JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE : Commercial Court. 9th June 2008

1. By a charterparty on an amended Shelltime 4 time charterparty form ("the charterparty"), the Defendant owners ("the Owners") chartered to the First Claimant ("the Charterers") the vessel "AILSA CRAIG" ("the Vessel") for a period of 24 months +/- 30 days in the Charterers' option commencing from the date and time of her delivery. The charterparty is evidenced by a number of documents beginning with an e-mail recap of 31st May 2007. It is expressly subject to English law. The Second Claimant was guarantor of the charterparty.

2. The charterparty provided, by clause 1, that "*at the date of delivery of the vessel under this charter*" the Vessel should have a number of characteristics (such as that she should be classed RRS, be fit in every way to carry crude petroleum and/or its products, etc.) and, by clause 2, that "*At the date of delivery of the vessel and throughout period* [sic] *under this charter*" she should fulfil certain other criteria. Under clause 3 the hire was to commence from the time and date of delivery of the Vessel.

3. Clauses 4 and 5 of the charterparty provided as follows:

   "4. The vessel shall be delivered by Owners at a port in WAF- Ghana/Nigeria range in Charterers' option and redelivered to Owners at a port in WAF- Ghana/Nigeria range in Charterers' option.

   5. The vessel shall not be delivered to Charterers before 25th September 2007 and Charterers shall have the option of cancelling this charter if the vessel is not ready and at their disposal on or before 31st October 2007. Notices: delivery/redelivery 30-25-15 days estimated then 10-7-5-3-2-1 definite days notice. All times are to be based on Universal Time (UT)."

4. According to the Owners the background of the charterparty, and its cancellation, is as set out in the following five paragraphs. I set this out, not by way of findings of fact (Charterers dispute most of what is said), but in order to indicate the nature of the dispute that has arisen.

5. The charterparty was agreed in the context of discussions between the Owners and the Charterers from about 16 November 2006 to 25 May 2007, about the modification of the Vessel so as to provide floating storage for two types of petroleum products, namely, segregated parcels of clean petroleum products ("CPP") and dirty petroleum products ("DPP"). Prior to that time, the Vessel had only been employed in the carriage and storage of DPP. The Owners were to bear the costs of the complex modifications necessary for this purpose on the basis that the Charterers would charter the Vessel for 2 years, for use as floating storage capacity for CPP and DPP products off West Africa.

6. From about January 2007 to March 2007, the Vessel was at Tema, Ghana, for ultrasonic testing in preparation for her Special Survey. Extensive consultation took place between the Charterers and the Owners in respect of the final modification works. By 14th March 2007, a finalised diagram of the split between the Vessel's DPP and CPP tanks had been produced and, on the same day, the Charterers agreed to this plan as the basis of the works.

7. On 25th May 2007, the Vessel left Tema, where up until this point she had remained, for Piraeus, Greece; where she was due to arrive one month later for dry-docking, repairs and the conversion works. It is common ground that she arrived at Piraeus in June 2007.

8. The charterparty was subsequently amended, following the Charterers' visits to the Vessel to assess the works in progress. Following such visits, various modifications were agreed and, on or about 18th September 2007, the Charterers and the Owners agreed that the laycan would be amended to allow the delivery date to be extended up to 15th November 2007. It is common ground that this extension was agreed.

9. The Owners' case is that significant modifications were requested by the Charterers on or about 18th October 2007 when Charterers and the Owners agreed that the forward bunker tank should be converted to CPP storage, after cleaning. This involved new works which would take about an extra 14 days to carry out. It was agreed that the works would be carried out at Piraeus for safety reasons. The Owners commenced these works. Given the voyage time to West Africa, it was obvious to the parties that the Vessel would inevitably miss the revised cancelling date, whether these works were "new" or "additional" (as the Owners say) or not (as the Charterers say).

Cancellation

10. On 16th November 2007, the Charterers sent a notice of cancellation to the Owners on the basis that the Vessel, which was still in Piraeus, had not been delivered. It is common ground between the parties (a) that the Vessel was not delivered to the Charterers by 15th November 2007; and (b) that the Charterers did not at any point nominate a delivery port within the delivery range. It is not suggested, for the purposes of the preliminary issue, that the non-delivery of the vessel by 15th November 2007 was the result of any breach of contract on Charterers' part: c.f *The Shipping Corporation of India Limited v Naviera Letasa S.A.* [1976] 1 Lloyd's Rep 132.

11. On 8th February 2008 Cooke, J., ordered a trial of the following issue: *"Whether the Applicants [i.e. the Charterers] were not entitled to cancel the charterparty by reason of any absence of nomination of a delivery port."*

12. By a consent order dated 15th February 2008 it has been agreed that it is to be *assumed* for the purpose of the preliminary issue only that any nomination of the delivery port would have been futile because the vessel was not and could not have been ready and at the Charterers' disposal in the delivery range by the cancelling date. This is without prejudice to either party's right to raise any factual issue after the preliminary issue has been determined.

The parties' submissions

The Charterers

13. The Charterers have three principal submissions.

14. Firstly, they contend that the charterparty did not oblige them to nominate a delivery port at all. It gave them an option, entirely for their benefit, to specify a port within the range. But it did not oblige them to exercise it. If, as happened, Charterers failed to nominate a port, it was open to Owners to deliver the vessel at any port within the contractual range.

15. Secondly, they contend that, upon the assumption that they were bound to nominate a delivery port, the time for the fulfilment of that obligation never arose. This is for two reasons. The first is that they were not obliged to nominate any port when they had not themselves received from the Owners any notice of estimated delivery. The second is that they were only obliged to nominate a delivery port by the time at which the Owners needed to know the identity of the delivery port in order to avoid delay to the vessel. If the vessel was coming from the west that would be when she was at or near Cape Palmas off the Liberian coast ("the deviation point"), after which her future course would depend on the delivery port chosen. In the event the vessel never came anywhere near the deviation point.

16. Thirdly, they contend that they were not bound to nominate a delivery port if any such nomination would be futile (because, whatever delivery port was nominated, the Vessel would never have been able to get there before the cancelling date).

17. Since Charterers had no obligation to nominate a delivery port no question can arise of any nomination being a condition precedent to the exercise of any right of cancellation.

Readiness

18. The Charterers also submit that, even if the obligation to put the Vessel at the Charterers disposal requires, as a pre-condition for its existence, a nomination of the delivery place the requirement to be "ready" does not. Readiness involved the Vessel being in the condition specified in paragraphs 1 and 2 of the charterparty and she was not. The Owners have a number of responses to that. The question as to who is right on this topic does not arise under the preliminary issue.

The Owners

19. The Owners contend that the structure of the charterparty is such that the Charterers have an option, which they are bound to exercise, to nominate a delivery port within the range. That nomination had to be made before Owners' 30 days estimated notice of delivery, since without knowing what the delivery port was to be it would be impossible for Owners to produce a bona fide estimate, on reasonable grounds, of when the vessel would arrive there. The Ghana/Nigeria range is large; and the Vessel's warranted speed was only about 7 knots. I was told that to traverse the distance from one end of the range to the other would take about 4 days.

20. Once Charterers exercise their option by nominating a delivery port, their choice determines the parties' contractual obligation as to place of delivery and is, accordingly, irrevocable. When, *but not before*, nomination has occurred the Owners come under an obligation to deliver the Vessel, for which the Charterers then become under an obligation to pay hire. In the absence of any obligation to deliver there can be no question of cancellation for non delivery.

The authorities

21. The significance or otherwise of a failure to nominate on a right of cancellation under a charterparty has been the subject of consideration in two cases which reached the Court of Appeal, the former not being cited in the latter.

Hudson's Bay

22. In ***Hudson's Bay Co v Domingo Mumbru Sociedad Anonima*** [1922] 10 Lloyd's Rep 476 a vessel was chartered at a very high rate of freight to proceed to the River Plate in ballast and "*with all convenient speed after arrival at … an Argentine port … [to] proceed as ordered by the charterers … to the undermentioned ports or places*". Clause 3 provided that the steamer should load at "*one or two* ***safe loading places*** *… in the port of Buenos Ayres or La Plata at Charterers' option.*'". Clause 11 provided that orders for the first **loading place** were to be given within four hours after receipt of the Master's application to the charterers or their agents in Buenos Ayres. Clause 12 provided that "*should the steamer not be ready to load by 6 p.m. on May 31 1920, Charterers shall have the option of cancelling this charterparty*".

23. On the morning of 31st May 1920 the vessel was in the roads, but not in the loading area, of the port of Buenos Ayres.[1] The Master went ashore and at 1045 gave notice of readiness and asked for orders. He did not, however, return to his vessel. The charterers delayed giving orders for the full four hours and then gave the Master orders to proceed "*to the port of Buenos Ayres*". Because the tug service broke down the Master was delayed in re-boarding his vessel. By the time he got to her it was impossible for the vessel to reach the loading area by 6 pm. The charterers then cancelled the charter.

24. Bailhache J and the Court of Appeal held that, in order for the vessel to be "*ready to load*" she had to be an arrived ship; and she was not. This was because she had not arrived in the roads *at* Buenos Ayres i.e. within the port of Buenos Ayres but only in the Roads *of* Buenos Ayres, some 10-20 miles away.

[1] At a spot described by Atkin, L.J., as one "*where I think no cargo of wheat has been loaded within the last generation*".

25. In the Court of Appeal the owners raised a new argument. They contended that the charterers' order to proceed to "*the port of Buenos Ayres*" was not a proper order under the charter because what was required under clause 11 was an order designating the actual loading place within the port.

26. Bankes, L.J., did not decide the point because he held that, even assuming the owners were right, and what was required was an order designating the actual loading place: *"... that is to say, a loading spot in the port …if the charterers had complied with that, still the captain could not have saved his cancelling date. For these reasons I think the view taken by the learned judge was right".*

27. Atkin L.J., characterised the only question remaining for determination as this: *"Are the shipowners right when they say: True it is we were not ready to load on May 31, but that was because you had not given us orders to load at a safe loading place and that was a condition precedent to our obligation to be ready to load by May 31 1920"*

28. In the result he was satisfied that the requirement to order the vessel to a safe loading place was met by ordering her to that place in the legal area of the port where vessels usually lie and in which she would be an arrived ship. But he added: *"I do not in any way dissent from the other point of view which appeals to my Lord, namely, that here at the time the notice was given by the charterers, the ship, in fact, was unable to proceed to any more definite place of loading, be it a dock or be it a berth, and that, therefore, I suppose it would be said that an order to load at a loading place was excused by reason of the ship [being] in the place where she was making it evident to the charterers that it was impossible for her to perform the orders given".*

29. Lord Justice Younger held, by reference to clause 9 which provided that the vessel was to "*shift at her own expense to a second safe shoot or berth in any rotation at each loading place if required by the charterers*", that: *"… a safe loading place in the port within the meaning of this charterparty and the readiness of the vessel to load at such place, would be readiness to load at a place within the port being safe to which she could be directed and had been directed by the charterers. It is clear that in this instance she had not been so directed to any such place; and it might have been that that would have been an answer to the particular case made against them by the charterers; but, as I have said, I agree with my Lord in thinking that even if she had been so directed on this 30th May to a particular berth or shoot in the harbour of Buenos Ayres by the charterers instead of being merely directed generally to the harbour itself, she would have been quite unable to comply with that direction within the time limited for the purpose and accordingly it would have made no difference in the result whether the direction given had taken that form: the result would have been the same as it is now having regard to the form in which the direction was, in fact, given, and, accordingly, on that ground, I am of opinion that the appeal should be dismissed".*

30. I take Younger, L.J. to have been holding that it was incumbent on the charterers to order the vessel to a place where she could load, and not just to a place where she could lie;[2] and that whilst, in other circumstances, that might be an answer to the charterers' claim to be able to cancel, the charterers' failure to give such an order was in fact no answer because it would have made no difference if such an order was given. Even if a contractual nomination had been given, the vessel could never have been delivered on time.

31. The parties are divided as to what exactly this case decides by way of ratio. Mr Steven Berry, Q.C., for the Owners, submits that it decides that, if Owners contend that their failure to deliver was caused by the Charterers' breach in failing properly to nominate and that they are excused from delivering on that account, Owners' contention will fail if they do not show that the breach had that effect. The case has, therefore, no relevance here, where no such causative breach is alleged. Mr Luke Parsons, Q.C., for the Charterers, contends that the case decides that, unless Owners' failure to deliver was caused by Charterers failing to make a proper nomination, such failure does not preclude cancellation.

32. As it seems to me, Lord Justice Bankes declined to decide whether charterers were in breach in not making a proper nomination, and Lord Justice Younger decided that the charterers were in breach. But both of them decided, as a matter of ratio, that, if the charterers were in breach, it made no difference on the facts (in the sense explained above), and because it made no difference, charterers still had the right to cancel. Lord Justice Atkin decided that the charterers were not in breach, but, if they were, he reached the same conclusion as the majority; but for him that conclusion was obiter.

33. What is less clear is the precise reason why the fact that the actual or assumed breach made no difference meant that charterers still enjoyed a right of cancellation. One possibility is that the obligation to nominate is not a condition precedent to the obligation to deliver, so that a failure to nominate can only give rise either to a claim in damages, or a claim to be excused from performance if owners' non-performance is caused by the breach. Neither claim is available if the non performance has no causative effect on the owners' ability to tender timeous delivery. Another is that a proper nomination is a condition precedent to any right to cancel; but that there is no obligation to make a nomination, where any nomination would be futile because the owners could never effect timeous delivery at the nominated place whatever nomination had been made. Lord Justice Atkin appears to have taken the latter route. The other two Lords Justices may have taken either route, although their reference to the absence of a valid nomination making no difference, without any express reference to any condition precedent, may mean that they took the former.

[2] I do not take the opening paragraph of his judgment to mean that he agreed with Lord Justice Atkin's view on the first question.

"The North Sea"

34. The issue arose again in ***Georgian Maritime Corporation v Sealand Industries (Bermuda) "The North Sea"*** [1997] 2 Lloyd's Rep 324 in which *Hudson's Bay* was not cited.

The facts

35. In that case the "North Sea" was chartered under a time charter which provided that the:

"Vessel shall be placed at the disposal of the Charterers at Charterers' berth Hong Kong or dlosp[3] Hong Kong in Charterers' option…as the Charterers may direct…. Vessel on her delivery shall be ready to receive container [sic] *with clean-swept holds and tight, staunch strong and in every way fitted for container service …"*

"14. … should vessel not have been delivered on or before 19th August 1995 12.00 hours Charterers or their agents shall have the option of cancelling this Charter…"

36. On August 9th 1995, when the vessel was at Hong Kong, the Master gave notice of intention to deliver her under the charter at 10.00 on August 10th. Various requests were then made to the charterers inquiring where they wanted the vessel delivered but no instructions were forthcoming. The vessel was at anchorage on August 10th and remained there. She neither went to charterers' berth nor steamed from the pilot station. Since the vessel was at neither of those spots the charterers cancelled.

Before the arbitrator

37. Before the arbitrator the charterers maintained that, since on 10th August the vessel was at neither spot mentioned in the charterparty, they were entitled to cancel. They also claimed an entitlement to cancel on the basis that the vessel was not "*ready*" because she had on board a lesser quantity of bunkers than that called for on delivery under a particular clause of the charter. The arbitrator rejected the first ground on the basis that the charterers' failure to nominate the place of delivery prevented them from relying on the owners' failure to deliver at either place. But he accepted that the charterers were entitled to cancel on the second ground.

First instance

38. Before Mance J, as he then was, counsel for the charterers accepted the arbitrator's conclusion on the first ground. Counsel for the owners submitted that the arbitrator should have gone further and held that charterer's obligation to select the place of delivery was a pre-condition to owners' ability and duty to deliver, without which no question of cancellation could arise. To that the charterers responded firstly, that, in the absence of nomination by them, the vessel fell to be treated as placed at their disposal as and where she lay at anchorage in Hong Kong. Secondly, and alternatively, they submitted that, even if charterers had selected a place for delivery, the vessel could still not have been delivered there in time with the specified quantity of bunkers so that the charterers would have the right to cancel anyway. The operation of the canceling clause should not, they submitted, depend upon charterers identifying a place of delivery if there was no point in doing so.

39. Mance, J, held that :

"The making of delivery depends … on the charterers identifying where delivery is to take place. The only charter-party agreement is that time runs from the placing of the vessel at charterers' disposal at the place so selected by the charterer. There is no basis on which even owners, still less the charterers when they are in default of selection, can claim to treat delivery as having been made on any other basis or at any other place… The express language… requires delivery to be effected by placing of the vessel at the charterers' disposal at a place to be selected by the charterers. ***Unless and until charterers select such a place, owners cannot deliver in accordance with the charter*** *…In the present case, the time for delivery never arose, and there is thus no basis on which charterers could assert, in the context of the cancelling clause, that the vessel was due to be, but had not been, delivered.*

It does not assist charterers to argue that, if they had identified a place for delivery, owners would not have delivered the vessel in time and in the right condition at that place. The operation of the cancelling clause depends on delivery actually being due and not being made when due. Charterers' contention that they were under no obligation to select the place for delivery, since it was clear that owners would not be able to deliver in the right condition and in time at any place so selected, has no basis. In practical terms, it would lead after the event to speculative arguments whether charterers were right about this. ***In principle, there is no way in which charterers were relieved of their obligation to identify the place for delivery, merely because they considered, however correctly, that owners would be unable to effect delivery there by the time specified in the cancelling clause…….***

…..In the present case, charterers' failure to identify any place for delivery means in my judgment that delivery never became due at all, and charterers' claim to invoke the cancellation clause was unjustified"

40. The Owners rely on this passage as showing (a) that the obligation to deliver, and any entitlement to cancel on account of non-delivery, is dependent on the Charterers nominating a place of delivery; and (b) that, in this context, there is no principle of futility.

41. Mance J considered that the appeal succeeded on the point raised by counsel for the Owners. But he also considered the bunkers point for the sake of completeness. In other words he regarded his decision on the nomination point as the ratio of his decision. As to the bunkers point, he accepted that clause 14 which applied "*should vessel not have been delivered*" referred to delivery in accordance with lines 34 to 45 of the charter which required her to be "*ready to receive container* [sic] *with clean-swept holds and tight, staunch, strong and in every*

[3] i.e. dropping last outward sea pilot.

way fitted for container service etc". But there was no breach of this requirement where all that was alleged was that the vessel did not have the full quantity of bunkers for which the charter provided.

42. It is material to note that by 10th August the time for the charterers to nominate the place of delivery had undoubtedly arisen.

On appeal

43. The charterers appealed to the Court of Appeal, where, again *Hudson's Bay* was not referred to. The only reasoned judgment was given by Hobhouse, L.J., as he then was. He took the bunkers point first and approved the judge's conclusion on it. Having done so, he regarded the nomination point as unnecessary to the determination of the appeal. This was because, on either of the two ways in which the charterers' put their case, it was necessary for them to succeed on the bunkers point.

44. However, Hobhouse, L.J., considered the nomination point. He said, (possibly unjustifiably), that the judge had implicitly introduced a concept of fault on the part of the charterers into the analysis. He described the judge's view on the point as presenting "*serious difficulties*". It would, he said:

"…apply where a vessel is clearly never going to be able to meet her cancelling date and would require the charterers to go through a futile and premature exercise of nomination which everyone knew that the vessel would be unable to comply with. If the Charterers were right to say, in the present case that the vessel was not in a deliverable state….. and that was so regardless of whether she was given orders to proceed to one or other of the places referred to in the charterparty…. it is hard to see upon what basis the failure to give the requisite order in exercise of the option could affect the right to cancel for lack of readiness"

45. He went on to say that he was not persuaded that the judge was right in relation to the charter under consideration or that his approach was correct. He pointed out that the vessel was already in Hong Kong and was required to be delivered in Hong Kong. So:

"It can strongly be argued that if the charterers do not exercise their option to direct the vessel to one or other place within Hong Kong delivery in Hong Kong suffices. They have waived their right to require the vessel to proceed (for their own benefit) to one or other of the two places first, or have precluded themselves from insisting that the vessel do so. This is not a point of general principle; it is simply a conclusion which is capable of being supported on the particular terms and circumstances of this charter."

46. He said that it was not necessary to express a concluded view about the nomination point other than to say that he was not persuaded that the judge's view was correct. Lord Justice Waller and Lord Justice Robert Walker gave concurring judgements

Discussion

47. Against that somewhat opaque background it is necessary to return to first principles. What falls to be interpreted are the terms of this charterparty. That is prima facie to be done by taking the ordinary and natural meaning of the words used as they would be understood by reasonable business men in the position of the parties and in the context in which the agreement was made. Part of that context is that the parties to the charterparty were engaged in a venture, which, if it was to work, involved a degree of co-operation between them in the sense that the action to be taken by one party would be dependent on action previously taken, or information supplied, by the other.

Obligation to nominate?

48. The charterparty required the Owners to deliver the vessel at a port in the Ghana/Nigeria range. The Charterers were to have the option to choose which of the several ports in that range it was to be. Until they did so the Owners could not know where that would be, and, therefore, how they were to comply with their contractual obligation to deliver the vessel.

49. It seems to me that owners and charterers would ordinarily understand that charterers' option to select the delivery port was an option that they were *obliged* to exercise. The expectation of the parties is that the charterer *will* declare where the vessel is to be delivered, not that he *may* do so. Further, the nomination is necessary in order to complete the definition of the parties' contractual obligations. As HH Judge Diamond, QC, put it in ***The "Jasmine B", Bulk Shipping v Ipco Trading*** [1992] 1 Lloyd's Rep 39,42:

"… in the absence of any special provision in a charterparty, the effect of the nomination of a loading or discharging port by the charterer is that the charterparty must thereafter be treated as if the nominated port had originally been written into the charterparty and that the charterer has neither the right nor the obligation to change that nomination".

50. I regard it as unlikely that the parties to this charterparty contemplated that the vessel could properly be left without orders from the Charterers as to where the charterparty service should begin, with the Owners being left to choose one of the several ports along the coast of Ghana and Nigeria, including, presumably ports where the Charterers had no business or agents, as the port of delivery. It is no doubt possible for the parties to agree that the charterers can choose the place of delivery, if they wish, but that they do not have to. Hobhouse, L.J. considered that that was strongly arguable in the particular case of the charterparty in ***The "North Sea"***. But no case has been cited to me in which such an argument has successfully been raised. The argument was put forward in *The "North Sea"* as a means of avoiding having to hold that the charterers must make a premature and futile nomination. There are, however, other means by which that result can be avoided. Further, in *The "North Sea"* the vessel was to be delivered at one of two places in Hong Kong. It would be distinctly more plausible to infer that

the parties had not required the charterer to choose where the vessel should be delivered in Hong Kong than that they had not required the Charterers to make any choice between all the ports of Ghana and Nigeria.

51. Accordingly, as I hold, Charterers in the present case were prima facie obliged to nominate the port of delivery.

Time for Nomination

52. The next question is: when did that obligation arise? I do not accept the Owners' submission that the Charterers were bound to nominate the delivery port before receiving Owners' 30 days notice of estimated delivery. The commercial purpose behind giving the Charterers the option to nominate the delivery port must have been to give them a degree of flexibility in the selection of port, which does not fit well with an obligation to choose the delivery port more than 30 days before the cancelling date and before the Vessel sets off on the approach voyage. Indeed, if the Owners' contention be right, it is difficult to see why the notice should not be required to be given more than 30 days before 28th September, the commencement of the laydays, the first of which is the date upon which the Owners are entitled to deliver the Vessel.

53. What, in my judgment, the parties contemplated was that the Vessel would set off for the Ghana/Nigeria range, and that the Charterers, if they had not already done so, would nominate a delivery port as the Vessel approached the range. The nature of the notices which the Owners were to give would depend on whether or not a nomination had been made. At an early stage, in default of a nomination, the Owners are required to give notice of the estimated date when the Vessel will be available for delivery within the range. Once the port of delivery is nominated, the notice (whether estimated or definite) will be an estimate, or a statement, of the time when the vessel will be delivered at the nominated port. In short, any estimated notice will take account of the absence of nomination (if there is none) and any definite notice will be as definite as it can be in the circumstances. This seems to me to be what sensible businessmen in the position of the parties would have contemplated.

54. It would not, however, be open to the Charterers to delay giving notice until the last moment. Owners' pleaded case is that it was a pre-condition of any right on the part of the Charterers to cancel that the Owners should:

"nominate a delivery port; and/or that they did so in sufficient time for the vessel to proceed to the delivery port, and for the [Owners] to deliver the Vessel to the [Charterers]".

The latest date by which it is claimed that a valid nomination could have been given was 15th October so as to allow 25-30 days for travel from Piraeus to West Africa. (However, it is to be noted that the assumption upon which the preliminary issue proceeds is that a notice given on 15th October would not have been sufficient to enable the Vessel to proceed to the delivery port).

55. Mr Berry submitted that it was not necessary to decide which of those two alternatives was right. But it cannot be right that the Charterers could nominate a delivery port, which might be days sailing time away, immediately before the cancellation date, unless the vessel was already there. In *Voyage Charters, 2nd Edition*, the learned authors observe:

"5.17. In the absence of any prescribed time limit, it is submitted that the nomination of a loading or discharging port must be made within a reasonable time[4] and that it should be **made early enough to ensure that the vessel suffers no delay resulting from the absence of nomination**. In ***The Rio Sun***[5] it was held that a c.i.f. buyer who had the right to name the discharging port owed such a duty to his seller who had chartered the vessel. There is no decision precisely in point in the context of a charterparty, although it has been held that the nomination of a loading port or range must be **made at a time which will not prevent the vessel from making her cancelling date**. So also the charterer cannot delay his nomination so as to prevent the vessel from being able to become an "arrived ship" for the purpose of the counting of laytime. However, it seems that, if the vessel is able to become an arrived ship without such nomination being made, the nomination need not be made before the expiry of the laytime. [6]"

56. I agree with this approach. In my judgment the correct formulation of the obligation, in respect of this charterparty, is that it was for Charterers to make their nomination within a reasonable time which would be such time as was (a) not so late as would mean that, because of the lateness of the nomination, the vessel could not make her cancelling; and (b) early enough to ensure that the vessel suffered no delay resulting from the absence of nomination. Such a conclusion appears to me to be correct in principle, and consistent with the Owners' obligation of co-operation. Before the vessel reaches the deviation point the Owners can, without a nomination, do all that they need to do to comply with the charterparty, and without loss to themselves.

57. If so, then, in the present case the time by which Charterers were bound to make a nomination never arrived. On the assumed facts there was never a moment beyond which the lateness of the nomination was the cause of the vessel not meeting her cancelling since she was never capable of meeting the cancelling date whenever notice was given. Nor was she caused any delay by want of a nomination.

58. In those circumstances there had been no failure on Charterers part to make a nomination because the time when they were obliged to do so had not arisen. The parties cannot have intended that the Charterers should be

4 See the **"Steendiek"** [1961] 2 Lloyd's Rep 138.
5 [1985] 1 Lloyd's Law Rep. 350
6 **The "Ulyanovsk"** [1990] 1 Lloyd's Rep 425.

disentitled from exercising a right to cancel because they had failed to make a nomination before they were obliged to do so.

59. I do not find it necessary to determine whether any notice of delivery from the Owners is a precondition to any obligation on the part of the Charterers to nominate the delivery port. I incline to the view that it is not. If the Owners are to fulfil their obligations under the charterparty they need to ensure that the vessel sails for the delivery range in sufficient time to enable her to be delivered before the cancelling date. The charterparty obliges them to give notice of, in effect, the vessel's progress. But I do not believe that the parties can have intended that the Owners' failure to give (say) a 30 day notice of estimated delivery would relieve the Charterer's from any obligation to make a nomination thereafter.

60. If that is so, it is questionable whether, even if, contrary to my view, there was an obligation on the part of the Charterers to nominate a delivery port in advance of 30 days before the cancelling date, or 30 days before the commencement of the laydays, nomination *at that stage* was a precondition to Owners' obligation to deliver.

Futility

61. If I am wrong on that, and before 15th November 2007 the time arose at which the Charterers prima facie came under an obligation to nominate the delivery port, then the question arises as to whether or not they were bound to do so notwithstanding the futility of the exercise.

62. Mr Berry submits that they were. Mance J was entirely right to hold that the making of a nomination is a condition precedent to any exercise of a right to cancellation. This is because Owners could not know where to deliver the vessel until Charterers had exercised the option. The obligation is also to be regarded as a condition, breach of which entitles the owner to treat the contract as at an end since:

"when a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a port, the term as to time for the performance of the obligation will in general fall to be treated as a condition" (See ***Bunge Corporation v Tradax S.A.,*** [1981] 1 W.L.R 711 per Lord Roskill at 729G).

63. However, it is when nomination serves, or is said to serve, no apparent purpose that the need for it is questionable. This was a consideration of prime importance in *Hudson's Bay* and in *North Sea* in the Court of Appeal.

Barrett Bros

64. A starting point on the issue of futility is ***Barrett Bros (Taxis) Ltd v Davies*** [1966] 1 WLR 1334. A motor-cyclist involved in an accident with a taxi failed to send his insurers a notice of intended prosecution. But the insurers learnt of the intended prosecution from the police. The insurers repudiated liability on the ground that the motor cyclist had failed to comply with a condition that he should forward immediately any notice of intended prosecution.

65. Lord Denning M.R held that, since the insurers had received the information from the police, "*it would be a futile thing to require the motor-cyclist to give them the same information. The law never compels a person to do that which is useless and unnecessary*". The case is authority for the proposition that, in certain cases, compliance with a condition precedent to the exercise of rights is not required if it is futile, useless and unnecessary.

66. The principle has been applied subsequently in a commercial context. In ***The "Mozart"*** [1985] 1 Lloyd's Rep 239 Mustill J had to consider a clause in a charterparty which provided that time lost by accidents to machinery affecting loading should not be computed as part of loading time, but which also provided that no deduction of time should be allowed for stoppage unless due notice had been given at the time to the Master or owner. He held that the requirement to give due notice could not sensibly be understood as requiring the charterers to notify the Master of something which by combining his own observations with information conveyed to him by people on the spot he knew perfectly well; and that, since the Master had received all the information which would have been contained in a notice, the absence of one did not preclude the charterers from relying on the exception.

67. In ***The "Chanda"*** [1985] 1 Lloyd's Rep 563, Bingham, J held that it was unnecessary for the charterers to repeat to the Master on one day that which had already been clearly communicated to owners on the previous day.

68. In ***The "North Sea"*** Mance J expressly rejected any argument based on futility.

69. Mr Berry submitted that an argument that the Charterers were excused from nomination on the grounds of futility was, in the present context, misplaced. Firstly, Charterers are seeking to rely upon a forfeiture clause. Such clauses must be strictly complied with and are not to be applied lightly: per Devlin, J., in ***Noemijulia Steamship v Minister of Food*** [1950] 83 Lloyd's Rep 500 (a voyage charterparty case); *Lewison* on *The Interpretation of Contracts* (2004) 16.14.

70. Secondly, cases such as ***The "Mozart"*** and ***The "Chanda"*** are cases in which the court declined to interpret the relevant clause as requiring the provision of information that the recipient already had. They were not cases in which the act, performance of which was said to be excused by the futility principle, completed the definition of the obligations of the parties and triggered a subsequent obligation on the part of the party said to be in default. In such circumstances the carrying out of the act cannot be said to be either useless or unnecessary. It can easily be performed and avoids the Charterers having to rely upon alleged futility. Whether or not it is futile to make a nomination may be hotly in issue. The Court should, in a commercial case of this kind, incline to a

construction which favours certainty and reduces the scope for what may be lengthy and costly inquiries as to whether a nomination would in fact have been futile.

71. Thirdly, he relies on a number of cases which, he submits, support this approach. In ***Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd*** [1999] 2 Lloyd's Rep 423 Stuart Smith, L.J., held that the clause in question had a clear commercial purpose and "*given the need for certainty, the need to avoid argument, the need for a written record*" strict compliance was required. In the present case, Mr Berry submitted, strict compliance would provide an informative notice, create certainty, ensure clarity and cause minimal cost. It would avoid, as Mance J observed, after the event speculation as to whether charterers were right.

72. Reference was also made to ***Glencore Grain Ltd v Flacker Shipping Ltd, The ("Happy Day")*** [2002] 2 Lloyd's Rep 487 where the charterparty provided that laytime should commence at the loading ports "*if written notice of readiness to load is given*". Owners submitted that what Lord Denning said in *Barrett Brothers* was authority for the wider proposition that where the service of a valid notice was a condition precedent to the triggering of a contractual right/privilege, that right/privilege might be triggered even in the absence of a valid notice where the other party is in any event aware of all the facts that would be contained in any such notice. Potter, L.J., rejected that proposition as an unjustified extension of *Barrett Brothers* and pointed out that neither *The "Mozart"* nor *The "Chanda"* involved a notice which had the function not merely of conveying information but also of bringing into effect a particular provision in the contract in a particular manner.

73. An identical provision was considered in ***Glencore Grain Ltd v Goldbeam Shipping Inc (The "Mass Glory")*** *[2002] 2 Lloyd's Rep. 244* where a similar argument was rejected. Moore-Bick, J observed that: *"…notice of readiness is given to start laytime running not merely to provide charterers with information which in many cases will be in their possession. As such it represents an essential step in the contractual mechanism for allocating the risk of delay in loading or discharging. Whether a step of that kind is essential in the performance of a contract is a matter for the agreement of the parties. If the parties have stipulated that a notice must be given in order to bring some other provision of the contract into operation, I doubt whether it could ever be dispensed with on the ground that to give such notice would be futile".*

Conclusion

74. The relevant question, in my opinion, is whether the parties to this charterparty agreed that, in order to be able to exercise a right of cancellation it was necessary for the Charterers to have nominated a loading port even in circumstances in which it was futile to do so because, no matter what nomination was given, the Vessel would never arrive by the cancelling date.

75. In my judgment they did not. The charterparty says nothing express to that effect. It certainly has no provision such as that in ***The "Happy Day"*** or ***The "Mass Glory"***, by which an event (the commencement of the laydays) was only to occur *if* a notice was given. The course of events which the charterparty contemplates is that the vessel should be placed at the disposal of the Charterers at some date between 25th September and 15th November 2007. When exactly that date would be was largely in Owners' hands. In order for the Vessel to be put at the Charterers' disposal by 15th November it would be necessary for the Vessel to proceed from Piraeus in order to arrive at the delivery range in sufficient time to meet the cancelling date. In ordinary course the Owners would give notice that the Vessel was leaving port or completing her previous voyage; would give ETAs in accordance with the charterparty terms, and, probably non contractual notices as well, and would seek a nomination before the deviation point.

76. On the assumption that events proceeded in ordinary course, it would then be incumbent on the Charterers to nominate the port of delivery. Since the Owners could not know where to deliver the vessel until they did so the obligation to nominate would, ordinarily, be a condition precedent to the Charterers being able to exercise a right to cancel for non-delivery.

77. But reasonable commercial men would not, in my judgment, contemplate that the Charterers had, on pain of losing their right to cancel, to go through the idle ceremony of nominating a delivery port when the vessel was nowhere near any possible delivery port (being in dry-dock in Piraeus), and could not possibly reach one by the cancelling date. That would be what, in my respectful view, Hobhouse, LJ rightly characterised "*as a futile and premature exercise*". On the assumption on which this preliminary issue proceeds it is as hard to see "*upon what basis the failure to give the requisite order could affect the right to cancel for lack of readiness*" in this case as it was in *The* ***"North Sea"***.

78. The making of a nomination would provide no useful information since, ex hypothesi, the vessel was never going to arrive at the nominated port by the cancelling date. Nor would it serve any commercial purpose other than to avoid the present controversy as to the rights of the parties. But I do not regard that as a sufficient reason to attribute to the parties an intention to require the Charterers to give the Owners notice to deliver the vessel at some port or other within the delivery range, which both of them know Owners cannot possibly reach by the cancelling date, in order to avail themselves of the right to cancel when the inevitable non-delivery occurs.

79. I recognise that English law has so far set its face against recognising some anticipatory right of cancellation. The fact that it has done so does not, however, mean that the construction that I favour must be rejected. That construction involves no recognition of any such right.

80. Nor do I ignore the fact that the cancellation clause is a form of forfeiture clause, as were the clauses in *Hudson Bay* and ***The "North Sea"***. That cannot, however, mean that the charterparty should be interpreted in an

uncommercial manner. The facts of this case, as put forward by the Owners, might cause one to think that the exercise of a right of cancellation was unfair. But the proper construction of the charterparty ought not to depend on whether the reason why the Vessel could not arrive before the cancelling date was because she was being fitted out in accordance with the Charterers' wishes or for some reason that was in no way connected with whatever negotiations had been taking place. Those negotiations may or may not afford Owners with a defence to Charterers' claim to an entitlement to cancel. But that is not the question to be decided at the moment.

81. I accept that it is desirable to avoid disputes about whether any particular step is futile. But I do not regard the possibility of argument about whether something is futile as a determinant of the proper construction of the charterparty. The Charterers should not be obliged to serve an obviously futile notice because in some cases there may be argument on whether a notice would have been futile. It is noticeable that both in *Hudson's Bay* and *The "North Sea"* there was no difficulty in concluding that a timeous nomination would be futile. The concept of futility itself makes it likely that, if there is any real doubt about the utility of a notice or a nomination it should be, and is likely to be, given. Further, in making his observations about the serious difficulties of the view taken by Mance J, Lord Justice Hobhouse must have had in mind what Mance J had said about the danger of speculative arguments.

82. I realise that, in reaching this conclusion I am taking a view which differs from that taken by Mance J at first instance in ***The "North Sea"***. I do so with diffidence but emboldened by the Court of Appeal's judgment that serious difficulties arise from it, which have to be addressed in this case, and by the observations of the Court of Appeal in ***Hudson's Bay*** and ***The "North Sea"*** itself, which point in a different direction.

83. Indeed, it seems to me that the ratio of *Hudson Bay* probably dictates the conclusion that I have, in any event reached. The Court of Appeal in that case did not accept that, in circumstances where a contractual nomination would have made no difference, a failure to nominate constituted a breach of a condition precedent to cancellation. Although, as ***The "North Sea"*** vouches, each charterparty must be considered in its own terms, there seems to me nothing in the terms of this charterparty that would dictate or justify a different result in the present case from that reached by the Court of Appeal in ***Hudson's Bay***.

84. I do not find it necessary to resolve the question as to whether the reasoning underpinning the decision of the Court of Appeal in ***Hudson's Bay*** was, or should now be regarded as being, that an obligation to nominate was (a) not a condition precedent so that breach of it had no effect unless the breach prevented delivery by the cancelling date, or (b) that, if a condition precedent, it was not necessary to fulfil it if nomination would be futile. In my view (b) is the preferable view. The proposition that, even where no question of futility arises, the obligation to nominate is *not* a condition precedent to cancellation for non-delivery seems to me erroneous – for the reasons powerfully expounded by Mance, J. The position is different from that in ***Universal Bulk Carriers Ltd v André et Cie*** [2001] 2 Lloyd's Rep 65 where the relevant clause obliged the charterers to narrow the laycan and they failed to do so. The clause was held not to be a condition, given that the charterparty could be performed in accordance with its terms whether or not the charterers complied with the clause.

85. The reason why I do not attempt to resolve that question is because the preferable route, in my opinion, is to determine what is or is not required on the true construction of the charterparty.

86. Accordingly, subject to any further submissions on the form of the order, I propose to answer the preliminary issue: "No".

Luke Parsons QC & Poonam Melwani (instructed by Stephenson Harwood) for the Claimants
Steven Berry QC & Jeremy Brier (instructed by Clyde & Co LLP) for the Defendants