CA on appeal from Commercial Court (Mr Justice Aikens) before Waller LJ; Rix LJ; Jonathan Parker LJ. 22nd November 2000

Lord Justice Waller:

1. This is an appeal from a decision of Aikens J given on 2 July 1999. He ruled at an interlocutory stage on the true construction of a charterparty that a term, clause 46, was not a condition breach of which entitled the Charterers to terminate automatically. He ruled that the term was an intermediate term in relation to which the Charterers would have to establish that the Owners were in repudiatory breach before they could terminate the charterparty. The evidence before Aikens J was contained in three affidavits together with a limited number of exhibits thereto.

2. Aikens J ruled that the point on construction was worthy of consideration by the Court of Appeal but that any appeal should be postponed pending the trial of the action so that all matters went to the Court of Appeal at the same time.

3. The matter came on for trial before Timothy Walker J and he handed down judgment on 19 April 2000, reported at [2000] 2 LLR 37 . He held in favour of the Owners that there had not been a repudiatory breach of the intermediate term. He also held that separate claims brought by the Charterers for misrepresentaion failed both with respect to the Exxon and BP approvals. He further refused permission to appeal on any aspect, leaving it to the Court of Appeal to decide whether leave should be given on any aspect.

4. The Charterers took the decision simply to pursue an appeal on the question whether Aikens J was correct to classify clause 46 of the charterparty as an intermediate term as opposed to a condition and sought permission to appeal. Permission to appeal was granted by Rix LJ and the matter was argued before us pursuant to that permission on Monday 6 November 2000.

Facts

5. It is possible to take the facts largely from the judge's judgment. Micado Shipping Limited as Owners, chartered their vessel to B.S. & N. Limited as Charterers for a period of minimum eleven months, maximum twelve months. The relevant terms are first, clause 1, which provides that at the date of delivery, the vessel shall be classed in every way fit to carry fuel oil and vacuum gasoil and/or its products, together with certain other matters; second, clause 5, which provides that the vessel is not to be delivered before 1st November 1997 and, if not delivered by 30th November, the Charterers have the right to cancel. Thirdly, there are the usual provisions in clause 15 with regard to delivery of bunkers on board and redelivery. Fourthly, clause 61 provides that the bunker quantities are to be approximately the same on delivery and redelivery. Fifthly, there is the critical clause, which is clause 46. This is an additional clause at the end of the standard printed clauses and which reads as follows:-

   "<u>MAJORS' APPROVAL CLAUSE</u>

   Vessel is presently MOBIL (expiring 27/1/98), CONOCO (expiring 3/2/98), BP (expiring 28/1/98) and SHELL (expiring 14/1/98) acceptable. Owners guarantee to obtain within 60 (sixty) days EXXON' approval in addition to present approvals. On delivery date hire rate will be discounted USD250 (two hundred and fifty) for each approval missing, ie MOBIL, CONOCO, BP, SHELL, EXXON.

   If for any reason, during the time-charter period. Owners would loose (sic) even one of such acceptances they must advise Charterers at once and they must reinstate same within 30 (thirty) days from such occurance (sic) failing which Charterers will be at liberty to cancel charterparty or to maintain same at reduced rate as stipulated above. Hire rate will be reinstated once Owners will show written evidence of approvals from Major Oil Companies."

6. The Charterparty also provided for English law and for the exclusive jurisdiction of the English Court.

7. The vessel was delivered to the Charterers on 5 November 1997. In fact Exxon approval had not been obtained by the Owners at that stage. On 30 December 1997, Charterers concluded, with "subjects", a proposed sub-charter of the vessel as is set out in the recap fixture exhibited to one of the Affidavits. The vessel was to be delivered not before 4th and not after 6th January 1998. The recap provides: *"The best of owners' knowledge vessel is acceptable by Shell/BP/Mobil/Conoco/Exxon (to be reconfirmed by owners before lifting subjects)."*

8. The Charterers sought Owners' confirmation that the vessel was to be approved by Exxon but the Owners were unable to confirm that there would be such approval. The Owners sent a telex at 1445 on 30th December 1997 explaining that : *"At time of writing vessel is not Exxon acceptable and frankly speaking won't be able to get it within the 5th of Jan 98."*

9. The significance of 5th January is that it was within the laycan period of the sub-charterparty and was the date falling 60 days after delivery of the vessel under the Head Charterparty. The telex explained that the vessel had been subjected to heavy weather and that the vessel would require high level alarms which needed to be fitted in drydock prior to Exxon giving their approval. The telex went on:- *"Owners believed to be ready for Exxon inspection by the end of Jan/ely Feb considering also that all the other approvals are elapsing within Jan and owners will apply first to them which are easier to extend. FYG Shell has been extended til July 98."*

10. The sub-charter could therefore not be confirmed and the Charterers sent a telex to the Owners at 1713 on the same day as follows:

   "Reference various telex exchanged we understand that vessel at of today December 30th 1997, is not acceptable by Exxon even though such acceptance was guaranteed to be obtained by owners within 60 days from vessel's delivery.

As above and without prejudice to charterparty terms and conditions charterers regretfully have no alternative to cancel charterparty redelivering vessel today.

Charterers also keep the right to claim for all damages, extra costs incurred due to vessel's non-compliance with the charterparty terms.

Full calculation for extra hire paid plus ROB bunker on redelivery and reimbursement for ROB on delivery due to owners' erraneous bunker invoice will follow soon."

11. The position then was that the charterparty had been terminated on 30 December 1977. The critical question is whether the Charterers had the right so to terminate the charterparty.

The Issues

12. Both parties accept the clarification of the issues of the judge. He put the issues in this way. The Charterers say that clause 46 which provides for Exxon approval to be obtained within 60 days in addition to the presence of approvals is a condition of the charterparty. That is, if the Owners fail to obtain approval within 60 days, the Charterers had the right to terminate the charterparty immediately as the Owners were in repudiatory breach. The Charterers also say that the obligation to obtain approval had to be fulfilled within 60 days of the date of the charterparty. The latest time for fulfilment on this basis was, therefore, 20th December 1997. Accordingly, as the approval had not been obtained by 30th December, the Owners were in repudiatory breach. In the alternative, the Charterers say that if the obligation had to be fulfilled within 60 days of delivery of the vessel, that period expired on 5th January 1998. The telex sent by Owners on 30th December was on this basis an anticipatory repudiatory breach of the charterparty by the Owners. The Charterers allege that this entitled them to accept the repudiatory breach which they did on 30th December. The Charterers claim certain sums in consequence of this alleged breach, the total amounting to some US$151,377.55.

13. The Owners contend that the obligation to obtain the approval of Exxon was not a condition. They also contend that the obligation was one requiring fulfilment only within 60 days of delivery of the vessel. However they do accept that approval had not been obtained by 30th December and would not and could not have been obtained by 5th January 1998. The primary submission by the Owners is that their failure constituted a breach of an innominate term which sounds in damages unless the consequences of the beach are proved by the Charterers to be so serious as to entitle the Charterers to terminate. The Owners accept that if they are wrong, and that the obligation does constitute a condition, then if time for fulfilling the obligation stems from the date of the charterparty itself, it must follow they were actually in breach by 30th December and that the Charterers had the right to terminate. They also accept that if the obligation is a condition that the time for fulfilment runs from the date of delivery under the charterparty, then, as at 30th December, the Owners would be in anticipatory repudiatory breach and the Charterers could terminate.

14. The issue on the appeal has been no different. Mr Timothy Hill, who on this occasion represents the Charterers, has contended that clause 46 is a condition and that failure to obtain the approval of Exxon within 60 days, from whichever date that runs, would be a repudiatory breach entitling the Charterers to cancel.

15. Mr Joseph, for the Owners, submits that clause 46 is an innominate (or alternatively an intermediate) term. That in the result having lost the trial before Timothy Walker J, the limit of the Charterers' rights is to a claim for damages.

The judge's conclusion

16. The judge put the matter this way.

"I have concluded, although not without great thought, that the obligation in relation to Exxon does <u>not</u> amount to a condition the breach of which gives the right to terminate the charterparty. My reasons are as follows:

1 The obligation is not stated expressly to be a condition. So it is necessary to see if that fact is implicit in the wording. It is not immediately clear that the implied intention of the parties <u>is</u> that the obligation should be a condition.

2 Approval by oil majors is an aspect of the condition of the vessel, like class. It is inherently no different from the obligation to maintain the vessel in a seaworthy state. Class or seaworthiness are aspects of the condition of the vessel which are needed to trade the vessel or to sub-charter her. Approval by oil majors is, in my view, no different.

3 Exxon approval is only one of five approvals by oil majors that is needed. The fact that it is not obtained is not as significant as would be the position if ***none*** *of the five approvals were obtained in the first place.*

4 There is no express right to terminate if there is a failure to obtain Exxon approval in time, whereas there is a right to terminate if one approval is lost and not recovered in 30 days. This difference is understandable. As far as concerns Exxon, the parties knew the approval was not present when the vessel was chartered or delivered. As far as concerns the other approvals, there was a contractual undertaking that they <u>had</u> been obtained. If those approvals were lost when the vessel was traded or sub-chartered, that would put the charterers in a very embarrassing position commercially. They would need approval reinstated very quickly in order to maintain any obligations under a sub-charter or else the charterers might be in breach of contract. If they could not maintain their sub-charter, then the charterers would need the ability to cancel under the head charter.

5 I take account of the fact that if there was not any approval on the delivery date, the remedy would be reduction of hire. This suggests that the parties did not see the failure to have Exxon approval as giving the automatic right to terminate.

6 The fact that there was a time limit attached to the obligation cannot, by itself, turn the obligation into a condition. Not all obligations which have to be done in a particular time under a contract are, by virtue of the time limit, a condition. It is necessary to consider the nature of the particular obligation. There are classically two types of obligation coupled with a time in which to perform them. First where the whole contractual obligation has to be performed in a certain time by one side: eg. ***Rickards v Oppenheim****. Secondly where something is a condition precedent to performance by the other side. The classic example is in the* ***Bunge v Tradax*** *case. But neither is the position with regard to Exxon approval.*

7 Lastly, commercial sense is against the obligation being a condition. If it were a condition, the slightest infringement, for example, failure to obtain approval by one day, would give the right to terminate. This does not sit well with the hire reduction of US$250 a day and the reality of what might occur if there was a breach."

Point on the evidence

17. Considerable evidence was given before Timothy Walker J at the trial which was not before Aikens J. The evidence before Timothy Walker J also had this feature. The Owners had complied with the directions in relation to serving of their evidence. That evidence sought to demonstrate that Exxon only had a small share of the market and thus that it was not that important whether Exxon approval had been granted or not. The Charterers had put in some evidence on that aspect but shortly before the trial attempted to put in some further evidence to deal with the importance of Exxon approval whether or not Exxon had the limited market share. Timothy Walker J refused the application to put in the further evidence.

18. Before us Mr Joseph wished to rely on the evidence that was before Timothy Walker J and Mr Hill's position was, at least initially, that albeit the court might look at that evidence, it should do so in the knowledge that there was other evidence which Timothy Walker J had not allowed to be produced.

19. In the course of his submissions, possibly having regard to the attitude of the court, Mr Hill somewhat changed his position and submitted that in essence this court should not test the decision of Aikens J other than by reference to the evidence that was before him. Mr Joseph, interestingly enough, did not press the point that the evidence before Timothy Walker J was admissible on the appeal, although he did suggest that the court should be entitled to take account of the fact that Exxon's market share was only 5%.

20. The difficulty in accepting that even the evidence that Exxon's market share should have any relevance to the construction of the contract is that there simply is no evidence as to whether the parties had that fact in mind or not when they concluded their negotiations for this charter. Without being too technical about the matter, it seems to me that the position is as follows. The parties chose to argue the point on construction by reference to the evidence that they put in before Aikens J. The Charterers have appealed against that order. Neither side has applied to put in fresh evidence before the Court of Appeal and indeed neither side has any basis on which it could make such an application. It would not be right for the court to have half an eye on some evidence that was given before Timothy Walker J. I do not think that Mr Joseph really resisted the conclusion that I have reached which is that the appropriate course is to rule on the question of construction on the basis of such evidence as might be admissible which was before Aikens J.

The arguments before the Court of Appeal

21. The submissions were wide ranging. Ultimately Mr Hill summarised in eight submissions why he submitted that the judge was wrong. I shall attempt to summarise those submissions and Mr Joseph's answers to them so as to identify the issues.

22. First Mr Hill submitted that the judge had failed to appreciate the contractual representations in the first sentence of the clause. He submitted that the representations if broken would have given the Charterer a right to rescind the contract on the basis of misrepresentation. He further submitted that the terms combined in those representations were such that if any of the four majors there identified had withdrawn their approval prior to delivery of the vessel the Charterers would have had an entitlement to accept that as a repudiation of the contract.

23. Mr Joseph's response was first that whatever the position might be in relation to misrepresentation the position in relation to whether the first sentence identified conditions was precisely the reverse from that for which Mr Hill contended. He submitted that the third sentence of the first paragraph of the clause demonstrated that it would not have been a breach of contract for the vessel to have been delivered without one of the approvals of the majors identified in the first sentence. He so submitted because the third sentence demonstrated that if such an approval was missing the remedy was simply that US$250 would be deducted from the hire rate.

24. Mr Hill's second submission was that although clause 46 with its time provision does not fall within the two types of obligation described by the judge in his reason 6 in reliance on the authorities as being the classic types of obligation, the authorities are not, and should not be, so confined. The judge suggested that the types of obligation coupled with the time in which to perform them were conditions classically in two situations, first where the whole contractual obligation has to be performed within a certain time by one side and secondly where something is a condition precedent to performance by the other side. Mr Hill's submission was that it is possible to find other cases in which a time provision has still been construed as a condition even though it does not fall within the above analysis. He relied on ***Greenwich Marine Inc v Federal Commerce and Navigation Co Inc*** [1985] 1 Lloyd's Rep 580.

25. Mr Joseph's response was that clause 46 was not truly a time clause at all. The real question, he submitted, was whether the obligation to have approvals from the majors, either at charterparty date or at delivery date other

than Exxon, were conditions. If they were not his submission was that the requirement to provide the Exxon approval within 60 days would itself not be a condition.

26. Mr Hill's third submission was that commercial sense dictated that clause 46 should be a condition. Charterers must know where they are. The second paragraph of the clause demonstrated how important the question of approval from majors was in that a failure to renew an approval lost resulted in a right of cancellation.

27. Mr Joseph's response was that the right to cancel was only limited to situations in which approvals had been lost during the currency of the time charter period. That was a very limited right of cancellation. Under the first paragraph there was no right to cancellation. Indeed Mr Joseph's submission was that if approval had been lost for one of the majors named in the first sentence prior to the delivery date under the charter, (i) there was no obligation on the Owners to advise the Charterers at once and (ii) there was no obligation to reinstate within 30 days or at all and (iii) that the Charterers would simply be obliged to continue with the charter with a discount of US$250 for any missing approval.

28. Mr Hill's fourth submission was that the judge was wrong to conclude that the absence of the Exxon approval was not considered as important as the absence of any of the other four. The judge based that conclusion on the second paragraph of clause 46 providing a right to cancel if one of the four were not reinstated within 30 days. But, submitted Mr Hill, that overlooks the fact that if the Exxon approval had been obtained and was then lost the right to cancel would apply to any failure to reinstate Exxon. Mr Hill submitted that the second paragraph in fact emphasised the importance of the approval of all the majors and no distinction could be made between Exxon and the others.

29. Mr Joseph submitted that the judge was right to suggest that the approval of Exxon was less important. He submitted that that is clear on the basis that on any view there would be no breach for a period of 60 days when Exxon's approval had not been obtained. He further submitted that it was demonstrated that Exxon was of less importance by the fact that there was no express power to cancel if Exxon's approval was not obtained within the 60 days.

30. Mr Hill's fifth submission was that the judge gave excessive weight to the fact that there was no express cancellation if the Exxon approval was not obtained within 60 days. His submission was that it would be inconsistent with the scheme as a whole if there was no right to cancel if Exxon failed to obtain approval. There was no difference he submitted between obtaining reinstatement of approval and obtaining Exxon's approval which would in effect be a reinstatement or no different therefrom.

31. Mr Joseph's submission was, not surprisingly, that the fact that there was no express right to cancel if Exxon did not provide their approval within 60 days was a highly significant factor.

32. Mr Hill's sixth submission was that the judge was wrong to place reliance on the reduction of hire after delivery if approval was not obtained. Mr Hill submitted in relation to the four majors the subject of the first sentence that the third sentence would not apply to a withdrawal of approval if that occurred prior to the delivery date but after the date of the charter. In his submission for there not to be approval by one or other of those four majors as at delivery date would be a breach of a condition giving a right to cancellation without the necessity of reliance on the second paragraph. Thus he submitted the discount of US$250 would not be applied to such a breach. His submission was further that the third sentence of the first paragraph only applied during the 60 days so far as Exxon was concerned i.e. he submitted it was not a liquidated damages clause at all. On the expiry of 60 days the Charterer in his submission would be free to cancel or continue with the charter with a claim to damages in relation to which there would be no agreed limit by reference to the discount of US$250.

33. Mr Joseph's submission was that the reduction in hire provision was of significance in that it demonstrated the level of importance attached to any one of the approvals being missing.

34. Mr Hill's seventh submission was that the judge failed to give any adequate weight to the word "guarantee". He relied on the judgment of Branson J in ***Pennsylvania Shipping Company v Compagnie Nationale de Navigation*** [1936] Lloyd's List Reports Vol. 55 at 271 particularly the passage at 277. Branson J having identified other clauses stating that owners guaranteed certain things came to the particular clause with which he was concerned and said:-

"As a matter of pure construction I think that the word "guarantee" in 11 of the 52 clauses shows an intention to lay a special emphasis upon the obligations assumed under these clauses and to treat them as conditions of the contract as distinguished from mere warranties."

35. Mr Joseph's response was to point out that various of the clauses in the charterparty relied on by Branson J as containing the word guarantee would, in the modern era, not be construed as conditions. He relied on a decision of Robert Goff J (as he then was) in ***Compagnie General Maritime v Diakan Spirit S.A. (The "Ymnos")*** [1982] 2 Lloyd's Rep 574 in particular a passage at 584 where he said:-

"It is true that the provision uses the word "guarantee", and provides that the container can be loaded without "any" stability problem words on which the charterers placed reliance in support of their argument. But we are familiar with the word "guarantee" being used in commercial documents as meaning no more than that the obligation undertaken is absolute in the sense of being unqualified; and in my judgment the use of the word "guarantee" in the clause under consideration means no more than that any stability problem during loading the contractual number of containers will result in a breach of contract by the owners."

36. It is right to say that the word guarantee is used in this charterparty in clause 2(b) and 24(a). Mr Hill did not suggest that that made those terms into conditions. What he did draw attention to was the fact that the wording in

clause 46 which was a clause drafted specifically rather than being in standard form should be contrasted with the language of other clauses specifically drafted or incorporated e.g. clauses 50 and 52 where the draftsmen have deliberately used the word warrant.

37. Mr Hill's eighth submission was that the judge was wrong to see clause 46 like a condition of seaworthiness. So far as seaworthiness is concerned what amounts to unseaworthiness runs the full spectrum of conditions of the vessel from relatively minor matters which may be a breach to very major matters. It is apparent from the start precisely what the breach will be in relation to the failure to have the approval of a major.

38. Mr Joseph's response was that the failure or otherwise to have the approvals of the majors was an aspect of the vessel's condition or status just as seaworthiness. Breach of the same might or might not affect the vessel's ability to trade and thus the seriousness of the breach could be judged on the facts of each individual case.

DISCUSSION

39. There was cited to us ***Bunge Corporation v Tradax Export S.A.*** [1981] 2 Lloyd's Rep 1. Mr Hill relied on the passage in the speech of Lord Wilberforce at pp. 5 and 6 and in particular the passage where Lord Wilberforce said:-

*"It remains true, as Lord Roskill has pointed out in **Cehave N.V. v Bremer Handelsgesellschaft m.b.H.,** [1975] 2 Lloyd's Rep. 445; [1976] 1 Q.B. 44, that the Courts should not be too ready to interpret contractual clauses as conditions. And I have myself commended, and continue to commend, the greater flexibility in the law of contracts to which **Hong Kong Fir** points the way (**Reardon Smith Line Ltd. V Hansen-Tangen**, [1976] 2 Lloyd's Rep. 621; [1976] 1 W.L.R. 989 at pp. 627 and 998). But I do not doubt that, in suitable cases, the Courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts. To such cases the "gravity of the breach" approach of **Hong Kong Fir** would be unsuitable. I need only add on this point that the word "expressly" used by Lord Justice Diplock at pp. 494 and 70 of his judgment in **Hong Kong Fir** should not be read as requiring the actual use of the word "condition": any term or terms of the contract, which, fairly read, have the effect indicated, are sufficient."*

He relied also on Lord Roskill's speech from pp. 12-13.

40. Mr Joseph relied on passages in Lord Lowry's speech at p. 8 and on the passage in Lord Roskill's speech at p. 15 where he said that :-

"The most important single factor in favour of [the term being a condition in that case] is that until the requirement of the 15 day consecutive notice was fulfilled, the respondents could not nominate . . . . as the loading port."

He further relied on the famous passage in Bowen LJ's judgment in ***Bentsen v Taylor*** [1893] 2 Q.B. 274 at p. 281 cited by Lord Roskill in **Bunge** at p. 12:

"There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability."

41. Both counsel referred us to the paragraphs in Halsbury's Laws Vol. 9(1). Mr Joseph placed greater reliance on paragraph 931 headed "Time not generally of the essence" while Mr Hill placed greater reliance on paragraph 932 "Circumstances making time of the essence".

42. Paragraph 12-040 from Chitty on Contracts 28th Edition seems to me to provide a neat summary of the principles. Having discussed the numerous authorities on the point, including the authorities cited to us, the editors say this:-

*"**Conclusion.** The conclusion to be drawn from these cases is that a term of a contract will be held to be a condition:*

(i) if it is expressly so provided by statute;

(ii) if it has been so categorised as the result of previous judicial decision (although it has been said that some of the decisions on this matter are excessively technical and are open to re-examination by the House of Lords)

(iii) if it is so designated in the contract or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract; or

(iv) if the nature of the contract or the subject-matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of his obligations in the event that the term was not fully and precisely complied with.

Otherwise a term of a contract will be considered to be an intermediate term. Failure to perform such a term will ordinarily entitle the party not in default to treat himself as discharged only if the effect of breach of the term deprives him of substantially the whole benefit which it was intended that he should obtain from the contract."

43. The problem with clause 46 is that on a strict construction of the language there would appear to be an inconsistency about the situations in which the clause would contemplate that a failure to have or obtain a major's approval should be considered as of great importance, and indeed of such importance that the Charterers should have a right to cancel.

44. There is no difficulty about one situation. If during the period of hire "even" (as the clause says) one major's approval is lost, and the Owners fail to obtain the reinstatement of the same within 30 days the Charterers have the right to cancel (or continue with the hire discounted by $250). That provision clearly applies to the loss of Exxon if Exxon approval had ever been obtained. That clearly points to the importance to the Charterers of the

major's approval being maintained and seems to treat a failure to reinstate within 30 days as a breach of a condition.

45. But what if the approval of one of the majors, say Mobil, were lost between the date of the charter 20 October and the commencement of the time-charter period 5 November? Mr Joseph for the Owners submitted that on the language of the clause, the second paragraph does not apply at all because it commences with the words "during the time-charter period", and he initially submitted thus (1) there would no obligation on the Owners to inform the Charterers; (2)that there would no obligation on the Owners to reinstate within 30 days or indeed at all; and (3) on the language of the first paragraph, particularly the third sentence, it is contemplated as a possibility that an approval may be lost by delivery date, and that a discount of US$250 would apply to the rate of hire. Indeed the submission amounted to asserting that the loss of an approval during such a period and the non-reinstatement would be no breach of contract at all. If the submission were right, it points to the almost total lack of importance to Charterers of approvals from majors; the discount of US$250 is sufficient recompense, and even if all four approvals as referred to in the first sentence were lost prior to the time-charter period a US$1000 discount would be the recompense.

46. Mr Hill's initial submission also seemed to present some inconsistency. He accepted that if an approval was lost during the period of the time charter, the Owners had a period of 30 days in which to reinstate the same. But he submitted the proper construction of paragraph one of clause 46 was that if an approval was lost before the period of hire commenced, the Owners would be in breach of a condition entitling the Charterers to cancel, and would not have a period of 30 days to reinstate the approval. He submitted that the first sentence of the clause imposed an obligation to have the approvals therein mentioned in existence both as at the date of the charter, and because of the reference to expiry dates all of which were after the date of the commencement of the period of hire, also at the date of the commencement of hire. He submitted further that since on its strict wording the language of the second paragraph did not apply, breach of the obligation gave a right to cancel. The third sentence of the first paragraph he submitted only applied to the situation in which approvals were lost once the time-charter period had commenced, and of course until Exxon approved. So his submission was that the above showed that the importance Charterers placed on having approvals in place was so great that if they were not present at the outset of the charter or at the commencement of the time-charter period, that should lead to a right to cancel even without giving a reasonable period to reinstate.

47. It seems to me that the parties should be assumed to have intended to be consistent about the importance of the obtaining and maintaining of majors' approvals. Only if the language drives one to inconsistency should the clause be construed so as to provide for that inconsistency. What is more it seems to me that they should not be taken to have intended to be inconsistent about the absence of "even" one major's approval, nor to be contemplating a distinction between having the approval in the first place and losing the approval after commencement of the charter period. This much is, as it seems to me, apparent from the second paragraph because it applies to the loss of "even" one major including Exxon, and because if it was the very fact of losing the approval which was considered so serious, the expectation would be a right to cancel immediately, not an obligation to reinstate. I take the point that a loss during the currency of the period of time-charter might have some effect on sub-charters already entered into, but if that was the major consideration, one would not expect the Owners to have a period of 30 days in which to reinstate in all circumstances. If one stands back from the strict language of the clause and asks oneself what are the consistent signs, I believe the answer is not that the approvals of majors were unimportant with a deduction of US$250 being the recompense, but would be as follows.

48. First the absence of even one major's approval during the period of the time charter was important to the Charterers. One gets that from the second paragraph which applies to all the majors including Exxon once Exxon's approval had been obtained; one also gets it from the fact that the Owners "guaranteed" to get the Exxon approval within 60 days. I for my part think the use of that word in its context is of importance. Second however it was not so important that the Owners should not be given a reasonable period in which to reinstate. That is clear from the second paragraph, and is clear from the fact that for Exxon the period was 60 days. Third, during the period given to reinstate there should be a discount of $250 not I would suggest as liquidated damages compensating for a breach but simply as a discount for periods which the Owners were entitled to have to reinstate or obtain approvals. Fourth, it might in fact turn out at the time when it becomes finally known whether the approval will be reinstated or obtained, that the absence of an approval was not so important that the Charterers wanted to exercise their right to cancel; if that was so, Charterers should have the option to continue with the charter with a discount in hire of US$250 this now being a liquidated damages provision and thus limiting their remedy in damages.

49. If the above is right one would expect that losses of approval prior to commencement of the time-charter period to have the consequence as per the second paragraph of clause 46. Furthermore, one would expect I suggest there to be no distinction between reinstating an approval of any one major within 30 days when it is lost during the period of hire, and obtaining the approval of the one missing major Exxon within 60 days also thus during the period of hire. But what about the language of the clause?

50. One must accept I say straight away that if the above consistency was being sought, it would have been very simple to provide expressly in relation to the obtaining of the Exxon approval within 60 days, the right to cancel, and the option to continue with a discount at US$250 a day, and that was not done. But does that provide the answer?

51. I believe it is a proper construction of the first paragraph of clause 46 and in particular the last sentence that the obligation to have the four consents referred to in the first sentence should apply as at the date of the commencement of the time-charter period. One can I think place that construction on the paragraph by reference to the first sentence which at least indicates an expectation that expiry will be after commencement date, and by reference to the language of the third sentence which is, I suggest when properly understood, saying that there will be no penalty for the absence of an approval, despite the obligation to have one in the case of the four, until the delivery date. I furthermore think that the second paragraph of the clause, when properly construed, must apply to the loss of approval which has occurred before the time-charter period but is still in existence as the date of the commencement of the period. It would certainly make a nonsense for the loss of approval which has been reinstated prior to the commencement of the period to be a breach of condition which entitles the Charterers to cancel. It makes also very little sense that Charterers should be entitled to cancel without allowing 30 days simply because the loss occurs on the day before the period of the time-charter commences. The second paragraph starts "if for any reason during the time-charter period the owners *would* loose (sic) ...."(my italics). It is not in my view to stretch the language too far to say that must include the owners having lost and still not having. Alternatively it seems to me that by implication the clause must be so construed otherwise either the Charterers have no remedy in such a situation other than the deduction of US$250 or, if the Charterers are held to have a remedy beyond that deduction, it makes little sense to make it a remedy in damages assessed but taking account of the deduction, or a remedy of cancellation, without the Owners having a reasonable period for reinstatement.

52. It follows from the above that, if nothing else, one thing is clear. The draftsmen did not use precise language to convey the terms of the agreement between the parties. In my view it follows that it is not right to elevate the failure to provide expressly for cancellation in relation to the obligation to obtain Exxon's approval within 60 days to a determinative position.

53. Where then does that lead? I come back to consistency. It would be surprising if the loss of one major and failure to reinstate within thirty days provided a right to cancellation, if the failure in effect to reinstate Exxon within 60 days did not do so.

54. In my view the word guarantee is the pointer that demonstrates that it was intended that 60 days was to be the outside limit for the obtaining of the approval of Exxon. If I ask myself whether the nature of the contract leads to the conclusion that the parties must by necessary implication have intended that the Charterers would be entitled to cancel i.e. accept a repudiation if the Exxon approval was not obtained within 60 days, the answer I would give would be yes. That, as it seems to me, achieves consistency in relation to the importance of the obtaining and maintaining of the majors' approvals, and that is what I suggest the contract intended.

55. I would accordingly allow the appeal.

Lord Justice Rix:

56. I agree with the judgments of Waller LJ and Jonathan Parker LJ which I have had the opportunity of reading in draft.

57. In his careful judgment Aikens J gave seven reasons why he ultimately concluded, but not as he himself remarked without great thought, thereby indicating that he did not find the matter easy, that the 60 day term was not a condition.

58. The first was that the term was not expressly stated to be a condition. That is true, but takes the matter very little further. Many conditions are not expressly described as such. In the present case, however, the term is concerned with what the judge himself accepted, and in my judgment rightly so, was regarded by the parties as an important matter. Thus he said, referring to the express right of cancellation contained in the second paragraph of clause 46 -

"... they regarded the procurement and maintenance of these approvals as having particular significance. This seems inherently likely if, as is agreed, vessels which do not have an approval simply cannot carry products of that oil major."

59. Moreover, the term not only requires Exxon approval, but lays down a time limit of 60 days for the obtaining of it. In ***Bunge Corporation v. Tradax Export SA*** [1981] 1 WLR 711 Lord Wilberforce (at 716E) approved the statement of law in Halsbury's Laws of England (now found in 4th ed reissue, 1998, Vol 9(1)) to the effect that -

"(1)...the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this will fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in "mercantile" contracts..."

60. Lord Wilberforce also said (at 716A) that -

"But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts."

Those passages were reiterated by Lord Ackner, speaking for the majority of their Lordships in ***Compagnie Commerciale Sucrees et Denrees v C Czarnikow Ltd*** [1990] 1 WLR 1337 at 1346G/1347A.

61. Thirdly, although the term is not described as a condition, it is introduced by the word "*guarantee*". I agree that this word is often used in connection with terms which are obviously indeterminate (see ***The Ymnos*** [1982] 2 Lloyd's

Rep 574, and printed clauses 2(b) and 24(a) of the charter). Nevertheless in its context it does provide a note of emphasis which cannot be ignored.

62. In sum, therefore, the language of the 60 day term itself is in no way inconsistent with the concept of its being a condition, and if anything might suggest that it is.

63. The judge's second reason was that approval by the oil majors was an aspect of the condition of the vessel, just like seaworthiness or class. That, if correct, would be an important link in his or any chain of reasoning, because it is of course well established that the obligation of seaworthiness is not a condition, but an innominate term ***(Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*** [1962] 2 QB 26. However, the position regarding class would appear to be different and more complex. Scrutton, 20th ed, 1996, at 90 submits, by reference *to* ***Routh v Macmillan*** (1863) 2 H&C 750, that a statement of the ship's class (at the time of contract) is a condition. Wilford, Time Charters, 4th ed, 1995, at 101 agrees, citing also ***The Apollonius*** [1978] 1 Lloyd's Rep 53 at 61/2, where Mocatta J opined that a statement as to a vessel's class is "clearly" a condition, referring to a number of authorities including ***Routh v Macmillan*** and disagreeing with an obiter remark to the contrary of Atkinson J in ***Lorentzen v. White Shipping Co Ltd*** (1942) 74 Ll Law Rep 161 at 163. However, a statement as to a vessel's class does not involve a promise that she will remain in class throughout the charter period. For that purpose a warranty is usually given, as it is in the present case in clause 3 of the Shelltime 4 form. It was presumably this warranty, which is closely allied with the warranty of seaworthiness, that Aikens J had in mind when he said that seaworthiness and class were both analogous with oil majors' approvals.

64. In my judgment this analogy breaks down. An oil company's approval may reflect the vessel's condition, but it is a matter of status rather than condition. Similarly, a vessel's class is a matter of status - although that status may be affected in many different ways: at one extreme a vessel may be completely out of class, which is a most serious matter, because such a vessel cannot trade, but at another extreme there may be only a recommendation or even a mere notation of class that something relatively minor be attended to within a certain date. In the case of an oil majors' approval, however, the vessel either has it or it does not. In that respect it is like a term as to the vessel's class at the time of contract: if the vessel is out of class, the condition as to her class is broken. As for unseaworthiness, it seems to me that there is no proper analogy at all between that and an oil major's approval; and unseaworthiness is not a matter of status.

65. Thirdly, the judge made the point that the Exxon approval was one of only five mentioned in clause 46. That is so, but the second paragraph emphasises that the loss of "even one" of those approvals would, after 30 days, entitle the charterers to cancel. There is no reason to think, therefore, that the absence of the Exxon approval would be less serious than the absence of any of the other four.

66. Fourthly, the judge pointed to the fact that there is no express right to cancel for breach of the 60 day term, and that this can be contrasted with the right to cancel in the clause's second paragraph. This, it seems to me, is the most important factor in support of his conclusion, and a powerful argument. It would have been a simple matter to have put in a reference to the owners' failure to obtain Exxon approval within 60 days as an additional hypothesis within the second paragraph, leading equally to a right to cancel. The judge reasoned that the difference between the first paragraph, with no express right to cancel, and the second paragraph, with its express right to cancel, was understandable, because the charterers knew that the Exxon approval had not been obtained, whereas loss of any of the others would come as an unpleasant surprise and would interfere with the charterers' fixtures.

67. However, as Waller LJ has shown in his judgment, the distinction is elusive and illusory. The charterers might indeed be unpleasantly surprised and prejudiced if there was a sudden loss of one of the four approvals during the outstanding periods remaining, each of which is indicated in the opening sentence of the clause; or if there was a loss of any approval even after renewal: for any such loss might well interfere with an existing sub-fixture. Such interference with an existing sub-fixture, however, is hardly solved by a 30 day reinstatement, even if it would at least be some comfort to know that there was an absolute time limit in play. That indicates to my mind that the purpose of the right of cancellation is not so much because of the exceptional case of immediate interference to an existing sub-fixture upon loss of any approval, but because of the need to introduce some essential time limit to the general problem of having the vessel unapproved by any of the five named oil companies. Moreover, as any one of the existing approvals expired or was due to expire, any further fixing of the vessel by the charterers would require them to do what they did with regard to the lost sub-fixture in December 1997: they would have to fix subject to confirmation of the relevant approval, and contact the owners for such confirmation. So there is no real difference in that regard. As for Exxon, the charterers ought to have been in the position to fix the vessel firm in reliance on the owners' guarantee of a 60 day approval, but of course it was prudent to check in advance, the only real difference (express right of cancellation apart) between the Exxon approval in the first paragraph and the question of reinstatement in the second paragraph is between 60 days and 30 days: but that is either explicable on the basis that a renewal ought to take less time than obtaining a new approval or (because there was some evidence before Aikens J that the vessel had been previously approved by Exxon but had lost that approval) on the basis that 60 days was what was needed and bargained for as the outside limit. In truth, there is no sufficient reason to distinguish, in terms of the importance of "even one" of them, between the failure to obtain Exxon approval and the loss of any approval. Consistency of importance would suggest consistency of treatment.

68. One comes back to the powerful point that the express right of cancellation only exists in the second paragraph, whereas the first paragraph countenances the absence of possibly all five approvals at the time of delivery, but appears to deal with such an event merely by a reduction in hire of $250 per day for each approval missing. However, this point is deceptive, as is indicated if one asks what is to happen if an approval - a fortiori, if all four existing approvals - is lost prior to delivery. In such a case, Mr Joseph submitted there was no obligation to do anything, since the second paragraph only operated after delivery "during the time-charter period". However, it is impossible to believe that the parties intended that: it would mean that a loss of an approval prior to delivery never needed to be rectified, or even notified to the charterer. Indeed, all four existing approvals might be absent on delivery, and (provided they were in place at the time of contract) the charterers' only remedy would be to continue with the charter at a discount of $1,000 per day. In some way, therefore, their contract must deal with the problem of a loss of approval between contract and delivery.

69. Mr Hill's solution to the problem was his submission that an absence of any approval upon delivery (save for Exxon's, if the 60 days were still running) would entitle the charterers to cancel, on the basis that the references to the expiry dates of the other four approvals in the opening sentence of the clause were themselves conditions of the contract. In other words he submitted that, for instance, "MOBIL (expiring 27/1/98)" was a promise, with the force of a condition, that the Mobil approval would still be effective up to that date.

70. The difficulty with that solution, however, is that it may be perfectly truthful and accurate to say that the Mobil approval was not due to expire before 27 January 1998, and yet the approval might still be lost before delivery. It is not easy to obtain from these words a *promise* that the approval will *not* be lost before it was due to expire. Compare clause 1 of the charter which makes clear that the seaworthiness and class and other such obligations contained in that clause are to be operative "*At the date of delivery* ...". I reject Mr Hill's submission.

71. A real solution, however, might well be that suggested by Waller LJ, to the effect that the second paragraph of clause 46 should be construed as covering the possibility that one of the approvals will be missing at delivery (ie "*would lose"* equals "*would be missing, having lost*"). In that case the obligations of the second paragraph, to inform the charterers and to reinstate within 30 days of the loss of approval, together with the right of cancellation, would all apply.

72. Another solution might well be to regard the case of an approval being lost within the period between charter and delivery as simply being a *lacuna*, an oversight. That would be perfectly understandable given that none of the existing approvals was due to expire before the time due for delivery, and the 60 days for the obtaining of the Exxon approval would not have expired before delivery either. In the circumstances, it is perhaps not surprising that the parties did not deal expressly with the possibility that any approval would be lost before delivery. If, however, one insists on asking - But what if that were to happen? - one ought not to expect any answer other than: The same as the second paragraph already provides. In my judgment, there would be no difficulty in implying just such a term. It would pass the test of business necessity; it would be reasonable, indeed any other answer would be unthinkable; and it would pass the "*officious bystander*" test. I would again see the obligation to inform the charterers and to reinstate within 30 days as counting from the time of loss.

73. Whichever solution is adopted, either that of construing the second paragraph as covering the case of loss of approval before delivery or that of the implied term brought in to deal with a genuine *lacuna*, the effect of that solution is to demonstrate that the first and second paragraphs of the clause are closely connected. So too with the provisions in both paragraphs relating to the $250 per day reduction in hire. The purpose of the $250 per day reduction is not at any rate in the first instance to provide liquidated damages for breach, for, other than in the case of either (1) a false statement as of the date of the charter or (2) delay beyond the 60 or 30 day terms respectively, there would be no breach. Rather, its primary purpose is to provide a discount for an interim period, until the end of the 60 or 30 day periods, while the owners are given a chance to fulfil their obligations. It is only if the owners fail to provide what they are obliged to provide at the end of the designated periods that they are in breach. The question remains: Are they in breach of a condition or of a merely indeterminate obligation?

74. The judge's fifth reason was that the remedy for failure to provide an Exxon approval by the time of delivery would be a reduction of $250 per day. This suggests, he said, that "the parties did not see the failure to have Exxon approval as giving the automatic right to cancel". With respect, I do not follow that. There was no obligation to obtain the Exxon approval by the time of delivery: the obligation was to obtain it within 60 days of the date of contract. Thus the "remedy" is not a remedy for breach, but a contractual discount for an event that was not part of the owners' obligations. The question is whether that discount is all that the charterers' are entitled to, short of a *Hong Kong Fir* repudiation of the contract.

75. Sixthly, the judge was not impressed by the time limit attached to the obligation of Exxon approval; in particular, this case fell neither into the category of total performance within a particular time (like delivery under a sale contract) nor into the category of interdependent obligations as in ***Bunge v Tradax***. So be it; but the categories of conditions are not thus closed, and charterparties provide other examples of time conditions which stand on their own feet, such as ***The Mihalis Angelos*** [1971] 1 QB 164 ("expected ready to load ... about 1st July 1965").

76. Finally, Aikens J held that commercial sense was against the obligation being a condition: he referred to the slightest infringement giving the right to terminate, the reduction of $250 per day, and "the reality of what might occur if there was a breach". With respect, I do not find these considerations cogent. It is always in the nature of conditions that the slightest infringement puts the contract at risk. That is of course a factor to consider in asking

the question whether a term was intended by the parties to be a condition or not, but it does not in itself tell you that commercial sense is against the term being a condition. As for the $250 per day reduction, I have already given my opinion about it above. It is primarily a stop-gap measure; only after the time obligation has been broken can the reduction become a remedy for breach, and then only if the charterers are prepared to forego their right of cancellation. That is clearly so in the case of the four other approvals, or in the case of the loss of the Exxon approval when once obtained. The only remaining question is whether that is also so in the case of breach of the 60 day term. Wherever the semantics of the argument leads one, there is, it seems to me, insufficient cause to say that the commercial sense of the $250 per day reduction militates against the 60 day term being a condition. As for "the reality of what might occur": I am not sure what that refers to. The reality is what occurred in this case: a sub-fixture that could not be obtained. But much more than that, the reality is the uncertainty which hangs over this charter if the 60 day term is *not* a condition.

77. That uncertainty is a most important consideration, and it does not appear to have been given its due in the judgment below. If the 60 day term is not a condition, when *will* the charterers obtain the approval, the loss of which for 30 days would entitle them to cancel the charter? Would the $250 reduction, after breach, prevent damages at large? Even if damages are at large, how much must the charterers suffer before they can with confidence act on their instinct that they will be able to prove the gravity of the breach and thus meet the ***Hong Kong Fir*** test in court? How will they prove the fundamental nature of their loss? By repeated failures or delays in sub-fixing the vessel? The charter is only 11/12 months long. By the time they prove the effect of the absence of Exxon approval, the charter may be over.

78. In ***Bunge v Tradax*** this factor of uncertainty was stressed (see Lord Wilberforce at 715F - "certainty which is the most indispensable quality of mercantile contracts", Lord Scarman at 718D, Lord Lowry at 720E, and Lord Roskill at 725C/D). Similarly, Staughton J stressed this factor in ***Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd (The Mavro Vetranic) [***1985] 1 Lloyd's Rep 580 at 583/4.

79. In my judgment, the 60 day term is a condition. Once the absence of an express right of withdrawal from the first paragraph, and its presence in the second paragraph only in connection with the loss of an approval, are seen as deceptive, the main prop of the argument in favour of the 60 day term's status as an indeterminate obligation is knocked away. There is no real reason for distinguishing loss of "even one" of the approvals from failure to obtain the Exxon approval. The $250 per day reduction is the only remedy pending the expiry of the clause's time limits, but that is not to say that it is the only remedy in the case of breach. That it is not the only remedy in case of breach, is express in the second paragraph, in the first paragraph it is implicit. If the 60 day time limit is not of the essence, it loses nearly all of its effect, and plunges the parties into uncertainty, when what they need to know is where they stand. The word "guarantee" in this context underlines the importance of the term. For these reasons, in support of or in addition to the reasons of Waller LJ and Jonathan Parker LJ , I would allow the appeal.

Lord Justice Jonathan Parker:

80. I agree with the judgments of Waller LJ and Rix LJ.

81. The question for decision on this appeal is whether, on the true interpretation of the charter in this case, the parties intended that the consequence of the owners' failure to obtain EXXON approval within the period of 60 days stipulated in clause 46 should be that the charterers should have the immediate right to treat the charter as having thereby been repudiated and to terminate the charter.

82. On any reading of clause 46 of the charter, the conclusion is inescapable (to my mind at least) that the draftsmen of the clause gave insufficient consideration to the precise meaning and effect of the terms in which it is framed. That being so, it seems to me that, as a matter of general approach to the interpretation of the clause, the court should focus rather more closely than might otherwise have been appropriate on what may be taken to be the parties' underlying commercial aims and objectives in entering into the charter (with particular reference to the obtaining of the approvals of the major oil companies), and rather less closely on the precise words which the parties have chosen to use to express their contractual intention. Certainly it would in my view be inappropriate in the circumstances to subject the clause to a process of minute textual examination and analysis which the parties themselves plainly did not consider necessary.

83. I start, therefore, by turning to the commercial considerations which seem to me to be of direct relevance to the interpretation of the clause.

84. In the first place, there is the general desirability, in the interests of both parties, of achieving as great a degree of certainty in the framing of their respective rights and obligations as is reasonably possible. In the case of a time clause in a mercantile contract, certainty is of particular importance. In ***Bunge v. Tradax*** [1981] 2 Lloyds Rep 5 (HL), the appellant buyers were late in giving a notice under the contract. The respondent sellers contended that the clause which imposed the time limit for the giving of the notice was a condition, in the sense that breach of it automatically constituted a repudiation of the contract. The appellants, relying on the decision of this court in ***Hong Kong Fir Shipping Co Ltd v. Kawasaki*** [1962] 2 QB 26, submitted that it was necessary for the court to consider whether on the facts of the case the effect of the breach was to deprive the respondents of substantially the whole benefit of the contract, and that only if it had that effect could the breach be regarded as a repudiation. Lord Wilberforce rejected the appellants' submission, saying this:

*"One may observe in the first place that the introduction of a test of this kind would be commercially most undesirable. It would expose the parties, after a breach of one, two, three, seven and other numbers of days to an argument whether this delay would have left time for the seller to provide the goods. It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so. **It would fatally remove from a vital provision in the contract that certainty which is the most indispensable quality of mercantile contracts, and lead to a large increase in arbitrations.** It would confine the seller - perhaps after arbitration and reference through the courts - to a remedy in damages which might be extremely difficult to quantify. These are all serious objections in practice. But I am clear that the submission is unacceptable in law.*" (Emphasis supplied.)

85. Later in his speech, after referring to the authorities, Lord Wilberforce approved certain passages in Halsbury's Laws of England (passages which are now to be found in Vol 9(1) of the 4th Ed. reissue paragraphs 994 and 995) and went on to approve in particular the following propositions:

"(1) that the Court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in "mercantile" contracts ...".

86. In the second place, it is of commercial importance to the charterer under a charter such as this that the owner should be under some obligation to ensure that the approvals of the major oil companies are maintained throughout the period of the charter, since in the absence of such an obligation the charterer's ability to sublet the vessel (pursuant to clause 18 of the charter) may be substantially restricted.

87. In the third place, it has not been suggested that there is any commercial reason in the instant case to distinguish the EXXON approval from the other four approvals mentioned in clause 46 (i.e. MOBIL, CONOCO, BP and SHELL). The only reason why the EXXON approval is treated separately in clause 46 is because as at the date of the charter (20 October 1997) it had not as yet been obtained.

88. Against that background, I turn to the clause itself. It is, I think, convenient to consider firstly the meaning and effect of the clause in relation to the other four approvals, and then, secondly, to consider how the provision relating specifically to the EXXON approval fits into that picture.

89. The clause consists of two paragraphs. I turn first to the opening sentence of the first paragraph: *"Vessel is presently MOBIL (expiring 27/1/98), CONOCO (expiring 3/2/98), BP (expiring 28/1/98) and SHELL (14/1/98) acceptable."*

90. The word *"presently*", taken by itself, could mean either *"as at the date of the charter*" or (perhaps) *"at all times during the continuance of the charter"*. In the context of the references to the expiry dates, however, only the former meaning seems to me to be possible. Thus, the opening sentence of the first paragraph contains a contractual representation by the owners that as at the date of the charterparty (in the event, 20 October 1997) all four approvals are in place. The references to expiry dates of the current approvals are not, in my view, intended to have any contractual effect; I would regard them as being included for the purposes of information only.

91. The second sentence of the first paragraph is the crucial sentence dealing with the EXXON consent, and I pass over it for the moment.

92. The third sentence of the first paragraph provides for a discount of US$250 in the daily hire rate of $8,500 as from the delivery date in respect of any "*missing"* approval. The laydays/cancellation provision in the charterparty provides for delivery between 1 and 30 November 1997. Although the sentence does not go on to say so in terms, it must be implicit that the discount is available only for so long as a particular consent is "missing" (i.e. until it has been restored or renewed); alternatively, the lacuna may be filled by the last sentence of the second paragraph. By one route or the other, however, it is clear that the discount ceases on reinstatement of the missing approval.

93. The first sentence of the second paragraph reads as follows: *"If for any reason, during the time-charter period, Owners would loose [sic] even one of such acceptances they must advise Charterers at once and they must reinstate the same within 30 (thirty) days from such occurrence [sic] failing which the Charterers will be at liberty to cancel charter party or to maintain same at reduced rate stipulated above."*

94. It is to be noted that, literally construed, this provision only covers the "*loss"* of an acceptance during the time-charter period. That period is specified in clause 4 of the charter as being 11 to 12 months *from delivery*. Literally construed, therefore, the sentence does not cover the withdrawal of an approval during the initial period between the date of the charter and the date of delivery. The daily hire rate would of course be discounted as from the date of delivery to reflect the "missing" approval, pursuant to the third sentence of the first paragraph, but there would be no obligations on the owners to advise and reinstate; and, more importantly, no right for the charterer to cancel the charter on the owners' failure to reinstate within 30 days. In my judgment, however, such a literal construction is inappropriate, given that it would lead to such an anomalous result. In my judgment, the reference to the owners losing an approval is, on its true interpretation, a reference to an approval having expired or been withdrawn; in other words, it refers to a situation in which an approval is *"missing"*. On that interpretation, the sentence covers a situation in which an approval is missing on the date of delivery, having been withdrawn during the initial period between date of contract and date of delivery. I fully accept that in such a situation, if that is the true interpretation of the sentence, it is not clear when the 30-day period starts to run - i.e. whether it runs from

the date of withdrawal or the date of delivery; but that uncertainty does not, to my mind, outweigh the desirability of interpreting the clause in a way which avoids the anomaly to which I have just referred, if such an interpretation is open to the court (as in my judgment it is).

95. The third sentence of the second paragraph provides for the cesser of the discount when the owners satisfy the charterers that a missing approval has been reinstated. It gives rise to no problems of interpretation.

96. So far as the four approvals *other than the EXXON approval* are concerned, therefore, the contractual position is, in my judgment, as follows: (a) it is a term of the contract that all four approvals are in place at the date of contract; (b) where an approval expires or is withdrawn during the period of the charter (i.e. after delivery) a discounted hire rate will apply, and the owners will have 30 days in which to procure that the approval is reinstated, failing which the charterers may cancel the contract; and (c) where an approval is withdrawn between date of contract and date of delivery and has not been reinstated by the date of delivery, a discounted hire rate will apply as from the date of delivery, and the owners will have 30 days from the date of delivery to reinstate the approval, failing which the charterers may cancel the contract.

97. Against that background, I turn to the second sentence of the first paragraph of the clause, which contains the provision relating to the EXXON approval.

98. The sentence reads as follows: *"Owners guarantee to obtain within 60 (sixty) days EXXON approval in addition to present approvals."*

99. It is to be noted that the 60-day period within which EXXON approval is to be obtained will inevitably expire *after* delivery has taken place under the contract (the latest date for delivery being 41 days after the date of contract). So any breach of the obligation to obtain EXXON approval will inevitably occur "during the time-charter period". The question then arises whether the failure to obtain EXXON approval falls within the first sentence of the second paragraph of the clause, thereby allowing the owners a further 30 days in which to obtain EXXON approval, failing which the charterers have an express right to cancel.

100. The first sentence of the second paragraph is expressed to apply in the event of the owners losing *"even one of such acceptances* ..." (and "acceptances" in this context plainly includes the EXXON approval). However, I conclude that on its true interpretation it does not apply to a failure to obtain the EXXON approval within the stipulated 60-day period, for two reasons. In the first place, the effect of such a construction would be to convert the 60-day period into a 90-day period, thereby rendering the contract internally inconsistent. In the second place, as I have already concluded, on its true construction the sentence in question applies where an approval has expired or been withdrawn, whereas in the case of the EXXON approval a breach of the obligation to obtain it can only occur in circumstances where it has neither expired nor been withdrawn. At the same time, the sentence will plainly apply where an EXXON approval, *once obtained*, expires or is withdrawn.

101. I turn now to the question at issue on this appeal, as to whether the owners' obligation to obtain EXXON approval within 60 days is a condition, breach of which constitutes a repudiation of the charter entitling the charterers to terminate.

102. I conclude that it is a condition in that sense. My reasoning is as follows:

1. Prima facie, the obligation to obtain EXXON approval in 60 days is one to which the general principles referred to by Lord Wilberforce in ***Bunge v. Tradax*** apply, for the reasons which he gave in the extract from his speech which I quoted earlier in this judgment.
2. There being, as I noted earlier, no suggested justification in the instant case for differentiating in terms of commercial significance between the EXXON approval and the other four approvals, it follows, in my judgment, that the contract should be construed so far as possible to produce consistent treatment of all five approvals, subject only to the fact that the EXXON approval was not in place at the date of the charter.
3. The charterers have an express right to cancel the contract if, at any time during the charter period, any one of the approvals (including the EXXON approval) expires or is withdrawn and is not reinstated within 30 days. In that respect, all five approvals are treated in exactly the same way.
4. I can see no commercial (or indeed logical) reason why the failure to obtain an outstanding approval should not receive substantially the same contractual treatment as the failure to reinstate an existing approval.
5. The fact that, whereas in the case of the four existing approvals the contract contains an express right to cancel on failure to reinstate an existing approval within 30 days, no express provision as to cancellation is provided in relation to a failure to obtain the EXXON approval, is not in my judgment a sufficient indication that the parties did not intend the charterers to have (in effect) a right to cancel on breach of the obligation to obtain the EXXON approval.
6. The use of the word *"guarantee*", in contrast to the word "*warrant"* used elsewhere in the contract, seems to me to provide some additional support for my conclusion - although it would certainly not provide enough support on its own to justify that conclusion.

103. For those reasons, I too would allow this appeal.

ORDER: Appeal allowed; agreed minute of order to be provided to the court. Application for permission to appeal to House of Lords refused. (Order does not form part of approved judgment.)

Mr Timothy Hill (instructed by Shaw and Croft) for the Appellant.
Mr David Joseph (instructed by Norton Rose) for the Respondent.