**Gulf Agri Trade Fzco v Aston Agro Industrial AG** [2008] Int.Com.L.R. 06/06

**JUDGMENT : Mr Justice Aikens:** Commercial Court. 6th June 2008

1. This is an appeal by Gulf Agri Trade FZCO ("Gulf") under ***section 69(1)*** of the ***Arbitration Act 1996*** from Appeal Award number 4099 of the GAFTA Board of Appeal, dated 30 May 2007. The GAFTA Board of Appeal had dismissed Gulf's appeal from the Award of a GAFTA First Tier Tribunal, which was Award no. 13-423 dated 26 January 2006. In the arbitration, Gulf, as buyers, sought damages from Aston Agro Industrial AG ("Aston") as sellers for the alleged non-shipment of 6000 metric tonnes of Russian Feed Barley in bulk in the period August/10 October 2004.

2. Leave to appeal against the GAFTA Appeal Award was given by Teare J on 16 October 2007. The three questions of law on which he granted leave to appeal are:
   i) Whether in the absence of any finding that Gulf was in breach of contract, the Board of Appeal was entitled to conclude that Gulf had wrongfully repudiated the contract;
   ii) Whether a party who serves a premature Notice of Default, acting under a misapprehension as to the correct date of default, necessarily commits a repudiatory breach of contract;
   iii) Whether a party incorrectly serving a Notice of Default under the GAFTA Default Clause, either alone or accompanied by an expression of hope that the parties might talk their way out of a crisis at the eleventh hour, thereby commits a repudiatory breach of contract.

***A The facts as found by the GAFTA Appeal Board***

3. By a contract dated 29th June 2004, Aston agreed to sell to Gulf 6000 metric tonnes (5% more or less at Seller's Option) of Russian Feed Barley in bulk, for shipment during the period August to 10th October 2005. The goods were to be shipped in two lots of about 3000 metric tonnes each. The contract was on CFR (Cost and Freight) terms with shipment from Anzali/Nowshahr.

4. The Contract incorporated the GAFTA Forms 48 and 125. GAFTA Form 48 is specifically concerned with Contracts for the shipment of goods in bulk from Central and Eastern Europe. Clause 24 of Form 48 is the "Default" clause. Its relevant provisions are:

   *"**DEFAULT –** In default of fulfilment of contract by either party, the following provisions shall apply:*
   *(a) the party other than the defaulter shall, at their discretion, having the right, after serving a Notice on the defaulter to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.*
   *(b) if either party be dissatisfied with such default price, or if the right at (a) above is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.*
   *(c) the damages payable shall be based on, but not limited to, the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above. …… "*

5. Aston had made no shipment by the end of September 2004. On 4 October 2004, Gulf sent an email to Aston, which stated: *"We attach a copy of fax from our buyer which is self explanatory. Please treat this as coming from us. You are kindly requested to find an amicable settlement in order to close this file."*

6. The attachment referred to was an email from Gulf's sub-buyers. That email stated:
   *"……. Please note that we consider our contract as defaulted and we, hereby, claim the following amount to be paid as compensation ……. Consider this as legal notice and expect the amicable settlement of the case until October 15, 2004. Otherwise we have to claim against your company with the legal procedure. Waiting for your response."*

   I have set out the terms of the sub-buyers' email exactly as it appears at paragraph 9 of the Appeal Board's Award. There is no finding of fact by the Appeal Board on whether, in accordance with clause 24(a) of GAFTA Form 48, Gulf's sub-buyer had purported to exercise the right to purchase against Gulf and establish a default price. Nor does the GAFTA Appeal Board's Award state what (if anything) was the actual amount being claimed by Gulf's sub-buyers as compensation. There is also no finding by the Appeal Board that Gulf itself attempted to exercise a right to purchase against Aston.

7. Paragraph 10 of the GAFTA Appeal Board Award records that on 5 October 2004, Aston replied to Gulf as follows: *"As you know we are entitled to buy goods afloat and are not obliged to ship them ourselves. The mere fact that the shipment period has passed without an extension being requested does not mean that we are in default. Under GAFTA's 48 Clause 24(f) (sic) we can only be deemed to be in default on the seventh business day following the end of the shipment period. This period has not yet expired. Your Notice of Termination is therefore premature and – as such – is a repudiatory breach of contract. We accept your repudiatory breach and consider the contract at an end. We will notify you with details of our damages shortly. All rights reserved."*

8. I note here that there appears to be some confusion in this email from Aston. In fact the shipment period under the contract between Aston and Gulf had not expired on 5 October 2004. Under the terms of the contract it would only have expired at midnight on 10 October 2004. Unfortunately, this error appears to be repeated by the Appeal Board itself at paragraphs 30 and 33 of its Award.

9. Gulf responded to Aston's email of 5 October in an email of 11 October 2004. This is set out at paragraph 11 of the Appeal Board's Award and is as follows:
   *"(1) In our email dated October 2, 04, we passed on the message from our buyer to reflect the kind of pressure we are under and it was not intended to put you on default, at least officially.*

*(2) Apart from above, the fact that sending you any notice before or after expiry of shipment period does not exhaust our rights.*

*(3) You at any point of time did not ask for extension of shipment period for above mentioned contracts and instead were offering washout. This is very clear evidence that you did not intend to ship the goods during or after the expiry of shipment periods.*

*(4) Nevertheless we still intend to settle the matter amicably and strongly believe that with some flexibility/improvement on your last offer, we can get our client approval and close this file.*

*The above are all without prejudice and all rights reserved."*

10. On the same day, ie. 11 October 2004, Aston replied to Gulf:

*"We noted your message as of today and reject the content in total and full. We consider the contract as closed.*

*Your message on 02/10/04 clearly stated that you consider the contract as defaulted.*

*We therefore reinforce our message sent to you on 05/10/04 which we repeat."*

Aston's message of 5 October is then set out.

11. Finally, on 19 October 2004, Gulf emailed Aston, stating: *"We reject your purported acceptance of our alleged repudiatory breach. There was no breach on our part for you to accept. On the contrary, you are in repudiatory breach …… for failing …… to ship the goods within the shipment period. Your comments with regard to possible purchase afloat and clause 24(F) of Gafta 48 are irrelevant. You have not given notice of any extention (sic) and in any event, the Extention Clause 9 of Gafta 48 is not applicable in the contracts because the shipment periods in each case exceed 31 days. We hereby give you notice of default for the purposes of clause 24 of Gafta 48. All our rights, including our rights to claim damages are reserved."*

***B The case before the Gafta Board of Appeal***

12. Paragraph 14 of the Award of the GAFTA Board of Appeal records that Gulf had two alternative principal claims. The first was for damages of US$ 222,300, which was said to be the loss suffered by Gulf as a result of Aston's breach of contract on 19 October 2004, in accordance with the terms of Gulf's email of that date. Gulf's alternative case was for damages of US$205,200. Gulf said that this sum represented the loss it suffered as a result of Aston's breach of contract on 4 October 2004. That accorded with Gulf's email of that date, which forwarded the email from Gulf's sub – buyers, alleging that Gulf was in default. Gulf lost on both alternatives before both the First Tier Tribunal and the Appeal Board.

13. The Appeal Board heard evidence from two witnesses of fact, who had earlier filed witness statements. Paragraph 20 of the Appeal Board's Award records that both witnesses, (one for each side), " *…gave full and helpful answers to questions put to them by the parties' trade representatives and by members of the Board".* However most of the evidence concerned conversations between the brokers regarding a possible "washout" of the contract and the availability of alternative goods with which Aston might have performed the contract between Gulf and Aston.

14. The Board of Appeal set out its analysis of the relevant issues at paragraph 23 of its Award. The Board posed three questions:

*"(A) Was Gulf's message to Aston of 4 October 2004 a notice of default purporting to terminate the subject contract? [the "default" point]*

*(B) If Gulf's message to Aston of 4 October was a notice of default purporting to terminate the contract, then was this termination legitimate on either or both of two bases, i.e.*

*(i) that it was possible to conclude on that date that it was impossible for Aston to ship goods in performance of the subject contract? [the "anticipatory breach through impossibility" point] and/or*

*(ii) that it was possible to conclude on that date that Aston were unwilling to ship goods in performance of the subject contract [the "anticipatory breach through renunciation" point];*

*(C) If it was legitimate for Gulf to terminate the Subject Contract for either or both of the above reasons, what was the quantum of damages recoverable by Gulf from Aston?".*

15. On the first issue (the "default" point), the Appeal Board reminded itself of the decision of the Court of Appeal in ***Toepfer v Cremer [1975] 2Lloyds Rep. 118.*** The Board said that Gulf's message of 4 October 2004 must be considered in the context of the general market background in the commodity trades and also in the light of what happened in this particular case.

16. The Board of Appeal found (at paragraph 28 of the Award) that "*…it is perfectly routine for buyers in a string to send to their sellers Notices sent to them by their buyers".* It also concluded (in the same paragraph) that:

*"…… In the context of a GAFTA contract, where the "Default" clause is clearly predicated on the termination of a contract, with sales or purchases against the defaulting party, a declaration of default, even a grammatically imperfect one, is likelier than not to be construed as a repudiatory notice."*

17. The Appeal Board then considered whether there is anything in the particular context of the facts in this case to *"upset this prima facie assumption of termination for breach".* The Board of Appeal analysed two arguments of Gulf under this heading.

18. First, Gulf had argued that the message of 4 October 2004 was sent under a misapprehension; that is *"…that [Gulf] was entitled at that time to send a Notice of Default".* The Appeal Board makes no finding of any

*"misapprehension"* by Gulf. It concluded that although the message was sent early, it was *"…not sent in the context of any confusion between the parties as to the agreed date of shipment and therefore of breach and possible default"*: see paragraph 30 of its Award.

19. The second argument was that this email was a negotiating ploy. The Appeal Board stated, at paragraph 31, that it did not "*find it credible that the reference to* ***"an amicable solution"*** *in the message itself was intended to refer to that ongoing negotiation"*.

20. Having rejected these two possible arguments "*to upset"* a *prima facie* assumption that Gulf's message of 4 October 2004 was a Notice of Default "*purporting to terminate the subject contract*", the Appeal Board concluded (at paragraph 32) that Gulf's message was indeed a Notice of Default. In making this finding, it is clear from the way the Appeal Board characterised the "*Default"* point in the question posed at paragraph 23 (A) of its Award that the Appeal Board had concluded that the message of 4 October of 2004 was a Notice of Default which purported to terminate the contract with Aston.

21. The Appeal Board then stated at paragraph 33 of the Award: *"Now for this finding to assist Aston in establishing that Gulf's message of 4 October 2004 put Gulf in breach, a breach Aston then accepted on 5 October 2004, Aston would need to prove that Gulf's notice was premature and Aston's suggestion – not one, it must be said, seriously challenged by Gulf - was that Gulf were only entitled to declare default for non-shipment on the 5th not the 4th October. However, given the alternative manner in which Gulf put their case (anticipatory breach through renunciation or impossibility) – and given our findings in this regard it becomes unnecessary for us to make any finding as to whether Gulf were a day early in sending the notice of default and we decline to do so."*

22. As I have already noted, there is some confusion in this paragraph. Before me, both Mr Akka (for Gulf) and Mr Byam-Cook (for Aston) accepted that the Appeal Board was incorrect to state that Gulf was *"…only entitled to declare Default for non-shipment on 5th October"*. In fact the shipment period only ended at midnight on 10 October 2004. The last sentence of this paragraph is puzzling. However, Mr Akka relied strongly upon the fact that the Appeal Board deliberately did not make any finding as to whether Gulf were a day (or several days) early in sending the Notice of Default.

23. In paragraphs 34 to 36 of its Award, the Appeal Board concluded that Gulf could not reasonably have been certain that Aston could not or would not perform the contract. Therefore, the Appeal Board held that *"…Gulf could not reasonably have concluded that Aston were in anticipatory breach of the contract through impossibility or renunciation"*.

24. The Appeal Board therefore concluded: first, that the email of 4 October 2004 from Gulf to Aston was a Notice of Default, which purported to terminate the contract. Secondly, it concluded that, at that point, Aston was not in anticipatory breach of the contract through either impossibility of performance or renunciation of performance. Therefore, thirdly, it held that Gulf had, on 4 October 2004, wrongfully repudiated the contract, which repudiation was accepted by Aston on 5 October 2004. Accordingly the Appeal Board dismissed the appeal from the First Tier Award.

***C. The Arguments of the Parties on this Appeal***

25. For Gulf, Mr Lawrence Akka made three principal submissions. First, he submitted that because the Appeal Board had not made any finding that Gulf was in breach of contract towards Aston, it was not entitled to conclude that Gulf had wrongfully repudiated the contract on 4 October 2004. Mr Akka relied upon the fact that the Board had refused to make a finding (in paragraph 33 of its Award) that the Notice of Default was premature. Without such a finding, he submitted, Aston could not establish that Gulf was in repudiatory breach of the contract when it sent the Notice of Default to Aston on 4 October. Secondly, he submitted that the Board of Appeal was wrong to conclude that Gulf had committed a repudiatory breach of contract simply because it had served a premature Notice of Default under Clause 24 of GAFTA Form 48, apparently acting under a misapprehension as to the correct date on which Aston would be in default. Lastly, he submitted that it made no difference to the answer to the second issue that, with the Notice of Default, Gulf had also expressed the hope that the parties might be able to reach a compromise agreement.

26. In support of the second and third propositions, Mr Akka relied on statements of Lord Wilberforce in the well – known case of ***Woodar Investment Development Ltd v Wimpey Construction UK Ltd.***[1] He also relied on the decision of the Court of Appeal in ***Alfred Toepfer v Peter Cremer.***[2] In that case the court had held that the service of a Notice of Default in the form set out in GAFTA Form 100 (very similar to the present clause) on the day before the party was entitled to do so, was not to be construed as a repudiation by the buyer capable of being accepted by the seller. Mr Akka submitted that the Board of Appeal failed to apply the principles laid down by the majority of the House of Lords in the ***Woodar case*** and misapplied or misunderstood the ***Toepfer case***.

27. For Aston, Mr Byam-Cook made three main submissions in answer. First, he submitted that although the Board of Appeal did not make any actual finding, it effectively characterised Gulf's Notice of Default as premature when it sent the email of 4 October. It was correct of the Board to hold that the Notice was wrongful unless it could be justified by Gulf on the grounds that Aston was in repudiatory or renunciatory breach of the contract at the time the Notice was sent. The Board had made findings of fact that Aston had not repudiated or renounced the contract as at 4 October 2004. On the second point, Mr Byam-Cook submitted that the Board of Appeal had

1 [1980] 1 WLR 277 at 280
2 *[1975] 2 Lloyd's Rep 118*

made a finding of fact that, in the circumstances of this case, Gulf's email of 4 October demonstrated an intention to abandon the contract and that this action was a repudiatory breach of the contract with Aston. That conclusion could not be attacked on appeal. Furthermore, the Board had made no error of law in making this finding.

28. Mr Byam-Cook submitted that the ***Woodar case*** and the ***Toepfer case*** were of no assistance to Gulf on the facts as found by the Board of Appeal. He emphasised three particular facts. First, the Board had made no finding of any discussion between the parties about Gulf's possible Notice of Default before it was sent. Secondly, there was a finding that Gulf had claimed compensation at the same time that it gave Aston the Notice of Default, thereby indicating that it regarded the contract as at end and that there would be no further performance by Gulf. Thirdly, and as a corollary to the second point, there was no finding that Gulf had indicated that it would continue to perform the contract should their statement that Aston was in default be proved wrong. Lastly, Mr Byam-Cook submitted that the fact that Gulf expressed a wish to compromise was of no help to Gulf.

***D. Discussion: analysis of the Appeal Board's conclusions of fact***

29. It is important to isolate the key conclusions of the Board of Appeal. The first is at paragraph 28 of the Award. The Appeal Board states that "*…in the context of a GAFTA contract where the "Default" clause is clearly predicated on the termination of a contract, with sales or purchases against the defaulting party*". In other words, it is finding that, in GAFTA trades, when a Notice of Default is sent, that is upon the premise that the contract is being terminated by that Notice. On that premise, the Appeal Board states that a declaration of default is "*likelier than not to be construed as a repudiatory notice*". I read that phrase in the Appeal Board's Award as meaning that "*a repudiatory notice*" is an unequivocal statement by the sender of the notice that it is not intending to be bound by the contract any more. Therefore the sense of paragraphs 28 and 29 of the Appeal Board's Award is that, prima facie, a Notice of Default under clause 24 of the GAFTA Form 48 is likelier than not to be construed as notice of a "*termination for [a] breach*" of contract by the other side on the ground that it has defaulted on its performance of the contract.

30. The second key conclusion of the Appeal Board is found in paragraphs 29 and 32 of the Award. Their effect is that the Appeal Board concluded that Gulf's email of 4 October was, in fact, a notice of termination of the contract with Aston, on the ground that Aston was in default of performance. I fail to understand why, given the Appeal Board's other conclusions, it did not find that Gulf was early in sending the Notice of Default. But it is quite clear on the facts as found by the Appeal Board that Gulf was not entitled to send a Notice of Default on 4 October 2004. Aston had until midnight on 10 October to ship the goods in order to conform with its contractual undertakings. The Appeal Board found that Aston had neither repudiated nor renounced the contract as at 4 October; therefore the Default Notice must have been premature.

31. However, although the Appeal Board declined to find that Gulf's Notice of Default on 4 October 2004 was premature, the effect of the Appeal Board's findings in paragraphs 34 and 35 of the Award is that the Notice was premature and unjustified. This is the Appeal Board's third key conclusion. I accept that this conclusion is implicit rather than express. But it must be the result of the Board findings that (i) Gulf's Notice was one terminating the contract with Aston because of its "default" in performance - paragraph 32; and (ii) when Gulf gave notice of default to Aston, as a matter of fact Gulf could not have been reasonably certain that Aston "*could not or would not perform the contract*" - paragraph 35. Because Aston still had time to perform the contract on 4 October 2004 and there was no other good reason for Gulf to send the Notice of Default, therefore the Notice of Default by Gulf was both premature and unjustified.

32. However, this conclusion leaves open the crucial question of whether the premature and unjustified Notice of Default constituted a ***repudiatory*** breach of contract by Gulf, as the Board of Appeal concluded at paragraph 37 of the Award.

***E. Discussion: the three points of law***

33. On the basis of the analysis above, it seems to me that it is necessary to recast the points of law on which leave to appeal was granted. That is because, in my view, the Appeal Board did find, at least implicitly, that Gulf was in breach of contract. The breach was in giving a Notice of Default that it was not entitled to give because Aston had not repudiated or renounced the contract and the time in which the contract could be performed by Aston had not expired. So, on a close analysis of the Appeal Board's Award, I consider the first point of law to be based on a false premise.

34. The second point of law proceeds upon the factual assumption that Gulf sent the Notice of Default "*under a misapprehension as to the correct date of default*". The problem with the point of law so stated is that there is no finding of fact by the Appeal Board that Gulf *did* send the Notice of Default under that misapprehension. The Board not only deliberately refrained from making a finding that the Notice was premature, it also made no finding on the state of mind of Gulf when the email of 4 October 2004 was sent. The Board certainly did not find that Gulf sent the Notice of Default because it believed that the time for performance of the contract had passed, so that Gulf was under a "*misapprehension*" that Aston was in default.

35. Therefore, it seems to me, the second point of law does not arise on the findings of fact in this case and I decline to consider it further.

36. That leaves the third point of law, viz. "*Whether a party incorrectly serving a notice of default under the GAFTA Default clause, either alone or accompanied by an expression of hope that the parties might talk their way out of a crisis at the eleventh hour, thereby commits a repudiatory breach of contract*".

37. It is in the context of this point of law that Mr Akka relies on the ***Woodar case*** and the ***Toepfer case.*** In ***Woodar Investments Development Ltd v Wimpey Construction UK Ltd,***[3] Wimpey had contracted to buy a plot of land from Woodar. At the date of the contract both parties knew that, about three years before, the relevant Secretary of State had given the then owners notice of a draft compulsory purchase order. Special Condition E(a)(iii) of the purchase contract gave Wimpey, as purchaser, the right to rescind the contract. It was in the following terms: "*….if prior to the date of completion….(iii) any authority having a statutory power of compulsory purchase shall have commenced to negotiate for the acquisition by agreement or shall have commenced the procedure required by law for the compulsory acquisition of the property or any part thereof*".

    Before completion, Wimpey, the purchasers, sent Woodar a notice purporting to rescind the contract under this condition, on the grounds that the Secretary of State had started the procedure for compulsory acquisition of part of the land. Subsequently a compulsory purchase order was made.

38. Woodar brought an action against Wimpey for a declaration that the Condition gave Wimpey no right to rescind in the circumstances. Fox J held that Wimpey was not entitled to rely on the Condition. Both he and the Court of Appeal (by a majority) held that Wimpey had repudiated the contract of sale by wrongly invoking the Condition. That decision was reversed in the House of Lords, by a majority of three to two.

39. Lord Wilberforce gave the leading judgment of the majority. In his speech he noted three particular facts which he regarded as indicative of the intentions of Wimpey at the time that it sent the notice to Woodar. First, before Wimpey sent Woodar the notice there had been a meeting at which a representative of Woodar stated that if Wimpey attempted to rescind the contract (using the Condition), Woodar would take Wimpey to court and the judge would have to decide whether the contract could be rescinded. Secondly, at that same meeting, Wimpey's representative said that the notice to be given was protective and Woodar's representative accepted that the notice would not be regarded as a hostile act. Thirdly, after the proceedings had been started by Woodar, a representative of Woodar wrote two letters to Wimpey, stating, first, that Woodar must await the decision of the court on the issue of the validity of the notice and, secondly, that he assumed that Wimpey would do so also.

40. On the basis of those facts, Lord Wilberforce concluded[4] that Wimpey had not manifested an intention to abandon or refuse further performance of the contract or to repudiate it. Lord Wilberforce stated that "*…..the proposition that a party who takes action relying simply on the terms of the contract, and not manifesting by his conduct an ulterior intention to abandon it, is not to be treated as repudiating it…*" was supported by ***James Shaffer Ltd v Findlay Durham & Brodie***[5] and ***Sweet & Maxwell Ltd v Universal News Services Ltd [1964] 2 QB 699***. Having referred to the very recent decision of their Lordship's House in ***Federal Commerce & Navigation Co Ltd v Molena Alpha Inc.,***[6] which he contrasted with the present case, Lord Wilberforce stated that Wimpey was entitled to succeed.[7] He then made a statement on which Mr Akka particularly relied: *"….it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations. To uphold the respondents'[Woodar's] contention in this case would represent an undesirable extension of the doctrine".*

41. Mr Akka also relied on statements of Lord Denning MR and Scarman LJ in ***Alfred Toepfer v Peter Cremer.***[8] In that case one of the issues that arose was the effect of a telex sent by the buyers to the sellers, notifying them that if a notice of appropriation was not received by the following day, then the buyers would treat the sellers as being in default, under clause 26 of the GAFTA Form 100. (In fact the sellers had one more day before the last day of shipment under the contract). No notice of appropriation was received, so the buyers sent a further telex in which they claimed a "*price fixing*" by arbitration, nominated their arbitrator and invited the sellers to do likewise. It was argued that these actions of the buyers constituted a repudiation of the contract. The Court of Appeal rejected that argument. Lord Denning MR characterised the telex giving notice of default as a "*misapprehension as to the date of default*". He held that the actions of the buyers, taken as a whole, indicated that they were not repudiating the contract but "*…insisting on it and claiming damages under it.*"[9] Scarman LJ pointed out that the arbitrators had not found the action of the buyers to be repudiatory of the contract. He concluded that it was not possible to infer, from the telex, that had the sellers given notice of appropriation on the following day (ie. the last day for shipment), then the buyers would have rejected it. Therefore the telex was not a repudiation.[10]

42. In my view the vital point to note about these two decisions is the emphasis placed on the facts surrounding the vital communication made by the party who was alleged to be repudiating the contract. Thus in the ***Woodar case,*** Lord Wilberforce analysed the facts to see whether, in the factual context in which the notice of rescission was sent, it manifested an intention to abandon the contract or to refuse future performance.[11] In the ***Toepfer case,*** both Lord Denning and Scarman LJ concluded that, on the facts overall, the buyers were not repudiating the contract.[12]

3 *[1980] 1 WLR 277*
4 At *page 282H.*
5 *[1953] 1 WLR 106*
6 *[1979] AC 757*
7 Lords Keith and Scarman agreed: see particularly pages 294, 298 and 299.
8 *[1975] 2 Lloyd's Rep 118*
9 *See page 125, left hand column.* Orr LJ agreed with Lord Denning on this point: *see page 126.*
10 *See page 129.*
11 *[1980] 1 WLR 277 at 282H.*
12 *[1975] 2 Lloyds Rep 118 at 125, left hand column and page 129 left hand column, respectively.*

43. The conclusions in those cases are to be contrasted with that of the House of Lords in the case of ***Federal Commerce & Navigation Co Ltd v Molena Alpha Inc.***[13] The charterers of three ships on time charter had made deductions from time charter hire which the shipowners regarded as unjustified. In retaliation the shipowners purported to revoke the authority of the Charterers (to be implied under the time charters) to sign bills of lading on behalf of the masters of the three vessels. Moreover, the shipowners ordered their masters to refuse to issue "freight pre – paid" bills of lading if presented by the charterers. Their Lordships characterised these orders to the masters as acts which deprived the time – charterers of substantially the whole benefit of each of the three time – charters. Therefore, it was either an actual or an anticipatory repudiatory breach of the three charters.[14]

44. It is sometimes suggested that the two House of Lords' decisions in the ***Woodar case*** and the ***Federal Commerce*** **case** are difficult to reconcile. With respect, I do not think that they are. Ultimately, both cases hold that it is necessary to ask the question : what, objectively, is the intention of the party who has done something which is said to be a repudiation of the contract? Is it (objectively) that party's intention to abandon or repudiate the contract or not? This is a question of fact, to be determined by the fact finding tribunal from all the relevant evidence available.

45. How are these principles to be applied to the third question of law, given the findings of the Appeal Board in this case? In my view it is important to recall the following points made, or not made, in the Award: (1) the Board concluded that there was no confusion between the parties as to the last date of shipment: paragraph 30. Therefore, there could not be any finding of a "*misapprehension*" by Gulf as to when it was entitled to send a Notice of Default. (2) The Board found that the email of 4 October was not a negotiating ploy "*…in the ongoing progress towards a wash – out*": paragraph 31. (3) The Board found that Gulf could not reasonably have concluded that Aston was in anticipatory breach of the contract through impossibility or renunciation: paragraph 36. On the other hand, (4) there is no finding that, in accordance with Clause 24(a) of GAFTA Form 48, Gulf did actually go out and purchase against Aston to establish the "*default price*". Moreover, (5) the Board did not find that, had Aston given a notice of appropriation under Clause 10 of the GAFTA Form 48 or otherwise indicated that shipment was to take place, then Gulf would have refused to perform the contract.

46. Therefore, the conclusion of the Appeal Board that the Notice of Default demonstrated that Gulf's intention was to abandon the contract is based on three findings. First, the very fact that the notice was sent, by the email of 4 October 2004. Secondly, because, "*…in the context of a GAFTA contract… the "Default" clause is clearly predicated on the termination of a contract…*"[15] Thirdly, the Board found that are no facts in this case to rebut the presumption that Gulf intended the notice of Default to terminate this contract, therefore Gulf must have intended to abandon it: see paragraph 32 of the Award. As Gulf had no good reason to terminate the contract, therefore its action was repudiatory: see paragraphs 34 to 36 of the Award.

47. Effectively, therefore, Mr Akka is inviting the Court to hold that the Appeal Board made two errors of law. The first error is said to lie in the conclusion that, "*in the context of a GAFTA contract*" when a Notice of Default is sent, the *prima facie* assumption must be that the contract is at an end. The second is in holding that there is therefore some kind of burden upon the party who sent such a notice to show that it was not its intention to terminate the contract.

48. I cannot accept these submissions. The Appeal Board is a well known and respected trade tribunal. It heard evidence in this case. It had to find the facts. In doing so it was entitled to draw on its experience in the grain and feed trade and the use of GAFTA contracts. I have concluded that it was reasonable for the Appeal Board to find, as a fact, that in GAFTA trades, when a Notice of Default is sent, that it is "*clearly predicated on*" ie. based upon, the termination of the contract. In that situation, if a party has sent a Notice of Default, but it asserts that the notice was not intended to terminate the contract and that its intention remained to perform its side of the bargain, then an "*evidential*" burden is bound to fall on that party to demonstrate that this was the case. There is no error of law in putting the matter that way. The Board's conclusion is that Gulf had failed to show that it was not its intention to terminate the contract when the Notice was sent in the email of 4 October 2004. That is a conclusion of fact, based upon the evidence, that cannot be attacked. Given the Appeal Board's other findings on the facts, the Appeal Board was then bound to conclude that Gulf was in repudiatory breach of the contract.

***E. Conclusions***

49. Accordingly, I answer the three questions of law as follows:
    i) Not relevant, given the explicit and implicit findings of fact and conclusions of the Board of Appeal.
    ii) Not relevant, given the lack of findings of fact of the Board of Appeal as to the state of mind of Gulf when it sent the Notice of Default on 4 October 2004.
    iii) Yes, on the facts as found by the Board of Appeal in its Award.

50. The appeal is therefore dismissed.

Mr Lawrence Akka (instructed by Holman, Fenwick & Willan) for the Claimant
Mr Henry Byam-Cook (instructed by Mays Brown) for the Defendant

[13] *[1979] AC 757.*

[14] The majority held that the shipowners' orders were an anticipatory repudiatory breach: see Lord Wilberforce at *page 778E,* Lord Fraser of Tullybelton at *page 782F,* Lord Scarman at *page 787D.* Viscount Dilhorne considered the order an actual repudiatory breach: *page 781B.* Lord Russell inclined to the same view: *page 787C.*

[15] Paragraph 28 of the Appeal Board's Award.