Weekly Law Reports (ICLR)/2009/Volume 3/Stocznia Gdynia SA v Gearbulk Holdings Ltd - [2009] 3 WLR 677

[2009] 3 WLR 677

Stocznia Gdynia SA v Gearbulk Holdings Ltd

Court of Appeal

[2009] EWCA Civ 75

2009 Jan 21, 22; Feb 13

Ward, Smith, Moore-Bick LJJ

Contract — Repudiation — Acceptance — Contract for sale of ship — Total failure of consideration — Purchaser terminating contract and recovering moneys paid under it in accordance with contractual termination provisions — Whether thereby electing to affirm contract — Whether precluded from treating contract as repudiated and claiming damages at common law — Whether notice of termination capable of being effective both to exercise contractual right to terminate and to accept repudiation

The purchaser and the seller entered into three contracts under each of which the seller agreed to supply a vessel to the purchaser. None of the vessels was delivered. The purchaser exercised its contractual rights to terminate each contract and to recover under a bank guarantee the first instalment of the price which it had paid on signing the contract. The parties referred to arbitration a dispute as to whether the purchaser was entitled to damages from the seller for the loss of its bargain in addition to recovering the first instalment of the price. The arbitrator held that at the time at which each contract had been terminated the seller had been unable and unwilling to perform the contract and had repudiated it, and that the purchaser was therefore entitled to recover damages for the loss of its bargain. The judge allowed the seller's appeal, **holding** that in terminating the contracts and recovering the first instalments under the bank guarantees, pursuant to the terms of the contracts, the purchaser had affirmed the contracts and lost its right to treat them as repudiated, and was therefore precluded from claiming damages at common law for their repudiation.

On the purchaser's appeal—

Held , allowing the appeal, that a person who exercised a contractual right of termination which arose on the breach of the other party to the contract was not inevitably prevented from treating the contract as discharged and recovering damages for the loss of his bargain; that whether such a party was so prevented would depend on the intention of the parties; that the exercise by the purchaser of its contractual right to treat each contract as terminated had been intended to operate, and had operated, to discharge the contract with

the same consequences as if it had been discharged by repudiation in accordance with the general law; that, further, the exercise by the purchaser of its contractual right to recover instalments of the contract price did not involve an election on its part to affirm the contract since it was clear that the parties had intended that right, together with the right to obtain payment under the bank guarantee, to survive the termination of the contract; that, therefore, the purchaser was not precluded from claiming damages at common law for the loss of its bargain; and that, accordingly, the arbitrator's award would be restored (post, paras *35–37*, *46*, *47*, *48*).

Per curiam. Since all that is required for acceptance of a repudiation at common law is for the injured party to communicate clearly and unequivocally his intention to treat the contract as discharged, where the contract provides a right to terminate which corresponds to a right under the general law to accept the other party's repudiation no election is necessary and a clear statement by the injured party that he is treating the contract as discharged can be effective both to exercise the contractual right to terminate and to accept the repudiation (post, paras *44–45*, *47*, *48*).

*[**2009**] 3 WLR 677 at 678*

United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 QB 54, CA distinguished.

Decision of Burton J [2008] EWHC 944 (Comm); [2008] 2 Lloyd's Rep 202 reversed.

The following cases are referred to in the judgment of Moore-Bick LJ:

Campbell Discount Co Ltd v Bridge [1962] AC 600; [1962] 2 WLR 439; [1962] 1 All ER 385, HL(E)

Dalkia Utilities Services plc v Celtech International Ltd [2006] EWHC 63 (Comm); [2006] 1 Lloyd's Rep 599

Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd [1970] 1 QB 447; [1970] 2 WLR 198; [1970] 1 All ER 225, CA

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26; [1962] 2 WLR 474; [1962] 1 All ER 474, CA

Lep Air Services Ltd v Rolloswin Investments Ltd [1973] AC 331; [1972] 2 WLR 1175; [1972] 2 All ER 393, HL(E)

Lockland Builders Ltd v Rickwood (1995) 77 BLR 42, CA

Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] AC 689; [1973] 3 WLR 421; [1973] 3 All ER 195, HL(E)

*Motor Oil Hellas (Corinth) Refineries **SA** v Shipping Corpn of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391, HL(E)

Photo Production Ltd v Securicor Transport Ltd [1980] AC 827; [1980] 2 WLR 283; [1980] 1 All ER 556, HL(E)

***Stocznia** Gdanska **SA** v Latvian Shipping Co* [2001] 1 Lloyd's Rep 537; [2002] EWCA Civ 889; [2002] 2 All ER (Comm) 768; [2002] 2 Lloyd's Rep 436, CA

United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 QB 54; [1967] 3 WLR 1; [1967] 2 All ER 345, CA

*Vitol **SA** v Norelf Ltd* [1996] AC 800; [1996] 3 WLR 105; [1996] 3 All ER 193, HL(E)

Wickman Machine Tool Sales Ltd v L Schuler AG [1974] AC 235; [1973] 2 WLR 683; [1973] 2 All ER 39, HL(E)

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

*Bank of Credit and Commerce International **SA** v Ali* [2001] UKHL 8; [2002] 1 AC 251; [2001] 2 WLR 735; [2001] ICR 337; [2001] 1 All ER 961, HL(E)

Bloemen (F J) Pty Ltd v City of Gold Coast Council [1973] AC 115; [1972] 3 WLR 43; [1972] 3 All ER 357, PC

Gold Coast Ltd v Caja de Ahorros del Mediterraneo [2002] EWCA Civ 1806; [2002] 1 All ER (Comm) 142; [2002] 1 Lloyd's Rep 617, CA

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896; [1998] 1 All ER 98, HL(E)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749; [1997] 2 WLR 945; [1997] 3 All ER 352, HL(E)

Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803; [1983] 3 WLR 163; [1983] 2 All ER 737, HL(E)

Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Comrs [2007] UKHL 34; [2008] AC 561; [2007] 3 WLR 354; [2007] 4 All ER 657, HL(E)

*Tradigrain **SA** v Invertek Testing Services (ITS) Canada Ltd* [2007] EWCA Civ 154; [2007] 1 CLC 188, CA

APPEAL from Burton J

The purchaser, **Gearbulk Holdings** Ltd, and the seller, **Stocznia Gdynia SA**, referred to arbitration a dispute as to whether the purchaser was entitled to damages for the loss of its bargain under three contracts for the construction and supply of certain vessels. By a first final award dated 11 September 2007 the sole arbitrator (Sir Brian Neill) determined the issue of liability in favour of the purchaser. By a decision dated 2 May 2008 Burton J [2008] 2 Lloyd's Rep 202 allowed the seller's

appeal under section 69 of the Arbitration Act 1996, **holding** that (i) article 10 of the contracts was not a contractual code which excluded all rights of termination in respect of the events which had occurred; (ii) the exclusion clause in article 10 of the contracts did not exclude any claim for damages in respect of what had occurred; but (iii) the termination of the contracts by the purchaser pursuant to and in reliance upon the contractual termination provisions coupled with the claim made upon the bank under the refund guarantees precluded the purchaser from subsequently claiming to have terminated at common law.

By an appellant's notice dated 5 June 2008 and pursuant to permission granted by the judge the purchaser appealed on the grounds that the judge had erred in law in **holding** that the act of drawing upon the refund guarantees was, or was capable of being, an act of affirmation of the contracts in that (1) each of the contracts had been terminated by the sending of a termination notice sometime before any claim was made on the refund guarantees, and having been terminated it was impossible for the contracts to be retrospectively revived and affirmed by the act of claiming on the refund guarantees as the judge had held; and (2) the purchaser had not exercised any rights under the contracts, which had been terminated by the relevant time, when the purchaser had in fact exercised rights under the independent contracts embodied in the refunds guarantees.

By a respondent's notice dated 19 June 2008 the seller cross-appealed on the grounds that the judge had erred in his **holdings** as to issues (i) and (ii).

The facts are stated in the judgment of Moore-Bick LJ.

Stewart Boyd QC and *Vernon Flynn QC* (instructed by *Ince & Co*) for the purchaser.

Graham Dunning QC and *Edmund King* (instructed by *Eversheds LLP*) for the seller.

The court took time for consideration.

13 February **2009**. The following judgments were handed down.

MOORE-BICK LJ

Introduction

1 In 2000 and 2001 the appellant purchaser, **Gearbulk Holdings** Ltd ("**Gearbulk**"), entered into contracts with the respondent seller, **Stocznia Gdynia SA** ("the yard"), for the construction of six "Fleximax" vessels for delivery on various dates between 2001 and the end of March 2004. A separate contract was signed in

relation to each vessel, but in all material respects they were in the same form. The present appeal is concerned with

three of those contracts, namely, those relating to the vessels identified by the yard as hulls 24, 25 and 26.

2 In the event none of the three vessels in question was delivered. Some steel cutting was carried out in relation to hull 24, but work on the vessel stopped in January 2003. No construction work of any kind was carried out on hulls 25 and 26. Between June and October 2003 there were discussions between the parties, but they were inconclusive and on 7 November 2003 **Gearbulk** wrote to the yard terminating the contract in respect of hull 24. It then exercised its right to recover under a bank guarantee the first instalment of the price which it had paid on signing the contract, together with interest at the agreed rate.

3 On 4 August and 30 November 2004 **Gearbulk** took similar steps to terminate the contracts relating to hulls 25 and 26 respectively and to recover the first instalments of the price paid in respect of those two vessels. The terms of the letter terminating the contract for hull 25 were in all material respects identical to those of the letter written in relation to hull 24. The letter written in relation to hull 26, however, was different and it will become necessary at a later stage to refer to the terms of all these letters in a little more detail.

4 Following the termination of the contracts a dispute arose between **Gearbulk** and the yard. **Gearbulk** asserted that it was entitled in each case to recover damages for the loss of its bargain. The yard said that because **Gearbulk** had exercised a right to terminate given by the contract its remedy in each case was limited to the recovery of the instalments of the price in accordance with the contract and nothing more. The dispute was referred to arbitration in accordance with the terms of the contract. The parties appointed Sir Brian Neill as sole arbitrator.

The contracts

5 It is convenient at this point to refer in more detail to the terms of the three contracts. Since they were materially identical it is sufficient to refer to the contract for hull 24, the most important parts of which for present purposes provided as follows:**"*Article 5 "Terms of payment …***

> "5.2 … the contract price shall be paid by the purchaser to seller in five instalments in the manner set out below.
>
> "5.3 … (a) 5% within seven banking days from the purchaser having received an executed refund guarantee (b) 5% within seven banking days of the date on which the seller has given notice to the purchaser of commencement of the steel cutting … (c) 10% within seven banking days of the date on which the seller has given notice to the purchaser of commencement of the keel laying of the vessel … (d) 20% within seven banking days of the date on which the seller has given notice to the purchaser of successful launching of the vessel … (e) 60% … shall be paid to the seller upon delivery of the vessel …"
>
> "5.7 *Purchaser's default*

"The seller shall be entitled, but not bound, to declare the purchaser in default where the purchaser (a) fails to pay to the seller any instalment of

the contract price when the same is due for payment … (b) is declared … insolvent or bankrupt … (c) fails to take delivery of the completed vessel within three banking days of when she is duly tendered for delivery by the seller …"

"5.9 In the event of such termination by the seller due to the purchaser's default as provided for in this article, the seller shall be entitled to retain and apply the instalments already paid by the purchaser towards the seller's recoverable loss and damage and at the same time the seller shall have the full right and power either to complete or not to complete the vessel and to sell the vessel at a public or private auction … provided that the seller is always obliged to mitigate all losses and damages due to any such purchaser's default … The proceeds received by the seller from the sale and the instalments already paid and retained shall be applied by the seller … as follows: First, in payment of all reasonable costs and expenses of the sale of the vessel. Second, if the vessel has been completed, in or towards satisfaction of the unpaid balance of the contract price, or if the vessel has not been completed, in or towards the satisfaction of the unpaid amount of the cost incurred by the seller prior to the date of sale on account of [the] construction of the vessel … Third, the balance of the proceeds, if any, shall belong to the purchaser and shall forthwith be paid over to the purchaser by the seller.

"5.10 *Refund guarantee*

"(a) The instalments of the contract price paid by the purchaser prior to delivery of the vessel … shall be in the nature of advances to the seller. In the event that the purchaser shall exercise its right to terminate this contract pursuant to any of the provisions hereof, the seller shall forthwith refund to the purchaser the aggregate amount of such instalments … together with interest thereon at the rate of one month LIBOR per annum. (b) It is a fundamental term of this contract that the seller's obligation to make such refund of any of the pre-delivery instalments, with interest, shall be secured under and pursuant to the refund guarantee issued in favour of the purchaser …"

"*Article 10 "Delay in delivery and deficiencies: seller's default*

"The contract price of the vessel shall be adjusted by way of reduction in the event of any of the contingencies set out in this article. Such adjustment shall be effected by way of reduction of the amount of the delivery instalment of the contract price … (it being understood by the parties that any such reduction of the contract price shall [be] by way of liquidated damages and not by way of penalties).

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

"In case the total amount of liquidated damages claimed by the purchaser under this article exceeds 5% of the contract price, the purchaser's right to liquidated damages shall be limited to such amount equal to and not exceeding 5% of the contract price as specified in article 4.1 of this contract.

"10.1 *Delay in delivery*

"(a) In the event that delivery of the vessel should be delayed beyond the delivery date, the contract price shall be reduced as follows (i) no adjustment shall be made for the first 30 days … (v) the maximum reduction of the contract price pursuant to this article 10.1(a) shall not exceed … $930,000. (b) If the delay in delivery of the vessel shall comprise a period of more than 150 days beyond the delivery date then the purchaser may, at its option, terminate this contract. (c) Without any prejudice to, and separately from, the foregoing, the purchaser shall also be entitled, at its option, to terminate this contract in the event that, for any reason whatsoever, the vessel shall not have been delivered to the purchaser hereunder on or prior to 15 August 2003 … [the 'drop dead date'] …"

"10.6 *Seller's default*

"The purchaser shall also be entitled, but not bound, to declare the seller in default and terminate the contract—(a) if there is a major breach by the seller of its obligation hereunder to proceed with the construction of the vessel, such that, in the reasonable opinion of the purchaser (supported by the opinion of the classification society), the vessel cannot be completed and delivered to the purchaser on or before the date specified in article 10(1)(c) hereof … (b) … Upon the occurrence of any such event of default the [purchaser] shall be entitled to terminate this contract with the consequences hereinafter provided.

"10.7 *Effect of termination*

"Upon termination of this contract by the purchaser in accordance with the provisions of article 10 or any other provision of this contract expressly entitling the purchaser to terminate this contract, the seller shall forthwith repay to the purchaser all sums previously paid to the seller under this contract, together with interest accrued thereon calculated at the rate of one month LIBOR per annum from the respective date(s) of payment of such sums until date of refund … It is however further expressly understood and agreed upon by the parties hereto that, if the purchaser terminates this contract under this article, the purchaser shall not be entitled to any liquidated damages under articles 10.1, 10.2, 10.3 or 10.4 hereof."

6 Article 10 contained similar provisions providing for the payment of liquidated damages by way of reduction of the final instalment of the price in respect of shortcomings in the vessel's speed, fuel consumption and deadweight capacity. The delivery date for hull 24 specified in article 3.1 of the contract was 3 March 2003.

7 The arbitrator directed that the question of liability should be tried as a preliminary issue. The material parts of the parties' arguments before the arbitrator can be summarised in the following way. **Gearbulk** submitted that the yard had repudiated each of the contracts, that in each case its repudiation had been accepted as terminating the contract and that it was entitled to recover damages for the loss of its bargain in accordance with ordinary principles. The yard argued that it had not repudiated the contracts, that in any event **Gearbulk** had not accepted any repudiation of the contracts relating to hulls 24 and 25, that in each case **Gearbulk** had exercised the right to terminate under article 10 and so was precluded from

*[**2009**] 3 WLR 677 at 683*

treating the contracts as repudiated and that article 10 of the contract excluded any claim for damages following termination in accordance with its terms.

8 In his first final award dated 11 September 2007 the arbitrator rejected the yard's submissions. He held that at the time each of the contracts was terminated the yard was unable and unwilling to perform the contract and had repudiated it. He held that article 10 did not exclude any of the rights that would otherwise arise by operation of law, either the right to treat the contract as discharged on the grounds of repudiatory breach or the right to recover damages for the loss of bargain. He also rejected a separate argument that **Gearbulk** had by its conduct affirmed the contract. Accordingly, he determined the issue of liability in favour of **Gearbulk** and made declarations accordingly.

9 The yard applied for leave to appeal against the award under section 69 of the Arbitration Act 1996 and in due course leave was granted. The appeal was heard by Burton J who at the suggestion of counsel for the yard, reformulated the questions to be determined as follows. (i) Whether article 10 is a contractual code which excludes all rights of termination in respect of the events that occurred here ("the first issue"). (ii) Whether the exclusion clause in article 10 of the contract excludes any claim for damages in respect of what has occurred ("the second issue"). (iii) Whether the termination of the contracts pursuant to and in reliance upon the contractual termination provisions (coupled with the claim in each case made upon the bank under the refund guarantee) precludes the buyer from subsequently claiming to have terminated at common law ("the third issue").

10 The judge, like the arbitrator, rejected the yard's argument on the first and second issues, but held in its favour on the third issue. He therefore allowed the appeal and varied the award by setting aside the declarations made by the arbitrator and substituting for them a declaration that

> "**Gearbulk Holdings** Ltd is precluded from claiming damages at common law for the repudiation of the three contracts by virtue of it having affirmed them and recovered moneys together with interest from the refund guarantor in accordance with the provisions of the contracts."

11 The judge himself gave **Gearbulk** permission to appeal against his decision on the third issue, recognising that it raised questions of general importance. The yard cross-appealed in respect of the first and second issues. We heard argument on the appeal first, followed by argument on the cross-appeal. However, in view of the nature of the issues to which the proceedings as a whole give rise, it is more helpful in my view to deal with the issues raised by the cross-appeal first. Moreover, because they both raise questions of the construction of the contract, it is convenient to consider the first and second issues together. However, before considering the terms of article 10 itself, I think it is worth giving some attention to the general nature of the contract of which it forms part.

The nature of the contract

12 The contract in the present case is one for the sale of future goods, in this case a vessel, to be constructed by the seller (the yard) and delivered to the buyer (**Gearbulk**) by an agreed date. It contains many detailed provisions relating to the specification and performance of the vessel, as well

as other matters. In relation to delay in delivery and deficiencies in speed, fuel consumption and deadweight capacity it provided for the payment of liquidated damages by the yard and, if the delay or any of the deficiencies exceeded a certain level, ultimately gave **Gearbulk** a right to terminate the contract. The contract also gave the yard a right to terminate it if **Gearbulk** failed to pay an instalment of the price when it became due.

13 The meaning of the word "terminate" depends on the context in which it is used. It is capable of meaning what is nowadays generally called rescission, that is, the discharge of all rights and obligations under the contract ab initio without liability on either side, and is also used in the context of discharge by frustration, but it is most commonly used in commercial contracts in the context of a right given to one party to a contract to treat it as discharged by reason of a breach on the part of the other.

14 It is inherent in the nature of a legally binding contract that each party expects to obtain the benefit of the bargain into which he has entered, or, if the contract is not performed, a right to recover compensation in the form of damages for the loss of that benefit. Accordingly, in a case where one party's breach is such as, in the words of Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, to deprive the other of substantially the whole benefit which it was intended that he should obtain from the contract, the common law recognises the right of the injured party to treat the contract as discharged and to recover damages for the loss of the bargain. Such a breach is commonly described as "going to the root of the contract". That is all trite law, but it provides the underpinning, should it be required, for Mr Boyd QC's submission that parties to a contract of this kind, or indeed to any contract, enter into negotiations in the expectation that if the one of them commits a breach which goes to the root of the contract in the sense just described, the other will be entitled to recover damages for the loss of his bargain. The parties may, of course, agree to depart from that position, but that is the point from which they start.

15 Whether a breach is sufficiently serious to go to the root of the contract depends on the terms of the contract and the nature of the breach, but it is open to the parties to agree that the breach of a particular term, however slight, is to be treated as having that effect and shall therefore entitle the other to treat the contract as repudiated. Different words have been used to express that intention. The use of the word "condition" will usually (though not always: see *Wickman Machine Tool Sales v L Schuler AG* [1974] AC 235) be sufficient, but many other forms of wording can be found. Sometimes the consequences of a breach are spelled out and sometimes they are not; in each case it is necessary to construe the contract as a whole to ascertain what the parties intended.

16 Article 5.8 in the present case gave the yard the right to "terminate" the contract if **Gearbulk** committed a breach of contract by failing to pay an instalment of the price within 14 days of the date on which it was due. If the yard exercised that right, the terms of article 5.9 gave it the right to recover the benefit of its bargain. Similarly, articles 10.1 to 10.4 gave **Gearbulk** the right to "terminate" the contract if the yard committed a breach of contract by failing to deliver the vessel within 150 days of the agreed date or by tendering it with deficiencies in capacity or performance which exceeded the

limits below which the payment of liquidated damages was considered to be sufficient compensation. In addition, article 10.6 gave it the right to terminate the contract if the yard committed a major breach which the classification society agreed would prevent it from completing and delivering the vessel by a specific date (the so-called "drop dead" date), or if it failed financially. It is clear, and was not in dispute, that if either party exercised a right to terminate the contract pursuant to any of those terms, all obligations which remained for performance in the future would be discharged. The nature of the circumstances giving rise to **Gearbulk**'s right to terminate, therefore, was in all cases a serious breach by the yard of its obligations and that, together with the provision for payment of liquidated damages for less serious breaches, provides a strong indication that if the right were exercised the parties intended that **Gearbulk** should have a right to recover any losses it might have suffered as a result of the loss of its bargain.

The nature and meaning of article 10

17 All this may seem obvious, but it is important because it provides the background to the submissions made by Mr Dunning QC as to the meaning and effect of article 10 as a whole and in particular its second (unnumbered) paragraph. His primary submission was that article 10 contains a complete code which provides for the consequences of the various events with which it is concerned. As such it displaces any right to treat the contract as repudiated at common law, leaving **Gearbulk** to the remedies for which it provided, namely, liquidated damages for delay and deficiencies in capacity and performance and the right to recover instalments of the price, with the benefit of a bank guarantee. His alternative submission was that even if article 10 does not exclude the right to treat the contract as repudiated at common law, it does provide an alternative means of bringing the contract to an end, but one which can be exercised only in accordance with its terms. In this case, he submitted, **Gearbulk** did not elect to treat any of the contracts as repudiated in accordance with the general law, but chose instead to exercise the rights of termination given by the contract itself. In those circumstances it cannot claim damages for the loss of its bargain because article 10 does not provide for it to do so.

Does article 10 displace the right to treat the contract as repudiated?

18 Mr Dunning sought to derive support for the first of these submissions from the decision of this court in *Lockland Builders Ltd v Rickwood* (1995) 77 BLR 42. In that case clause 2 of a contract for the construction of a house gave the building owner the right to determine the contract if the rate of progress, materials or workmanship proved unsatisfactory as certified by an independent third party and the building contractor failed to rectify them within a specified period. The building owner was dissatisfied with the work, but did not seek to invoke clause 2. Instead he wrote to the building contractor purporting to treat the contract as discharged and sought to recover damages. The court noted that clause 2 was designed to deal with shortcomings of the very kind alleged and held that the common law right to treat the contract as discharged by reason of repudiation could arise only in a case where the breach was of a fundamental

nature. The breaches alleged were not of that kind and so the building owner's only right to terminate arose under clause 2, which he had not invoked. In reaching its decision the court placed some emphasis on the fact that the clause was not expressed to be without prejudice to the building owner's rights under the general law.

19 Mr Dunning submitted that there were parallels between that case and the present. In that case clause 2 contained a complete statement of the right to terminate for the kind of breaches to which it referred; in the present case article 10 likewise contains a complete statement of **Gearbulk**'s right to terminate the contract for delay in delivery and shortcomings in the vessel and contains no saving for rights that would arise under the general law. He submitted that it was intended to exclude any right to treat the contract as repudiated at common law. However, in my view the decision in *Lockland Builders Ltd v Rickwood* provides no assistance because it turns entirely on the construction of the contract in that case which was of a very different nature from that with which this appeal is concerned. Whenever one party to a contract is given the right to terminate it in the event of a breach by the other it is necessary to examine carefully what the parties were intending to achieve and in particular what importance they intended to attach to the underlying obligation and the nature of the breach. The answer will turn on the language of the clause in question understood in the context of the contract as a whole and its commercial background. Sometimes, as in *Lockland Builders Ltd v Rickwood* , the parties will have intended to give a remedy of a limited nature for breaches of a certain kind; in other cases the terms of the contract may reflect an intention to treat the breach as going to the root of the contract with the usual consequences, however important or unimportant it might otherwise appear to be. Inevitably, therefore, there can be no hard and fast rule.

20 In my view Mr Dunning's submission fails properly to recognise the true nature of the contract. The primary purpose of article 10 in the present case is to provide an agreed measure of compensation for breaches of contract by way of delay in delivery and deficiencies in capacity and performance which, although important, do not go to the root of the contract. For these the parties have agreed the payment of liquidated damages which are to be deducted from the final instalment of the price and to that extent their agreement displaces the general law, at least as regards the measure of damages recoverable for a breach of that kind. However, they have also agreed that there comes a point at which the delay or deficiency is so serious that it should entitle **Gearbulk** to terminate the contract. In my view they must be taken to have agreed that at that point the breach is to be treated as going to the root of the contract. In those circumstances the right to terminate the contract cannot sensibly be understood as anything other than embodying the parties' agreement that **Gearbulk** has the right to treat the contract as repudiated, with (subject to Mr Dunning's alternative argument) the usual consequences. The same holds true in relation to the yard's right to terminate the contract under article 5.7. Although the parties may have agreed to exclude, in whole or in part, **Gearbulk**'s right to recover damages for a repudiatory breach on the part of the yard, I am unable to accept that they intended to create by their contract a situation which differed in its effect from that which would arise on the acceptance of a repudiation under the general law. Article 5.9 and article 10 simply identify

the circumstances in which one or other of the parties is entitled to treat the contract as discharged by the other's breach. In ***Stocznia*** *Gdanska* ***SA*** *v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436, para 88 Rix LJ expressed the view that where contractual and common law rights overlap it would be too harsh to regard the use of a contractual mechanism of termination as ousting the common law mechanism, at any rate against a background of an express reservation of rights. In this case I would go further. In my view it is wrong to treat the right to terminate in accordance with the terms of the contract as different in substance from the right to treat the contract as discharged by reason of repudiation at common law. In those cases where the contract gives a right of termination they are in effect one and the same.

Does article 10 exclude liability for damages for loss of bargain?

21 Mr Dunning's alternative argument was that the second paragraph of article 10 excludes the right to recover damages for loss of bargain in the event of termination by **Gearbulk**. He placed particular reliance on

the words "by reason of events set out in this article", which, he submitted, are apt to include all the events to which articles 10.1 to 10.4 and 10.6 refer, including those which gave **Gearbulk** a right to give notice of termination. There is no reason, of course, why the parties could not have agreed that **Gearbulk** should have no right to recover damages for loss of bargain in those circumstances, but it is worth bearing in mind what the consequences of doing so would be. For reasons already explained, whatever the breach which might give rise to the right to terminate, it must be assumed that the parties accepted that it would go to the root of the contract and justified the extreme step of treating it as discharged, but the only remedy then available to **Gearbulk** would be to recover what it had paid by way of instalments of the price with interest. It is true that it would have the benefit of a demand guarantee under which it could be sure of recovering its money quickly, but it would recover nothing in respect of the bargain represented by the contract itself. That would be in marked contrast to the position of the yard if it were to terminate the contract under article 5.9. Moreover, it would mean that the yard could at any time refuse to perform the contract without any liability other than to refund instalments of the price. That does not strike me as the kind of agreement that would be likely to commend itself to any purchaser. Of course, as the performance of the contract progresses the terms agreed may operate more in favour of one party than the other, especially if commercial conditions change, but the fact that the contract would, if Mr Dunning is right, be so unbalanced in relation to the consequences of termination for breach necessarily causes one to question whether that can have been what the parties intended.

22 For reasons given earlier, any person approaching negotiations with a view to entering into a legally binding contract (and certainly experienced businessmen such as the parties to these contracts) is to be taken to know that the law gives him a right to recover damages for loss of his bargain if the other party commits a breach which deprives him of substantially the whole benefit that it was intended that he should obtain from it. That, of course, is a valuable right, even more valuable, perhaps, than the right of set-off considered in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689. In that case Lord Diplock observed, at p 717, that "one starts with the presumption that neither party intends to abandon any

remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption".

23 Mr Dunning submitted that since that decision the approach of the courts to the construction of exclusion clauses has developed in favour of a greater willingness to give them the meaning which the words used would naturally bear. I would accept that, but I would not accept his suggestion that as the law stands today there are two competing approaches struggling for supremacy: one requiring clear express words, the other favouring the natural meaning of the words used. It is important to remember that any clause in a contract must be construed in the context in which one finds it, both the immediate context of the other terms and the wider context of the transaction as a whole. The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be.

24 The second paragraph of article 10 forms part of an introductory section to the article as a whole which provides in general terms for the payment of liquidated damages for the various breaches of contract later described in detail in articles 10.1, 10.2, 10.3 and 10.4. The first paragraph provides for the contract price to be adjusted by way of reduction of the amount of the delivery instalment of the price "in the event of any of the contingencies set out in this article" and expressly states that that is to be by way of liquidated damages. The second paragraph excludes any other right to compensation for damages sustained "by reason of events set out in this article … other than liquidated damages specified in this article". The third paragraph limits the total amount of liquidated damages to 5% of the contract price.

25 Each of articles 10.1 to 10.4 gives **Gearbulk** the right to terminate the contract if the delay or deficiency in question exceeds a certain level. Mr Dunning submitted that the reference to "events set out in this article and/or direct consequences of such events" in the second paragraph was apt to include a reference to ter-

mination under any of those articles and also to termination under article 10.6. However, I am unable to accept that submission. It is clear, in my view, that the introductory paragraphs are directed only to those parts of article 10 that provide for the payment of liquidated damages and have no application to the situation that would arise on termination of the contract. That is apparent from the wording of the three paragraphs, all of which refer in terms to liquidated damages. The "events set out in this article" to which the second paragraph refers are the events on the happening of which liquidated damages become payable and the paragraph is intended to make it clear that the measure of liquidated damages agreed is all that **Gearbulk** is entitled to recover for the degree of delay or deficiency described. That is clear, not just from the language used but from the fact that liquidated damages are to be paid by a reduction of the instalment of the contract price payable on delivery. If the contract is terminated, the vessel will not be delivered and the delivery instalment will not become payable. Consistently with that, no provision is made for the payment of liquidated damages in respect of the termination of the contract (although it could have been) and there is nothing elsewhere in the article which touches on the question. The second paragraph of article 10.7 points in the same direction: if the contract is terminated liquidated damages are

not payable, the implication being that **Gearbulk** is entitled to recover any losses in the usual way. For these reasons, which are in substance the same as those of the arbitrator and the judge, I agree that article 10 does not exclude **Gearbulk**'s right to recover damages at common law for the loss of its bargain.

Does giving notice of termination under the contract preclude Gearbulk from treating the contract as discharged at common law?

26 Although he rejected the yard's submissions on the meaning and effect of article 10, the judge [2008] 2 Lloyd's Rep 202 accepted Mr Dunning's submission that by choosing to terminate the contract pursuant to article 10.1(b) and 10.1(c) **Gearbulk** lost its right to treat the contract as repudiated and with it its right to recover damages for repudiation. Before the judge the argument appears to have been advanced on the basis that by invoking its rights under article 10 **Gearbulk** elected to affirm the contract and could not subsequently treat it as having been repudiated. The judge derived support for that conclusion from *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54 ("the *UDT* case"). His reasoning appears most clearly from para 43(ii) of his judgment [2008] 2 Lloyd's Rep 202 in which he said:

> "Conclusive in my judgment is the fact that the purchaser enforced a provision in the contract which was very significant to it. The purchaser did not simply make a claim, and obtain recovery, against the yard. It enforced the contractual provisions under [articles] 10.7 and 5.10, which enabled it to obtain a secured sum, and one sought and obtained against a *third party* , the guarantor, by virtue of an entitlement only available under the contract."

27 In the *UDT* case the defendant, a waterman in the Port of London, entered into a hire-purchase contract with the claimant finance company in respect of a motor car. After he had paid the initial instalment his wages were seriously affected by a dock strike, so he wrote to the company enclosing the keys and log book saying that he wished to terminate the agreement because he could not fulfil its terms. He returned the car to the dealer which had supplied it and the company later took possession of it. Clause 8 of the agreement gave the company the right to terminate the agreement if the hirer failed to pay any instalment. Clause 10 gave the hirer the right to terminate the agreement at any time by returning the car to the company. Clause 11 provided that, if the agreement should be terminated under either provision, the hirer should pay the company such an amount as together with the instalments already paid should amount to two-thirds of the total hiring cost as agreed compensation for depreciation. The company issued a writ claiming the amount provided for in clause 11 on the grounds that the hirer had terminated the contract under clause 10. Later, during the course of the proceedings, it was amended to add an alternative claim for damages for repudiation. The matter was remitted to the county court where the judge held that the hirer had terminated the agreement and gave judgment for the company. On appeal this court held that the company must be taken

to have terminated the agreement under clause 8 and that, since the sum provided for by clause 11 was a penalty (not being a genuine pre-estimate of loss), it could not be recovered. There being no claim by the

*[**2009**] 3 WLR 677 at 690*

company for any identified loss, the court directed that the appeal be allowed and that judgment be entered for the hirer.

28 Although the decision itself is clear enough, it is not altogether easy to understand the principles on which the court acted, particularly in the light of more recent expositions of the principles governing the law on repudiation and the doctrine of election. In the case of repudiation, subsequent decisions of the House of Lords, in particular in *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331 and *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, have established that when a repudiatory breach is accepted by the injured party as discharging the contract, all primary obligations remaining for performance in the future are discharged and replaced in the case of the party in default by a secondary obligation to pay damages imposed by law. In such circumstances damages are to be assessed in the light of all the terms of the contract, including any relevant exclusion clause. This analysis led to the overruling of *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 in which it had been held that an exclusion clause could not be relied on once the contract had been discharged.

29 In *Motor Oil Hellas (Corinth) Refineries **SA** v Shipping Corpn of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391, 398, Lord Goff of Chieveley summarised the principle of election in the following way:

> "In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract … In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by **holding** him to have elected not to exercise the right which has become available to him, or sometimes by **holding** him to have elected to exercise it. Instances of this phenomenon are to be found in section 35 of the Sale of Goods Act 1979. In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him—for example, to determine a contract or alternatively to affirm it—he is held to have made his election accordingly, just as a buyer may be deemed to have accepted uncontractual goods in the circumstances specified in section 35 of the 1979 Act."

30 With those principles in mind I return to *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54. Lord Denning MR dealt with the matter in this way, at pp 65–66:

> "In the absence of a consensual termination, I think the finance company must be taken to have terminated the hiring under the powers
>
> *[**2009**] 3 WLR 677 at 691*
>
> given to them by clause 8 of the agreement. That clause says that 'should the hirer fail to pay … any subsequent instalment … the owner may forthwith and without any notice terminate the hiring'. That is how this agreement came to an end. The owners exercised their right to terminate the hiring: and the hirer was content that they should do so. On such a termination the

> owners cannot rely on the minimum payment clause: for the simple reason that they are terminating for a breach; and in that case the minimum payment clause is a penalty and unenforceable under the decision of the House of Lords in *Campbell Discount Co Ltd v Bridge* … There remains the alternative claim for repudiation. It is said that Mr Ennis repudiated the contract. I very much doubt myself whether his letters and his conduct should be considered as repudiation. He was simply asking for the agreement to be terminated. He was not repudiating it. But even if it be treated as a repudiation, it is clear that the repudiation was never accepted by the finance company. After receiving his letter, they treated the contract as being still continuing. They claimed under the minimum payment clause, which is a thing they could not possibly have done if there had been an acceptance of repudiation. By so doing, they elected to treat it as continuing. Mr Goodenday said they accepted the repudiation by retaking possession of the car. But that was not pleaded. Nor has it ever been suggested hitherto. The county court judge said they accepted the repudiation in November 1963, when they amended their pleading. That was far too late. They had already evinced their intention to treat the agreement as continuing. I do not think they can rely on the alleged repudiation."

31 Harman LJ agreed that the hirer had not exercised his option to terminate the agreement. He said, at p 68:

> "As to the other point, I think it may be said that the letter was the expression of a determination not to be bound any further by the agreement. If there had been a prompt acceptance of that, I am not sure I should not have held that there was a repudiation, because a repudiation needs both the expression of such an intention and its acceptance on the other side. There clearly was no acceptance on the other side. The plaintiffs elected not to accept repudiation: they elected to treat the agreement as binding and to sue him under it and not to sue him for damages for its breach. Therefore, they cannot rely on repudiation."

32 Salmon LJ agreed that the company had terminated the agreement under clause 8. He said, at p 70:

> "… I think that the finance house must be taken to have repossessed the goods under clause 8, as they were entitled to do, since the hirer was in arrear with the first instalment. As I have already stated, this would give the finance house no right to recover any part of what would then clearly be a penalty under clause 11."

33 I think it reasonably clear that all three members of the court were satisfied that the agreement had been terminated by the company under clause 8 and that the sum expressed to be payable under those circumstances was irrecoverable as being a penalty rather than a genuine pre-estimate of damage: see *Campbell Discount Co Ltd v Bridge* [1962] AC 600, in which

the facts were almost identical to those in the *UDT* case. It follows, therefore, that the company had terminated the contract on the grounds of the hirer's breach, as indeed Lord Denning MR made clear in the first of the passages cited. There is no doubt that the court proceeded on the basis that the contract had been terminated. What then did Lord Denning MR mean, when discussing the question of repudiation, by saying that the company had elected to treat the contract as continuing, and what did Harman LJ mean by saying in

the same context that it had elected to treat the agreement as binding? The company had no intention of returning the car to the hirer any more than he was willing to take it back, so there was no question of further performance on either side.

34 It should be borne in mind that these were extempore judgments delivered at a time when the principles of discharge by breach had not received the detailed analysis and exposition provided in the more recent authorities. One can now see that it is impossible for a party to terminate a contract, in the sense of discharging both parties from further performance, whether by invoking a term which entitles him to do so or by exercising his rights under the general law, and at the same time treat it as continuing, since the two are inconsistent. Either the primary obligations remain for performance, or they do not.

35 Both counsel found the *UDT* case [1968] 1 QB 54 a difficult case to explain and neither was able to identify entirely satisfactorily any principle of general application for which it could be said to be authority. All three members of the court held that the finance company had terminated the agreement under clause 8 and that in my view is the ratio of the decision. It was unnecessary for them to decide whether the finance company could sue under those circumstances for loss of bargain because no such case was before it, although all three members of the court appear to have accepted that it could recover its actual loss. The issue of repudiation was not central to the decision, but in so far as the discussion suggests that a contract can both be terminated and continue in existence I do not think it can stand with more recent statements of principle in the House of Lords. In any event, I do not think it can be authority for the general proposition that a person who exercises a contractual right of termination which arises on the other party's breach is inevitably prevented from treating the contract as discharged and recovering damages for the loss of his bargain. That must depend on the intention of the parties in each case.

36 In the present case I am of the view, for the reasons given earlier, that the exercise by **Gearbulk** of the right to treat the contract as terminated under article 10.1(b) and 10.1(c) was intended to and did operate to discharge the contract with the same consequences as if it had been discharged by repudiation in accordance with the general law. Mr Dunning sought to argue that **Gearbulk** had no right to recover damages for loss of bargain in this case because the effective cause of its loss was not the yard's breach of contract but its own decision to exercise its contractual right of termination. I cannot accept that. Whatever may have been said in other cases about other contracts, I think it is clear that in this case the contract proceeds on the footing that if **Gearbulk** chose to exercise its right, the yard's breach was to be viewed as the effective cause of the contract's termination.

37 Moreover, I am quite unable to accept that the exercise by **Gearbulk** of its right to recover instalments of the contract price under articles 5.9

and 10.7 involved an election on its part to affirm the contract. In the first place, **Gearbulk**'s letters exercising its right to terminate the contracts for hulls 24 and 25 were wholly inconsistent with an election to affirm them, so there can be no doubt that the contract in each case was discharged. However, as Mr Boyd pointed out, the right to recover the instalments of the price, together with the right to obtain payment under the bank guarantee, arose only on and by reason of the termination of the contract. I think it is clear, therefore, that the parties intended it to survive the termination of the contract, just as, for example, they intended the arbitration clause to survive. Reliance on that obligation could not, therefore, amount to an election to keep the contract in being. At one point Mr Dunning suggested that the *UDT* case is binding authority for the proposition that it is not open to the parties to enter into an agreement of that kind, but that is not what the case purports to decide and in my view there is no reason in principle why they should not do so. In each case one must construe the contract to see exactly what the parties intended. In this case I think the commercial context as well as the terms of the contract make it clear that the obligation to repay instalments of the price was intended to survive the termination of the contract, whether that occurred by reason of the exercise by **Gearbulk** of a right to terminate expressed in the contract itself or by its acceptance of a repudiatory breach on the part of the yard, each of which had the same consequences in law.

38 Accordingly, far from being determinative of the present case, as the judge thought, I do not think that the decision in the *UDT* case has any direct bearing on it.

39 Faced with these difficulties Mr Dunning submitted in the alternative that in the light of the yard's failure to perform the contracts **Gearbulk** had been faced with a need to choose between alternative and inconsistent remedies. His argument was that article 10 gave **Gearbulk** a choice between a right to recover instalments of the price, supported by the bank guarantee, and a right to claim damages under the general law, which would have to be pursued in arbitration with an uncertain outcome against a potentially insolvent respondent. Those remedies were inconsistent and in this case **Gearbulk**, having chosen the former, could no longer pursue the latter.

40 I am unable to accept that submission. On discharge of a contract of this kind a buyer who has paid the whole or part of the price in advance is entitled, in the absence of any agreement to the contrary, to recover what he has paid by reason of a total failure of consideration. He therefore has a right to recover in restitution any payments he has made in respect of the price, a right which is quite distinct from any right he may have (if he is the injured party) to recover damages for the loss of his bargain. In the present case the parties made specific provision for the repayment of instalments and **Gearbulk** could not, of course, recover both under the contract and in restitution; to do so would result in double recovery. In fact, however, **Gearbulk** is not seeking to recover the advance payments since it has already done so. There is no inherent inconsistency, however, in recovering instalments of the price under article 10 and recovering damages for loss of bargain at common law.

41 If this argument is sound, therefore, it can only be because the parties have agreed that the right to recover instalments of the price provided by article 10 is an exclusive alternative to **Gearbulk**'s rights under the general

law. In my view that argument must be rejected. I can well see the force of the argument that a right to obtain repayment of instalments under a demand guarantee is of great value to a buyer because it provides both certainty and speed, but in the light of the fact that, as is well known, the value of a vessel can rise or fall to a marked degree between the date of the contract and the date of delivery it would be surprising if a buyer entering into a contract for a new vessel were prepared to exchange the whole value of his bargain for the certainty of a speedy recovery of advance payments in the event of the builder's repudiation. Mr Dunning's answer to that was that the buyer has a choice: he can recover his money quickly from the bank or he can pursue all his remedies against the yard (including the recovery of the instalments) slowly in arbitration and take his chance at the end of the day with its solvency.

42 In my view that is not how the contract is to be construed. It does not make good commercial sense and there is nothing in article 10 itself or in the rest of the contract to suggest that is what the parties had in mind. Once one accepts that article 10 does not exclude **Gearbulk**'s right to claim damages for loss of bargain, there is no good reason to construe article 10.7 as providing an exclusive remedy of a kind that was intended to take away by the back door rights of potentially considerable value. Lord Diplock's observation in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689, 717 comes to mind once again. Taking into account the contract as a whole I am left in no doubt that the parties intended article 10.7 to provide a remedy additional to those that would ordinarily be available to **Gearbulk** on termination of the contract.

Acceptance of repudiation

43 The arbitrator held that the yard had repudiated each of the contracts by the time **Gearbulk** sent its letter of termination. As a result counsel on both sides addressed the court at some length on whether the letters of 7 November 2003 and 4 August 2004, neither of which purported in terms to accept the yard's conduct as a repudiatory breach discharging the contract, was none the less effective to bring about that result. We were referred in that connection to a number of authorities, including ***Stocznia*** *Gdanska* ***SA*** *v Lat-*

vian Shipping Co [2001] 1 Lloyd's Rep 537; [2002] 2 Lloyd's Rep 436 (Court of Appeal), and *Dalkia Utilities Services plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599. In view of the conclusion to which I have come on the construction of the contracts this question does not arise in the present case and I therefore propose to express my view on it shortly.

44 It must be borne in mind that all that is required for acceptance of a repudiation at common law is for the injured party to communicate clearly and unequivocally his intention to treat the contract as discharged: see *Vitol **SA** v Norelf Ltd* [1996] AC 800, 810 G–811 B, per Lord Steyn. If the contract and the general law provide the injured party with alternative rights which have different consequences, as was held to be the case in the *Dalkia* case [2006] 1 Lloyd's Rep 599, he will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant, but where the contract provides a right to terminate which corresponds to a right under the general law (because the breach goes to the root of the contract or the parties have agreed that it should be treated as

doing so) no election is necessary. In such cases it is sufficient for the injured party simply to make it clear that he is treating the contract as discharged: see the *Dalkia* case [2006] 1 Lloyd's Rep 599, para 143, per Clarke J. If he gives a bad reason for doing so, his action is none the less effective if the circumstances support it. That, as I understand it, is what Rix LJ was saying in ***Stocznia** Gdanska **SA** v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436, para 32, with which I respectfully agree.

45 In the present case the parties accept, and indeed the arbitrator has found, that the breaches on the part of the yard which entitled **Gearbulk** to terminate the contracts were in each case sufficient to amount to a repudiation. I accept Mr Dunning's submission that in its letters of 7 November 2003 and 4 August 2004 **Gearbulk** purported to terminate the contract pursuant to article 10.1(b) and (c) and not under the general law, but each of the letters made it clear that it was treating the contract as discharged and in those circumstances each was sufficient to amount to an acceptance of the yard's repudiation. In its letter of 30 November 2004 **Gearbulk** sought to rely on both. Mr Dunning said that letter was equivocal as between reliance on the terms of the contract and reliance on the general law. Perhaps it was, but it was quite unequivocal as to **Gearbulk**'s intention to treat the contract as discharged and that was all that was necessary.

46 For these reasons I would allow the appeal, set aside the judgment and restore the arbitrator's award.

SMITH LJ

47 I agree.

WARD LJ

48 I also agree.

Appeal allowed.

Cross-appeal dismissed.

M B