CA on appeal from QBD Commercial List (Mr Justice Mocatta) before Lord Denning MR; Edmund Davies LJ; Megaw LJ. 1st July 1970.

THE MASTER OF THE ROLLS:

1. The material facts are these. On 35th May, 1965, the shipowners let the steamer Mihalis Angelos to the charterers for a voyage from Haiphong, in North Vietnam, to Hamburg or other port in Europe. In the charter party the shipowners said that she was "expected ready to load under this charter about 1st July, 1965". The vessel was to proceed to Haiphong and then load a cargo of apatite and carry it to Europe. There was a cancelling clause in case the vessel was not ready to load by 20th July, 1965.

2. The owners were quite wrong in saying she was "expected to load on 1st July" at Haiphong. They had no reasonable grounds for any such expectation. On 25th May, 1965, the date of the charter, the Mihalis Angelos was in the Pacific on her way to Hong Kong. She was not expecting to reach Hong Kong until 25th or 26th Jure., She would need fourteen days to discharge, thus taking it to 9th or 10th July. She had to have a special survey of two days. That took it to 11th or 12th July. She would take two days from Hong Kong to Haiphong. So she could not reasonably be expected to arrive at Haiphong until 15th or 14th July. Yet the shipowners, quite wrongly, said she was expected to arrive on 1st July.

3. In point of fact, she made up time across the Pacific, and arrived at Hong Kong on 23rd June: but the discharge at Hong Kong was unexpectedly prolonged. She did not complete it until 23rd July. Meanwhile, however, the charterers had their own troubles. They discovered there was no apatite ore available at Haiphong. They thought it was due to the War in North Vietnam. It was said that the Americans had bombed the railway line to the port. On 17th July, 1965, the charterers cancelled the contract as a case of force majeure. The ship-owners accepted this information as a repudiation of the contract. They did not charter the vessel to anyone else. Instead they sold her on 29th July as she lay in Hong Kong.

4. The Arbitrators found that if the ship, after discharge at Hong Kong, had proceeded to Haiphong, the charterers would, beyond doubt, have cancelled the charter on the ground that the ship had missed her cancelling date. So the owners, in fact, lost nothing. But they claimed damages on the footing that they lost the charter on 17th July and were entitled to £4,000 damages. The Arbitrators rejected the claim, but the Judge allowed it.

5. The first point arises on the clause by which the charterers said that the vessel was "*expected to arrive ready to load about 1st July, 1965*". The charterers said that this was a condition of the contract: and that it was broken because the owners had no reasonable grounds for any such expectation. The Arbitrators found that "on *25th May, 1965, the owners could not reasonably have estimated that the Mihalis Angelos could or would arrive at Haiphong about 1st July, 1965*".

6. The charterers did not take this point on 17th July, 1965, when they cancelled the charter. They put it on the ground of force majeure. But the owners admit that, if this point is a good one, the charterers can rely on it. The fact that a contracting party gives a bad reason for determining it does not prevent him from afterwards relying on a good one when he discovers it: see ***British & Benningtons v. Cachar*** (1923 A.C.,48 at 71-2) by Lord Sumner.

7. The contest resolved itself simply into this. Was the "*expected ready to load*" clause a condition, such that for breach of it the charterers could throw up the charter? Or was it a mere warranty such as to give rise to damages if it was broken, but not to a right to cancel, seeing that cancellation was expressly dealt with in the cancelling clause?

8. Sir Frederick Pollock divided the terms of a contract into two categories; Conditions and Warranties. The difference between them was this: If the promisor broke a condition in any respect, however slight, it gave the other party a right to be quit of his future obligations and to sue for damages: unless he by his conduct waived the condition, in which case he was bound to perform his future obligations but could sue for the damage he suffered. If the promisor broke a warranty in any respect, however serious, the other party was not quit of his future obligations. He had to perform them. His only remedy was to sue for damages.

9. This division was adopted by Sir Mackenzie Chalmers when he drafted the Sale of Goods Act, and by Parliament when it passed it. It was stated by Lord Justice Fletcher Moulton, in his celebrated dissenting judgment in ***Wallis v. Pratt*** (1910, 2 K.B., 1003, at 1012), which was adopted in its entirety by the House of Lords in 1911 A.C., 394.

10. It would be a mistake, however, to look upon that division as exhaustive. There are many terms of many contracts which cannot be fitted into either category. In such cases the Courts, for nigh on 200 years, have not asked themselves: Was the term a condition or warranty? But rather: Was the breach such as to go to the root of the contract? If it was, then the other party is entitled, at his election, to treat himself as discharged from any further performance. That is made clear by the judgment of Lord Mansfield in ***Boone v Eyre*** (1777, 1 H.B1., 273); and by the speech of Lord Blackburn in ***Mersey v. Naylor*** (1834, 9 A.C., 434, at 443-4); and the notes to ***Cutter v. Powell*** (2 Smith's Leading Cases, at 16-18). The case of ***Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha*** (1962, 2 Q.B., 26) is a useful reminder of this large category.

11. Although this large category exists, there is still remaining a considerable body of law by which certain stipulations have been classified as "*conditions*" so that any failure to perform, however slight, entitles the other to treat himself as discharged. Thus a statement in a charter-party on 19th October, 1860, that the ship is "*now in the port of Amsterdam*" was held to be a "*condition*". On that date she was just outside Amsterdam and could not get in owing to strong gales. But she got in a day or two later when the gales abated. The Court of Exchequer

Chamber held that the charterer was entitled to call off the charter: see ***Behn v. Burness*** (1863, 3 B. & S., 751), overruling the Court of Exchequer (1862, 1 B. & S., 877).

12. The question in this case is whether the statement by the owner: "*expected ready to load under this charter about 1st July, 1965*" is likewise a "*condition*". The meaning of such a clause is settled by a decision of this Court. It is an assurance by the owner that he honestly expects that the vessel will be ready to load on that date and that his expectation is based on reasonable grounds see ***Sanday v Keighley, Maxted & Co.*** (1922, 27 Commercial Cases, 296). The clause with that meaning has been held in this Court to be a "*condition*" which, if not fulfilled, entitled the other party to treat himself as discharged; see Finnish Government v. Ford (1921, 6 Lloyds List Reports, 188). Those were Sale of Goods cases. But I think the clause should receive the same interpretation in charter party cases. It seems to me that, if the owner of a ship or his agent states in a charter that she is "*expected ready to load about 1st July, 1965*" he is making a representation as to his own state of mind; that is, of what he himself expects: and, what is more, he puts it in the contract as a term of it, binding himself to its truth. If he or his agent breaks that term by making the statement without any honest belief in its truth or without any reasonable grounds for it, he must take the consequences. It is at lowest a misrepresentation which entitles the other party to rescind- and at highest a breach of contract which goes to the root of the matter, The charterer, who is misled by the statement is entitled, on discovering its falsity, to throw up the charter. It may, therefore, properly be described as a "condition".

13. I am confirmed in this view by the illustration given by Lord Justice Scrutton himself in all the editions of his work on charter parties: "*A ship was chartered* ***'expected to be at X about the 15th December... shall with all convenient speed sail to X'.*** *The ship was in fact then on such a voyage that she could not complete it and be at X by 15th December. Submitted that the charterer was entitled to throw up the charter*".

14. I do not regard the case of ***Associated Portland Cement Manufacturers v. Houlder Bros.*** (1917, 22 Comm.Cas., 279) as any authority to the contrary. The facts are too shortly reported for any guidance to be got from it.

15. I hold, therefore, that on 17th July, 1965, the charterers were entitled to cancel the contract on the ground that the owners had broken the "*expected ready to load*" clause. In case I am wrong, however, I go on to consider the charterers' second point. They say that they were entitled to cancel on that day under the cancelling clause, which reads:

> "*(11) Should the vessel not be ready to load (whether in berth or not)on or before 20 July '65 Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading".*

16. The charterers said that on 17th July, 1965, it was plain that the vessel would not be ready to load on or before 20th July, 1965: and on that account they were entitled to cancel the charter. But the shipowners said that the charterers could not exercise the option until 20th July, 1965, after office hours on that day.

17. We were referred to the antecedents of this clause. The part "*...such option to be declared*", etc. was inserted to modify the decision of this Court in ***Moel Tryvan v. Andrew Weir*** (1910, 2 K.B., 844). We were also referred to ***The "Helvetia -S"*** (1960, 1 LIL.R., 540 at 551), and to ***The "Madeleine"*** (1967, 2 LIL.R., 224), where the Judges said, of a somewhat similar clause, that a charterer cannot exercise the option to cancel before the cancelling date. That is simply not true of this present clause. Suppose that the vessel was delayed so that she was not expected to arrive at the port of loading until 21st July: and that on 15th July they told the charterer: "*She will not be able to arrive until 21st July. Please declare your option*". The charterer would be bound, under this clause, to declare his option at least by 19th July. So on those facts the charterer would not only be entitled, but would be bound, to exercise it before the cancelling date. Seeing that result, it seems to me that the clause is a concise way of expressing this meaning:

> "*Should the vessel not be ready to load (whether in berth or not), or be in such a position that she will not be ready to load on or before 20th July, 1965, Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading*".

18. So expanded, the clause means that the charterers have the option of cancelling the contract as soon as it becomes plain that the vessel cannot possibly be ready to load on or before 20th July, 1965. This is a sensible interpretation: because, as a matter of commercial convenience, it is better for both sides that, when it is obvious that the vessel will not arrive in time, the charterer should be able to cancel. The charterer can then engage another vessel: and the ship-owner can use his ship elsewhere.

19. I limit myself, of course, to saying that the charterer is entitled to exercise his option before the cancelling date: not that he is bound_ to exercise it before that date, save in the circumstances described in the second part of the sentence. ***The Moel Tryvan*** case still holds good to show that the charterer is not bound to exercise it.

20. Mr Goff submitted that in any case the charterers cannot rely on the clause, for this reason; They did not exercise the option given to them by the clause. They did not cancel on the ground that the vessel would not be ready to load on or before 20th July, 1965. They cancelled on the ground of force majeure, i.e., that they themselves could not load the vessel. But I think that the principle stated by Lord Sumner in ***British & Benington*s** applies here also. If they had a right to cancel on 17th July, they can rely on it, even though they gave a wrong reason for it. I would hold, therefore, that the charterers on 17th July were entitled to cancel under the cancelling clause.

21. In case I am wrong on this second point, I come to the third point, It proceeds on the footing that the charterers were wrong in cancelling or. 17th July, 1965, If so, their cancellation was a renunciation of their contract to load the vessel when she arrived at Haiphong. The shipowners accepted this renunciation and called off the charter. They are entitled to damages, But what are the damages? The Arbitrators found that, if the vessel had sailed to Haiphong, the charterers would beyond doubt have cancelled the charter, and would be within their rights then in so doing. So the shipowner suffered no loss.

22. The Arbitrators on this account awarded the shipowners only nominal damages. But the Judge, with regret, found they were entitled to damages of £4,000.

23. The reason, as I understand it, was as follows:-

    The shipowners are entitled to damages for "*anticipated breach*" of contract. The Court must, therefore, accept that there would inevitably have been a breach by the charterers if the contract had run its full course. The Court cannot listen to any argument which says that the charterers would have committed no breach, not even in reduction of damages.

    This reasoning was supported by the statement of Chief Justice Cockburn in ***Frost v. Knight*** (1872, L.R., 7 Ex.Cas., at 114): "*The eventual non-performance may, therefore, by anticipation, be treated as a cause of action...";*

    and of Mr Justice Devlin in ***Universal Cargo Carriers v.Citati*** (1957, 2 Q.B.,401, at 438): *"The injured party is allowed to anticipate an inevitable breach".*

24. I think that the argument is rooted in fallacy. The words "*anticipatory breach*" are misleading. The cause of action is not the future breach. It is the renunciation itself. I venture to quote the notes to ***Cutter v. Powell*** (2 Smith's Leading Cases, at 30): "*It is of the essence of every contract that each party thereto should have the right to consider it as of binding force from the moment it is made and should have the right to base his conduct on the expectation of its being fulfilled by the other party. If, therefore, the other side by an unqualified refusal to perform his side of the contract, destroys that expectation, he destroys that which is the basis of the contract: and his conduct may be treated as a breach going to the whole of the consideration".*

25. Seeing that the renunciation itself is the breach, the damages must be measured by compensating the injured party for the loss he has suffered by reason of the renunciation. You must take into account all contingencies which might have reduced or extinguished the loss. That is made clear by the very first case in which that doctrine of anticipatory breach was established, in ***Hochster v. De la Tour*** itself (1853, 2 E. & B. at 686-7). It follows that if the defendant has under the contract an option which would reduce or extinguish the loss, it will be assumed that he would exercise it. Again, if it is reasonable for him to take steps to mitigate his loss, he must do it. And so forth. In short, the Plaintiff must be compensated for such loss as he would have suffered if there had been no renunciation: but not if he would have lost nothing.

26. Seeing that the charterers would, beyond doubt, have cancelled, I am clearly of opinion that the shipowners suffered no loss; and would be entitled at most to nominal damages. On this point the two experienced Arbitrators (one on each side) were quite agreed. I agree with them. I would allow the appeal and restore the Award, which adjudged that the claim of the owners failed.

LORD JUSTICE EDMUND DAVIES:

27. The two broad questions raised by this appeal may be thus stated;

    (1) On 17th July, 1965, did the charterers of the vessel Mihalis Angelos commit an anticipatory breach of their contract with the shipowners?

    (2) If they did, are the owners entitled to recover more than nominal damages?

28. By their admirably clear and helpful Award, the Arbitrators answered the first question in the affirmative. But they considered that the second question called for a negative answer and, as the charterers had tendered £5 at a sufficiently early date, they held that the owners' action failed. The learned Judge upheld their finding in relation to the first question but held that the second question must be answered in the affirmative and awarded the owners £4,000 damages.

29. While these two questions summarise the basic matters raised by this appeal, they have been considered before us under three heads, and it seems right that I should indicate my conclusions regarding each of them.

30. **Issue A.** Clause 1 of the Charter party of 25th May, 1965, stated that the Mihalis Angelos was *"expected ready to load under this Charter about the 1st July, 1965".* These words mean that, in the light of the facts known to the owner at the time of making the contract, he honestly expected that the vessel would be ready as stated and, further, that such expectation was based on reasonable grounds; ***Sanday v. Keighley. Maxted & Co.*** (1922, 27 Com.Cas., 296).

31. It is undisputed that in the present case the owner had no reasonable grounds to expect that his ship would be ready to load "*about 1st July, 1965*". That Clause 1 was a contractual term is not in issue, and is, in any event, established by ***Corkling v. Massey*** (1873 L.R., 8 C.P., 39 5). But what is in dispute is its legal nature. In other words, was it a condition of the contract, a breach of which entitled the charterers to repudiate? Or was it a term which, if broken, restricted the charterers to claiming damages? The owners urge the latter, and rely on ***Associated Portland Cement Manufacturers v. Houlder Bros.*** (1917, 22 Com. Cas.,279, at 281), where Mr Justice Atkin said:

"The obligation of the defendants to be ready to load on May 25th by reason of the definite alongside date having been given to the plaintiffs is not in my opinion one which it was of the essence of the contract for them to perform. I think the plaintiffs are merely entitled to recover such carnages as in fact they suffered by reason of the defendants' delay..."

But as to this Mr Mustill makes two cogent observations:

(a) It does not appear to have been a term of the contract itself that the ship should be ready to load on 25th May, and

(b) the quoted observation of Mr Justice Atkin was obiter, inasmuch as the only question there arising was as to damages for one day's delay, and whether the term was a condition or not made no difference, as the plaintiffs never sought to treat the term as a condition entitling them to cancel. This last-mentioned case may be contrasted with ***C. Mathisens v. Smith*** (1922, 13 LIL.R., 212), where the charter party contained the following clause as to the vessel's position: *"Now leaving today Birkenhead for Flushing for orders, and expecting to load June 28th-29th".*

Mr Justice Greer said: *"There can be no question that the words 'leaving Birkenhead for Flushing for orders' are not mere terms or an independent term of contract, but they are a condition of the contract which gives the charterer every right to say he can cancel... They were untrue, that is to say inaccurate, at the time of the signing of the Charter party, and on that ground the charterers were entitled to cancel, as they did, after they had ascertained the facts".*

32. It was strenuously argued by Mr Goff, for the owners, that, in the light of ***Hongkong Fir Shipping Co. v. Kawasaki Risen Kaisha*** (1962, 2 Q.B., 26), the long-standing dichotomy between conditions and warranties should no longer persist and that, as Lord Justice Diplock put it (at page 70):

*"There are, however, many contractual undertakings...which cannot be categorised as being 'conditions' or 'warranties'... Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty' For instance, to take Baron Bramwell's example in **Jackson v. Union Marine Insurance Co.Ltd**. (L.R. 10 C.P., 125 at 142) itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charter party, but if the breach is so prolonged that the contemplated voyage is frustrated, it does have this effect".*

33. In that case the Court of Appeal held that, although the owners were in breach of the clause in the charter party relating to seaworthiness, the vessel being unseaworthy on delivery by reason of an incompetent engine room staff, seaworthiness was <u>not</u> a condition of the charter party a breach of which entitled the charterer at once to repudiate. Lord Justice Upjohn said, at page 63:

"*It is open to the parties to a contract to make it clear either expressly or by necessary implication that a particular stipulation is to be regarded as a condition which goes to the root of the contract, so that it is clear that the parties contemplate that <u>any</u> breach of it entitles the other party at once to treat the contract as at an end. That matter has to be determined as a question of the proper interpretation of the contract*".

34. He then went on to recall Baron Bramwell's warning in ***Tarrabochia v. Hickie*** (1 H. & N., 183) against the dangers of too readily implying such a condition, but continued:

"Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would in my judgment be unsound and misleading to conclude that, being a warranty, damages is necessarily a sufficient remedy".

35. In other words, breach of a stipulation which is not a condition strictly so called may nevertheless be such as, in certain circumstances, to entitle the innocent party to treat the contract as at an end. In that case the Court of Appeal held that the initial unseaworthiness did not go so much to the root of the contract that the charterers were then and there entitled to treat the charter party as at an end, for, being due to the insufficiency and incompetence of the crew, the parties must have contemplated that in such an event the crew could be changed and augmented.

36. An undertaking as to seaworthiness being of obvious importance and yet, in the circumstances of the ***Hongkong Fir*** case, being found not to amount to a "*condition*" the breach of which entitled the charterers at once to repudiate, Mr Goff has urged how much less does clause 1 of the present charter-party import such a condition. With respect, I do not find such an approach convincing, for as Mr Justice Williams said in ***Behn v. Burness*** (1865, 3 B. & S., 751, at 759):

"For most charterers, considering winds, markets and dependent contracts, the time of a ship's arrival to load is an essential fact, for the interest of the charterer... Then if the statement of the place of the ship is a substantial part of the contract, it seems to us that we ought to hold it to be a condition, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend".

37. How ought this matter to be resolved? Notwithstanding the observations in the ***Hongkong case***, if the fact is that a provision in a charter party such as that contained in clause 1 in the present case has generally been regarded as a condition, giving the charterer the option to cancel on proof that the representation was made either untruthfully

or without reasonable grounds, it would be regrettable at this stage to disturb an established interpretation. The standard textbooks unequivocally state that such a clause as we are here concerned with is to be regarded as a condition: see, among others, Chitty on Contracts (23rd Edition, "General Principles" Volume, para.598) and Carver (Vol.3, para.355). Even more impressive is the fact that certainly from the 10th Edition and onwards of Scrutton on Charter parties the learned author and his successive editors have "submitted" that such a clause as we are presently concerned with is one the breach of which entitled the charterer to throw up the charter. In sale of goods cases the Courts have for many years held that an analogous provision imported a condition - see, for example, ***Finnish Government v. H_._Ford Ltd.*** (1921, 6 L1L.R., 188) and ***Macpherson, Train & Co. Ltd. v. Howard Ross Ltd.*** (1955, 1 W.L.R., 641) - and it is difficult to see on what ground a distinction should be drawn in the case of charter-parties.

38. On these grounds, and particularly having regard to the importance to the charterer of the ability to be able to rely upon the shipowner giving no assurance as to expected readiness save on grounds both honest and reasonable, I would be for holding that clause 1 in the present case imported a condition. That the owners were in breach of it is common ground. It is equally undisputed that, if, as I think, the circumstances entitled the charterers to repudiate on 17th July, the fact that they did so by reliance on an untenable plea of force majeure does not invalidate their act of cancellation. In the result, I would be for reversing the finding of the Arbitrators and of the learned Judge on the first question and for holding that on 17th July, 1965, the charterers were entitled to cancel the charter party, as they in fact purported to do.

39. If I am right in so holding, that is an end of this case. But, out of respect for the able arguments of learned Counsel, I feel I ought to express the views I have formed regarding the two other questions canvassed before us.

40. **Issue B.** This relates to the proper construction of clause 11 of the charter party, which provides as follows:
"*Should the vessel not be ready to load (whether in berth or not) on or before the 20th July '65 Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load, Charterers have the option of cancelling this contract, unless a cancelling date has been agreed upon*".

41. The question that here arises is whether, assuming that the charterers were not entitled to cancel for the owners' breach of clause 1, they could nevertheless cancel on 17th July because the circumstances (although unbeknown to them) were such that the Mihalis Angelos could not possibly be ready to load at Haiphong on 20th July? That they did not purport to invoke clause 11, either expressly or impliedly, is clear, but they nevertheless claim to have been entitled to do so. This point was not argued below. Having had the advantage of reading in advance what Lord Justice Megaw has to say on this issue, I am in agreement with the reasons he has given for holding that this question should be answered in a manner adverse to the charterers. I accept this view all the more readily because I think it is one likely to arise only with extreme rarity. Furthermore, to hold the charterers bound by the strict terms of clause 11 does them no harm; for if circumstances become known to them which make it clear or probable that the vessel cannot be ready to load on or about the specified date, it is always open to the charterers to communicate forthwith to the owners their intention to exercise their power of cancellation on the date fixed by the charter party and that they will meanwhile be making alternative chartering arrangements. It was submitted in argument that good sense demanded that the charterer should have the right to cancel before the date specified in the charter party, but, for the reason I have given, I see no reason for not adopting the contrary view expressed by Mr Justice Pearson in ***The "Helvetia - S"*** (1960, 1 IIL.R., 540, at 551) and by Mr Justice Roskill in ***The "Madeleine"*** (1967, 2 LIL.R., 224). The latter felicitously expressed all that I want to say on this aspect of the appeal in these words at page 241:
"For my part, I have great difficulty in seeing how, where there is an express right given to cancel if the vessel is not delivered by May 10th, an implied right can concurrently exist to cancel under the clause at some earlier point of time, namely when it becomes inevitable that the stated cancelling date will not be able to be attained by the ship... I would say that, however reasonable it might be to imply (such) a term...it cannot be said to be necessary to give business efficacy to the contract because the contract gives an express right to cancel at a certain date and not at any earlier time".

42. **Issue C.** The final issue raised in the appeal was this: Assuming that the purported cancellation by the charterers on 17th July was invalid, to what damages are the owners entitled? The starting point must, I think, be the finding by the Arbitrators that "*the charterers would beyond doubt... have cancelled the charter on the ground that the ship had missed her cancelling date*". Proceeding therefrom, they held that the owners were only entitled to be put in the position of having their ship on a charter which, as soon as she got to Haiphong, could legally and would actually have been cancelled. They accordingly concluded that, although they had found the charterers in breach of the charter party by an invalid purported cancellation on 17th July, 1965, the owners were entitled only to nominal damages in respect of what, in the circumstances, was none other than a worthless charter party.

43. I am bound to say that this conclusion has throughout seemed to me both reasonable and ineluctable. Indeed, I confess that I would have regarded the contrary view as unarguable had we not had presented to us by Mr Goff an argument so skilful that he actually succeeded in persuading Mr Justice Mocatta that his clients should recover £4,000 damages, a conclusion at which the learned Judge nevertheless arrived with confessed reluctance. The stages in Mr Goff's argument are these: In ***Frost v. Knight*** (1872 L.R., 7 Ex. Cas., 111), where the defendant had

promised to marry the plaintiff as soon as the defendant's father died but nevertheless married another during his father's lifetime, it was held that the plaintiff was entitled to recover damages while the father was still alive, Chief Justice Cockburn observing, at page 114, that:

44. "The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote".

45. Mr Goff next relies upon the observations of Mr Justice Devlin in ***Universal Cargo v. Citati (***1957, 8 Q.B., 401), founding himself largely on ***Hochster v. De la Tour*** (1853, 2 E. & B., 678), that a renunciation, when acted upon, becomes final and that it is essential to the concept of anticipatory breach that "the injured party is allowed to anticipate an inevitable breach... So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate the inevitable breach and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited".

46. Upon this basis Mr Goff skilfully constructed an elaborate submission that, since one is proceeding here on the basis that on 17th July, 1965, the charterers committed an anticipatory breach of the charter party, it was no longer open to them to assert that, on the very belated arrival of the vessel at Haiphong, they could invoke the right to cancel conferred by clause 11. In other words, one is driven to assume an actual breach of the charter party being committed by the charterers, and the submission made was that this involved assuming that the charterers, being obliged to load a cargo of apatite, wrongfully refused to load any cargo at all. Influenced by Mr Goff's persuasive argument, Mr Justice Mocatta said, at page 19-A:

"Once there is a renunciation and an acceptance of it, there is in the eyes of the law a breach and the contract is at an end, but the assumed (and, in law, inevitable) failure to perform is one at a date in the future when performance would have been required had there been no anticipatory breach. It is in relation to that assumed future breach of contract, which by law is anticipated, that damages will have to be assessed. Here, on the facts, the assumed breach can only be a failure to load; omission to exercise an option to cancel can never be a breach of contract",

47. I am afraid it has to be said, though with the greatest respect, that this approach leads to a result so manifestly unrealistic that there must surely be something wrong with it. And so there is, in my judgment. As Mr Mistill clearly brought out, the underlying fallacy is in assuming that the anticipatory breach was one which presupposes that the right to cancel will not be exercised - in other words, that you must always anticipate not only a breach, but the worst breach. But the true test in a case of anticipatory breach is: *"What would the position of the parties have been if the defendant had not wrongly announced his refusal to fulfil his part of the contract when the time for performance arrived?"* One must look at the contract as a whole, and if it is clear that the innocent party has lost nothing, he should recover no more than nominal damages for the loss of his right to have the whole contract completed. The assumption has to be made that, had there been no anticipatory breach, the defendant would have performed his legal obligation and no more. *"A defendant is not liable in damages for not doing that which he is not bound to do"* (per Lord Justice Scrutton in ***Abrahams v. Reiach*** (1922, 1 K.B. , 477, at 482), cited with approval by Lord Justice Diplock in ***Laverack v. Woods & Co.*** (1967, 1 Q.B., 278, at 293). In the light of the Arbitrators' finding, it is beyond dispute that, on the belated arrival of the Mihalis Angelos at Haiphong, the charterers not only could have elected to cancel the charter party, but would actually have done so. The rights lost to the owners by reason of the assumed anticipatory breach were thus certain to be rendered valueless. It follows from this that, in my judgment, the Arbitrators were right in holding that, in the circumstances, the claim of the owners for damages should be dismissed.

48. As to the appeal as a whole, for the reasons given in relation to Issue A, I concur in holding that it should be allowed and judgment entered for the charterers.

LORD JUSTICE MEGAW:

49. As a result of the admirable clarity and precision of the Arbitrators' Award, there is no doubt or ambiguity about the facts relevant to this appeal. They may be summarised as follows:

50. The charterers, who are the Appellants in this Court, and the owners of the vessel Mihalis Angelos, who are the Respondents in this Court, made a contract, in the form of a charter party, on 25th May, 1965. By that charter, the owners agreed that the vessel, "now trading and expected ready to load under this Charter about 1st July, 1965", should proceed to Haiphong, in North Vietnam, and there load 9,500 tons of a mineral called apatite and should carry that cargo to a port in Northern Europe. It was provided that lay days should not commence before 1st July, 1965. The first sentence of the Cancelling Clause, clause 11, reads: "Should the vessel not be ready to load (whether in berth or not) on or before the 20th July, 1965, Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading".

51. On 25th May, 1965, the date of the charter, the owners could not reasonably have estimated that the vessel could or would arrive at Haiphong about 1st July, 1965. The Arbitrators have expressly so found, and that finding of fact is binding and conclusive.

52. The vessel in fact reached Hong Kong on 23rd June, but the time of discharge of cargo there, which could have been expected to take 14 days, was substantially and unexpectedly prolonged. Discharge at Hong Kong ended on 23rd July, 1965.

53. Meanwhile other events had happened which have led to this litigation. The charterers found, possibly because of warlike activities in and over North Vietnam, that the intended cargo of apatite was not going to be available at Haiphong. On 17th July, 1965, the charterers, through their agents, informed the owners, through their agents, that they cancelled the charter party. They gave as their reason "*force majeure*". The owners, rightly as is now accepted, denied that the charterers were entitled to cancel the charter party for "*force majeure*", whether or not that phrase meant, or was intended to include, frustration of the contract. There was, it is now accepted, no case of frustration. The owners treated the charterers' intimation of cancellation as being a wrongful repudiation of the contract, and on the same day notified the charterers of their acceptance of it as terminating the contract, leaving the owners, so they claimed, with the right to recover damages because of the alleged wrongful repudiation by the charterers.

54. The owners sold the vessel in Hong Kong. They were, however, able to provide evidence which satisfied the Arbitrators that if, instead of selling the vessel, the owners had sought to employ the vessel on a substituted voyage to a North European port, in place of the cancelled charter party voyage, the owners would, as a result of the prevailing freight market, have suffered a loss of profit of £4,000 on that notional substituted voyage, as compared with the profit obtainable on the voyage which the charterers had refused to carry out.

55. The only other finding of fact of the Arbitrators to which reference need be made is this: *"We find that if the ship, after discharge at Hong Kong, had proceeded to Haiphong, the charterers would beyond doubt (there having, on this assumption, been none of this business of anticipatory repudiation) have cancelled the charter, on the ground that the ship had missed her cancelling date*". (Para.30).

56. The owners dispute the relevance of that finding. If relevant, its conclusiveness as a finding of fact by the Arbitrators cannot be disputed.

57. Three issues of law have been argued on this appeal.

58. The first is whether the charterers were entitled to treat the breach by the owners, now conclusively established by the Arbitrators' findings of fact, of the contractual term contained in the words *"expected ready to load under this Charter about 1st July, 1965*" as putting an end to their, and the owners', future obligations under the charter. Of course, before the breach could produce that result, the charterers had to notify the owners that they, the charterers, were treating the contract as at an end. But it has been accepted, for the purposes of this case, that such a notification by the charterers would not be ineffective merely because it was accompanied by a statement of the wrong reason, if in fact there was then in existence a right reason. Hence the charterers' notification of 17th July, 1965, would be effective, despite the fact that the purported cancellation was expressed to be on the basis of "*force majeure*", if in fact the owners' breach of the "*expected ready to load*" term of the charter entitled the charterers to treat the contract as terminated. If so, there could be no question of a wrongful repudiation by the charterers or of any damages being payable by them to the owners, as was claimed in the arbitration.

59. Therefore the crucial question on the first issue is whether the charterers were entitled, because of that breach, to treat the charter party as at an end.

60. It is not disputed that when a charter includes the words "*expected ready to load..*" a contractual obligation on the part of the shipowner is involved. It is not an obligation that the vessel will be ready to load on the stated date, nor about the stated date, if the date is qualified, as here, by "*about*". The owner is not in breach merely because the vessel arrives much later, or indeed does not arrive at all. The owner is not undertaking that there will be no unexpected delay. But he is undertaking that he honestly and on reasonable grounds believes, at the time of the contract, that the date named is the date when the vessel will be ready to load. Therefore in order to establish a breach of that obligation the charterer has the burden of showing that the owner's contractually expressed expectation was not his honest expectation, or, at the least, that the owner did not have reasonable grounds for it.

61. In my judgment, such a term in a charter party ought to be regarded as being a condition of the contract, in the old sense of the word *"condition*": that is, that when it has been broken, the other party can? if he wishes, by intimation to the party in breach, elect to be released from performance of his further obligations under the contract; and he can validly do so without having to establish that on the facts of the particular case the breach has produced serious consequences which can be treated as "*going to the root of the contract*" or as being "*fundamental"*, or whatever other metaphor may be thought appropriate for a frustration case.

62. I reach that conclusion for four inter-related reasons.

63. First, it tends towards certainty in the law. One of the essential elements of law is some measure of uniformity. One of the important elements of the law is predictability. At any rate in commercial law, there are obvious and substantial advantages in having, where possible, a firm and definite rule for a particular class of legal relationship: for example, as here, the legal categorisation of a particular, definable Type of contractual clause in common use. It is surely much better, both for shipowners and charterers (and, incidentally, for their advisers) when a contractual obligation of this nature is under consideration, and still more when they are faced with the necessity for an urgent decision as to the effects of a suspected breach of it, to be able to say categorically: *"If a*

breach is proved, then the charterer can put an end to the contract", rather than that they should be left to ponder whether or not the Courts would be likely, in the particular case, when the evidence has been heard, to decide that in the particular circumstances the breach was or was not such as *"to go to the root of the contract"*. Where justice does not require greater flexibility, there is everything to be said for, and nothing against, a degree of rigidity in legal principle.

64. Second, it would, in my opinion, only be in the rarest case, if ever, that a shipowner could legitimately feel that he had suffered an injustice by reason of the law having given to a charterer the right to put an end to the contract because of the breach by the shipowner of a clause such as this. If a shipowner has chosen to assert contractually, but dishonestly or without reasonable grounds, that he expects his vessel to be ready to load on such-and-such a date, wherein does the grievance lie?

65. Third, it is, as Mr Justice Mocatta held, clearly established by authority binding on this Court that where a clause *"expected ready to load"* is included in a contract for the sale of goods to be carried by sea, that clause is a condition, in the sense that any breach of it enables the buyer to reject the goods without having to show that the dishonest or unreasonable expectation of the seller has in fact been prejudicial to the buyer. The judgment of Lord Justice Bankes,in which Lord Justice Warrington and Lord Justice Atkin concurred, in ***Finnish Government v. H. Ford & Co.Ltd.*** (1921, 6 Ll.L.R., 188) is in point. The clause there was *'Steamers expected ready to load February and/or March 1920"*. Lord Justice Bankes, at page 189, said: *"I come to the conclusion that this clause is one containing a contract. It is a contract which is in its nature a condition...*".

66. That authority is not only binding on this Court, but is, I think, completely and desirably in conformity with the line of cases which have decided - and the law in that respect is now accepted as being beyond dispute - that a statement in a contract of sale as to the loading period is a condition in the sense which I have indicated. If the contract says "*loading to be during July*", the buyer can reject the goods if the loading was not complete until mid-day on 1st August. He is not limited to claiming damages; he is not obliged to show that he has suffered any damage.

67. It would, in my judgment, produce an undesirable anomaly in our commercial law if such a clause - "*expected ready to load"* - were to be held to have a materially different legal effect where it is contained in a charter party from that which it has when it is contained in a sale of goods contract. True, in the latter case the relevant "*expectation"* is that of the seller of the goods, who may himself be the charterer; whereas in the former case the relevant "expectation" is that of the shipowner. But I do not see that that fact is sufficient to warrant the making of a distinction between the two. True, also, as was stressed by Counsel for the owners, the charter party will almost invariably include a cancelling clause; and it is argued that that fact justifies the drawing of a distinction. Again, I think not, for various reasons. One of them is that the date before which the cancelling clause cannot be exercised (this involves the argument for the owners on the second issue, to be considered hereafter) is itself normally fixed by reference to the date of expected readiness to load, and on the assumption that that is an honest and reasonable expectation.

68. The fourth reason why I think that the clause should be regarded as being a condition when it is found in a charter-party is that that view was the view of Lord Justice Scrutton, so expressed in his capacity as the author of Scrutton on Charter parties. The 10th Edition of the work, for which the Lord Justice was personally responsible, contained the same expression of opinion as is still to be found in the 17th Edition at page 79, under the head *"Case 4",* as follows: *"A ship was chartered 'expected to be at X about the 15th December... shall with all convenient speed sail to X'. The ship was in fact then on such a voyage that she could not complete it and be at X by December 15th. Submitted, that the charterer was entitled to throw up the charter*".

69. In the footnote to that passage reference is made to, amongst other cases, Corkling v. Massey (1873, L.R., 8 C.P., 395). The facts in "*Case 4"* are the facts of ***Corkling v. Massey***. In ***Corkling v. Massey*** the question whether the clause operated as a condition was left undecided by a Divisional Court. Lord Justice Scrutton, in the sentence "*Submitted...",* indicated how he would have decided it.

70. Mr Justice Mocatta reached a different conclusion on this issue because, I think, he considered that some observations of Lord Justice Upjohn in ***Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*** (1962, 2 Q.B., 26, at 63) with a citation from the judgment of Baron Bramwell in ***Tarrabochia v. Hickie*** (1 H. & N., 183), were at least persuasive authority in that direction. Those observations were very general in their effect. I do not think, myself, that Lord Justice Upjohn would have intended that they should be treated as derogatory from the principle applicable to the present type of case to be deduced from a passage in the judgment of the Exchequer Chamber in ***Behn v. Burness*** (1863, 3 B. & S., 751 at 759) which my Lord Lord Justice Edmund Davies cited in his Judgment and which I need not, therefore, repeat. It is true that that case was concerned with the words *"now in the port of Amsterdam*". But in my opinion the principle stated is applicable.

71. If this first issue be decided, as I think it should be decided, in favour of the charterers, then the appeal succeeds and the other two issues do not need to be decided. Nevertheless, as they were argued fully, it seems desirable that they should be determined by this Court.

72. The second issue is a question of construction of the cancelling clause, clause 11, The charterers say that even if they were wrong on the first issue, they were entitled, on 17th July, 1965, to exercise their option under clause 11 to cancel the charter party. True, they purported to cancel because of "*force majeure*"; but the fact that they gave the wrong reason is, they say, not relevant. The owners say that the charterers cannot rely upon clause 11 for two

reasons. First, the clause by its terms does not permit of the exercise of the option before 20th July; seconds the purported cancellation of the contract could not be treated as an exercise of the option under clause 11 since the charterers expressed their notification of purported cancellation as being on a wholly different ground.

73. We do not have the advantage of the views of Mr Justice Mocatta or of the Arbitrators on this issue, since the charterers reserved their argument below and adduced it for the first time in this Court. Their reason for taking that course was that there are decisions, or dicta, adverse to them by Mr Justice Pearson in ***The "Helvetia - S"*** (1960, 1 Ll.L.R., 540, at 551) and by Mr Justice Roskill in ***The "Madeleine"*** (1967, 2 Ll.L.R., 224, at 241 et seq,).

74. Respectfully disagreeing on this issue with the Master of the Rolls, I am comforted by finding myself in agreement with Lord Justice Edmund Davies. I am of opinion that the first answer given by the owners must be right. If it were wrong, the second answer would not avail the owners. The construction of the clause proposed in the first answer, which accords with the view expressed in the cases I have mentioned, which, whether they be dicta or more than dicta, are, I respectfully think, right. There is nothing in the different wording of the clauses in those two cases which affects the applicability of the reasoning to the present clause.

75. The owners' proposition is quite simple. The clause begins with the words; *"Should the vessel not be ready to load... on or before the 20th July 1965",* Those words govern and control the clause. The charterers are given an option, for their own benefit. This option is exercisable, and exercisable only, when the condition is fulfilled: namely, that on 20th July the vessel is not ready to load.

76. The charterers' contention is that the opening words should be interpreted as though they read: "*Should the vessel not be ready to load, or should she be in such a position that she will not be ready to load, on or before 20th July 1965...*".

77. On 17th July the vessel was still unloading at Hong Kong. There was no possibility, as is now known, of her being able to reach Haiphong by 20th July. Hence the charterers (though in fact it did not occur to them to do so) could lawfully have exercised their option under this clause, even though 20th July had not yet come.

78. It might perhaps be permissible to give the charterers' construction to the words of the clause, though I think that it would properly be described as a bold construction, if so to do would make the clause a substantially more sensible instrument for carrying out the general purpose for which it was introduced. But I think that Counsel for the owners is right in his submission that the bold construction - the reading in of the words which are not there - does not have that effect. It involves reading in also a thought which was not present to the minds of the parties and which in my view is not necessary to give the clause sensible legal and practical effect. If the charterers are confident that the vessel is going to miss her cancelling date, and for some reason are minded to put an end to the charter party before that date has arrived, there is nothing whatever to prevent them from asking the owners to agree that the charter party should be cancelled. That does not require clause 11. If the owners do agree, clause 11 neither helps nor hinders. There is no need to read into it words that are not there to achieve that which can be achieved by mutual consent. If the owners do not agree, is there any possible advantage to the charterers in reading these suggested words into the clause? In the absence of agreement by the owners, the charterers are no better off as a result of the re-writing of the clause. Without any forced construction of the clause, the charterers can, if they are confident of the non-arrival of the vessel by the cancelling date, go ahead and make whatever arrangements they wish in anticipation of exercising their option under the clause when the cancelling date arrives. Of course, if they prove wrong in their forecast of the vessel's arrival, and if the vessel in fact, after all, makes the cancelling date, the charterers will be in trouble if they have already made other arrangements. But that is not a good ground for giving a bold interpretation to the clause. It is really in only a very odd and exceptional case, such as the present, that the suggested extension of meaning could be of any importance; and here, if it were important, it would only be of importance because the charterers misinterpreted their rights under other provisions of the charter party. No conceivable harm would have been done to them if they had waited until 20th July and then invoked the cancelling clause. The bold construction is called for by the charterers, not because the natural construction leads to practical difficulty, but in order to try to save themselves from the consequences of their own error.

79. I think the owners are right on the second issue.

80. The third issue is as to damages, assuming that there was, as I think there was not, a breach of contract by the charterers. The owners suffered no loss. The Arbitrators held that their entitlement was nominal damages only. Long before the arbitration took place, the charterers had tendered £5 to the owners in full settlement of their claim. The Arbitrators expressed their conclusion in this way in paras.29 to 31 of the Award:

> *"(29) We think the right view is that when a contract is repudiated, the repudiation accepted, the innocent party can truly say the contract is at an end: its performance is no longer binding but it (or its ghost) must survive as the datum line for measuring the damages: the innocent party is entitled to be put, financially, in the same position as, but in no better position than, that in which he would have been if the contract had not been repudiated but had come on for performance: and his claim for damages must be based on that method of performing the contract which would have been least profitable to him.*
>
> *"(30) We find that if the ship, after discharge at Hong Kong, had proceeded to Haiphong, the charterers would beyond doubt (there having, on this assumption, been none of this business of anticipatory repudiation) have cancelled the charter, on the ground that the ship had missed her cancelling date.*

"(31) We hold in those circumstances that the owners are only entitled to be put in the position of having their ship on a charter, which, as soon as she got to Haiphong, could legally have been, and would have been, cancelled: and are entitled to nominal damages accordingly and no more".

In my Judgment, the Arbitrators' conclusion is right, as are also their reasons.

81. The contrary view was put forward in a most attractive argument by Counsel for the owners. It was an argument which persuaded Mr Justice Mocatta reluctantly to the conclusion that the law is such as to require the award of £4,000 damages in a case such as this, even though not one penny of damage was suffered.

82. When a logical argument leads to such a conclusion, one is bound to consider whether the premise is sound. The premise here, based on some passages in the judgment of Chief Justice Cockburn in ***Frost v. Knight*** (1872, 7 Ex.Cas., 111) and in the judgment of Mr Justice Devlin in ***Universal Cargo Carriers v. Citati*** (1957, 3 Q.B., 401), is that where there is an anticipatory breach of contract the law assumes that when the time for performance of the contract by the respondents would have come the repudiator will commit a breach of the contract. The law assumes that there will be a breach. Hence it is not open to the repudiator to say that no breach would then have taken place, even though there is a term of the contract which provides that, in the events which would necessarily have happened, he would have been excused further performance under a term of the contract.

83. It would follow that if a contract of sale provided for the delivery of a maximum of 5,000 tons and a minimum of 1,000 tons, the seller, having committed an anticipatory repudiation which had been duly accepted, would be liable for damages on the minimum quantity of 1,000 tons only; whereas if the option were for the seller to deliver no goods at all in certain events, which events, it could be proved, were at the date of the repudiation bound to happen, the seller would be liable for damages on the basis of non-delivery of the whole 5,000 tons.

84. In my view, where there is an anticipatory breach of contract, the breach is the repudiation once it has been accepted, and the other party is entitled to recover by way of damages the true value of the contractual rights which he has thereby lost, subject to his duty to mitigate. If the contractual rights which he has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, pre destined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those pre destined events.

85. I would allow the appeal. I would answer the questions in para.34(b) and (c) of the Award in the affirmative, and, in the absence of agreement between the parties, remit the matter to the Arbitrators as they request, so that they can bring the matter to finality.

(**Appeal allowed**; Questions in para.34(b) & (c) of Award answered in affirmative and, in absence of agreement, matter remitted to Arbitrators. Appellants to have costs in Court of Appeal and below; leave to appeal to House of Lords).

MR M.J. MUSTILL, Q.C. and MR M. SAVILLE (instructed by Messrs. Hill,Dickinson & Co.) appeared on behalf of the Appellants (Respondents).
MR R. GOFF, Q.C. and MR B. DAVENPORT (instructed by Messrs. Richards, Butler & Co.) appeared on behalf of the Respondents (Claimants).