***401** Universal Cargo Carriers Corporation v. Citati.

Queen's Bench Division

QBD

Devlin J.

1957 Feb. 14, 15, 18, 19, 20, 21; Mar. 12.

Shipping--Charterparty--Voyage--Anticipatory breach--Renunciation or impossibility--Failure to load--Inability of charterer to nominate shipper, or berth, or to provide cargo--Whether breaches of condition or warranty-- Charterparty cancelled by shipowners before expiry of lay days--Whether justified--Delay justifying rescission--Proper test to be applied.

Contract--Repudiation--Anticipatory breach--Nature of.

Arbitration--Case stated--Form--Interim award--Undesirability of setting out evidence. Arbitration--Case stated--New point of law--Court's right to consider--Question of law left in general form. Arbitration--Case stated-- Remission to arbitrator--Relevant facts

Commercial Court--Value of--Superiority to arbitration--Questions of mixed fact and law.

Contract--Frustration--Fact or law--Period of delay--Arbitration. Fact or law.

By a voyage charterparty dated June 30, 1951, the Catherine D. Goulandris was chartered to load at Basrah a quantity of scrap iron for carriage to Buenos Aires. By the charterparty it was provided that "cargo to be brought alongside in such a manner as to enable the vessel ... to load ... the cargo at the rate of 1,000 tons per weather working day. ... Time to commence 1 p.m. if notice of readiness is given before noon and at 6 a.m. next working day if notice given ... after noon ... notice of readiness to be given to shipper. ... Time lost in waiting for berth to count as loading time." The ship arrived at Basrah on July 12, but the charterer failed to nominate an effective shipper so she was sent to the buoys where she remained until July 18. On July 18, three days before the lay days were due to expire under the charterparty, no cargo having been provided, the owners cancelled the charter, rechartered the ship to another charterer and ordered her away from Basrah. She sailed on July 23, the charterer's efforts to find a cargo having failed, and the owners having refused to accede to his demand to detain the ship.

The owners claimed damages before an arbitrator for breach of the charterparty. They justified the cancellation of the charter on the grounds (1) that the breaches alleged, namely, in failing to nominate a shipper or a berth or to provide cargo, were breaches of conditions, and (2) that the charterer's conduct amounted to a repudiation of the charterparty. The charterer denied any breach and counterclaimed for damages for wrongful repudiation by the owners.

The arbitrator found that the owners should on July 18 have inferred from the charterer's conduct: (1) that he was always willing to perform if he could; (2) that he could not have performed by the end of the lay days or within a reasonable time thereafter; and (3) that he could have performed before the delay became so long as to frustrate; but (4) that, in the light of later events, the owners would have concluded that the charterer would not be able to perform before the delay had become so long as to frustrate.

The arbitrator held that the charterer had committed a breach of the charterparty by failing to nominate a shipper, but that it was a breach of warranty entitling the owners only to damages; but that he had, by his conduct, evinced an intention not to perform the charterparty. He made an interim award on liability in favour of the owners subject to the decision of the court on the question whether on the facts found and on the true construction of the charterparty the owners were entitled to treat the charterparty as discharged:-

***403 Held:**

(1) that where no time was stipulated, the preliminary obligations under the charterparty had to be performed in sufficient time to allow the main obligation of loading to be completed within the prescribed time and as, on the facts found, the loading could not have been completed in the lay time remaining after July 18, by that date the time for nominating a berth and providing a cargo had expired and the charterer was in breach of both those terms; and in those circumstances it was not necessary to decide whether the nomination of a

shipper was a term of the charterparty. Moreover, the charterer, by putting it out of his power to load the cargo within the lay time prescribed, had committed a further breach of the charterparty; but that none of the breaches committed were breaches of condition and therefore the owners were not ipso facto entitled to rescind.

Vergottis v. Wm. Cory & Son Ltd.[1926] 2 K.B. 344 and Chandris v. Isbrandtsen-Moller Co.[1951] 1 K.B. 240; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768 applied.

(2) That the proper test to apply in order to decide whether delay in fulfilling obligations under a contract was so grave as to entitle the aggrieved party to rescind was whether that delay was such as to frustrate the commercial purpose of the venture; that "reasonable time " could only be accepted as the test where the period regarded as reasonable time was the same as the period necessary to frustrate; and therefore, as the arbitrator had based his award in favour of the owners on the finding that the charterer would be unable to perform within a reasonable time after the expiry of the lay days (which was less than the period required to frustrate) he had applied a test as to the delay necessary to amount to repudiation which was erroneous in law.

Tarrabochia v. Hickie(1856) 1 H. & N. 183; Stanton v. Richardson(1872) L.R. 7 C.P. 421; dictum of Scrutton L.J. in Inverkip Steamship Co. Ltd. v. Bunge & Co. [1917] 2 K.B. 193, 201 applied.

Geipel v. Smith(1872) L.R. 7 Q.B. 404 considered.

(3) That, while the application of the doctrine of frustration was a matter of law, the assessment by the arbitrator of the period of delay sufficient to constitute frustration was a question of fact, and could be attacked only if he had applied some wrong principle of law (which he had not).

(4) That an anticipatory breach of contract (on which the owners must rely) was (1) renunciation by a party of his liabilities under it, or (2) impossibility of performance, including when by his own act or default circumstances arose which rendered him unable to perform his side of the contract or some essential part of it. "Anticipatory breach " covered all breaches which were bound to happen.

Dictum of Lord Porter in Heyman v. Darwins Ltd.[1942] A.C. 356, 397; 58 T.L.R. 169; [1942] 1 All E.R. 337 and Smith's Leading Cases (1929), 13th ed., vol. 2, p. 40, applied.

(5) That as conduct could only be interpreted in the light of events known to the interpreter at the time, the owners had failed ***404** to establish that the arbitrator should properly have taken after-events into account in determining the conduct of the charterer. Accordingly, the owners' claim on renunciation failed.

Forslind v. Bechely-Crundall,1922 S.C.(H.L.) 173 considered.

But (6) that the owners were entitled to succeed if they could prove that the charterer had, on July 18, 1951, become wholly and finally disabled from finding a cargo before the delay frustrated the venture; it was immaterial whether the disablement was deliberate or not; but the determination of inability must be made in the light of all the events, occurring before and after the critical date, which were put in evidence at the trial.

Dicta of Lord Sumner in British & Beningtons Ltd. v. N. W. Cachar Tea Co. Ltd.[1923] A.C. 48, 71 applied.

Geipel v. Smith,L.R. 7 Q.B. 404 and Thorpe v. Fasey[1949] Ch. 649; 65 T.L.R. 561 ; [1949] 2 All E.R. 393 considered.

(7) That on this form of award, leaving the question of law in general form, a party was entitled to argue any point of law arising on the facts found.

(8) That it was the duty of a party to satisfy himself when he got the case stated that the relevant facts were found, and, if not, apply for remission under R.S.C., Ord. 64, r. 14, within the six weeks allowed.

(9) That there was no clear finding on which the question could be argued on the case as it stood as the award was directed to renunciation and not impossibility in fact and therefore, as the owners ought not to be debarred from taking the point and could now be allowed to do so without injustice to the charterer, the case would be remitted to the arbitrator for a further finding on the question whether the charterer was, on July 18, 1951, willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the venture.

SPECIAL CASE stated by an arbitrator (Mr. Eustace Roskill Q.C.) in form of interim award.

By a charterparty in the Gencon form signed in London on June 30, 1951, by the duly authorized agents of Universal Cargo Carriers Corporation (a corporation registered in the United States of America), owners of the ss. *Catherine D. Goulandris*, and Pedro Citati (a merchant carrying on business in Buenos Aires), the latter (hereinafter referred to as "the charterer ") chartered the vessel (expected ready to load at Basrah on July 6, 1951), to load a cargo of scrap iron at Basrah for carriage to Buenos Aires at U.S.$28 per ton. The charterparty provided, inter alia:

"5. Cargo to be brought alongside in such a manner as to enable the vessel to take the goods with her own tackle and to load and stow the goods

free of expense to vessel the cargo at the rate of 1,000 tons per weather working day, Sundays and ***405** holidays excepted unless used. ... Time to commence 1 p.m. if notice of readiness is given before noon and at 6 a.m. next working day if notice given during office hours after noon. The notice to be given to the shippers. ... Time lost in waiting for berth to count as loading time. ... 7. Demurrage to be at the rate of $1,000 per day. ... 11. Lay days not to commence before July 5, 1951, and should the vessel not be ready to load (whether in berth or not) on or before July 25, 1951, the charterers to have the option of cancelling the contract. ..." It was also provided that any dispute should be referred to arbitration in London.

Disputes having arisen under the charterparty, Mr. Eustace Roskill Q.C. was appointed as sole arbitrator, the hearing taking place in London on February 27, 28, 29 and 30, 1956.

The owners claimed damages exceeding $100,000 from the charterer for breach of the charterparty. The charterer counterclaimed for the sterling equivalent of $5,000 which he had paid to the owners as advance of freight payable under the charterparty under a collateral agreement.

The issue argued before the arbitrator was whether the owners were justified in treating the charterparty as at an end on July 18, 1951, when they rechartered the vessel to charterers other than the charterer. The owners maintained that they were justified in so acting by reason of the charterer's alleged breach of the charterparty, and that they were also entitled to damages for that breach. The charterer maintained that the owners were not justified in rechartering the vessel on July 18, 1951.

The following statement of facts is taken from the judgment and is a summary of the main facts set out in the case: On June 30, 1951, the charterer entered into a charterparty with the owners whereunder the *Catherine D. Goulandris*, expected ready to load at Basrah about July 6 (she, in fact, arrived on July 12), was to proceed to Basrah and there load 6,000 tons of scrap iron which she was to carry to Buenos Aires. The charterer, who carried on business at Buenos Aires, intended to use the vessel to import from Basrah this quantity of scrap iron which he had bought from a merchant called Haddad, who appeared to carry on business at Baghdad and was intended to be the shipper of the cargo at Basrah. It appeared that Haddad in turn had bought from a merchant called Chbib of Beirut, and Chbib from a merchant called Vassos, who carried on business in Baghdad and was known to be the main shipper of the occasional cargoes of scrap that were exported from Basrah. At or shortly after ***406** the time that the charterparty was executed the charterer nominated Haddad as the shipper, to whom notice of readiness was to be given under the charter, but gave his address as Basrah and not as Baghdad. Gray, who was the ship's agent at Basrah, ascertaining that there was no such person as Haddad there, and getting his address in Baghdad, cabled to him on July 4 asking for the name of his agent at Basrah, but he never received any reply. Gray appeared to have heard privately on this date that a cargo of scrap iron did exist in Basrah, but was located some distance from the loading wharf, and that it would be ready for shipment about July 15. On July 7 Gray cabled once more to Haddad, and on July 8 sent him a registered letter. Again he received no reply, and inquiries he made on his own did not enable him to find out whether Haddad had any local agent in Basrah or whether he had begun to make local arrangements. Gray kept his principals informed of the position, and they passed the information on to the charterer, pointing out the urgency of the matter.

During this time Haddad was in fact in Washington, and, on his instructions, on July 10 a cable was sent to Gray saying that shippers through Beirut would contact him. This was presumably a reference to Chbib. On July 11 Gray received a cable saying that, as the charterer was still without "contact" with the shipper, he would order the vessel to the buoys at Basrah to await orders. On the same day Gray got another cable, as the result of a further conversation with Haddad, instructing him to contact Vassos, and on the same day another cable from the charterer or his agents instructing him to contact Chbib. On July 12 Gray cabled Vassos in Baghdad but got no reply, and on the afternoon of that day the vessel arrived at Basrah, reaching the buoys at 2.34 p.m. Gray, who was uncertain as to whom he was authorized to deal with as shipper, cabled for clarification and got an answer on the instructions of the charterer that he was to accept Vassos or his nominees as shipper. Accordingly, on the same day he sent Vassos a registered letter asking for information, and on July 15 Vassos cabled back: "Regret I have no connexion with steamer in question."

The reason for this situation was not known to Gray or to the owners. But the facts were that the price of scrap iron had risen very rapidly, and Vassos, who was the ultimate seller and who alone owned or controlled sufficient scrap iron in Iraq to supply the charterer's needs, was seeking to free himself from ***407** the bargain by claiming that the credit under which he was to receive payment from Chbib had not been opened in time.

Gray did not know what was going on behind the scenes; but on July 17 he did know that Vassos had again confirmed emphatically that he had no interest in the Catherine D. Goulandris charter, and that there were 6,000 tons of scrap iron in the Basrah area for which no shipping arrangements had yet been made, but that shippers closely associated with Vassos were believed to be interested in shipping 6,000 tons to the United Kingdom. The vessel had now been in Basrah at the buoys for five days, and it must have been plain to the owners that no cargo would be loaded for some time, if at all. On the following day, July 18, the owners chartered the vessel to load another cargo from an Indian port and carry it to Mobile, Alabama. Both sides were agreed that July 18 was the crucial date and that on that date the owners, rightly or wrongly, threw up the charter.

Thereafter, the charterer, who had been told that the owners were ordering the vessel away, continued with his endeavours to arrange a shipment before she actually sailed, and on July 19 cabled Gray demanding that he should hold the vessel and contact Chbib in Beirut for loading instructions. On July 20 the charterer, through attorneys in New York, wrote to the owners threatening action. The owners, however, refused to detain the vessel, and she left Basrah on July 23. On July 24 the charterer obtained a court order in New York restraining the owners from operating the vessel otherwise than under the charterparty. On July 27 that order was discharged by consent, the parties agreeing without prejudice to their respective contentions that the owners would give the charterer the option (to be exercised by midnight on August 15), to charter a substitute vessel to load scrap iron at Basrah on the same terms, provided that the charterer first satisfied Gray that he had a cargo ready. The charterer never exercised that option and, if and in so far as he made any further efforts to procure a cargo, they were unsuccessful.

The owners claimed that they were entitled (a) to act as they did when, on July 18, 1951, they rechartered the vessel, and (b) to recover damages for the charterer's alleged breach of the charterparty. They contended (1) that the charterer was guilty of a breach of condition or of a fundamental term of the charterparty in failing to nominate a shipper ready, willing and ***408** able to accept notice of readiness under clause 5 of the charterparty, and that by reason of that breach of condition they (the owners) were entitled to treat the charterparty as at an end, as they in fact did on July 18, 1951; (2) that the charterer either by his failure to nominate a shipper or by his reiterated nomination of alleged shippers who were, in fact, unwilling and unable to accept notice of readiness, evinced an intention not to perform the charterparty or, at least, not to perform it in accordance with its terms, and were thus guilty of an anticipatory breach of contract which the owners were entitled to accept as a repudiation of the charterparty, as they in fact did. They also relied, both in connexion with their allegations of breach of condition and with their allegations of repudiation, upon the charterer's failure to provide cargo at Basrah or to nominate a berth there.

The charterer contended, inter alia, that there was no breach of the charterparty in relation to the nomination of shippers, nomination of berth or provision of cargo; that, if any breach were committed, it was not a breach of condition, but a breach of a term which sounded in damages only and, accordingly, the charterer was not entitled on July 18, 1951, to treat the charterparty as at an end; that he had not, on July 18, evinced an intention not to perform the whole contract; at the worst he was on that date only unable to perform and mere inability to perform was never sufficient to bring about an anticipatory breach of a contract, but that, if that contention were wrong as a matter of law, nevertheless, before inability to perform could as a matter of law bring about an anticipatory breach of the contract, it must be inability of an irretrievable nature, and there was no such irretrievable inability in the present case. He relied on the fact that hv July 18, 1951, lay time had not expired.

The arbitrator found, on the owners' first contention, inter alia, that the charterer never at any time nominated a shipper at or with a representative at Basrah able, ready and willing to accept notice of readiness there; and held that he had thereby committed a breach of clause 5 of the charterparty, as such nomination ought to have been made at the latest by the time that the vessel arrived at the buoys at 2.34 p.m. on July 12, 1951; that if it was necessary to consider when a reasonable time for making such a nomination expired, it had expired by the time that the vessel arrived at the buoys. If, contrary to his view, the charterer was not obliged to nominate a shipper at Basrah until after the vessel had arrived, a reasonable time for the nomination had expired by the time that the vessel was ***409** rechartered on July 18, 1951. He held as a matter of law that failure timeously to nominate a shipper did not amount to a breach of condition of the charterparty, and that the owners were not entitled to rely upon that failure to justify their action in rechartering. He held further that there was no breach of the obligations to provide a cargo or to nominate a berth as a reasonable time for fulfilling those

obligations had not expired by July 18, 1951. Accordingly, the owners failed on their first point.

On the assumption that lay time began to run on July 12, 1951, the arbitrator found that it would have expired on July 21, 1951; that no cargo had been brought to the loading wharf by July 18, 1951, or would have been brought there by July 21; and that the cargo could not possibly have been loaded within the lay time remaining between July 18 and July 21.

On the issue of anticipatory breach, the arbitrator accepted the charterer's contention that he could only look at the events which had occurred and which were known to the owners on July 18, 1951. He accordingly excluded from consideration everything which occurred before that date or thereafter which was unknown to the owners on that date. On that basis he found that on July 18, 1951, there was no person or shipper in Basrah or elsewhere in Iraq who was prepared to ship any scrap iron on board the vessel, but that the charterer was not aware that that was so; that the only person in Iraq who had scrap iron in his possession or control which could have been used for shipment on board the vessel was Vassos, and the charterer, by July 18, 1951, was aware that that was so; that on July 18, 1951, Vassos was not prepared to ship any scrap iron on board the vessel; that the charterer on July 18, 1951, was aware that Vassos had refused so to ship, but hoped that he might agree thereafter; that the charterer was encouraged in that hope by Chbib; that Vassos was in fact not prepared at any time after July 18, 1951, to sell any scrap iron which he owned or controlled either to the charterer, Haddad or Chbib, but that the charterer until July 23 or 24, 1951, continued to hope, and was encouraged by Chbib to hope, that Vassos might agree to ship; that even if Vassos had agreed to ship on board the vessel, such shipment on or after July 18, 1951, could only have taken place if the owners had been prepared to break the fresh charterparty into which they had entered; that there was no evidence from which it could be inferred that the owners would have been prepared to do so; that even if Vassos had agreed to ship, such agreement would in all probability have been ***410** conditional upon Vassos receiving a greatly enhanced price; that the charterer on July 18, 1951, was not able to perform the charterparty; that he was willing to perform it if and when cargo became available to load.

In paragraph 34 of the award the arbitrator made further findings at the request of the parties, the effect of which was as follows: That a reasonable shipowner on July 18, 1951, would have concluded (1) that the charterer was always willing to perform if he could; (2) that he could not have performed by the end of the lay days or within a reasonable time thereafter; (3) that he could have performed before the delay became so long as to frustrate; (4) that a reasonable shipowner on the facts known to the owners on July 18, 1951, as interpreted in the lights of later events would conclude that the charterer was willing to perform his obligations but would be unable to do so within a reasonable time, and would be unable to do so before such time as would frustrate the charterparty.

In so far as it was a question of fact he found, and in so far as it was a question of law he held, that the charterer evinced an intention not to perform the charterparty and committed an anticipatory breach of it, which the owners were entitled to treat and accept, and did treat and accept, as a repudiation of the charterparty by rechartering the vessel on July 18, 1951. In his opinion the owners were entitled to an interim award on liability in their favour on their second contention.

The question of law for the court was whether upon the facts found, and upon the true construction of the charterparty, the owners were entitled on July 18, 1951, to treat the charterparty as discharged by the charterer's breach, and to claim damages accordingly.

Subject to the decision of the court the arbitrator answered the question in the affirmative and awarded (a) that the charterer broke the charterparty and was liable in damages to the owners; (b) that the charterer's counterclaim failed and was dismissed; (c) that the charterer pay the costs of the reference.

In the alternative (if the court answered the question in the negative) he awarded (a) that the charterer did not break the charterparty and was not liable in damages to the owners; (b) that the owners' claim failed and was dismissed; (c) that the owners were liable to repay the charterer the sum claimed by way of advance of freight; (d) that the owners pay the costs of the reference.

***411** *A. A. Mocatta Q.C.* and *Michael Kerr* for the charterer. Before the arbitrator the owners claimed that they were entitled to cancel the charter on two main grounds, (1) that the charterer had committed breaches of certain fundamental terms of the charterparty, and (2) that he had repudiated the charterparty by evincing an intention not to be bound by it. It is not proposed at this stage to argue whether or not there was a breach at all. The arbitrator's findings are accepted. The only breach found, i.e, failure to nominate a shipper, was held to be a breach of warranty which did not of itself

entitle the owners to rescind.

The question for the court arising out of the arbitrator's conclusion on anticipatory breach raises the following main issues: Where a party is willing to perform a contract but is unable to do so through no fault of his own, when, if at all, does that inability amount to repudiation when the contract is not one of which time is the essence? If inability can amount to repudiation, what is the proper test to be applied in relation to time under the contract? Is it where the innocent party believes that the defaulting party is unable to perform within a reasonable time, or where he cannot perform within such time as would frustrate the contract? A further question is to what extent, if at all, is the court entitled to have regard to matters which occurred before or after the date on which the repudiation was alleged to have taken place which were not at the time known to the innocent party.

Whether a party to a contract has evinced an intention not to be bound by it depends on the conclusion that a reasonable man would draw from the overt acts or words of the party alleged to have repudiated. When conduct is relied on as repudiation it must be judged on the same basis, i.e., on the overt acts or words of the guilty party. Inability to perform as distinct from unwillingness cannot amount to repudiation as it cannot be interpreted as evincing an intention not to be bound: see Freeth v. Burr, [FN1] where the classic statement on evincing an intention appears in the judgment of Lord Coleridge C.J. [FN2] That excludes inability. In the same case Keating J. [FN3] appears to have regarded it as throwing some light on the way in which the conduct of the party is to be assessed. Lord Coleridge's statement was approved by the House of Lords in Mersey Steel and Iron Co. v. Naylor, Benzon & Co. [FN4]: see *per* Lord Selborne. [FN5] Reliance is also placed ***412** on Johnstone v. Milling, [FN6] where it was held that a lessor who had failed to rebuild premises because he had been unable to find the money to do so had not repudiated. Lord Esher M.R., [FN7] who dealt with the matter on the basis of renunciation, stated that inability to perform did not amount to repudiation. Cotton L.J. [FN8] took the view that whether inability amounted to renunciation depended on the circumstances of the case and the nature of the contract. Bowen L.J.'s approach was on all fours with Lord Esher M.R.'s. On Cotton L.J.'s approach it may be that a statement by a party to a contract that he is unable to perform is a circumstance which can be taken into consideration in deciding whether an intention has been evinced not to be bound, but that does not mean that it can by itself amount to repudiation. In the classic statements of the law on repudiation by way of anticipatory breach inability is not mentioned except in circumstances where a party has put it out of his power to perform: see Heyman v. Darwins Ltd., [FN9]*per* Lord Porter [FN10]; Chitty on Contracts, 21st ed., vol. 1, p. 192, para. 364; Halsbury's Laws of England, 3rd ed., vol. 8, p. 202, para. 456. There is a distinction between that type of case and the present where a person does his best to perform but fails to do so. Thorpe v. Fasey [FN11] obliquely raises the point as to the distinction to be drawn between inability to perform and renunciation and is a clear decision that inability coupled with willingness does not amount to repudiation. That case is important because there there was the rare concatenation of circumstances of a man saying "I would like to but I cannot. " Here the circumstances are the same. [Reference was also made to Southern Foundries (1926) Ltd. v. Shirlaw [FN12] and Shaffer (James) Ltd. v. Findlay, Durham and Brodie. [FN13]]

FN1 (1874) L.R. 9 C.P. 208.

FN2 Ibid. 213.

FN3 Ibid. 215.

FN4 (1884) 9 App.Cas. 434.

FN5 Ibid. 438.

FN6 (1886) 16 Q.B.D. 460; 2 T.L.R. 249.

FN7 16 Q.B.D. 460 , 468.

FN8 Ibid. 471.

FN9 [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

FN10 [1942] A.C. 356, 397.

FN11 [1949] Ch. 649; 65 T.L.R. 561; [1949] 2 All E.R. 393.

FN12 [1940] A.C. 701; 56 T.L.R. 637; [1940] 2 All E.R. 445.

FN13 [1953] 1 W.L.R. 106.

If that submission is held to be wrong, or untenable in this court, then inability can only amount to repudiation if it is of an irretrievable nature in relation to the particular contract. In contracts such as the present, of which time is not of the essence, it can only amount thereto if it persists for such a time as would frustrate the contract. The test of reasonable time, which the arbitrator has applied, is inapplicable. The mere fact that a ship does not load within a reasonable time after the expiry of the lay days does not entitle the owner to withdraw the ship and abandon ***413** the charter: Inverkip Steamship Co. Ltd. v. Bunge & Co., [FN14] *per* Scrutton L.J., [FN15] where the question was whether a fixed rate of demurrage applied throughout the whole period of detention of a ship after the lay days had expired, and it was held that it did. Warrington L.J. expressed no view as to the right to withdraw the ship, but the passage in Scrutton L.J.'s judgment, [FN16] on which reliance is placed, though obiter, supports my submission. Reliance is also placed on dicta of Roche and Greer L.JJ. in Harold Wood Brick Co. Ltd. v. Ferris, [FN17] which, although obiter, indicate that inability only amounts to repudiation if it be a permanent disability. Here there was nothing to show that the charterer would not be able to perform the charterparty before the frustration date, and if the dictum of Scrutton L.J. in Inverkip Steamship Co. Ltd. v. Bunge & Co. [FN18] and the dicta of Roche and Greer L.JJ. in Harold Wood Brick Co. Ltd. v. Ferris [FN19] are correct the charterer is entitled to submit that the arbitrator misdirected himself in law in applying the test of reasonable time.

FN14 [1917] 2 K.B. 193.

FN15 Ibid. 201.

FN16 Ibid. 201.

FN17 [1935] 2 K.B. 198, 204, 208.

FN18 [1917] 2 K.B. 193, 201.

FN19 [1935] 2 K.B. 198, 204, 208.

[DEVLIN J. Assuming against you that "I cannot" is equal to "I will not," and the test in relation to actual breach of an obligation is reasonable time, how can it be different in the case of anticipatory breach?]

In order to rescind on the ground of an actual breach, there must be a breach of a condition of the contract or such a breach of warranty as will go to the root of it, i.e., that will frustrate it. The test must be the same in the case of an anticipatory breach: see Thorpe v. Fasey, [FN20]*per* Wynn-Parry J. [FN21] Where time is not of the essence of a contract, delay in fulfilling the obligations thereunder when it arises from inability and not from unwillingness is a breach of warranty and not a breach of condition, and it can only give rise to rescission if it is such as to make it plain that the party in default will be incapable of performing the contract: Evera S.A. Commercial v. North Shipping Co. Ltd., [FN22] *per* Devlin J. [FN23] The obligation to load within the lay days is not a condition but a warranty: Aktieselskabet Reidar v. Arcos Ltd. [FN24] There is no term of the contract making it a condition and the only way in which it could have become one is if a notice had been given making time of the essence. Such notice could only have been given after the lay days had expired, and therefore ***414** notice is of no importance in the present case, because the ship was withdrawn before the lay days had expired.

FN20 [1949] Ch. 649.

FN21 Ibid. 661.

FN22 [1956] 2 Lloyd's Rep. 367.

FN23 Ibid. 376.

FN24 [1927] 1 K.B. 352; 42 T.L.R. 737.

As to the obligation to provide cargo, the same reasoning applies. That obligation is to have it there by the time the ship arrives or within a reasonable time thereafter so that the ship can be loaded within the lay days, but that is a warranty only and not a condition. Admittedly there is a finding against the charterer that the ship could not have loaded within the lay days remaining, but there is also a finding that the time for providing the cargo had not passed by July 18, the alleged date of repudiation. If,

contrary to the arbitrator's finding, there was a breach of warranty, the owners were not entitled to rescind on the basis of that breach unless it had continued for such time as would frustrate the charterparty. The same considerations apply to the failure to nominate a berth.

Forslind v. Bechely-Crundall [FN25] justifies the arbitrator's finding of law that he could have no regard to matters occurring after July 18 - which both parties regard as the crucial date - which had not on that date come to the knowledge of the owners.

FN25 1922 S.C.(H.L.) 173.

Ashton Roskill Q.C. and *H. V. Brandon* for the shipowners. It is immaterial to the owners' case whether the charterparty was a berth charterparty (as the arbitrator has held) or a port charterparty: North River Freighters Ltd. v. H.E. President of India. [FN26] Whichever be the category (berth or port) within which the charterparty falls, the charterer was under an obligation to nominate shippers to whom notice of readiness could be given. Until such notice was given, lay time proper could not start to run under the charterparty. The charterer failed to nominate shippers and there is a finding of fact that a reasonable time for such nomination had expired by the time the vessel had arrived at the buoys at Basrah on July 12 or, at the latest, by the time the vessel was rechartered on July 18. The obligation to nominate shippers was fundamental because time under the charterparty could not start to run until notice of readiness was given, and notice of readiness could only be given to the shippers. Therefore, failure to nominate shippers effectually operated to prevent the working of the charterparty in a vital respect. The owners are entitled to succeed on the basis of this breach alone.

FN26 [1956] 1 Q.B. 333; [1956] 1 All E.R. 50.

Further, although a charterer is not obliged to have cargo available by the time the ship arrives, he must have it there in ***415** time to enable the ship to be completely loaded within the lay days: Vergottis v. Wm. Cory & Son Ltd., [FN27]*per* Greer J. [FN28] If he does not, there is a breach of condition: see Ardan S.S. Co. v. Weir, [FN29] where the obligation to furnish a cargo is described as a "primary" obligation. Even if (which is not conceded) "primary" is not synonymous with "fundamental," it must be closely related thereto. As to your Lordship's observations in Chandris v. Isbrandtsen- Moller Co. [FN30] on the meaning of the word "primary," whether or not that word is synonymous with "preliminary" does not affect the fundamental character of the obligation of the charterer to furnish cargo. The fact that breach of the obligation to load within the lay days can be paid for by demurrage and must therefore be treated as a warranty and not as a condition does not mean that failure to furnish cargo so that a vessel can be completely loaded within the lay days is not, or may not be, a breach of condition.

FN27 [1926] 2 K.B. 344.

FN28 Ibid. 354.

FN29 [1905] A.C. 501; 21 T.L.R. 723.

FN30 [1951] 1 K.B. 240, 252; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768.

Further, the charterer was under an obligation to nominate a berth to enable the cargo to be completely loaded within the lay days. This obligation flows from the obligation to furnish cargo. Both obligations are, it is submitted, fundamental. On the facts found in the award the charterer failed to furnish any cargo at any time and could not have furnished cargo so as to enable the ship to be completely loaded within the lay days. The same facts show that a berth could not have been nominated in time for the vessel to be completely loaded within the lay days. It is therefore submitted that in these two further respects the charterer was in repudiation of the charterparty.

If, contrary to this submission, the failure to furnish cargo was a breach of warranty only, there is still a breach of one or more conditions, i.e., the failure to nominate a shipper and the failure to nominate a berth. Alternatively, if those breaches were breaches of warranty only, then breaches of two or more warranties can amount to a breach of condition or fundamental term, because there would then be a breach of the obligation to perform the charterparty as a whole.

If the court is not satisfied that there was breach of a condition or fundamental term of the charterparty, then reliance is placed on the arbitrator's finding of anticipatory repudiation. Whether there has been repudiation or not is a

question of fact to be decided on the acts and conduct of the party alleged to ***416** have repudiated. The cumulative effect of the facts found by the arbitrator fully justifies his conclusion that the charterer evinced the intention not to be bound by the charterparty. The charterer's submissions with regard to his disablement do not touch the matter. It makes no difference, if a party has failed to perform, whether he has disabled himself from doing so or, simpliciter, does not perform. The question is: Is he able and willing to perform his contract? Inability is part and parcel of unwillingness. A party does not the less repudiate by saying "I would if I could but I can't."

The passage in Scrutton L.J.'s judgment in Inverkip Steamship Co. Ltd. v. Bunge & Co. [FN31] relied on by the charterer does not support his submission that inability, if it is to amount to repudiation, must be irretrievable and such as to frustrate the contract. The Lord Justice does not say in that case that a claim for anticipatory repudiation against a charterer who has failed to perform his obligation can only succeed if the delay is such as to frustrate the charterparty. He is, if anything, contrasting repudiation and frustration. Alternatively, in that passage, he is not directing his mind to anticipatory repudiation at all. In any event, this question has to be decided on the ordinary principles of the law of contract and not in the light of the somewhat esoteric issue which arose for decision in the Inverkip case, [FN32] namely, whether shipowners were entitled to damages, as distinct from the demurrage rate, in respect of part of the period of time during which a ship was detained by charterers. On common law principles the owners are entitled to succeed: see Millar's Karri and Jarrah Co. (1902) v. Weddel, Turner & Co. [FN33]

FN31 [1917] 2 K.B. 193, 201.

FN32 [1917] 2 K.B. 193, 201.

FN33 (1908) 14 Com.Cas. 25; 100 L.T. 128.

The charterer's submission that inability to perform cannot produce repudiation unless it continues for such time as would amount to frustration of the contract confuses two different principles, namely, anticipatory repudiation of a contract, and its dissolution by operation of law, viz., frustration. There is no true connexion between the two and no comparison of like with like. It does not follow as a matter of law that because in different circumstances delay could produce frustration of a contract, an equivalent amount of delay is necessary before it can be said that the contract has been repudiated.

[DEVLIN J. If the breach would not of itself entitle you to rescind, you cannot go further and say that an anticipatory breach ***417** of that obligation would entitle you to do so. [Reference was made to Thorpe v. Fasey,*per* Wynn-Parry J. [FN34]] The broad proposition advanced on behalf of the charterer is that in order to justify rescission there must be shown either a breach of condition or such a breach of warranty as to go to the root of the contract, i.e., as will frustrate it.]

FN34 [1949] Ch. 649, 661.

Rescission is justified if there is inability to perform the contract within a reasonable time within which performance must take place. The case is a fortiori if a party to a contract shows that he is unable to perform it whatever time for performance may be given. This, it is submitted, was what was under consideration in Thorpe v. Fasey. [FN35] What is reasonable is to be decided by the tribunal having regard to the commercial exigencies of the situation. Here, although the charterer never in fact said that he was going to break the charterparty, his conduct and the cumulative effect of the facts found were such as to justify the conclusion of repudiation.

FN35 [1949] Ch. 649, 661.

[DEVLIN J. referred to McElroy and Glanville Williams on Impossibility of Performance, (1941), p. 121, and to the cases cited therein.] [If delay which goes to the root of the contract is synonymous with the frustration period, then frustration must be the right test. There is a finding in the award that the delay was not such as to frustrate the object of the voyage.]

No. The only finding in this connexion in the award is that a reasonable shipowner on the facts known to the owners by July 18, 1951, would not then conclude that the charterer would not be able to perform his obligations under the charterparty before the expiry of such time as would frustrate the charterparty: the opposite conclusion is reached if such facts are interpreted in the light of after-events.

[DEVLIN J. referred to MacAndrew v. Chapple.

[FN36]]

FN36 (1866) L.R. 1 C.P. 643.

Let it be assumed that historically frustration derives from the principle of failure of consideration; this conception is driven too far in McElroy and Glanville Williams on Impossibility of Performance, p. 121. When the doctrine of failure of consideration was developing, the doctrine of anticipatory breach had not developed at all. In considering whether a contract has been repudiated by delay, the court is not tied to the yardstick of frustration. Macandrew v. Chapple [FN37] enunciates what is now expressed compendiously in Chitty on Contracts, 21st ed., vol. 1, p. 252. The proper test is whether the business efficacy of the ***418** contract is destroyed by the breach. Of course, frustration of a contract involves ex hypothesi that its business efficacy is gone. But delay short of what would effect frustration may still destroy a contract's business efficacy. Technical questions of frustration are beside the point. To apply the frustration yardstick involves confusion of two different legal conceptions. Frustration automatically brings the contract to an end. Upon a repudiation by one party the other party has the right to elect to keep the contract alive. So the delay must not be so long as the life of the contract. Further, frustration must be irrelevant because, as it automatically destroys the contract, there is nothing for the injured party to keep alive, and, even if he wished to do so, there would be no point in so doing.

FN37 (1866) L.R. 1 C.P. 643.

[DEVLIN J. On the authorities delay must be such as to go to the root of the contract. Both Scrutton L.J. in Inverkip Steamship Co. Ltd. v. Bunge & Co. [FN38] and Willes J. in MacAndrew v. Chapple [FN39] equate going to the root of the contract with frustration. Is there any authority which equates it with reasonable time?]

FN38 [1917] 2 K.B. 193, 201.

FN39 L.R. 1 C.P. 643, 648.

There appears to be no conclusive authority, but on principle reasonable time is the test which should be applied: see Geipel v. Smith. [FN40] An undertaking of a commercial character for which no time of performance is fixed has to be performed within a reasonable time. If it is not so performed, there is a breach or repudiation according to the importance that falls to be attached to the non-performance of the obligation.

FN40 (1872) L.R. 7 Q.B. 404.

The doctrine of notice making time of the essence has no application in contracts of this nature. It would necessarily involve unilateral variation of the contract. To import it into commercial contracts would be dangerous and unreasonable: see Reuter, Hufeland & Co. v. Sala & Co., [FN41]*per* Cotton L.J. [FN42]

FN41 (1879) 4 C.P.D. 239.

FN42 Ibid. 249.

If the argument as to reasonable time is unacceptable and the frustration test is the proper test to apply, the finding in the award that the charterer could have performed before the frustration date cannot stand because it is based solely on the facts known to the owners on July 18, 1951. On the true facts it is clear that the charterer was on July 18 completely disabled from finding a cargo and thus from performing his obligation under the charter. Reliance is placed on the alternative findings on the basis of the charterer's conduct looked at in the light of ***419** after-events. The arbitrator was wrong in excluding those events from his consideration. It is a well- established principle of law that after-events may be taken into consideration in ascertaining the true position: see British & Beningtons Ltd. v. N. W. Cachar Tea Co. Ltd., per Lord Sumner [FN43]; The Savona [FN44]; Bank Line Ltd. v. Arthur Capel & Co., per Lord Sumner. [FN45][Reference was also made to Andrew Miller & Co. Ltd. v. Taylor & Co. Ltd. [FN46]; Maritime National Fish Ltd. v. Ocean Trawlers Ltd. [FN47]] Forslind v. Bechely-Crundall, [FN48] on which the arbitrator based his exclusion of them, does not conflict with that submission. If, on the true facts, it was clearly impossible on July 18 for the charterer to perform his part of the charter, the owners were justified in withdrawing the ship notwithstanding that they may not have been entitled to do so on the facts known to them at the time.

FN43 [1923] A.C. 48, 71, 72.

FN44 [1900] P. 252.

FN45 [1919] A.C. 435, 454, 35 T.L.R. 150.

FN46 [1916] 1 K.B. 402; 32 T.L.R. 161.

FN47 [1935] A.C. 524.

FN48 1922 S.C.(H.L.) 173.

[DEVLIN J. Are you entitled to submit that there is an actual finding that the charterer would never be able to provide a cargo?]

It is submitted that there is such a finding, but, even if there is no such actual finding, the cumulative effect of the facts found shows conclusively that there was inability ever to perform. It is for the court to draw inferences of fact and the court has power to do so: see R.S.C., Ord. 34, r. 1. The court cannot substitute its own inferences of fact for those drawn by an arbitrator, but no authority supports the proposition that the court cannot draw its own inferences. The point was taken before the arbitrator: the pleadings are not annexed to the award, but should if necessary be looked at in this connexion. But whether it was taken or not, the court is entitled to deal with it on the facts found, having regard to the form in which the question for the court is stated: see Hudson's Bay Co. v. Domingo Mumbru Sociedad Anonima, [FN49] which is conclusive on the point. Minister of Food v. Reardon Smith Line Ltd. [FN50] is distinguishable because there the question for the court was stated narrowly. But if the court is of the opinion that it cannot deal with this question of inability on the facts found in the special case it should exercise its power under section 22 of the Arbitration Act, 1950, and remit to the arbitrator for further findings. [Reference was made to Re an Arbitration between Baxters and Midland Railway Co. [FN51]]

FN49 (1922) 10 Ll.L.Rep. 476.

FN50 [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.

FN51 (1906) 95 L.T. 20.

***420** *Mocatta Q.C.* and *Michael Kerr* in reply. As to the alleged breaches, on the true construction of this charterparty there was no term which obliged the charterer to nominate a shipper and no such term should be implied. The object of nominating shippers to whom notice of readiness can be given is for the protection of the charterer. If he acts in such a way as to make it impossible for notice to be given he must be put in the same position as if it had been given. The only effect of giving notice of readiness is that lay time begins to run, but if, on the authority of North River Freighters Ltd. v. H.E. President of India, [FN52] time begins to run while the vessel is waiting for a berth, notice would appear to be of no importance. There is no reason why the court should import into the charterparty a provision which is not expressed. The common law obligation on the owners is to give notice of readiness to the charterer with whom there is a contractual nexus. There is none between the owners and the shipper until the latter has performed some part of his duty in bringing the cargo to the ship's tackle. If that be wrong, then the failure to nominate a shipper was not a breach of condition but a breach of warranty and the arbitrator rightly so held. Reliance is placed on Aktieselskabet Reidar v. Arcos Ltd. [FN53] As to the obligation to nominate a berth, if this was a port charter there could not have been a breach until the lay days had expired. If it was a berth charter, time lost waiting for a berth counts as loading time and therefore that obligation would seem to be unimportant.

FN52 [1956] 1 Q.B. 333.

FN53 [1927] 1 K.B. 352.

[DEVLIN J. referred to Vergottis v. Wm. Cory & Son Ltd. [FN54]]

FN54 [1926] 2 K.B. 344.

It is admitted that there is a finding that the ship could not have loaded by the end of the lay days, but reliance is placed on the further finding that a reasonable time for nominating a berth or providing cargo had not expired by July 18. On that finding there never was a breach of the obligation if it was a port charter, because the ship was withdrawn before the lay days expired. If it was a berth

charter, nomination of a berth was irrelevant.

As to the obligation to provide a cargo, the law is not clear. In Inverkip Steamship Co. Ltd. v. Bunge & Co. [FN55] both Scrutton and Greer L.JJ. had grave doubts whether Ardan S.S. Co. v. Weir [FN56] laid down the principle contended for by the owners that the obligation to provide cargo before the lay days expired is a condition of the contract. In that case the word "primary" is not used as a term of art but in its ordinary meaning. Reliance ***421** is placed on the observations of Devlin J. in Chandris v. Isbrandtsen-Moller Co. [FN57] on the meaning of the word "primary." In any event there is a finding that there was no actual breach.

FN55 [1917] 2 K.B. 193.

FN56 [1905] A.C. 501 .

FN57 [1951] 1 K.B. 240, 252.

On the question whether there was an anticipatory breach which the other party could accept, the owners' argument on inability affords no answer to the submissions that inability alone cannot evince an intention not to perform a contract. The passage in Millar's Karri and Jarrah Co. (1902) v. Weddel, Turner & Co. [FN58] on which he relied is not well founded. It did not stem from the binding authorities following Freeth v. Burr. [FN59]

FN58 100 L.T. 128.

FN59 L.R. 9 C.P. 208.

The arbitrator's findings will not help the owners unless they can establish that reasonable time is the proper yardstick to apply in measuring delay arising out of breaches of warranty. They are in the same difficulty that Roche and Greer L.JJ. found themselves in Inverkip Steamship Co. Ltd. v. Bunge & Co. [FN60] Support for the charterer's submission that frustration is the only yardstick which can be applied in the absence of unwillingness and in the absence of notice making time of the essence is to be found in Scrutton on Charterparties (16th ed., 1955), p. 93, where it is stated that "a statement that a ship will not sail ... or load with all convenient speed is not a condition, but the delay may be such as to frustrate the commercial purpose of the voyage." That statement goes back to the 11th edition, which was the last to be edited by Scrutton L.J. The early cases cited in McElroy and Glanville Williams on Impossibility of Performance (1941), p. 121, and on which reliance is placed, are cited in Scrutton as authority for that proposition. [Reference was made to Dimech v. Corlett [FN61]; Tarrabochia v. Hickie [FN62]; MacAndrew v. Chapple, per Willes J. [FN63]; Clipsham v. Vertue, [FN64] and Freeman v. Taylor. [FN65]] See also Scrutton on Charterparties, 16th ed., p. 350. In Stanton v. Richardson, [FN66] where a ship was found to be defective, the question arose as to the length of time which would be necessary to make her fit. The questions put to the jury on that matter were: If the ship was defective, was the captain willing and able to make her fit in a reasonable time? Was he willing and able to make her fit within such a time as would not have frustrated the object of the venture? To both questions the jury returned the answers "Willing, but not able."

FN60 [1917] 2 K.B. 193.

FN61 (1858) 12 Moo.P.C. 199.

FN62 (1856) 1 H. & N. 183.

FN63 L.R. 1 C.P. 643, 648.

FN64 (1843) 5 Q.B. 265.

FN65 (1831) 8 Bing. 124.

FN66 (1872) L.R. 7 C.P. 421.

***422** [DEVLIN J. That case might be difficult for you on another limb of your argument.]

So far as the breach of warranty was concerned it was clear that the reason why the court held that the charterer was entitled to rescind was because the delay in making the ship fit was likely to be so long as would frustrate the object of the venture: see *per* Brett J. [FN67] and *per* Bovill C.J. [FN68] In addition to the dicta of Scrutton L.J. in Inverkip Steamship Co. Ltd. v. Bunge & Co., [FN69] to which reference has already been made, reliance is placed on further dicta to the same effect in Snia Societa di Navigazione Industria e Commercio v.

Suzuki & Co. [FN70] The owners are entitled to say that in Stanton v. Richardson [FN71] Bovill C.J. referred to reasonable time or such time as would frustrate the object of the venture, [FN72] but that passage is not in accordance with the rest of his judgment or with the judgment of Brett J. In any event, if one talks of reasonable time at all, it can only be thought of as reasonable time in relation to the object of the venture. The arbitrator manifestly meant something different and therefore the test of reasonable time was improperly applied.

FN67 L.R. 7 C.P. 421, 437.

FN68 Ibid. 433.

FN69 [1917] 2 K.B. 193, 201.

FN70 (1924) 29 Com.Cas. 284, 294.

FN71 L.R. 7 C.P. 421.

FN72 Ibid. 433.

As to the finding of frustration on which the owners rely, Forslind v. Bechely-Crundall [FN73] clearly establishes that after-events cannot be taken into account in considering whether an intention has been evinced not to be bound by the contract. The owners cannot found an argument on the dicta of Lord Sumner in British & Beningtons Ltd. v. N. W. Cachar Tea Co. Ltd. [FN74] With the exception of Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd., [FN75] this is the first case where it has been sought to apply that principle in a case of anticipatory breach. That line of cases is patently irrelevant when considering an intention not to perform.

FN73 1922 S.C.(H.L.) 173.

FN74 [1923] A.C. 48 , 71.

FN75 [1955] 1 Lloyd's Rep. 303.

[DEVLIN J. intimated that he did not require further argument on that point on the present state of the case.]

[If the test is what did the conduct of the charterer on July 18, 1951, convey to the shipowner, then after-events must be excluded. That is clear from Forslind v. Bechely-Crundall. [FN76] But there may be a question whether the test laid down in Bank Line Ltd. v. Arthur Capel & Co. [FN77] and Embiricos v. Sydney Reid & Co. [FN78] has any application. I refused to apply that test in G. W. ***423** Grace & Co. v. General Steam Navigation Co. [FN79] If on the true facts, although not known to the shipowners at the time, the charterer was on July 18 unable to fulfil the contract, why were the owners not entitled to sail the ship away? The Forslind [FN80] line of cases was designed to ascertain whether by his conduct a man is saying "I will not " or "I cannot" Stanton v. Richardson [FN81] seems to indicate that it is not primarily the conduct of the man which is important but the fact that he cannot perform. Is that to be answered in the light of all the facts now known or in the light of some limited facts?]

FN76 1922 S.C.(H.L.) 173.

FN77 [1919] A.C. 435.

FN78 [1914] 3 K.B. 45.

FN79 [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201 .

FN80 1922 S.C.(H.L.) 173.

FN81 L.R. 7 C.P. 421.

The test laid down in Bank Line Ltd. v. Arthur Capel & Co. [FN82] and Embiricos v. Sydney Reid & Co. [FN83] is inapplicable to a case of repudiation. Stanton v. Richardson [FN84] must be read in relation to the facts of the case. The questions put to the jury would not necessarily be the right ones in a case such as the present where there were facts in existence which were not known to the parties at the time of the breach. Evidence of future events cannot be admissible. There is no authority to the contrary. But if the true question to be decided on the basis of Stanton v. Richardson [FN85] is: was the charterer in fact able to load before the expiry of the lay days, the question arises, to what extent is it open to the court to answer that question on the special case? The law

laid down in Hudson's Bay Co. v. Domingo Mumbru Sociedad Anonima [FN86] and Minister of Food v. Reardon Smith Line Ltd. [FN87] is accepted. If the court is asked a question of law on a special case the parties are entitled to advance any principle of law which will persuade the court to answer that question in their favour provided that there are findings of fact on the face of the special case relevant to those principles of law, but if there are not, then the court will not remit the special case unless it is satisfied that principles of law were advanced before the arbitrator with which he has not dealt. If a party has argued a point of law before the arbitrator and asked him to find facts in a certain way and he has not done so, that is technical misconduct and the party can ask for remission. In the present case the owners cannot make any formal application for remission. All they can do is to invite the court to exercise its own power to do so. Prima facie, the court ought not to exercise its own power to remit ***424** unless it cannot answer the question of law and wishes to remit for its own purposes. [Reference was made to Société Co-operative Suisse des Céréales et Matières Fourragères v. La Plata Cereal Co. S.A. [FN88] and Tatem Steam Navigation Co. Ltd. v. Anglo-Canadian Shipping Co. Ltd. [FN89]] The position is no different if all that is required is for the court to draw an inference from the facts in the case. It will not be done in order to deal with a question of law not argued below. The court must look at the special case bearing in mind the specific questions put to the arbitrator and agreed by counsel and the arbitrator's summaries of the arguments which show to what matters he directed his mind in making his findings of fact. The whole framework of the special case is directed to answering the questions relating to the evincing an intention not to perform. The findings of the arbitrator fall far short of final and irretrievable inability and the court is not entitled to draw that inference. Provided that an arbitrator has directed himself properly on the law, all conclusions of fact and inferences from fact are for the arbitrator: Nello Simoni v. A/S M/S Straum [FN90]; Strathlorne S.S. Co. Ltd. v. Andrew Weir & Co. [FN91]; Royal Greek Government v. Minister of Transport [FN92]; North Western Cachar Tea Co. Ltd. v. British & Beningtons Ltd., [FN93] and Produce Brokers Co. v. Weiss & Co., [FN94] *per* McCardie J. [FN95]

FN82 [1919] A.C. 435.

FN83 [1914] 3 K.B. 45.

FN84 L.R. 7 C.P. 421.

FN85 L.R. 7 C.P. 421.

FN86 10 Ll.L.Rep. 476.

FN87 [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.

FN88 (1947) 80 Ll.L.Rep. 530.

FN89 (1935) 53 Ll.L.Rep. 161.

FN90 (1949) 83 Ll.L.Rep. 157.

FN91 (1934) 40 Com.Cas. 168.

FN92 (1949) 83 Ll.L.Rep. 228.

FN93 (1922) 10 Ll.L.Rep. 381.

FN94 (1918) 87 L.J.Q.B. 472.

FN95 Ibid. 476.

[He was stopped on that point.]

[DEVLIN J. intimated that he was not prepared of his own motion to remit the special case but that he would be prepared to consider applications by the owners for remission and for an extension of time to allow such an application to be made.]

[After hearing counsel on both sides, his Lordship acceded to applications made by Mr. Roskill for an extension of time to allow an application to remit to be made and for remission to enable the arbitrator to answer the following question: "Whether the charterer was on July 18, 1951, willing and able to perform the charterparty within such time as would not have frustrated the commercial purpose of the venture?" His Lordship intimated that the applications would be allowed on terms that any further costs incurred as a result of the remission should be paid by the owners. Leave to appeal against remission was granted to Mr. Mocatta. The argument then continued on the basis that ***425**

there was a finding that the charterer was unable to perform the charterparty before the date of frustration of the venture.]

Mocatta Q.C., with reference to his submission that inability without unwillingness could not by itself amount to repudiation, referred to Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd. [FN96] and continued: In considering whether the charterer, by his inability to perform, has evinced an intention not to perform, inability must be judged in the same way as unwillingness. Where the date of final performance has not been reached an innocent party can only rescind if the conduct of the defaulting party is such as to justify the innocent party, as a reasonable man, in reaching the conclusion that the defaulting party was unwilling or unable to perform the contract.

FN96 [1934] 1 K.B. 148; 50 T.L.R. 58.

[DEVLIN J. It is put against you that inability in fact is different. Is there any authority for the proposition that inability can only be dealt with by inferring an intention?] [Reference was made to Stanton v. Richardson. [FN97]]

FN97 L.R. 7 C.P. 421.

Inability comes under the head of renunciation except where it arises from a deliberate act on the part of the defaulting party: Heyman v. Darwins Ltd., *per* Lord Porter. [FN98] Where there is no such act, the only question is whether the conduct of the party is such as to evince an intention not to perform. The literal truth is immaterial whether or not it is ascertained from events occurring afterwards not known to the innocent party at the time of the breach. There is no case which is directly on the point, but equally there is no case which suggests that that submission is wrong. Millar's Karri and Jarrah Co. (1902) v. Weddel, Turner & Co., [FN99]In re Phoenix Bessemer Steel Co. [FN100] and In re Agra Bank [FN101] suggest that it is correct. Stanton v. Richardson [FN102] does not assist one way or the other. The form of the questions put to the jury' depended on the facts of the case. There would have been no object in asking the questions in any other form on the evidence before the jury. The only way in which inability can be brought under the heading of "Impossibility" is if the defaulting party does some act which he knows at the time will render him incapable of performing the contract: see Halsbury's Laws of England, 3rd ed, vol. 8, p. 202, para. 342, and Chitty on Contracts, 21st ed., vol. 1, p. 252, para. 456. All the cases there cited are cases of self- induced inability. [Reference was ***426** also made to Warburton v. Storr [FN103]; Lovelock v. Franklyn [FN104]; M'Intyre v. Belcher [FN105]; In re Imperial Wine Co., Shireff's Case [FN106]; Synge v. Synge, [FN107] and Hochster v. De la Tour. [FN108]] Omnium d'Enterprises v. Sutherland [FN109] is cited by the editors of Chitty on Contracts, 21st ed., vol. 1, p. 192, para. 364, under "Renunciation." If that submission is correct no further answer is required. On the case as it stands the charterer is entitled to succeed.

FN98 [1942] A.C. 356, 397.

FN99 100 L.T. 128.

FN100 (1876) 4 Ch.D. 108.

FN101 (1867) L.R. 5 Eq. 160.

FN102 L.R. 7 C.P. 421.

FN103 (1825) 4 B. & C. 103.

FN104 (1846) 8 Q.B. 371.

FN105 (1863) 14 C.B.N.S. 654.

FN106 (1872) L.R. 14 Eq. 417.

FN107 [1894] 1 Q.B. 466.

FN108 (1853) 2 E. & B. 678.

FN109 [1919] 1 K.B. 618.

Roskill Q.C. The charterer's submission that the only inability which can avail the shipowners is inability deliberately created by the charterer is unsound. No authority supports it. The insolvency cases which were cited, namely, In re Agra Bank [FN110] and In re Phoenix Bessemer Steel Co., [FN111] lay down no such general principle, and

the observations of Lord Sumner in the N. W. Cachar Tea case [FN112] are against it. [Reference was also made to Leake on Contracts, 7th ed., p. 658.]

FN110 L.R. 5 Eq. 160.

FN111 4 Ch.D. 108.

FN112 [1923] A.C. 48, 71.

Cur. adv. vult.

March 12. DEVLIN J.

read the following judgment. This case gives rise to a difficult question. How long is a ship obliged to remain on demurrage, and what are the rights of the owner if the charterer detains her too long? Translated into the terms of general contract law, the question is: Where time is not of the essence of the contract - in other words, when delay is only a breach of warranty - how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it. The difficulty lies in the application, for it is hard to say where fact ends and law begins. The best solution will be found, I think, by a judge who does not try to draw too many nice distinctions between fact and law, but who, having some familiarity both with the legal principle and with commercial matters and the extent to which delay affects maritime business, exercises them both in a common-sense way. This is the sort of solution which, upon the supposition that it was acceptable to business men, the commercial court was created to provide.

***427** It is not a solution which can be easily found by the process of arbitration, which requires the rigid separation of fact and law. There does not appear to have been any serious dispute about the primary facts - the case was tried on documentary evidence - but there was a great deal of dispute about the inferences of fact to be drawn from them. I venture to think that either a judge or an arbitrator, given full jurisdiction over fact and law, could have disposed of the whole case in much less time than it would take the arbitrator separately to settle the facts and the judge separately to settle the law. The central question being, it was thought, what was the meaning to be attached by a reasonable shipowner to the conduct of the charterer, the arbitrator has found sixteen different shades of meaning, so that the law may be fully argued. But Mr. Ashton Roskill has submitted that the sixteen are not enough - he ought to have found what the true meaning would be in the light of earlier events as well as of later ones. Much of my time (not all, for there are difficult questions of law, which have been fully and most helpfully argued) has been occupied with the sort of questions that troubled the courts so much before the procedural reforms of the last century: What precisely are the facts found; what inferences of fact can be implied; what points are open to each side; and in what circumstances ought the award to be remitted for further findings? In the end I have had to accede to an application to remit. Much of this might have been shortened if I were permitted to draw inferences of fact, but it is well settled that I am not. The process of arbitration in this case has certainly increased greatly the expense of arriving at a just decision, and perhaps diminished the likelihood of a satisfactory one.

I am well aware that commercial men - particularly when, as in this case, they are foreigners - often have good reasons for preferring arbitration to litigation, which in their minds override the expense and the delay. But I do not think I do any disservice to the business community by reminding them how much extra in a case of this sort they do have to pay; and when in the end the bill comes in, I should not like either of the two foreign concerns which will have to pay it to suppose that it resembles. even remotely, the cost of obtaining judgment in England on a commercial matter.

I take the principal facts from the narrative at the beginning of the case stated. [His Lordship stated the facts as set out above and continued.] If the lay days are treated as running from July 12 at 2.34 p.m. when the vessel arrived at the buoys, ***428** they would have expired on July 21. So, when the charter was cancelled on July 18, the lay days had only run for two-thirds of the time. The owners justify their action in cancelling before the lay days had expired by saying that on or before July 18 the charterer had committed an actual or anticipatory breach of his obligation under the charter.

The obligations which for this purpose fall to be considered are four: (1) To nominate a shipper. (2) To nominate a berth. (3) To provide a cargo. (4) To finish loading before the expiry of the lay days. The charterer submits that there was no obligation on him to nominate a shipper; he claims that the only consequence of his failure to do so would be

that the owners were dispensed from the duty of giving notice of readiness. It might perhaps be otherwise, it was submitted, if the lay days did not begin to run until after notice of readiness was given, for then the operation of the charterer might be held up. But the decision of the Court of Appeal in North River Freighters Ltd. v. H.E. President of India [FN113] shows that under a charterparty in this form the lay days begin to run, in effect, from the time the vessel is ready to proceed to her berth, irrespective of whether or not a berth has then been nominated or whether notice of readiness has been given. The result, the charterer submits, is that the only person who can suffer from there being no notice of readiness is himself. This is a plausible contention; but I need not determine it one way or the other, for it is clear that the same sort of reasoning does not apply to the next two obligations.

FN113 [1956] 1 Q.B. 333; [1956] 1 All E.R. 50.

The charterer admits that he was under an obligation to nominate a berth and also to provide cargo, the latter being a separate and distinct obligation from the obligation to load: see Grant v. Coverdale, Todd & Co. [FN114] But he submits that he would not be in breach of either of these obligations until after the expiry of the lay days. In my judgment this submission is not good. Since no time is mentioned in the contract within which these obligations have to be fulfilled, the law implies a reasonable time. All these obligations, i.e., the obligation to nominate a berth (and a shipper, if it be a term) and to provide a cargo, are obligations preliminary to loading the cargo. The obligation to load has a time prescribed for it in the charterparty; loading must be completed within the lay days and the charterer is in breach of contract if he fails so to do. ***429** The time therefore within which the preliminary duties are to be performed is to be calculated by relation to the time prescribed for the main duty; they need not be performed any earlier than is necessary to enable the main duty to be performed timeously, but they may not be performed any later. The result is that the nomination of the berth and the provision of the cargo must be made in sufficient time to enable the vessel to be completely loaded within the lay days. In Vergottis v. Wm. Cory & Son Ltd. [FN115] Greer J. [FN116] so decided in relation to the obligation to provide a cargo, and in my judgment the same reasoning applies to the obligation to nominate a berth. The arbitrator has found that on July 18 6,000 tons could not possibly have been loaded in the lay time remaining. It must follow, therefore, that by July 18 the time for providing a cargo and nominating a berth had expired. In another part of the award the arbitrator finds that a reasonable time for providing cargo and for nominating a berth had not expired by July 18. I can account for this alternative finding only on the hypothesis that the arbitrator has not measured the reasonable time in the way in which as a matter of law I think it ought to be measured. Accordingly, this finding cannot stand, and I hold, contrary to the view of the arbitrator, that the charterer broke both these terms.

FN114 (1884) 9 App.Cas. 470.

FN115 [1926] 2 K.B. 344.

FN116 Ibid. 354.

What of the obligation to load? On July 18 the lay days had not expired, but the charterer had by his dilatoriness put it out of his power to comply with the term that he must complete the loading by July 21. There cannot be an actual breach of the express term to complete loading by July 21, but Mr. Ashton Roskill was at one point of his argument disposed to submit that there was an implied term that a party should not do any act (and I should add, though this goes beyond Mr. Roskill's submission, be guilty of any omission) which would put it out of his power to perform his obligations. If this is right, the charterer had by July 18 committed an actual breach of that implied term. But whether the breach is said to be an actual breach of an implied term or an anticipatory breach of an express term is not to my mind at all important; and it must be one or the other.

The next point to be determined is whether any of the breaches was of a condition of the charterparty as distinct from a warranty. If so, then the owners were, ipso facto, entitled to rescind on July 18. In my judgment none of them is a condition. It is well settled, and not in this case disputed, that the obligation to load ***430** within the lay days is a warranty only and not a condition. Its breach does not entitle the owner to rescind, but gives rise to a claim for damages only; and in this charterparty, as in most others, those damages are liquidated damages paid in the form of demurrage. It would be strange if, when the main obligation to load is only a warranty, preliminary obligations should be given the status of a condition. It would be strange if, for example, the charterer were to be legally advised that he must not keep the vessel waiting idly at the buoys on pain of cancellation, but that if

he nominated a berth he could keep her waiting idly at the berth by payment of demurrage. As to the obligation to provide a cargo, I am satisfied that it is concluded as a matter of authority that this obligation is a warranty only. I cited the authorities in Chandris v. Isbrandtsen-Moller Co. [FN117] I have in the light of Mr. Roskill's argument examined them again, but I am still of the opinion that in the above case I drew the right conclusion from them and I need not therefore repeat in detail the reasoning which is there set out. I think that the same reasoning must apply in principle to the obligation to nominate a berth.

FN117 [1951] 1 K.B. 240, 252; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768.

It follows that the owners were not entitled ipso facto to rescind on July 18. But a party to a contract may not purchase indefinite delay by paving damages and a charterer may not keep a ship indefinitely on demurrage. When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind. What is the yardstick by which this length of delay is to be measured? Those considered in the arbitration can now be reduced to two: first, the conception of a reasonable time, and secondly, such delay as would frustrate the charterparty. The arbitrator, it is clear, preferred the first. But in my opinion the second has been settled as the correct one by a long line of authorities.

Before I refer to them, I must enlarge a little on what is meant in this connexion by frustration. The doctrine that a commercial contract is dissolved upon the happening of a supervening event which frustrates the object of the venture now plays so important a part in the law that a reference to frustration is likely to be taken as a reference to that doctrine. But the term was in use in relation to breach of contract well before the doctrine was declared in 1870 or thereabouts. For some time before that the courts had been using the yardstick of frustration for the ***431** measurement of delay caused by breach of contract. It was because the same yardstick was used for the measurement of delay caused by the supervening event that the new doctrine got its name of frustration. The history is most conveniently and concisely set out in McElroy and Glanville Williams' "Impossibility of Performance" (1941), p. 121. To bring a contract to an end by breach of warranty there had to be a failure of consideration, that is to say, the breach had to be such as to deprive the plaintiff in effect of the benefit of his contract. Various metaphors came into use for describing the character of such a breach, such as "going to the whole root and consideration of the contract" and "frustrating the object of the voyage." The former phrase was used by Lord Ellenborough in Davidson v. Gwynne, [FN118] and the second appears to have been used first in Tarrabochia v. Hickie. [FN119]

FN118 (1810) 12 East 381 , 389.

FN119 (1856) 1 H. & N. 183.

The authorities cited by Mr. Mocatta are Freeman v. Taylor [FN120]; Clipsham v. Vertue [FN121]; Tarrabochia v. Hickie [FN122]; MacAndrew v. Chapple, [FN123] *per* Willes J., and Stanton v. Richardson. [FN124] There is then a gap until in modern times there is a dictum of Scrutton L.J. in Inverkip Steamship Co. Ltd. v. Bunge & Co. [FN125] The point is also dealt with in Scrutton on Charterparties, 16th ed., p. 350, where it is stated that the shipowner cannot say that demurrage provisions apply only for a reasonable time; the shipowner "may not take his ship away unless the delay is so long as to amount to a repudiation or the frustration of the contract." In the earlier editions of Scrutton this read differently and ended in the sense for which Mr. Roskill contends: "after the lapse of a reasonable time he may take his ship away. " Curiously enough, notwithstanding the dictum of Scrutton L.J. in 1917, [FN126] the text remained in this form until it was altered in 1931 in the 13th edition, for which Mr. Porter and Mr. McNair were responsible. In the latest [16th] edition of Scrutton, p. 93, the text deals with the right of the charterer to cancel in respect of delay in arrival at the port of loading and states that (apart from the common cancelling clause) it is not a condition, but "the delay may be such as to frustrate the commercial purpose of the voyage." This statement is also to be found in the 11th edition, p. 93, the last for which Scrutton L.J. was himself responsible, where it has also the authority of Lord Porter. I can ***432** see no ground for drawing any distinction on this point between delay in loading and delay in proceeding on a voyage, since time is not of the essence in either case.

FN120 (1831) 8 Bing. 124.

FN121 (1843) 5 Q.B. 265.

FN122 1 H. & N. 183.

FN123 (1866) L.R. 1 C.P. 643, 648.

FN124 (1872) L.R. 7 C.P. 421.

FN125 [1917] 2 K.B. 198, 201.

FN126 [1917] 2 K.B. 198, 201.

It appears that in the arbitration only the dictum of Scrutton L.J. in Inverkip Steamship Co. Ltd. v. Bunge & Co. [FN127] was cited to the arbitrator - there is of course no obligation on the parties to go exhaustively into the law - and no doubt he felt himself free to disregard it on the ground that it was obiter. If the earlier authorities had been cited to him I think he would inevitably have reached the same conclusion as I do.

FN127 [1917] 2 K.B. 198, 201.

In Clipsham v. Vertue [FN128] the charterer refused to load and pleaded that the vessel did not arrive at the port of loading "within a reasonable and proper time in that behalf after the making of the said charterparty; but, on the contrary thereof, the said vessel arrived at Nantes aforesaid a long and unreasonable time, to wit 38 days, after the said vessel would have arrived. " [FN129] There was a demurrer to the defendant's plea on the ground that it did not show that by the supposed delay the object of the voyage was lost. The demurrer was upheld. Denman C.J. said [FN130]: "If issue had been taken on the term 'unreasonable,' we should have been required to put a construction upon it; and that, without further explanation, we have not the means of doing. It is quite possible that a vessel may arrive in a time which, in some sense of the word, is unreasonable, and yet that the freighter may derive benefit from the voyage"; Williams J. said [FN131]: "The real question is, whether a plea, using only such expressions as this plea contains, can be supported. I find no authority in its favour: what is an 'unreasonable' time is left matter of speculation. To what extent the unreasonableness went, whether so far as that the voyage was lost, or the cargo could not be put on board, we are not told."

FN128 5 Q.B. 265.

FN129 Ibid. 269.

FN130 Ibid. 272.

FN131 Ibid. 269.

In Tarrabochia v. Hickie [FN132] the jury found that the vessel did not proceed to the port of loading within a reasonable time, but that the object of the voyage was not thereby frustrated. The charterer who had refused to load lost his case.

FN132 1 H. & N. 183.

Stanton v. Richardson [FN133] was one of the early cases in which it was decided that a ship which was unfit for the cargo which she had contracted to load was unseaworthy. The question, however, also arose as to the length of time which would be ***433** necessary to make her fit, and the evidence appears to have been that it would be probably seven or eight months. On this the jury were asked two questions [FN134]: "11. If the ship was defective, was the captain willing and able to make her fit in a reasonable time? 12. Was he willing and able to make her fit within such a time as would not have frustrated the object of the adventure?" To each of these questions the jury answered: "Willing, but not able." Bovill C.J. said that the jury, having found that what occurred did wholly frustrate the objects of the voyage, the case came distinctly within the dictum of Lord Ellenborough that a neglect which precluded the defendants from making any use of the vessel would go to the whole consideration and might be insisted on as an entire bar; and he added [FN135] that the object of the voyage being frustrated the charterer was not bound to load a cargo. Brett J., who had tried the case and given the directions to the jury, said [FN136]: "the conclusion to be drawn from all the cases analogous to this is, that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether."

FN133 L.R. 7 C.P. 421.

FN134 L.R. 7 C.P. 421, 425.

FN135 Ibid. 433.

FN136 Ibid. 437.

While these authorities are in my judgment conclusive, I must not refrain from dealing with arguments on general principle that were advanced by Mr. Roskill for the shipowners. Upon a repudiation by one party, the other has the right to elect to keep the contract alive. So Mr. Roskill argued that the period of delay allowed must not be so long as the life a of the contract; otherwise the election would be rendered valueless. This consideration, he submitted, showed that the "frustration" yardstick was inapplicable for two reasons. The first was that, as by the doctrine of frustration a contract is dissolved automatically, whether the parties wish it to end or not, the aggrieved party could not then elect to keep the contract alive. The second was that, even if he could elect, since, ex hypothesi, the object of the parties would have been frustrated, there could be no point in keeping the contract alive.

In my judgment neither of these considerations is valid. The first, I think, confuses the occurrence of a frustrating event with the doctrine of dissolution by frustration. Not every frustrating event brings the contract to an end. The event must have other characteristics, and one of them is that it must not have arisen ***434** by the fault of either party. This is clearly shown by Maritime National Fish Ltd. v. Ocean Trawlers Ltd. [FN137] In that case the charterers claimed that the refusal of a fishing licence in respect of the trawler which they had chartered frustrated the object of the charterparty and put an end to it. The plea failed because the refusal of the licence had been brought about by the charterers' own fault. The charterparty remained alive and the owners succeeded in their claim for hire.

FN137 [1935] A.C. 524.

As to the second consideration, it does not follow automatically that because the object of the venture is destroyed, there is no value left in the charterparty. Usually that would be so, and therefore usually no doubt the aggrieved party would wish to rescind. But the rights given to a party under a contract may be wider than the object of the venture requires them to be. It may then be worth a party's while to keep the contract alive for an ancillary purpose and compensate himself by damages for the loss of his main object.

Mr. Roskill next argued that there were ambiguities in the arbitrator's finding which made it unacceptable, at least unless remitted for clarification. He pointed out that the phrase used in the award is: "before the expiry of such time as would frustrate the charterparty"; and said that the arbitrator must therefore have had in mind the application of the doctrine of discharge by frustration since he referred to the charterparty and not the object of the venture. I do not think that for this purpose it matters if he had. For the purpose of measuring the period of delay, the yardstick is the same whether what is involved is a dissolution or a repudiation.

Mr. Roskill also pointed out that in some of the authorities the "reasonable time" yardstick is used as well as the "frustration" yardstick. This shows, he submits, that the two are to be regarded in law as one and the same thing, and therefore the arbitrator's findings are contradictory. It is true that in some of the cases, for example, Geipel v. Smith, [FN138] to which I shall later refer, a reasonable time is equated with the frustration period. The truth is that there is nothing wrong in using a reasonable time as a yardstick provided you determine what is reasonable by considering whether or not there has been unreasonable delay in the light of the object which the parties had in mind. It is only when the two yardsticks have in effect been shown to be the same that the courts have accepted the test of reasonableness. Where they have been contrasted, as in Clipsham v. ***435** Vertue [FN139] and Tarrabochia v. Hickie, [FN140] the test of reasonable time has been rejected. In the arbitrator's findings the two periods are contrasted and it is clear that whatever he understood to be meant by a reasonable time, it was something less than the period required for frustration, and therefore does not amount to a delay long enough to justify rescission.

FN138 (1872) L.R. 7 Q.B. 404.

FN139 5 Q.B. 265.

FN140 1 H. & N. 183.

Mr. Roskill next argued on this topic that the finding by the arbitrator based on the frustration of the charterparty involved a point of law, because frustration is a question of law, and that in its

application the arbitrator must have misdirected himself on the true meaning of frustration and have considered the period to have been longer than the law requires. I think that, while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact. The period has to be measured, no doubt, in the light of the principles that have been laid down in cases as to the sort of thing that amounts to frustration, but it is in the end a finding of fact. As such it can be successfully attacked only if I am satisfied that the arbitrator could only have reached his conclusion of fact by applying some wrong principle of law. Mr. Roskill does go so far as to submit that the arbitrator, if he had applied the right test, must inevitably have found frustration. On the facts, it seems plain that by July 18 the charterer had got no cargo to ship, and indeed no shipper, and that he was in the position of having within three days of the expiry of the lay days to begin a search for a shipper of a cargo of a commodity which was not easy to find. It can be argued that a contract under which a ship is expected to go and hang about while the charterer negotiates for a cargo is, commercially speaking, a quite different venture from that which the ordinary charterparty contemplates. I think that a strong case could be, and doubtless was, made out by the owners on these lines. The arbitrator may have thought that it was a strong case too; but, if so, he did not think it quite strong enough. I do not find it possible to say that the facts are so strong that the inference of frustration is the only one that can properly be drawn from them. N. W. Cachar Tea Co. v. British & Benningtons Ltd., [FN141] which I cite later on in another connexion, affords an illustration of how a judge can go wrong by interfering with an arbitrator's conclusions on this point unless there is no evidence to support them. ***436** Having settled the proper yardstick, the next question that arises for determination could, I think, have been put very conveniently in the form adopted in Stanton v. Richardson, [FN142] namely, was the charterer on July 18, 1951, willing and able to load a cargo within such time as would not have frustrated the object of the venture; and the answer to that question would have determined the case. But in the arbitration the main argument was on anticipatory breach, and the emphasis on one mode of it, namely, renunciation. The chief findings of the arbitrator relate entirely to renunciation. I must therefore consider the nature of anticipatory breach and the findings thereon which the arbitrator has made.

FN141 (1922) 10 Ll.L.Rep. 381.

FN142 L.R. 7 C.P. 421.

The law on the right to rescind is succinctly stated by Lord Porter in Heyman v. Darwins Ltd. [FN143] as follows: "The three sets of circumstances giving rise to a discharge of contract are tabulated by Anson as: (1) renunciation by a party of his liabilities under it; (2) impossibility created by his own act; and (3) total or partial failure of performance. In the case of the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance."

FN143 [1942] A.C. 356 , 397; 58 T.L.R. 169; [1942] 1 All E.R. 337.

The third of these is the ordinary case of actual breach, and the first two state the two modes of anticipatory breach. In order that the arguments which I have heard from either side can be rightly considered, it is necessary that I should develop rather more fully what is meant by each of these two modes.

A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must "evince an intention" not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract. This application is fully discussed in Forslind v. Bechely-Crundall [FN144] and forms the basis for the arbitrator's findings.

FN144 1922 S.C.(H.L.) 173.

Of the two modes, renunciation has since the decision in Hochster v. De la Tour [FN145] established itself as the favourite. The disadvantage of the other is that the party who elects to treat ***437** impossibility as an anticipatory breach may be running a serious risk. Suppose, for example, that a man promises to marry a woman on a future date, or to execute a lease or to deliver goods; and that before the day arrives he marries another, or executes the lease in favour of another, or delivers the goods to a third party. The aggrieved party may

sue at once. "One reason alleged in support of such an action," Campbell C.J. observed in Hochster v. De la Tour, [FN146]"is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day: but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff." But if the plaintiff treats the defendant's conduct as amounting to renunciation and justifies his rescission on that ground, the defendant could not avail himself of this defence.

FN145 (1853) 2 E. & B. 678.

FN146 2 E. & B. 678, 688

I said that it was after Hochster v. De la Tour [FN147] that renunciation established itself as the favourite, because until then it was not certain that a man who said "I will not perform" would be held to his word. In Hochster v. De la Tour [FN148] it was argued that he could change his mind, and that the fact that at one time he said he was not ready and willing did not necessarily mean that he would be unwilling when the time for performance came. Hochster v. De la Tour [FN149] established that a renunciation, when acted upon, became final. Thus, if a man proclaimed by words or conduct an inability to perform, the other party could safely act upon it without having to prove that when the time for performance came the inability was still effective.

FN147 2 E. & B. 678.

FN148 2 E. & B. 678.

FN149 2 E. & B. 678.

Since a man must be both ready and willing to perform, a profession by words or conduct of inability is by itself enough to constitute renunciation. But unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform. Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say: "I would like to but I cannot" negatives intent just as much as "I will not." In the earlier part of his argument Mr. Mocatta contended that a statement of inability without unwillingness did not amount to a renunciation, but in the end he abandoned the point. He concedes that the arbitrator's conclusion that the charterer evinced an intention not to perform is sufficiently ***438** supported by the finding that his attitude was that he was willing to perform if he could, but that he could not. In the other form of anticipatory breach, Mr. Mocatta, as will be seen, contends that the disablement must be deliberate and not negligent or accidental. But to the extent that inability enters into renunciation, Mr. Mocatta is not concerned with the character of the inability. If a man says "I cannot perform," he renounces his contract by that statement, and the cause of the inability is immaterial.

The two forms of anticipatory breach have a common characteristic that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be legally inevitable; if a man puts it out of his power to perform, the breach will be inevitable in fact - or practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities. So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited. In Thorpe v. Fasey [FN150] Wynn-Parry J. said [FN151]: "In my judgment, when one considers these cases there is neither any good reason for a distinction nor, in my view, does there exist any distinction between the nature of the repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen." If this is right, it seems to me to dispose in principle of Mr. Mocatta's submission that the disablement must be deliberate. If when the day comes for performance a party cannot perform, he is in breach, quite irrespective of how he became disabled. The inability which justifies the assumption of an anticipatory breach cannot be of any different character. Anticipatory breach was not devised as a whip to be used for the chastisement of deliberate contract-breakers, but from which the shiftless, the dilatory, or the unfortunate are to be spared. It is not confined to any particular class of breach, deliberate or blameworthy or otherwise; it covers all breaches that are bound to happen.

FN150 [1949] Ch. 649; 65 T.L.R. 561; [1949] 2 All E.R. 393.

FN151 [1949] Ch. 649, 661.

***439** I turn now to the findings in the award. The arbitrator finds as a fact, in so far as it be a question of fact, and holds in law, in so far as it be a question of law, that the charterer evinced an intention not to perform the charterparty and committed an anticipatory breach of it. This finding or conclusion is based on 16 findings, in which the arbitrator states his view of the effect of the charterer's conduct on a reasonable shipowner. I think that I can, sufficiently for the purposes of this judgment, summarize the effect of these findings without setting out all 16. In the arbitrator's judgment, the owners should on July 18 have inferred from the charterer's conduct: (1) that he was always willing to perform if he could; (2) that he could not have performed by the end of the lay days or within a reasonable time thereafter; and (3) that he could have performed before the delay became so long as to frustrate.

This third finding is, however, to be qualified by a fourth, which is that if the shipowner was entitled to interpret what he knew of the charterer's conduct on July 18 in the light of later events, he would then have concluded that the charterer would *not* be able to perform before the delay had become so long as to frustrate.

For the arbitrator to have awarded as he did in favour of the owners, he must have adopted as correct and relevant either the second or the fourth of these findings. In fact, he states that he rejected the fourth finding as irrelevant, and so must have found for the owners on the second finding. As I have held that the second finding is irrelevant in law, the owners can succeed before me on renunciation only if they satisfy me that the arbitrator was wrong in rejecting the fourth finding.

In my opinion the arbitrator was right. Indeed, I do not really know what is meant by interpreting conduct in the light of later events. I think that the question or the finding embodies a confusion between the principle illustrated by Forslind v. Bechely-Crundall [FN152] and that laid down in The Savona [FN153] and Embiricos v. Sydney Reid & Co., [FN154] and which is most fully formulated by Lord Sumner in Bank Line Ltd. v. Arthur Capel & Co. [FN155] as follows: "The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases ***440** substantially agree. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided."

FN152 1922 S.C.(H.L.) 173.

FN153 [1900] P. 252.

FN154 [1914] 3 K.B. 45; 30 T.L.R. 451.

FN155 [1919] A.C. 435, 454; 35 T.L.R. 150.

The Forslind case [FN156] is based on the simple and well-known principle that a man may speak by his deeds as well as his words. It is not peculiar to anticipatory breach; a contract can, for example, be made by conduct as well as be broken by it. Lord Sumner's principle is a device by which for commercial purposes a man may be entitled to act on information which he has and be protected even if it turns out to be unreliable or untrue. It depends on likelihood and a forecast of future events. But conduct, it seems to me, can only be interpreted in the light of the events that are known to the interpreter at the time.

FN156 1922 S.C.(H.L.) 173.

Even if Lord Sumner's principle applied, Mr. Roskill rests too much on the words "what happens afterwards may assist." This does not, in my judgment, mean that a forecast, which appeared to be the most reasonable one at the time, may be revised in the light of after events and the revised version prevail. It means simply that if there is a question as to which of two forecasts seemed at the time to be the better one, the knowledge of what happened afterwards may assist the judge in making his choice between them.

Finally on this point, Mr. Roskill submitted that he had got a finding of anticipatory breach, that there was evidence to support it and that that ended the matter. He, too, claimed that he was in a better position with a finding of anticipatory breach than he would have been with a similar finding of actual breach, and with that argument I have already dealt. It is true that the finding is in Mr. Roskill's favour and that the evincing of an intention is a question of fact. But Mr. Mocatta successfully attacks that finding if he can show that there is necessarily involved in it an error of law. In the light of the findings in paragraph 34, and for the reasons I have given, I think he can show that it must be based on an erroneous concept of the length ***441** of delay necessary to amount to a repudiation; and so the finding cannot stand. This means that Mr. Roskill's case on renunciation fails and that he must rely on the other side of anticipatory breach. That brings one back to the question: Was the charterer, whatever interpretation be put on his conduct, in fact willing and able to perform?

The arbitrator has not found facts which constitute a direct answer to this question. But Mr. Roskill submits that the has found facts which, taken together, amount to an answer, and that the answer is "Willing but not able. " This alleged finding, which is crucial to Mr. Roskill's case on the point. is disputed by Mr. Mocatta; he says it is not to be found in the award. This dispute has led to a lot or argument and detailed examination of various parts of the award, and also to a motion to remit made by Mr. Roskill in case he was wrong and Mr. Mocatta was right. It is inconvenient to interrupt the argument to deal with these points now. I shall continue it on the assumption that Mr. Roskill has got or gets the finding he wants. Mr. Mocatta, as I have already indicated, submits that this finding, if Mr. Roskill has it, is irrelevant. He submits that the only sort of inability that would. standing by itself, be of use to Mr. Roskill is inability deliberately created by the charterer, i.e., by the doing of an act which he knew at the time would disable him from performing his contract. There is no suggestion of an act of this character, and it would, of course, be inconsistent with the finding of willingness.

I have already given reasons for thinking that, if I have rightly understood the nature of anticipatory breach, Mr. Mocatta's argument is unsound in principle. I turn now to consider how it stands on the authorities. Lord Porter's statement of the law, [FN157] to which I have referred, uses the term "created by his own act." I see no reason for reading any limitation into those words. I think that the law on this point is correctly stated by the editors of Smith's Leading Cases, 13th ed. (1929), vol. 2, p. 40, in the following terms: "A party is deemed to have incapacitated himself from performing his side of the contract, not only when he deliberately puts it out of his power to perform the contract, but also when by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part thereof."

FN157 [1942] A.C. 356, 397.

The first authority cited for this proposition is Keys v. Harwood. [FN158] In this case the defendant had undertaken to deliver ***442** certain furniture, but before he could do so a judgment creditor took the furniture in execution. The defendant's inability to perform was clearly not due to his own deliberate act, but nevertheless he was in default. Tindal C.J. said that the case was to be considered as if the defendant had himself taken away the furniture and sold it. Other examples can be found in the insol vency cases, since insolvency which renders a man unable to meet his commitments can hardly be created by a deliberate act. But the cases on insolvency are not clear cut. The way in which a party learns about insolvency is usually by the conduct of the other party and this necessarily introduces the question of whether that conduct amounts to renunciation. But I must deal with two insolvency cases upon which Mr. Mocatta much relied: In re Agra Bank [FN159] and In re Phoenix Bessemer Steel Co. [FN160] In the former case it was held that the suspension of payment by a bank was not an anticipatory breach of its obligations under a letter of credit which the bank had issued. The case is simply a decision on the facts that the suspension of payment was not sufficient proof that the bank would not accept the bills or that they would not be able to do so. But Page Wood V.-C. states the relevant principle in terms which I respectfully adopt and which appear to me to be contrary to Mr. Mocatta's argument. He says [FN161]: "I consider the principle of those cases to be simply this - that if a man by his own act renders it impossible for him to perform the contract, or if he distinctly and decidedly repudiates and rejects the contract, even though the time of its performance has not arrived, and it may be said, as was said in the courier's case, that there is still time for repentance, then the contract is broken, and a remedy may be had in damages." And, again, he says [FN162]: "The only question is, have the bank refused to complete the contract, or disabled themselves from completing it?"

FN158 (1846) 2 C.B. 905.

FN159 (1867) L.R. 5 Eq. 160.

FN160 (1876) 4 Ch.D. 108.

FN161 L.R. 5 Eq. 160, 164.

FN162 Ibid. 166.

In the later case [FN163] a company which had an obligation to accept and pay for goods in monthly instalments called a meeting of its principal creditors to ask for an extension of credit on existing contracts. The principle was put by Jessel M.R. as follows [FN164]: "As I understand the decisions, where there has been actual insolvency or a declaration that the purchaser does not ***443** choose to pay, the vendor is not bound to deliver without the cash."

FN163 In re Phoenix Bessemer Steel Co., 4 Ch.D. 108.

FN164 Ibid. 112.

The Master of the Rolls and the Court of Appeal held that on the facts there was no repudiation. I cannot find anything in the judgments which says that insolvency by itself without the declaration of it would not have been enough. In the circumstances of the case the judgments were not concerned to distinguish between the two, and where the point is not in issue it is not in my opinion legitimate to pick out references, such as that of Bramwell L.J. [FN165] to "avowed inability," and to submit that "inability" is no use unless "avowed."

FN165 4 Ch.D. 112, 122.

The truth is that there is little or no authority directly in point because it is very difficult to find a case in which the point is clearly raised. Whenever the inability is manifested by something that a party does, the other party will rely upon renunciation by conduct rather than upon impossibility, because renunciation is so much easier to establish. If he does not rely solely upon renunciation, at least he will not exclude it, and it is then unnecessary in the judgment to distinguish between renunciation impossibility. Even in a case like Stanton v. Richardson, [FN166] where renunciation is not mentioned at all and where the inability was clearly not caused by a deliberate act, it is possible for Mr. Mocatta to argue, as he does (though not, I think, very convincingly), that the conduct of the owner in failing to provide a ship that could be made seaworthy before frustration amounted to a renunciation. In short, it is impossible to get a clear case unless inability is concealed or for some reason not appreciated by the rescinding party at the time when he acts. In that event can the rescinder, having rescinded for the wrong reason, perhaps because he misinterpreted the conduct of the other side, justify his action by relying on facts which come to his knowledge thereafter and with the aid of which he can prove inability? It is now well settled that a rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason.

FN166 L.R. 7 C.P. 421.

It so happens that one of the leading authorities which established this principle is also on the point which I am now considering. In British & Beningtons Ltd. v. N. W. Cachar Tea Co. [FN167] a contract was made in September, 1919, for the sale of a quantity of 1919-1920 crop of Indian tea. It was agreed ***444** between the parties at the arbitration (see the report in the Court of Appeal [FN168] that the contract required delivery in bonded warehouse in London. No time for delivery being prescribed, it followed that the contract required delivery within a reasonable time. Shipment was made in good time, but, owing to congestion in the Port of London, the ships were diverted by the Shipping Controller to various other ports, and the cargoes were discharged there in February and March, 1920. Negotiations took place between the parties for delivery to be taken at these other ports, but they resulted only in an unenforceable agreement. In July, 1920, the buyers wrote saying that, as the goods were not yet delivered in London as promised by the contracts, the latter were null and void. At the arbitration the buyers argued that they were entitled to cancel the contract because by July, 1920, a reasonable time for the delivery of the tea had expired. The arbitrator held that a reasonable time had not then expired and awarded damages to the sellers.

FN167 [1923] A.C. 48.

FN168 10 Ll.L.Rep. 381.

When the award was considered by McCardie J. [FN169] the buyers argued that the contract was frustrated on the ground that the action of the Shipping Controller had imposed a delay which made it impossible for the sellers to deliver within a reasonable time. Since the arbitrator had found that, notwithstanding the delay imposed by the diversion, a reasonable time had not expired, it could not be contended, if that finding stood, that the contract had been discharged by frustration. McCardie J. in effect disregarded that finding and held that the doctrine of frustration applied and that the award should be set aside. His judgment was reversed in the Court of Appeal, which held that he had no power to interfere with the arbitrator's decision on what amounted to a reasonable time.

FN169 8 Ll.L.Rep. 220.

In the Court of Appeal [FN170] the buyers also argued frustration on a different ground; they argued that the contract upon its true construction required that the tea must be shipped direct to London and be there delivered ex bonded warehouse. Since the goods had before the date of cancellation been discharged in other ports, this term could not in any event have been fulfilled. Bankes L.J. [FN171] dealt with the point by holding that that was not the right construction of the contract. Scrutton L.J. dealt with it [FN172] by holding that the buyers, having refused to take delivery on a wrong ground, might not at the hearing put it on the right ***445** ground. He said that the effect of Braithwaite v. Foreign Hardwood Co. [FN173] was that the sellers were relieved, by the acceptance of repudiation on a wrong ground, from any further performance of the contract.

FN170 10 Ll.L.Rep. 381.

FN171 Ibid. 383.

FN172 Ibid. 387.

FN173 [1905] 2 K.B. 543; 21 T.L.R. 413.

In the House of Lords Lord Sumner [FN174] rejected the reasoning of Scrutton L.J., holding that Braithwaite's case [FN175] either did not lay down that proposition or, if it did, was wrong. He said [FN176]: "I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial. What he says is of course very material upon the question whether he means to repudiate at all, and, if so, how far, and how much, and on the question in what respects he waives the performance of conditions still performable in futuro or dispenses the opposite party from performing his own obligations any further; but I do not see how the fact, that the buyers have wrongly said 'we treat this contract as being at an end, owing to your unreasonable delay in the performance of it' obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether. Braithwaite's case [FN177] says nothing, which affects the regular consequences, when it appears that at the time of breach the plaintiff is already completely disabled from doing his part at all." Lord Sumner then proceeded to examine the point, and held that there was not in fact an obligation to ship direct to London and therefore that the argument did not prevail. It is plain that the inability to deliver was due to circumstances beyond the sellers' control and could not possibly be described as a deliberate act of disablement. But no point of that sort occurred to Lord Sumner, and it is clear that if he had found that there was a disablement of the character he was examining he would have regarded it as a good defence. This part of his speech was obiter, but the speech received the general concurrence of three ***446** others of their Lordships and has always been followed as an illuminating statement of the law.

FN174 [1923] A.C. 48, 70.

FN175 [1905] 2 K.B. 543.

FN176 [1923] A.C. 48, 71.

FN177 [1905] 2 K.B. 543.

I think, therefore, both principle and authority, so far as it goes, are against Mr. Mocatta's argument. The argument is worth testing also in the light of what is just and reasonable. Suppose, for example, that in this case the time allowed for the lay days had been of the essence of the contract. The shipowner sails away three days before the expiry of the lay days relying upon an anticipatory breach. It is manifest that the loading could not have been completed by the end of the lay clays. I do not see why the shipowner should not succeed simply by proving that fact, without having to go into questions of how the charterer conducted himself and what the effect of that conduct would be on the mind of a reasonable shipowner. If the charterer was continuing to assert, wildly and optimistically, that he could and would complete the loading, although everyone else knew it to be impossible, would that amount to renunciation? If not, would the shipowner be obliged to wait? I can see no good reason why a party's right to claim an anticipatory breach should depend simply on whether his adversary is artful enough to conceal his state of mind or obstinate enough not to admit his inability. Take another example from the facts of this case. The shipowner might say that it was plain to him on July 18 that the charterer could not get a cargo for at least a fortnight and that so long a delay defeated the charterparty. The arbitrator might say that he quite agreed that it was plain on July 18 that the charterer could not get a cargo for at least a fortnight, but that he could not agree that such a delay would defeat the charter; the charterer in his opinion ought to have been given a month. Surely the owner is entitled to say: "As it has turned out, he could not have got a cargo even in a month, so the difference between us does not matter."

In my judgment, therefore, if the owner can establish that in the words of Lord Sumner [FN178] the charterer had on July 18 "become wholly and finally disabled" from finding a cargo and loading it before delay frustrated the venture, he is entitled to succeed. Lord Sumner's words expressly refer to the time of breach as the date at which the inability must exist. But that does not mean, in my opinion, that the facts to be looked at in determining inability are only those which existed on July 18; the determination is to be made in the light of all the events - whether ***447** occurring before or after the critical date - put in evidence at the trial. Apart from the special principle illustrated in Bank Line Ltd. v. Arthur Capel & Co., [FN179] that is the usual mode of proof, Here again, there is not much authority in cases dealing with anticipatory breach for the same reason, namely, that the vast majority deal with renunciation. But enlightenment is, I think, to be obtained from looking at some of the earlier cases on the application of the doctrine of frustration. In these cases, of course, the doctrine of renunciation plays no part. Take, for example, Geipel v. Smith. [FN180] The owners refused to load a cargo because Hamburg, the port of discharge, was under blockade and they contended that the performance of the contract was prevented by an excepted cause, namely, restraint of princes. The court held that as the blockade had lasted for more than a reasonable time (I think they must be treated as equating a reasonable time with such time as would frustrate the object of the venture), the shipowner was justified in throwing up the contract. Cockburn C.J. said [FN181]: "the defendants rest their defence on the ground that it was here impossible to expect, from the nature of the circumstances, that the obstacle of the blockade would be removed within a reasonable time. It is a sufficient answer on the defendants' part that it was not likely to be removed within a reasonable time; and assuming that either party was bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were therefore justified in not attempting to perform their contract." Blackburn J. said [FN182]: "the defendants say, 'We are not going to let our ship sail to the port of loading at all, because you, the plaintiffs, never will be ready and willing to perform your part of the contract.' But then it is said, it is possible the blockade might be raised within a reasonable time. No doubt it was possible. But it must be taken on this record that it was not raised within a reasonable time; so if the defendants chose to run the risk, and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away." In these citations it will be seen that Cockburn C.J. thought that it would be a sufficient answer for the defendants to say that the blockade was not likely to be removed. This is the answer that has subsequently been taken ***448** up and developed by Embiricos v. Sydney Reid & Co. [FN183] and Bank Line Ltd. v. Arthur Capel & Co., [FN184] and is now, I think, to be treated as the right answer in cases to which the doctrine of frustration applies. The other answer, however - and the only answer that Blackburn J. gave - embodies the ordinary rule, and in my opinion is applicable to cases of anticipatory breach.

FN178 [1923] A.C. 48 , 72.

FN179 [1919] A.C. 435.

FN180 L.R. 7 Q.B. 404.

FN181 Ibid. 411.

FN182 Ibid. 413.

FN183 [1914] 3 K.B. 45.

FN184 [1919] A.C. 435.

More authority of the same sort may be found in those cases which exemplify the equitable doctrine of making time the essence of the contract. If a party rescinds without giving reasonable notice thereby making time of the essence, he is in the same position as one who acts before a reasonable time has expired. In Thorpe v. Fasey, [FN185] in the passage I have already cited, Wynn-Parry J. said [FN186]: "It is true that in the present case the plaintiff did not, as he could have done, make time of the essence of the contract. That is not fatal to his case, if he can demonstrate that the evidence discloses that the defendant is unable or unwilling, whatever time is given, to perform his contract."

FN185 [1949] Ch. 649.

FN186 Ibid. 661.

I considered the same sort of point in Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd., [FN187] on which Mr. Roskill relied. In this case there was an obligation on the buyers who undertook to furnish a letter of credit; they failed to do so within the contract time; the sellers extended the time and then cancelled without giving a reasonable notice of their intention to do so. The position at the date of cancellation was, although the sellers did not know it, that the buyers could not have furnished a letter of credit within any reasonable extension of time. I said [FN188]: "Does it make any difference that the defendants did not know what we now know to be the true facts? In my judgment, it does not. Defendants who act as these defendants did no doubt run a considerable risk; they run risks that they will not be able to discharge the burden, which I think is upon them, of proving affirmatively that if they had given a reasonable notice the other side could not have complied with it; but in this case I think that the defendants do discharge that burden. The evidence shows quite clearly that any reasonable extension of time such as I might have been willing to fix in other circumstances, such as 14 days or another month at the most, would not have availed the plaintiffs at all ... when the facts disclosed that, that is a good enough justification for the defendants' attitude." In my judgment in this case I ***449** referred to the authorities which seemed to me to support my conclusion and I need not cite them again here.

FN187 [1955] 1 Lloyd's Rep. 303.

FN188 Ibid. 314.

I said earlier that Mr. Mocatta did not contend that the principle in Embiricos v. Sydney Reid & Co. [FN189] and Bank Line Ltd. v. Arthur Capel & Co. [FN190] applied in cases of anticipatory breach. But I think perhaps that I ought to say why, because during a large part of his argument he did appear so to contend; and the question was discussed whether the arbitrator ought to be asked to make a finding of fact on that basis. Such a finding of fact would be about the expectation of reasonable and well-informed men on July 18 as to whether a cargo could be found without a delay long enough to defeat the charter. The arbitrator has found what conclusion a reasonable shipowner would have drawn from the facts known to him on that day. It does not, however, necessarily follow that the well-informed man who might be credited with a wider knowledge of the facts would have necessarily drawn the same conclusion. In the end Mr. Mocatta made no request for this finding and abandoned the point, I think rightly. Questions of breach of contract are not to be determined on the principle of Embiricos v. Sydney Reid & Co. [FN191] Speaking of this principle, as laid down by Scrutton L.J., [FN192] I said this in G. W. Grace & Co. v. General Steam Navigation Co. [FN193]: "That principle is at least as old as the conception of constructive total loss, but it is one to be applied with discrimination. It involves the court in proceeding on an erroneous estimate of the facts and probabilities for, if the estimate is not erroneous, no point arises. That course can be taken only when it serves the important commercial purpose indicated by Scrutton L.J. When a claim for damages is being considered, the event has happened and need no longer be forecast. The right to damages depends on a wrong done and an injury actually sustained, not on someone's estimate of whether a wrong is likely to be done or an injury likely to be sustained. A master is not to be deprived of his remedy because, in ignorance of the danger, he entered a port which well- informed

men might erroneously have pronounced to be safe; nor is he to be given damages if he sustains injury in conditions which fall short of the danger-point merely because well-informed men might have erroneously pronounced his entry into the port to be foolhardy. In my ***450** judgment, the arbitrator, being concerned only with a claim for damages for injury to the ship, rightly proceeded on the view which he formed of the true facts."

FN189 [1914] 3 K.B. 45.

FN190 [1919] A.C. 435.

FN191 [1914] 3 K.B. 45.

FN192 Ibid. 54.

FN193 [1950] 2 K.B. 383, 393; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201 .

I think that this is the right view. An anticipatory breach must be proved in fact and not in supposition. If, for example, one party to a contract were to go to another and say that well-informed opinion on the market was that he would be unable to fulfil his obligations when the time came, he might get the answer from his adversary that the latter did not care to have his affairs discussed on the market and did not choose to give any information about them except the assurance that he could and would fulfil his obligations. If that assurance was rejected and the contract rescinded before the time for performance came and the assurance in fact turned out to be well-founded, it would be intolerable if the rescinder was entitled to claim that he was protected because he had acted on the basis of well-informed opinion.

For all these reasons I have come to the conclusion that if Mr. Roskill can produce out of the award a finding, that on July 18 the charterer was unable to load a cargo within such a time as would not have frustrated the object of the venture, the owners would be entitled to succeed, notwithstanding that that was not a conclusion which they would have been justified in drawing from the facts known to them at the time. I pass therefore to deal with a group of submissions by Mr. Mocatta on this point. They are: (1) The point is not open to Mr. Roskill anyway because it was not argued in the arbitration; (2) That there is no finding of fact on which the point can now be made good; and (3) That it is not a case in which the award ought to be remitted for such a finding to be made.

I shall begin by stating what appear to me to be the general principles in the light of which these three submissions should be considered.

The question of law for my decision is stated in the award in the customary phraseology: "Whether upon the facts found and upon the true construction of the charterparty the claimants [the shipowners] were entitled on July 18, 1951, to treat the charterparty as discharged by the respondent's breach and to claim damages accordingly." When the question of law is left in this general form, a party is entitled to argue any point of law that arises on the facts found. The purpose of arguing the law before the arbitrator - and the only useful purpose, as far as I can see, once it becomes clear that a case is ***451** to be stated - is to enable him to know what facts to find as relevant to the points of law which the parties are taking. It is the duty of each party, when he gets the case stated, to consider it and satisfy himself that the relevant facts are found. If they are not, he should apply to the court within the six weeks allowed by R.S.C., Ord. 64, r. 14, to have the case remitted for the findings he wants. If the relevant facts have not been stated, it must, strictly speaking, be the fault either of the party for failing to make his point properly or of the arbitrator for failing to apprehend it. I say "strictly speaking" because there may be cases of complexity where it is difficult to put the blame on anybody. If, however, it is the fault of the arbitrator, the applicant is, I think, entitled to remission almost as of right; if it is his own fault, he must ask for indulgence. The court must then exercise its discretion, which is a wide one.

The importance of making an application in time is two-fold. It may be a case which it is best to remit at once before the argument of law begins. If it is not, and if the court thinks that time and money may be saved by first hearing the argument, the result of which may make the remission unnecessary, the application will nevertheless make it clear beyond doubt that the applicant's grievance was one which occurred to him at once on reading the case, and that the point of law is not an after-thought which arose for the first time during the hearing of the argument. If the application is not made in time and the applicant has to ask for an extension, he must, I think, not only explain the delay, but also show "a strong case on the merits indicating a really definite issue for consideration"; *per* Scott L.J. in Temple Steamship v. Sovfracht. [FN194]

FN194 (1943) 76 Ll.L.Rep. 35, 36.

Under the Arbitration Act, 1950, section 22, the court has the power to remit of its own motion without any application being made. The existence of this power, and the fact that it has not infrequently had to be used, has, I believe, led parties to think that there is no need - except when the award is so deficient as to make argument impossible - to take the initiative in making an application; and that it is better to wait and see how the matter develops at the hearing. For my part, I am not prepared to use this power unless I find that I cannot deal with the matter justly on the material provided. Remission is a step which a court is slow to take because there is no merit at all in arbitrations unless awards are to be treated, if at all possible, as ***452** final on the facts. The court does not expect all awards to be perfect and will not remit them merely for minor clarifications. Mr. Roskill invited me to use this power in respect of three points (none of them the subject of his later application) and I have declined to do so. I think that Mr. Mocatta is also right in submitting that the power ought not to be used to assist one side rather than the other and certainly not to relieve a party of the consequences of not making in time an application which he ought to have made.

In Hudson's Bay Co. v. Domingo Mumbru Sociedad Anonima [FN195] the Court of Appeal held that where the umpire stated the facts as he found them and then asked the court, not a question as to a specific point of law, but generally to say whether having regard to the facts as found the one party or the other was in the right, the parties are entitled to take any questions of law that arise upon those facts. In my judgment this decision applies only to clear and conclusive findings and not to incidental or narratory findings. Although the question of law is here stated in a general form, it is quite clear that the arbitrator regarded his conclusion as turning on the question of whether or not an intention had been evinced to renounce the contract; and I do not think it would be right to make too much of findings set out in the course of the narrative, which he could not have thought to be material to the points of law which the parties were really arguing.

FN195 (1922) 10 Ll.L.Rep. 476.

In this connexion it is not, I hope, out of place for me to comment upon a form of award that appears to me to be in a new style. The award in this case consists of 46 pages of foolscap; and another that I have had before me this term, also by a legal arbitrator, was of the same length. Both these documents are cast as judgments rather than awards; they set out the evidence in extenso with the views and comments of the arbitrator on it and on the matters of law discussed. The Court of Appeal has several times said that arbitrators ought not to annex bundles of correspondence to their awards, and I think the same principle applies to extended narratives of evidence. Strictly speaking, a case stated should contain nothing but findings, positive or negative, of fact. In practice, it is always necessary to include some explanatory matter, but it should, I think, be kept to a minimum; its purpose being simply to make the findings easily intelligible. The award in this case would be admirable if the court had full appellate jurisdiction or even ***453** had power to draw an inference of fact, but it has not. Unless the question is whether there is any evidence to sustain a finding, the court is not concerned with the evidence, nor with the processes by which the arbitrator arrived at his inferences or conclusions of fact. The effect of setting out the evidence may conceivably be to cause the judge to entertain doubts, which he ought not to entertain, about the value of the findings and almost certainly will be to allow the argument at the hearing to range much more freely than it ought to. No doubt the reason that lies behind this type of award is that the arbitrator wants to give the parties as good a run as he can at the hearing of the argument. But that is not, in my opinion, the proper object of arbitral proceedings, which is to cut out all further argument on questions of fact; and that object should be achieved as firmly and concisely as possible.

Another disadvantage about this type of case stated - and the one that is material to the point I have to decide - is that it is very difficult to make sure how much of it is meant to be a firm finding of fact and how much merely narrative or disputable evidence. When, for example, the arbitrator sets out information given in correspondence, does he mean to find that the information is true or just that it was given? The paragraph of the case which opens with "I find the following facts," is qualified in many places by phrases such as "the evidence points strongly to." However, the findings of fact on which Mr. Roskill principally relies are unqualified. They contain much material from which an inference about the charterer's inability to ship might be made, but the inference is not drawn. In paragraph 20 an inference about inability is drawn, but is limited in scope (it relates to the option); it is based, perhaps, on the absence of evidence (whereas it may be contended that it is for the owners to call evidence proving inability); and

it is, or may be said to be, qualified by the expression "in my view."

I do not overlook the consideration that there is a specific finding about what a reasonable shipowner would conclude "on the facts known to him by July 18, 1951, as interpreted in the light of subsequent events"; and that it is in Mr. Roskill's favour. As I have already said, I do not know precisely what this means. All that is clear about it is that it is directed to renunciation and not to proof of impossibility. On the whole, I have come to the conclusion that, while there are many indications of how the arbitrator had looked at the matter and, "a strong case on the merits indicating a very definite issue for ***454** consideration" (I need say no more than that), there is no clear and conclusive finding on this point; and the reason why there is no such finding is shown well enough by the form of paragraph 34, which makes it clear that at the arbitration the parties were arguing about renunciation and not about impossibility in fact. I must, therefore, hold that Mr. Roskill cannot argue the point on the case as it stands; and that, subject to his application that the award should be remitted to the arbitrator for a specific finding of fact, the owners must lose on the argument before me.

In these circumstances ought I to refuse Mr. Roskill's application? On the whole, and not without much hesitation, I have come to the conclusion that the owners ought not to be barred altogether from taking this point, and that they can now be allowed to do so without injustice to the charterer. I extend the time for this application to be made, but do not wish it to be treated as any sort of a precedent; nor do I modify the view that I have already expressed in general about the duty of parties to examine awards for supposed defects or to offer an adequate explanation if they have failed to do so. I shall grant both applications on terms. In the first place, I shall not allow the result of the remission to affect the costs of the hearing which have been incurred to date. As the case stands, the charterer is entitled to succeed and therefore he must have the costs of the hearing to date. In the second place, I think that he is entitled to have the costs that may further be incurred in the arbitration as the result of the remission. If the point had been taken during the original hearing before the arbitrator, the probability is that it could have been disposed of then without increasing the costs of the arbitration, as they may be in consequence of a further hearing. I do not make an unqualified order about this, as it may conceivably turn out that the additional hearing before the arbitrator is one which might have substantially increased the length of the arbitration anyway.

In the result, therefore, I have reached a decision on a point of law which is not before me. To be strict, I should have remitted the award to the arbitrator for the further finding of fact; and if he made the finding in favour of the charterer, the point of law about the nature of the disablement that justifies rescission would not arise. But the point having been fully argued before me, I have thought it right to express my conclusion on it, because I think that thereby I may save the parties the cost of further argument before me. If the further ***455** finding of fact is in the charterer's favour, the award will stand. If it is in the owners' favour, I shall uphold the alternative award, subject to any fresh award the arbitrator may see fit to make on the question of costs. I expect, therefore, that when the remitted case comes back to this court, I shall be able to give the appropriate judgment without hearing further argument.

Representation

Solicitors: Holman, Fenwick & Willan; Constant & Constant.

On application by owners for remission, ordered, on owners undertaking to pay costs of remission unless court otherwise directs, that time for application be extended, that award be remitted to arbitrator (1) to answer question whether the charterer was on July 18, 1951, willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the adventure, and (2) to reconsider his award of costs. Leave to appeal from this order. (E. M. W.)

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