to the act of the former in purporting to withdraw the vessel without M.G.T's consent. But I do not see how the provision of a contract to which the charterers were not a party, and of which they had no knowledge, could affect the legal rights and obligations arising between the charterers and the owners on a different contract. In any event, it would, in my judgment, be wrong to allow such a point, depending on a suggested variation of contract, unpleaded, to be taken at this stage, when, if it had been pleaded and was otherwise valid, and if it was relevant to affect the rights and obligations under the charterparty, it would or might have given rise to a vital issue of fact, which in the

absence of pleading was wholly irrelevant: namely, whether or not the consent of M.G.T. had been obtained by the owners.

77. Therefore, as I see it, for the purposes of this case, and on these pleadings, we are bound to assume, it may be artificially, that: (1) as a result of the assignment, the legal right to the hire payments and all legal and other remedies for the same had passed away from the owners and had become vested absolutely in M.G.T.; but (2) the owners' contractual right to withdraw the vessel for failure of punctual payment remained as it would have been apart from the assignment, even though the payment now had to be made to M.G.T., not to the owners.

78. The inevitable result of (1), as I see it, is that any acceptance or refusal of money tendered by the charterers as a hire payment was an acceptance or refusal by M.G.T. in its own right and on its own account. It was not an act done either by or on behalf of the owners. If that be right, I am unable to see how it can he said that the acceptance by M.G.T. on 2nd April constituted waiver by the owners. It was not their act, nor the act of anyone whom they could control, with regard to the doing, or abstaining from doing, the act. Therefore, I am unable to accept that there was a waiver in the first way in which it Is put in the Statement of Claim: namely, in effect, waiver by virtue of the act of M.G.T. in accepting the proposed payment.

79. Equally, I do not see how the second way of putting the waiver can be right: that is, waiver by virtue of the omission of the owners to instruct M.G.T. not to accept payment. If I am right in my analysis of the effect of the assignment, the owners could not give valid instructions to M.G.T. either to accept or to refuse any payment tendered. How can an omission to give instructions which, if given, would have no legal validity constitute a waiver on the part of the person who does not give them?

80. It is said on behalf of the charterers that it would be absurd if the charterers were to be prejudiced by the fact of the assignment, over which they have no control: and that they would be so prejudiced if an acceptance of payment which, apart from the assignment, would provide them with a defence of waiver when they pay late does not provide that defence because of the assignment. It is said that if there is here no waiver of the legal right of withdrawal of the vessel arising from the unpunctual payment, the effects would be anomalous and unjust, and the principle involved would be unfortunate: for, it is said, the owners, though payment had been received by M.G.T. on 2nd April, might not exercise their right to withdraw until near the end of the month, thereby possibly causing the charterers acute embarrassment and loss.

81. With all respect, I do not think those consequences would follow if the view which I take of the waiver question on the special facts of this case, and on the assumptions involved in the way in which it has been pleaded, be correct. Whether there has or has not been an assignment, if the owners should stand by and delay before giving notice of withdrawal after the right has to their knowledge arisen, at a time when they ought to realise that the charterers are acting on the assumption that the charterparty being allowed to continue, the owners would lose the right of withdrawal.

82. Also, I think, they would lose the right in a case such as the present, where there had been an assignment, if the owners knew or ought to have known that an unpunctual payment had been accepted by the assignee. But in the absence of such knowledge, I see no ground in law or in expediency why the owners should be held to have waived their right to withdraw the vessel. The mere receipt of payment, without more, is not enough. If it were, the ***"Georgios C"*** point would simply not arise, for belated payment would always constitute waiver. For waiver, there must, at least, be in addition knowledge of the payment: actual knowledge of legally deemed knowledge. In the present case, at the time when they gave their notice of withdrawal the owners did not know, and had no ground on which they reasonably ought to have known, that a payment had been initiated or had been received by M.G.T. The charterers' suggestion, put to the owners' witnesses in cross-examination, that they did indeed know, has been rejected, and as I think rightly rejected, by the judge. Since M.G.T., by virtue of the assignment relied upon by the charterers themselves, received the money as creditors, and not as agents for the owners, M.G.T's knowledge of payment at the moment when it took place, whenever that was, cannot be fictionally attributed to the owners. Until they knew or ought to have known, they could not waive their right. But even if the effect of the assignment were properly to be ignored, I doubt whether, even so, when a payment is made belatedly in breach of contract there is any principle of law which requires the "deemed", or fictional, attribution to the creditor of the knowledge of an agent as at the very moment when the agent acquires that knowledge. It is, I think, essentially different from the situation where the payment is made in time in accordance with the contract. There, it is the fact of payment which matters, not the creditor's knowledge of the fact.

83. Accordingly, I do not think that waiver avails the plaintiff. I do not find it necessary to consider the further point whether, if the assignment were to be ignored, the judge is or is not right in his view that the receiving of the payment by M.G.T. on behalf of the owners would not constitute waiver by the owners because it is a ministerial act.

84. Before turning to the time question, I propose to deal briefly with the issue raised by the owners in their cross-notice.

THE REPUDIATION QUESTION.

85. The owners contend that the history of belated hire payments by the charterers is such that the owners were entitled to treat the charterparty contract as at an end, apart altogether from the "*falling punctual payment*" clause. Once again, because of the assignment, there might be difficulties for the owners in relying upon late payments, the right to receive which they had transferred to another person. But in any event, with all respect, the

argument on behalf of the owners wholly failed to convince me that there was any possible basis for disagreeing with the view held and expressed by the learned judge, who rejected this submission upon his review of the relevant facts.

THE TIME QUESTION.

86. If I am right on the issues which I have already discussed, this question does not arise. If it does arise, I agree with the conclusion reached by my brethren and, substantially, with their reasons. Nevertheless, with some hesitation, I have decided that I should retain in this judgment some part of the reasons which I had prepared before I had the advantage of seeing the judgments of my brethren.

(A) The time of payment.

87. The contract provided expressly for payment to be made "in cash in United States currency". It is not easy to believe that the parties contemplated that payment should be effected each month by the tender and acceptance of dollar bills or other United States currency. Whether the creditor would have had the right to insist on such a mode of payment (after due notice, if some other made of payment had been previously used without objection), it is not necessary to consider. But it does, I think, tend in favour of the owners' general submission as to the time of payment. Whatever mode or process is used, "payment" is not achieved until the process has reached the stage that the creditor has received cash or that which he is prepared to treat as the equivalent of cash., or has a credit available on which, in the normal course of business or banking practice, he can draw, if he wishes, in the form of cash. On that basis, the telex message from Hambros to M.G.T. would not itself be "payment", nor would it result in payment by its mere receipt.

88. The charterers rely upon the decision in ***Tankexpress A/S v Compagnie Belge des Petroles S.A.*** (1949 A.C. p.76) as supporting their submission about the time of payment. They say that there was here an "accepted method of payment" by telex transfer. This, they say, is analogous to the accepted method of payment which was held, by arbitrators, to have existed in ***Tankexpress.*** There the accepted method involved that the hire was to be treated as duly paid when a letter containing a cheque for the hire was posted, at a time when in the normal course of post it would have arrived on the specified date. So here, it is claimed, the accepted method involved that the hire was paid when the telex transfer arrived in M.G.T's office or at the opening of office hours thereafter. I do not think that any analogy with ***Tankexpress*** could be extended to a case such as the present where the payment in question is admittedly late, so that the contract has already been broken as to time of payment. If in Tankexpress the cheque for the hire had been posted a day later than was required by the normal course of post, I do not think that, as against the owners, had the question arisen, this would have been held to produce payment merely a day late, when in fact the cheque was not delivered until many days later. But in any event, I do not see how in the present case the fact, if fact it be, that the use of telex transfer was an "accepted method" in any way affects the question as to the time of payment. To say that it was *"an accepted method of payment"* begs the question. The question is whether despatch and receipt of the telex message was, indeed, *"payment",* or was merely a part of the process which led towards the making of payment.

89. Much reliance was placed by the charterers upon the correspondence between Embiricos S.A. Ltd. and M.G.T. For the reasons given by Lord Justice Edmund Davies, I do not think that this avails the charterers.

90. The charterers maintain that, because of the assignment of the charter hire by the owners to M.G.T. and the notice thereof given to the charterers at the beginning of the charter period, M.G.T. are to be regarded as being themselves, beneficially, the payees of the hire. As I have already said, in connection with the waiver question, I think that the charterers are right in that contention.

91. If I should be wrong in this, and if the owners should be right in their contention that the assignment is irrelevant, I should have little hesitation in accepting the learned judge's view that the time of payment could not be earlier than the time when M.G.T. made their decision to debit Hambros' account and to credit the Reinante account. On that hypothesis, M.G.T. would, in my view, have been the agents of the charterers (or rather their sub-agents acting on the instructions of the charterers' agents, Hambros) in dealing with Hambros' telex instructions, up to the point of decision to give effect to those instructions. It may be that in some respects, as counsel for the charterers sought to stress, M.G.T. might also owe a duty to their customers, the owners, in dealing with Hambros' telex. But primarily and for all relevant purposes M.G.T., as Hambros' "correspondents", were acting as the charterers' sub-agents up to the stage of decision to accept and act on the instructions; and it would be impossible for the charterers to contend successfully that, even if M.G.T. were in any respect careless or dilatory, payment was made before M.G.T. had at least decided to do that which their principals, the charterers, instructed them to do for the purpose of effecting payment.

92. However, because of the assignment, the factor of M.G.T's agency does not apply. The payment is a payment to M.G.T. themselves. Nevertheless, I do not think the result is different. It might have made a difference if there had been some valid suggestion of undue delay or departure from normal commercial practice on the part of M.G.T. in its dealing with Hambros' telex. There is no such suggestion.

93. I think that the owners are right in their contention that there is no useful analogy between, on the one hand, a payment made by delivery of cash or of a cheque (where a cheque is a permissible method of payment) and, on the other hand, telex instructions to pay, such as were given in this case. The receipt of a cheque is not the receipt of mere instructions. It is the receipt of an instrument - a chose in action - which has an inherent value, because the holder of it obtains, by virtue of his holding of the document, a legal right to a sum of money, which right he can

enforce, if necessary by action. The receipt of a telex containing instructions to transfer funds from one account into another account confers on the holder of the telex no such right. It is instructions to pay, not a payment. It is instructions to the creditors, M.G.T., to bring about payment of the debt owed by the charterers to M.G.T. themselves, as assignees of the debt, by a process of debiting Hambros' account with M.G.T. and crediting another, named, account controlled by M.G.T. There might, I suppose, in a case such as this be evidence that such instructions from one banker to another have as a matter of banking or commercial practice the same status, generally or subject to qualifications, as bankers' cheques or drafts, that they are treated as being irrevocable, and that they are treated as constituting "payment"' as soon as the instructions are received. But the weight of the evidence of witnesses for the owners, as accepted by the judge, and I think rightly accepted, was to the contrary. There was a notable absence of evidence from the charterers, or their bankers, on any such topic. On the evidence, and the absence of evidence, in this case, in agreement with Mr. Justice Brandon, I see no ground for holding that telex instructions such as were here given themselves constitute, or effect, "payment" by the mere receipt of the document containing the instructions.

94. It would, in my judgment, be equally wrong to treat M.G.T. on the facts of this case as having received payment at the time of the arrival of Hambros' telex at 04.53 New York time (when no-one would have supposed that responsible officers of M.G.T. would know of it or deal with it), as it would be wrong to treat the charterers as having received effective notice of withdrawal if the owners had sent a telex message to the charterers' office in London at 04.55 London time, when no-one would reasonably he expected to be there to receive it.

95. In my judgment, at any rate after the proper contractual time for payment had passed, instructions to the creditor to pay himself out of an account held by him on behalf of the debtor's agent do not constitute payment until the instructions become known to the creditor and the creditor has had an opportunity, such as would reasonably be required in the ordinary course of business in respect of such a transaction, to satisfy himself that the instructions are such as he can properly, in his own interest, accept. That involves checking, in accordance with ordinary business routine, that the account out of which the creditor is instructed or required to pay himself is an account which is in credit to that extent; so that the purported payment of the debt will not be nullified by the creation, as a result of the same transaction, of another debt. It is when that reasonable check has been carried out and the creditor has decided that the instructions can be acted on -then and no sooner - that payment of the debt should be treated as having been made. Here no question arises, on the evidence, the cross-examination or the judge's findings, of any delay or unreasonable conduct on the part of M.G.T. in carrying out what was unquestionably their normal procedure in such cases. There was no evidence from the charterers, or their bankers, Hambros, to contradict the evidence for the owners or to suggest any defect in the system operated by M.G.T. or in their operation of it in the present transaction.

96. In my opinion, the owners are right on this point, and the learned judge was right in so holding. I should not quarrel with his method of defining the time of payment as being 12.07 New York time, and thus 18.07 London time. But I think there is another, possibly preferable, approach, which in this case leads to the same result. I shall consider the other approach when I have dealt with the second part of the time question, the question of the time of notice of withdrawal, to which I now turn.

(B). THE TIME OF NOTICE OF WITHDRAWAL.

97. The learned judge reviewed with care the acutely conflicting evidence as to the time when the telex notice of withdrawal was despatched from the office of Embiricos S.A. Ltd and received at the charterers' office, on the evening of 2nd April.

98. There was no doubt that the telex machine in the charterers" office was in working order and was set so as to invite and receive messages. This telex message, when it was sent, was reproduced in the charterers' office simultaneously with its despatch.

99. The judge held that the telex message was certainly sent, and received on the charterers' machine before 18.00. The time which he found was 17.45.

100. We were, first, invited by counsel for the charterers to review the evidence and to hold that the judge was wrong, despite the fact that he had seen and heard the witnesses and had expressly stated that he thought the evidence of the owners' witnesses was better and more convincing than that of the charterers' witnesses. Having seen the transcript of all the evidence, I see no reason to think that the learned judge's assessment of the witnesses or his conclusion of fact was wrong. I do not think it matters for the ultimate result whether the learned judge was justified in fixing the precise time of 17.45. He was certainly entitled to conclude that the time of the telex message was before 18.00; and it would make no difference if he held that the best he could do was to say "*some time not earlier than 17.30 and not later than 18.00*."

101. On the assumption that, as I think plainly must be so, this court upholds the judge's findings of fact, there was lengthy and elaborate argument, with the citation of numerous authorities, as to the principle applicable for deciding the time at which such notice ought to be treated as having been effectively given.

102. With all respect, I think the principle which is relevant is this: if a notice arrives at the address of the person to be notified, at such a time and by such a means of communication that it would in the normal course of business come to the attention of that person on its arrival, that person cannot rely upon some failure of himself or his servants to act in a normal businesslike manner in respect of taking cognisance of the communication, so as to postpone the effective time of the notice until some later time when it in fact came to his attention.

103. It was conceded on behalf of the charterers that if Mrs. Sayce, an employee of theirs, had seen the telex message when it arrived at the charterers' London office on 2nd April, her sight of it would constitute effective notice to the charterers at that moment. Mrs. Sayce gave evidence that she was in the office that evening until at least 18.50, and that, if the telex message had arrived on the machine in the charterers' office up to that time, she must have seen it. There is now, on the judge's findings of fact, which are, I think, unchallengeable, no question but that the telex message had arrived before 18.00. It follows that if the judge had held that Mrs. Sayce saw the telex message that would have been the end of any argument on this point. Notice would have been effectively given before 18.00. But the charterers say that they escape from that conclusion because the judge said that he was inclined to accept that Mrs. Sayce was not in fact aware of the telex message, despite the fact that it had arrived and her own emphatic evidence that if it had arrived she could not have failed to see it. The judge was inclined to think that, contrary to her own insistence, either she left the office before 18.00 or she neglected to pay attention to the telex machine in the way she claimed it was her practice to do.

104. I do not think that avails the charterers in the way in which their case was presented. The owners have rebutted the charterers' case that the message had not arrived by 18.00. I do not think that the owners were obliged, before the time of the receipt in the charterers' office could be treated as the effective time of the giving of the notice, to go on to establish affirmatively that which the charterers themselves asserted: namely, that a person competent to receive the message was there at that time, and, being there, should have seen it. As I have already said, I do not think that the law regards the effective time of the giving of a notice as liable to be postponed because of some failure by the recipient to see it in the ordinary course of a business competently conducted in a normal businesslike way. I do not think that in the circumstances any burden rested on the owners to show that in the ordinary course of business some competent person ought to have been in the office to receive the message when it arrived before 18.00, when the case for the charterers was: "A competent person <u>was</u> there".

105. I agree with Mr. Justice Brandon that the notice was effectively given when it appeared on the telex machine in the charterers?' office before 18.00 on 2nd April, when, according to her own evidence, it should have been seen by Mrs. Sayce.

106. Before leaving this part of the case, I should say that I reject, as Mr. Justice Brandon did, attacks made on behalf of the charterers on the good faith of Mr. Embiricos in the evidence which he gave.

CONCLUSION ON THE TIME QUESTION.

107. On the learned judge's findings, there was the 22nd minutes gap. The notice was given at approximately 17.45 on 2nd April in London. The payment was made in New York at 18.07 London time. I have said earlier that there was another approach which may be preferable, leading to the same conclusion that the payment was later than the notice. The probable time of payment was two to three hours after 09.37 New York Rime; that is, it was between 17.37 and 18.37 London time. The probable range is 17.37 to 18.37. The range of time within which the notice of withdrawal was given is from 17.30 to before 18.00. If it were wrong to select any particular point of time, for example, the mean, within either of these ranges as being the probable particular point of time, and if one were then to look at the probability as to which event preceded the other by taking each of the two time ranges as a whole, the balance of probability would be strongly in favour of the notice of withdrawal having preceded, rather than having come after, the time of payment. Whichever be the right approach, I agree with the learned judge's conclusion that the notice was given before the payment. I would dismiss the appeal.

LORD JUSTICE CAIRNS:

108. In considering at what time the April hire was tendered or paid both parties attach importance to the question "Who was the payee?". That question is not capable of a simple answer. The charterers' obligation was to pay "in New York in cash in United States currency to Morgan Guaranty Trust Co. of New York, 33 Wall Street, New York, for the credit of the account for Reinante Transoceania Navigacion S.A. of Panama re m.s. "Brimnes". Because the right to receive the hire was assigned by the shipowners to M.G.T., and notice of the assignment was given by M.G.T. to the charterers, the charterers became obliged to pay the hire to M.G.T. or as M.G.T. might direct. There does not appear to have been any express direction from M.G.T. to the charterers to pay the hire in accordance with the terms of the charterparty, but in my view such a direction must be implied, because the hire was always so paid (subject to immaterial variations of wording on some occasions), and this was certainly with the concurrence of M.G.T. It follows that tender took place when the charterers made funds available to M.G.T., as bankers of the shipowners, for crediting to the shipowners' "Brimnes" account with M.G.T.; and payment took place when M.G.T. made such funds available to the shipowners in that account. This was not dependent on any particular mode of transfer of the funds; it could have been done in cash, by cheque, by transfer from some other bank in New York or by transfer from one account to another within M.G.T. M.G.T. was not entitled to require any particular machinery of transfer. It <u>was</u> entitled to require the money to be paid simply to itself as assignee of the hire: but it never did so. I do not consider that any estoppel arose. It was for M.G.T. to say to what account payment should be made; it was for the charterers to arrange how it should get there.

109. I do not derive any assistance from the words "in cash in United States currency". It would be absurd in modern business conditions to suppose that payment in dollar bills was contemplated. I think the words simply mean that the currency of payment is to be United States dollars and that the payment must be in a form which does not involve the giving of credit; for example, must not be by post-dated cheque or by telex message with a "value date" after the due date. In considering what is the time of tender or of payment, I do not consider that one can safely argue by analogy and say is that because a bundle of notes is "paid" when it/handed over and before

the recipient counts it, or because the handing of a cheque constitutes conditional payment at the time of delivery, therefore when payment is made by means of a telex message the time of payment is the time when the message arrives or when it is available to the recipient on opening of his office. The property in money passes on delivery, so does the property in a cheque. Partly by operation of the law merchant and the Bills of Exchange Act, partly by the customs of business, cheques have come to be regarded as the equivalent of money (subject always to being afterwards defeated by dishonour). I do not think the telex message in this case can be regarded in the same way. It was not a negotiable instrument. It could have been revoked by Hambros at any time before being acted on by M.G.T. - and, if so revoked, no action could be brought on it as on a stopped cheque. Further, it has to be remembered that the only reason why the telex was sent to M. G.T. was that M.G. T. were bankers to Hambros. In my opinion, no tender was made until M.G.T. took such action on the telex that Hambros could no longer say, "You are not to take the money from our account", and Reinante could say, "The money is available to us in our account". On the evidence it appears that that moment came at what has been called the "decision time".

110. Mr. Goff makes the point that it is highly inconvenient that the payment should be regarded as occurring at a time which it may well be difficult to discover precisely. It is, of course, only in exceptional circumstances that anybody needs to determine the time of day, as distinct from the date, on which payment is made. That the time when a telex is transmitted is not always known is shown by the evidence about the withdrawal telex in this case. But even if there would be greater convenience in regarding the time of receipt as the time of payment, I do not consider that this would justify the conclusion that in law this is the time of payment.

111. I am satisfied that in this case the time of tender and of payment was the time when the decision was made to transfer the funds from Hambros' to Reinante's account.

112. This time cannot be ascertained with certainty. The judge's finding that it was between 11.37 and 12.37 New York time was well founded on the evidence, and I accept it. I cannot go with the judge in the next stage of his reasoning, to the effect that the time of payment should be taken to be 12.07, as being the mean between the earliest and latest times to which the evidence points. I do not consider that the court can make any more precise conclusion than that payment took place some time within that hour and that any one moment therein is as likely as any other.

113. I next consider the time of notice of withdrawal. In my opinion, the general rule is that notice must reach the mind of the charterer or of some responsible person on his behalf. There must clearly be exceptions to this rule: for example, if the charterer or his agent deliberately keeps out of the way, or refrains from opening a letter with a view to avoiding the receipt of notice. How much further than this do exceptions go? I feel little doubt that if an office were closed all day on an ordinary working day, though without any thought of a notice of withdrawal arriving, such a notice delivered by post on that day must be regarded as then received. What I find much more difficult is the case of a notice by telex, sent near the close of a working day, and not seen on that day because the person responsible for receiving such message has left the office a little early or has failed to look at the telex machine before leaving. I do not find it possible to say that there was here any representation by the charterers to the shipowners that telex messages sent to their office at any time up to 6 p.m. on any working day would be dealt with at once.

114. In the end, however, the view that I take is this: the charterers founded their case on the evidence of Mrs. Sayce that she was still in the office up to 18.50 B.S.T. or later. I do not think they are entitled to throw that evidence overboard and say that if the telex message arrived before 18.00 then Mrs. Sayce must have left before that time. If she had not left when the message arrived, there was, on her own evidence, some neglect of duty on her part in failing to observe it and attend to it. I do not consider that the charterers are entitled to take advantage of that neglect to say that they did not receive the notice when it arrived.

115. Now the judge was satisfied on the evidence that the telex message was sent between 17.50 and 18.00 B.S.T., and I can see no ground for disturbing that finding. But, again, I can find no sufficient reason for pin-pointing the time at 17.45, although the judge's reasons for arriving at this time were not so artificial as in the case of the time of payment.

116. I approach my final consideration of the times in this way: the time of payment should be taken to be some time between 11.37 and 12.37 New York time (that is, 17.37 and 18.37 B.S.T.) with no preference for any particular moment in that hour. The time of notice of withdrawal should be taken to be some time between 17.30 and 18.00 B.S.T. with no preference for any particular moment within that half hour. If the notice was between 17.30 and 17.37 it was before the payment; if the payment was between 18.00 and 18.37 the notice was before the payment; if both were between 17.37 and 18.00, then it is equally likely that the payment was first or the notice was first. On these data it is clearly more likely than not that the notice was first. A simple calculation will show that the mathematical probability was that there was only about one chance in seven of the payment being first. I therefore conclude that on a balance of probabilities the payment was not made until after the notice of withdrawal was received.

117. If that is right, then the charterers cannot succeed either on the ***"Georgios C"*** ground or on waiver. But in case I should be wrong about the times, I will deal briefly with each of these other points.

118. I agree with the learned judge that this case is to be distinguished from the ***"Georgios C"*** because the charterparty here gave a right of withdrawal if the hire was not punctually paid. It is impossible to say that the April hire was punctually paid. So the right of withdrawal arose. Was it thereafter lost?

119. I may summarise the charterers' contentions as follows: (1} The introduction of the word "punctual" adds nothing, because whenever a day is fixed for payment there is an obligation to pay punctually. (2) The issue is not whether a right of withdrawal arose (admittedly it did), but whether the charterers' default was "remedied" or "rectified" or "cured" by payment before withdrawal: (see (1971) 1 Q.B. at pp. 504H, 506E and 507D). (3) "*Punctual payment*" is equivalent to "such payment" which, in ***The"Langfond"*** (96 L.T. p.559), was held to be complied with by late payment. (4) Lord Wright in ***The "Tankexpress"*** (1949 A.C. p.76, at p.94) said that the words "regular and punctual" added nothing. (5) It is undesirable to draw fine distinctions based on small differences of language in commercial documents.

120. I would answer: (1) While the word "punctual" adds nothing to the duty of the charterers to pay, it nay well alter the circumstances in which the shipowners' right to withdraw the ship can exist. (2) While it can properly be said that a person who has paid late has remedied his failure to pay, it cannot be said that he has remedied his failure to pay punctually. (5) Even if ***The "Langfond"*** is not to be treated purely as a case on waiver, it cannot be said that the word "such" necessarily involves the conception of payment on the day named, whereas the word "punctual" certainly does. (4) None of the other members of the House of Lords supported the view of Lord Wright, and I am unable to accept his opinion on this matter. (5) While unreal distinctions should not be made when slightly different expressions in different contracts can be supposed to be intended to have the same effect, it is unlikely that the word "punctual" in this clause was not intended to be given some effect, and if it is to have any effect it must mean that a payment which is not punctual will not avoid a withdrawal. That was the view obiter of Mr. Justice Donaldson in the ***"Georgios C"*** (at p.494H); and I agree with him.

121. As to waiver, I do not consider that the acceptance of payment by M.G.T. can be dismissed as a mere ministerial act. What the mutual obligations in regard to acceptance of payment and electing to withdraw the ship were as between Reinante as shipowners and M.G.T. as their bankers and their assignees I do not attempt to resolve. But I am satisfied that the shipowners could not by assigning the right to receive the hire deprive the charterers of the benefit of the principle that acceptance of the hire would effect a waiver of the right to withdraw; and could not contend that acceptance of the money by the bank named in the charterparty as the person to receive it on behalf of the shipowners was not equivalent to acceptance by the shipowners. They could have avoided a waiver by saying to M.G.T.: *"If the hire is not paid on 1st April please do not accept it later."* There is no reason to suppose that M.G.T. would not have complied with such a request, since they did not object to the withdrawal of the vessel. I see no reason why a shipowner who chooses to have hire paid to a bank instead of directly to himself should not have to elect before the due date whether he is going to accept the late payment or to withdraw the ship if payment is late. If I am right on ***the "Georgios C"*** point, the shipowners would have run no risk in making such an election; the charterers, having failed to make punctual payment, were not entitled to keep the charter alive by tendering payment late.

122. It is contended for the shipowners that hire for the whole of the month of April could be accepted by them without waiving the right of withdrawal because some hire would accrue (for the use of the ship up to withdrawal} and they were entitled to receive the whole month's hire and later to account to the charterers for any overpayment. I do not think this can be right. It would mean that the shipowners could retain the money without comment for most of the month and then elect to withdraw and have the matter adjusted in accounts. It may be that the shipowners could avoid a waiver by saying to the charterers before the due date, "*If the hire is tendered late the payment will be accepted only on account of hire already accrued and of any other sums due from you to us, and any balance will be repaid to you in due course",* or by saying something to a similar effect at the time of payment. I consider, however, that if a month's hire in advance is tendered late, but before withdrawal, and is accepted without qualification, it must be taken to be accepted as hire for the month, which must amount to an election not to enforce the right of withdrawal, so constituting a waiver of that right. Therefore, unless I had concluded that the withdrawal preceded the payment, I should have held that there was here a waiver of the right to withdraw.

123. As to repudiation, in my opinion, the conduct of the charterers did not, either at the beginning of April, 1970, or over the period of the charterparty as a whole, come anywhere near to being repudiatory in character. I would therefore reject the contention raised by the shipowners' cross-notice.

124. For the reasons I have given, however, I agree that the appeal must be dismissed.

(Appeal dismissed, with costs. Leave to appeal to the House of Lords granted.)

MR R. GOFF, Q.C. and MR B. ECKERSLEY, (instructed by Messrs. Sinclair, Roche & Temperley) appeared on behalf of the Appellants (Plaintiffs).
MR A. EVANS, Q.C. and MR M. SAVILLE, (instructed by Messrs. Constant & Constant) appeared on behalf of the Respondents (Defendants).