Neutral Citation Number: [2020] EWHC 1845 (Comm)

Case No: CL-2019-000401

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION PURSUANT TO THE ARBITRATION RULES NO 125 OF THE GRAIN AND FEED TRADE ASSOCIATION

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 10/07/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

ALEGROW S.A.

Claimant/
Arbitration Respondent/
Seller

- and –

YAYLA AGRO GIDA SAN VE NAK A.S.

Defendant/
Arbitration Claimant/
Buyer

- -
- -

Timothy Hill QC (instructed by **Jackson Parton**) for the **Claimant**
Can Yeginsu and Joshua Folkard (instructed by **Memery Crystal LLP**) for the **Defendant**

Hearing date: 12 May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down at a hearing attended by the judge remotely via Skype, and by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 July 2020 at 10:30 am.

MR JUSTICE HENSHAW
Approved Judgment

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Claimant ("***Alegrow***") brings this appeal on a point of law, pursuant to section 69 of the Arbitration Act 1996 ("***the Act***"), from Appeal Award No. 4539 dated 24 April 2019 (the "***Award***") of the GAFTA Appeal Board (the "***Appeal Board***"). The appeal is brought pursuant to permission granted by Teare J on 9 October 2019.

2. The questions of law in relation to which the appeal is brought are:-

   i) "*Was the Buyer contractually entitled to demand a 'shipment schedule' on 29 March 2017*?"; and

   ii) "*Was the Seller in repudiatory breach of the Contract in failing to provide such a shipment schedule by the Buyer's deadline of 30 March 2017?*".

   The Defendant ("***Yayla***") disputes that those questions in truth arise from the Award.

3. An application for clarification and/or for removal of ambiguities in the Award was made to the Appeal Board on 10 May 2019 (the "***Section 57 Application***"). The Appeal Board responded on 5 June 2019 (the "***Section 57 Response***").

4. The claim relates to a quantity of Russian paddy rice which Alegrow agreed to sell to Yayla, only part of which was ultimately shipped. The Appeal Board concluded that, following a series of events culminating in Yayla on 29 March 2017 asking Alegrow to provide by the following day a schedule for shipment of the remaining rice by 15 April 2017, and Alegrow's failure to provide such a schedule, Alegrow was in breach of contract as of 31 March 2017 and (implicitly) that Yayla was entitled on 7 April 2017 to bring the contract to an end.

5. The essence of Alegrow's appeal is that the Appeal Board was wrong in law to conclude that it was obliged to provide a shipment schedule by 30 March 2017 and was in repudiatory breach by failing to do so.

6. Yayla has served a Respondent's Notice which contends *inter alia* that the questions of law Alegrow has identified are not questions the Appeal Board was asked to determine, and that their determination would not affect the outcome. The Notice also states that if the Appeal Board is held not to have expressed or fully expressed the following reason(s) for its decision, then Yayla will contend that the Award should be upheld for these reasons:

    i) Alegrow was in continuing breach of the contract by failing to ship the remaining rice or to commit to doing so, which culminated in renunciation by Alegrow's non-response to Yayla's deadline contained in its email to Alegrow dated 29 March 2017.

    ii) To the extent that Yayla was previously estopped from terminating the contract and claiming damages, Yayla gave reasonable notice to resile from any representation giving rise to such estoppel(s) by its 29 March 2017 email to Alegrow.

7. For the reasons set out below, I have concluded that the Award was wrong in law, and that the correct determination of the questions of law raised leads to the conclusion that Alegrow had not committed a breach of contract such as to entitle Yayla on 31 March (or 7 April) 2017 to treat the contract as having been brought to an end. It also follows that by purporting to do so, Yayla itself renounced the contract and is contingently liable in damages. The Award must be varied accordingly, and the case remitted to the tribunal to decide the remaining issues identified in section (E) below.

(B) PRIMARY FACTS

8. I summarise below the basic facts in so far as they were either found by the Appeal Board or are not in dispute.

9. By a contract dated 21 May 2016 governed by English law, Yayla agreed to buy, and Alegrow agreed to sell, 24,000 MT of Russian Paddy Rice Rapan Type Crop 2016 CIF Free Out Mersin, Turkey (+/- 10% at Alegrow's option) ("***the Contract***"). The Contract price was US$280/MT and shipment was to be between 1 September 2016 and 15 December 2016 (with both dates included).

10. The rice had to meet various detailed contractual specifications, including that it be from the crop year 2016, that rice harvested from the side of the fields was not to be shipped, and the rice was to be harvested "*slowly by a combiner to avoid high percentage brokens*". In order to meet those specifications, Alegrow agreed to purchase the same quantity of rice from Krasnodarzernoprodukt-Expo LLC, Krasnodar, Russia ("***KZP***"); Yayla knew this, but it was not a term of the Contract that Alegrow should do so. The terms of Alegrow's purchase from KZP were US$235/MT FOB Temryuk, with delivery to be between 1 September 2016 and 15 December 2016.

11. The Contract incorporated: (i) GAFTA Contract No. 48; (ii) GAFTA Sampling Rules No. 124; and (iii) GAFTA Arbitration Rules No. 125.

12. The Appeal Board found that there was a considerable level of rainfall for this harvest in 2016, and that this could have delayed harvesting. From the time of harvest, the rice was processed and stored by KZP, and the impact of the weather on the humidity and condition of the rice made drying/processing necessary.

13. By an email of 9 November 2016, Yayla told Alegrow that it had planned that shipment of the rice would start in September and that the whole contract quantity would be loaded by the end of December 2016, *"explaining that they had to change all production and delivery schedules due to delays".*

14. 7,116.28 MT of rice were loaded onto the MV Kiowa on 1 December 2016, and 5,498.14 MT of rice were loaded onto the MV Karewood Pride on 3 December 2016, making a total of 12,614.42 MT out of the total contractual quantity of 24,000 MT.

15. On 23 November 2016, Yayla e-mailed Alegrow asking for a shipment time for the remaining rice, stating that the latest date for shipment was 31 December 2016 and that if Alegrow would be late for some shipments in December 2016 then they should revise the latest shipment date in the Contract.

16. Alegrow's case before the tribunal was that on 23 November 2016 Yayla asked for the remaining two (if not three) shipments to be spread out with intervals of 10 to 15 days after the previous shipment. The "Karewood Pride" loaded on 3 December and therefore the third shipment would be between 12 to 18 December and the fourth shipment might not be until 2 January 2017. The Appeal Board did not deal with this point in the Award, but in the Section 57 Response it said *"the Board understands that from 23rd November 2016 shipments were to be spread over 10 to 15 days period"* (§ 5).

17. The rice on board the MV Karewood Pride was imported into Turkey, but the rice on board the MV Kiowa was initially rejected by the Turkish authorities. The MV Kiowa arrived at the discharge port of Mersin on 14 December 2016 and tendered notice of readiness. On 19 December 2016, the Turkish customs and quarantine authorities rejected the cargo due to what they alleged was the apparent presence of nematodes (roundworms). The rejection was subsequently confirmed by local lawyers on 6 January 2017. (Alegrow makes the points, in this regard, that (a) it had complied with the contractual terms, providing the requisite quality certification by a GAFTA approved surveyor, and (b) the Kiowa cargo was from the same supplier, fields and storage facility as the Karewood Price cargo, which reached Mersin after the Kiowa and after a short delay was accepted for discharge by the Turkish authorities, the rice having been found to be free of nematodes).

18. On 27 December 2016 Yayla sent Alegrow an email repeating its 23 November request for an amended contract showing the new shipment date.

19. The Appeal Board found that in the months after the due date for shipment (15 December 2016) and from 27 February 2017, the shippers and Yayla's representative in Russia were aware of the condition of the rice in KZP's store. However, the Appeal Board found that Alegrow did not exercise any remedies under the Contract

arising in the case of inferior quality and/or condition, nor allege that it had been frustrated.

20. The Appeal Board further found that Alegrow did not ship the outstanding 11,385.58 MT of rice by 15 December 2016; that Yayla initially sought an amended shipment period to 31 December 2016; but that Alegrow did not, however, ship the outstanding 11,385.58 MT of rice by the end of December 2016.

21. On 20 January 2017 Yayla sent Alegrow an email referring to a conversation on 19 January 2017, and asking for a shipment programme for the rest of the rice.

22. The Appeal Board said:

> "[Alegrow] did not respond in writing to [Yayla's] emails asking for news about the shipments but submitted that they answered the emails by telephone. [Alegrow] contended that the parties had agreed to defer shipments until the discharge of the rice on the m.v. Kiowa. Buyers denied that they had requested to defer the shipments, but they did not declare [Alegrow] in default and instead asked [Alegrow] for news of the shipment dates thus keeping the Contract alive for performance." (§6.15)

23. The Appeal Board did not make any findings as to whether or not, and if so how, Alegrow had answered by telephone Yayla's email(s) asking for news about the shipments, save that in the Section 57 Response the Appeal Board said:

> "The Board of Appeal did not find any evidence of an agreement between the parties to suspend any future shipments pending the resolution of the issues relating to the m.v. Kiowa. [Yayla] continued to seek shipment dates and [Alegrow] failed to respond by giving a definite date(s) when they would or would not make shipment." (§ 6)

24. On 16 February 2017, Alegrow e-mailed Yayla stating that the MV Kiowa was waiting for discharging permission and enclosed a debit note for demurrage in the sum of US$361,784.88. In discussion with Yayla, Alegrow agreed to absorb US$132,500 of the demurrage costs but declined Yayla's proposal to reduce the contract price in view of the rice's deteriorating condition.

25. On 27 February 2017 the MV Kiowa was allowed to berth and discharge, and discharge was ultimately completed on 2 March 2017.

26. Also on 27 February 2017, representatives of the parties met in Dubai at an exhibition. The Appeal Board recorded Alegrow's evidence as being that during this discussion, Yayla was informed that further shipments were possible if they were ready to accept stored goods, as some of the parameters would not comply with the contractual specification, but that Yayla refused this and replied that the rice must be shipped in accordance with the Contract.

27. On 24 March 2017 Alegrow sent Yayla an email (not referred to in the Award, though in evidence before the Appeal Board) with the subject heading *"The rest of 20.000 mt shipments"* stating: *"As my colleagues in Krasnodar will be out of the office until next Thursday, upon their arrival they will be ready to support you with the inspection of the cargo available. Please ask your colleagues in Krasnodar to contact them by Thursday."* The email also indicated that Alegrow would send Yayla the final invoice for the demurrage and asked Yayla to arrange for its payment.

28. On 29 March 2017 Yayla sent an email to Alegrow saying:

> "I sent you several mails (you can also see attached file my previous emails) in order to get the shipment schedule about our 12.000 rest quantities as per our contract number ALG-160521, as you know that your shipment validity has finished on 15 December 2016,
>
> At Gulfood exhibition meeting in Dubai on 28 Feb 2017, you confirmed us you would give new shipment schedule during first half of March 2017, unfortunately today is 29 March and you did not give any information yet,
>
> As we said you several times, we faced huge problems with our customer and our vendors due to not shipping paddy rice on time as per our contract, This is our kindly last reminder in order to get shipment schedule until 15 April how many tones you will ship, please let us inform until 30 March 2017 evening,
>
> If you will not reply until tomorrow evening what quantity you will load until 15 April 207, we will consider your response and willing negatively to ship the rest paddy rice what you did not ship on time as per our contract,
>
> We have been in good relation with your company for many years, unfortunately in this situation, we are disappointed about not giving us satisfactory information until now about the rest quantity shipment schedule from our contract,
>
> In addition we still want to protect our long term mutually business relationship with your company, therefore last time we kindly ask you to answer our mail and we want you to answer realistically you will be able to ship or you will not be able to ship the rest quantity as per our contract. If you will not be able to ship, please let us know, if you will not be able to ship than we can discuss and we may find mutually solutions for both of us,
>
> Please reply our mail latest tomorrow evening
>
> Waiting urgently your positive reply"

29. On 1 April 2017 Yayla said in a further email to Alegrow:

> "… you have failed to fulfill your obligations to ship the remaining quantity of 11,385.58 metric tons within the delivery period settled in the subject sales contract. Until now, all our attempts to find an amicable solution have been failed. Therefore, considering your unwillingness we hereby notify you that we will apply for arbitration by GAFTA as per GAFTA Rules Article 2 "Settlement for Claiming and Arbitration", if we do not receive your decision regarding the dispute until 4th April, 2017."

30. On 7 April 2017 Yayla said:

> "Please be informed that all our attempts to find an amicable solution regarding your default in execution of the referenced sales contract have been failed and therefore we do not have any other option to refer this matter to GAFTA Arbitration as per GAFTA Arbitration Rules No. 125.
>
> The notice of arbitration is attached file for your reference."

31. The notice of arbitration indicated that Yayla had had to purchase substitute goods and had contacted third parties in order to purchase such goods at a unit price of US$415, and claimed damages.

(C) COURSE OF EVENTS IN THE ARBITRATION

32. Yayla's claim was considered, first, by a three-person First Tier Tribunal ("***FTT***"), on the papers following detailed written submissions; and, secondly, by a five-person Appeal Board including an oral hearing. Alegrow was represented by a London firm of shipping solicitors and Yayla by its Foreign Trade Manager, Mr Özdemir.

(1) Yayla's case before the First Tier Tribunal

33. Yayla's case before the FTT referred to Alegrow's failure to deliver the contracted goods, as well as to Alegrow's alleged lack of response to Yayla's emails of 20 January 2017, 29 March 2017 and 1 April 2017. Yayla alleged that Alegrow had failed to deliver because the price had risen and Alegrow had sold the rice to third parties instead. It said Alegrow's point that the goods had deteriorated because they had had to be stored was false. Yayla maintained that time was of the essence under the Contract, that Alegrow was in default from 15 December 2016, and that Alegrow had committed a material breach entitling it to terminate the Contract.

34. Alegrow makes the point that in its Further Written Comments to the FTT dated 10 October 2017, Yayla relied on a case of actual breach, *Harold Wood Brick Co v Ferris* [1935] 2 KB 198. It is relevant to note, though, that Greer LJ's judgment also included reference to the principle that *"If one party indicates by his conduct that he is unable or unwilling, whatever time is given, to perform his contract, that is sufficient to justify an acceptance of the repudiation and to entitle the other party to damages"* (pp205-206), albeit he did not consider it necessary to decide on that

ground; and Roche LJ stated *"... I agree that it is established that September 15, described as the date for final completion, was of the essence of the contract. Further, I agree that the purchaser, the defendant, had by November 13 failed to complete the purchase and had made it plain that he was unable or unwilling to do so then or at all. In those circumstances, the liquidator, the plaintiff in the action, was entitled, as he purported to do, to treat the contract as broken by the defendant in an essential term ..."* (p208).

35. Nonetheless, the substance of the case Yayla advanced before the FTT was based squarely on actual failure to deliver, and the email correspondence was relied upon essentially to rebut Alegrow's defence to the effect that Yayla had acted inconsistently.

(2) Decision of the First Tier Tribunal

36. The FTT itself, in its decision issued on 21 March 2018, understood Yayla's case to be that Alegrow had *"materially breached the Contract by not delivering the balance of the goods within the contracted shipment period. Buyer had to purchase goods from other suppliers to replace the goods which were not received from the Seller",* and that *"the failure of the Seller to supply the balance of the contractual quantity was based solely on the increase in price and the goods were sold to third parties at higher prices"* (§§ 6.1 and 6.3). Likewise in § 6.8:

> "Buyer reiterated that the Seller had materially breached the Contract by failing to deliver 2016 crop product and Buyer was entitled to terminate the Contract due to the breach. Buyer cited the case of *Harold Wood Brick Co. v Ferris [1935]*. Buyer argued that its actions and indemnification are justified."

§ 8.1 was to similar effect.

37. The FTT found that:

i) the obligation was on Alegrow to procure the harvested rice, with any problems associated with such procurement being Alegrow's risk – the existence of any procurement problems could not be used as an excuse not to ship the goods;

ii) Alegrow's primary CIF obligation was to ship the cargo;

iii) the contemporaneous evidence before the Tribunal gave no indication whatsoever that Yayla was seeking any delays in the shipment;

iv) whilst the e-mails showed that the parties had discussions about the way forward after the original shipment date had passed, it was apparent that no agreement was reached;

v) Alegrow *"was in default for not supplying the balance of the cargo against the contract"*, and its counterclaim for damages and other arguments for estoppel, variation, impossibility and others of a similar nature failed; and

vi) Yayla did not hold Alegrow in default but instead kept the Contract alive; Yayla granted indulgence to Alegrow to complete the Contract.

38. The FTT concluded as follows:-

> "The Buyer having indulged the Seller for a reasonable period of time, finally made time of the essence by their email of 29 March 2017 when they required the Seller to declare by 30 March 2017 the tonnage that would/would not be loaded by the latest shipment date of 15 April 2017 AND WE SO FIND. The Seller failed to respond and on 1 April 2017 the Buyer once again gave notice that they would apply for Arbitration, thereby ending their indulgence if they did not receive a decision by 4 April 2017. With time of the essence once again preserved and the Seller failing to react, the Buyer finally brought the Contract to an end and held the Seller in default on 7 April 2017 and claimed arbitration. WE THEREFORE FIND that the date of default is 7 April 2017." (§ 11.11)

(3) Yayla's case before the Appeal Board

39. On Alegrow's appeal to the Appeal Board, Yayla again based its claim on Alegrow being in repudiatory breach by reason of its failure to deliver the balance of the cargo; that time remained of the essence, by reason of which Yayla terminated the agreement and claimed damages; and that Alegrow had sold the goods to a third party at a higher price: see Buyer's Concise Statements dated 13 August 2018 (Introduction; Summary §§ 1, 3 and 10; Concise Statements §§ 5-9, 12, 14-17, 22, 25 and 28; and Conclusion §§ 3 and 6).

40. As part of the narrative Yayla made reference to Alegrow's (alleged) lack of response to Yayla's emails requesting the remaining shipments, but did not rely on such lack of response as itself constituting a breach or renunciation; and Yayla made the point that its own emails were unnecessary since Alegrow was obliged to ship the goods without being reminded to do so (Buyer's Concise Statements dated 13 August 2018 at Summary §10 and Concise Statements §§ 6, 9 and 20).

41. Yayla submits now that it did advance a claim of renunciation before the tribunals, pointing out that it appeared 'in person' before both tribunals so that its submissions should not be read legalistically. It relies, specifically, on the following passages of its submissions to the Appeal Board:

i) "*Yayla sent emails to Alegrow on 27 December 2016, 20 January 2017, 29 March 2017 and 1 April 2017 and asked about the shipment of the remaining goods, but failed to receive a response. Then, an application was filed with GAFTA*" (§ (A)(2)).

ii) *"Alegrow did not respond to the e-mails of Yayla in which it requested Alegrow to perform the remaining shipments. Alegrow has never sent the remaining goods of 11,385.58MT. It also did not suggest sending 2017 crop goods to Yayla or another solution to fulfill [sic] its obligations under the contract"* (§A(10)).

iii) *"[Yayla] sent e-mails to [Alegrow] on 27 December 2016, 20 January 2017, 29 March 2017 and 1 April 2017. In other words, [Yayla] sent e-mails to [Alegrow] asking about the status of the remaining shipments ... Yayla is not obliged to send e-mails to [Alegrow] continuously, and ask about the status of the remaining shipments"* (§ C(20)).

iv) *"[Alegrow] alleges that the goods harvest was delayed because of the increased rainfall. When Yayla sent e-mails to [Alegrow] asking for the shipment of the remaining goods, [Alegrow] has not given any response to the e-mails and never mentioned these weather conditions"* (§ D(1)).

42. As to those points:

i) Paragraph (A)(2) should be read in the context of §§ (A)(1) and (3):

> "(1) EVEN THOUGH THE SELLER WAS OBLIGED TO DELIVER 24,000 MT RAPAN TYPE PADDY RICE PURSUANT TO THE CONTRACT DATED 21 MAY 2016 BETWEEN THE PARTIES, THE SELLER DID NOT DELIVER THE 11,385.58 MT PART.
>
> …
>
> (3) AS A MATTER OF FACT, ALEGROW FAILED TO SEND TO YAYLA THE GOODS IT UNDERTOOK TO SELL TO YAYLA WITH THE CONTRACT DATED 21 MAY 2016 BECAUSE OF INCREASING MARKET PRICES, AND SOLD THEM IN THE MARKET AT A HIGH PRICE. HOWEVER, ALEGROW IS TRYING TO MAKE UP A "LEGAL MASK" FOR SUCH ACT OF ITSELF"

as well as in the context of the Concise Statements as a whole, which state the breach to be the failure to deliver. Paragraph (A)(2) does not in any event suggest that Alegrow's (alleged) failure to respond was in itself a breach or renunciation of the Contract.

ii) Paragraph (A)(10) equally does not allege that the (alleged) failure to respond was in itself a renunciation. The first sentence quoted is immediately followed by the allegation of actual failure to deliver.

iii) Paragraph (C)(20) contends in substance that Yayla never agreed to delay the shipments, and that it was entitled to rely on Alegrow's breach without the need to send Alegrow emails reminding it of its obligations. It is in no sense an allegation of renunciation.

iv) Paragraph (D)(1) relates to Alegrow's point that the weather delayed harvesting. It is not an allegation of renunciation.

(4) Decision of the Appeal Board

43. The Appeal Board, after reciting a summary of the parties' submissions, stated that the appeal was against the FTT's decision *"that Sellers breached the Contract by failing to ship … the remaining quantity of rice and that Sellers were in default as of 7th April 2017."*

44. Having stated the basic facts, the Appeal Board found that:

    i) the condition of the rice was Alegrow's obligation and for Alegrow to manage at its own cost, so that Alegrow's counterclaim for damages for financing and storage costs failed (§ 6.8);

    ii) Alegrow was in breach of contract by failing to deliver the balance of the rice by 15 December 2016, but by seeking in December 2016 an amended shipping period Yayla "*waived their rights to be delivered in accordance with the original stipulated period of the Contract*" (§ 6.11);

    iii) by asking again on 20 January 2017 for a shipment programme, the parties "*kept the Contact alive for performance*" and "*time was not of the essence for [Yayla]*" (§ 6.14);

    iv) following the lack of written responses from Alegrow to Yayla's emails asking for news about the shipments (and having made no findings about Alegrow's submission that it answered the emails by telephone) Yayla did not declare Alegrow in default and instead asked for news of shipments dates "*thus keeping the Contract alive for performance*" (§ 6.15); and

    v) Yayla's email of 29 March 2017, referring to the meeting in Dubai in February, was "their last reminder to get a shipment schedule until 15th April 2017, how many tons would Sellers ship and asking to be informed by 30th March 2017". (§6.18)

45. The Appeal Board then concluded as follows:

> "6.19 Buyers gave a final deadline to Sellers of 30th March 2017 for them to receive a schedule for the shipment of the outstanding balance. Sellers failed to respond to or meet this deadline and provide a schedule. Buyers notified Sellers of their intention to go to arbitration on 1st April 2017 and declared Sellers in default on 7th April 2017. We therefore uphold the first tier Tribunal's Award to the extent that Sellers are in default by their failure to provide the balance of rice outstanding of 11,385.580mt rice. It is important to note that Buyers were not, on 29th March 2017, insisting on shipment before the end of March, but were requesting a shipment schedule AND WE FIND THAT the notice gave adequate time for Sellers to provide a schedule.
>
> 6.20 With regard to the date of default by their failure to respond to the deadline of 30th March 2017, Sellers were in

> breach of the Contract on the next business day after the deadline for receipt of a schedule for the outstanding shipment and the default date was 31st March 2017."

46. The Appeal Board's Section 57 Response included the following questions and answers:

> **"Appellants' Queries on Original Obligation, Time Not of the Essence and Condition of the Contract.**
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> …
>
> 3. Buyers were not estopped from alleging time thereafter was of the essence in seeking information when shipment(s) would be made.
>
> **Contract Variation**
>
> 4. Conversations and meetings took place between the parties but there was a lack of written or recorded communications between the parties for the material time from 15th December 2016 to 29th March 2017.
>
> 5. The evidence showed that some shipments were made prior to 15th December 2016 and the Board understood that from 23rd November 2016 shipments were to be spread over 10 to 15 days period.
>
> **Schedule**
>
> 6. The Board of Appeal did not find any evidence of an agreement between the parties to suspend any future shipments pending the resolution of the issues relating to the m.v. Kiowa. Buyers continued to seek shipment dates and Sellers failed to respond by giving a definite date(s) when they would or would not make shipment.
>
> 7. On 29th March 2017 Buyers emailed Sellers requiring a shipment schedule by the following day with the remaining shipments to be made by 15th April 2017. This notice of 29th March 2017 requesting a shipment schedule was the first final and definite notice to Sellers and gave a reasonable time for Sellers to provide a shipment schedule, which they failed to do.
>
> **Frustration**
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> 8. Sellers did not claim to be or notify the Buyers prior to 29th March 2017 that they were frustrated from performing the remaining shipment(s). Sellers were to supply the goods and

having failed to do so were in breach of the Contract and supply/demand does not create a defence of impossibility.

(D) ANALYSIS OF ISSUES

(1) The court's approach

47. So far as relevant, section 69(1) of the Act provides that "*a party to arbitral proceedings may […] appeal to the court on a question of law arising out of an award*."

48. Once leave has been granted, the general approach on a s.69 application is to be informed by what this Court has termed three "*guiding principles of fundamental importance*" (*Bunge SA v. Nibulon Trading BV* [2013] EWHC 3936 (Comm); [2014] 1 Lloyd's Rep 393, §§ 35-36 per Walker J, referring to statements of the Court of Appeal in *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] 1 Lloyd's Rep. 638):

    i) First, as a matter of general approach, the English court strives to uphold arbitration awards (*MRI Trading* § 23 per Tomlinson LJ).

    ii) Secondly, in order to give effect to the first principle, the court should read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it. It should not approach awards "*with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the object of upsetting or frustrating the process of arbitration*." (*ibid*.)

    iii) Thirdly, in cases of uncertainty the court will, so far as possible, construe the award in such a way as to make it valid rather than invalid (ibid.)

49. Walker J in *Bunge* added, however, that these principles *"are not intended to, and do not, enable the court to give to an award a meaning which plainly was not intended by its authors"* (§ 36).

50. In relation to a challenge to a GAFTA award, two further relevant considerations apply:

    i) The first and second general principles mentioned above will apply *a fortiori* where "*the tribunal comprises market men, since one is not entitled to expect from trade arbitrators the accuracy of wording, or cogency of expression, which is required of a judge*" (*MRI Trading AG* [2012] EWHC 1988 (Comm); [2013] 1 All ER (Comm) 1, 8g-h [15(a)] and 9f [16] per Eder J).

    ii) Trade tribunal decisions are generally to be accorded deference where the arbitrators' experience assists it in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of an arbitrator's own trade or industry (*Kershaw Mechanical Services* [2006] EWHC 727 (TCC); [2006] 4 All ER 79, at § 57(2) per Jackson

J). Thus in *PEC Ltd v Thai Maparn Trading Co Ltd* [2011] EWHC 3306 (Comm), [2012] 1 Lloyd's Rep 295, the question had arisen for a GAFTA Appeal Board whether one of two notices provided by the buyer constituted a valid claim for an extension (under clause 7 of GAFTA Form No. 120). Hamblen J, in the context of deciding a section 69 appeal said:

> "it has to be recognised that the trade tribunal, the Board of Appeal, concluded that [one of the two alleged notices] was conditional and that deference should be paid to their view on an issue of this kind, involving as it does construction of a message passing between trading parties against the background of their prior dealings and of the trade and trade contract in question" (§ 21)

51. In *Novasen v Alimenta* [2013] EWHC 345 (Comm), [2013] 1 Lloyd's Rep 648, Popplewell J pointed out that the appropriate degree of deference may sometimes be tempered:

> "26. I would naturally be reluctant to differ from a trade tribunal such as the FOSFA Board of Appeal on a question of the interpretation of one of its standard clauses unless I were satisfied that despite the collective experience of the Board it were wrong. Nevertheless in this case the deference due to their views is somewhat tempered by the fact that the tribunal did not articulate any reasoning for their conclusion, either as to the wording of the clause, or as to the commercial considerations which might have influenced the effect which they found the clause to have. …" (§ 26)

52. In determining whether questions of law were dealt with by a tribunal, the court should read *"[the relevant] paragraphs [in the award] in a fair and reasonable way in the context of the award as a whole. They must not be taken in isolation and subjected to minute textual analysis*." (*Kershaw Mechanical Services*, *supra*, at 97j [77]-[78] per Jackson J). The view taken at the permission stage as to whether or not the questions of law arise out of the impugned award is not conclusive. In *Agile Holdings Corp v Essar Shipping* [2018] EWHC 1055 (Comm), [2018] Bus LR 1513, HHJ Waksman QC (i) noted that the question of whether there is "*a question of law arising out of an award made in the proceedings*" falls into a different category to the other permission requirements in sections 69(3)(a), (c)(ii) & (d) of the Act (§ 31(2)); and (ii) concluded that there was no bar to that point being raised on appeal (§ 33), particularly where (as here) permission was granted on the papers (§ 31(3)). *Agile* was applied by Carr J in *Silverburn Shipping (IoM) Ltd v Ark Shipping Company LLC* [2019] EWHC 376 (Comm), [2019] 1 Lloyd's Rep 554 § 34 (reversed by the Court of Appeal on other grounds).

(2) The Appeal Board's decision and the questions of law raised

53. Alegrow submits that the Appeal Board's decision was based on a finding of a contractual obligation to provide a shipment schedule, the breach of which was

repudiatory, and that the Appeal Board was therefore in error as no such obligation existed.

54. Yayla submits that the Appeal Board's conclusion was in substance that Alegrow renounced the Contract, thus entitling Yayla to treat it as having been brought to an end, and to claim damages.

55. I note first that neither of those approaches reflects the conclusions which the FTT had reached, nor either party's case before the Appeal Board.

i) Yayla's case throughout was that time remained of the essence, and that Alegrow was in actual repudiatory breach by failing to deliver the outstanding rice.

ii) Alegrow's case was that the parties had agreed, by way of contractual variation (alternatively estoppel or waiver), that shipments should be suspended until the customs issue arising from the Kiowa cargo had been resolved. By 27 February 2017, when the issue was finally resolved, the remaining rice Alegrow had purchased to deliver under the Contract was non-compliant with the contractual specification, so Alegrow offered Yayla the choice of that rice or rice from the 2017 crop (which would involve a delay of some months). Alegrow said it could not source rice fully meeting the contractual specification as it was not available.

iii) The FTT had held that time ceased to be of the essence, but that Yayla's 29 March 2017 email made it of the essence again, and that on 4 April 2017 Yayla then withdrew its 'indulgence' due to Alegrow's failure to provide a shipping schedule by 30 March 2017. That was in substance a finding of breach by failure to deliver, time having once more become of the essence.

56. The FTT's conclusion on the latter point was unsupportable: if and to the extent that Yayla's email of 29 March 2017 made time of the essence, it did so only by stipulating 15 April 2017 as a reasonable date by which to ship the remaining goods. In order to find time thereby to have been made of the essence again, the FTT would have had to conclude that the period from 29 March to 15 April 2017 was a reasonable time to ship the remaining goods. No such finding is evident from its award. Further, if Yayla had made time of the essence by requiring shipment by 15 April, it could not then in law have treated Alegrow as in breach for failing in the intervening period to provide a shipment schedule that was not contractually required. The law on these particular points is fairly well established:

i) Where time is originally of the essence, it may cease to be so as a result of election or affirmation:

> "Even though time is of the essence, the buyer is not bound to reject the goods for late delivery and may elect either to waive the breach or to treat it as a breach of warranty only. An election by the buyer in this sense is to be distinguished from an estoppel, in that it depends upon an informed choice made by the elector and not upon reliance by the other party. The parties may also, by a process of mutual affirmation, agree to

> keep the contract on foot, with the seller bound to deliver in a reasonable time when so instructed by the buyer. Further, where the contract of sale is not severable and the buyer has accepted the goods or part of them, a late delivery can in any event only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect. Whereas a buyer excusing timely delivery before the due date may be taken to have waived timely delivery, a buyer who does so after the due date may thereby have elected to affirm the contract." (Benjamin's *Sale of Goods* 10th ed. (2017) §8-028, footnotes omitted, my emphasis)

ii) The passage underlined above reflects Blair J's statement in *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm) § 58 approving the following passage set out (now) in Benjamin § 20-033:

> "If no shipment period is specified by the contract, the period may be fixed by the terms of the buyer's shipping instructions, provided that those instructions allow the seller a reasonable time for shipping the goods."

iii) Similarly in relation to waiver:

> "Where the buyer voluntarily accedes to a request by the seller that delivery of the goods be postponed, he may be held to have waived his right to insist that the goods be delivered within the time fixed by the contract of sale. ...
>
> Where the period of postponement is not specified, the buyer can give reasonable notice to the seller requiring that the goods be delivered within a certain time and, if he so specifies a new time limit, delivery at the time thus specified becomes of the essence of the contract. The effect of giving the notice, however, is not to permit the party giving it to rely upon a breach of contract during the period governed by the waiver. Where the period of postponement is specified, the new delivery date applies; but the buyer does not thereby waive his right to continue to treat the time of delivery as of the essence if it was originally so." (Benjamin § 8-030)

iv) These propositions are supported by the decisions in *Hartley v Hymans* [1920] 3 K.B. 475 and *Charles Rickards v Oppenhaim* [1950] 1 KB 616, which were helpfully summarised by Stuart-Smith J in *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) [2015] 1 All E.R. (Comm) 204:

> "127. … In *Hartley v Hyams* [1920] 3 KB 475, time was originally of the essence of the contract so that when the supplier failed to deliver by 15 November 1918, the purchaser could have taken that failure as entitling him to terminate the

> contract. Instead the purchaser persistently complained of the delay and asked for better deliveries, thereby leading the supplier to believe that the contract still subsisted and to act on that belief at expense to himself. When the purchaser gave notice without warning in March 1919 cancelling the contract it was held that he had waived his right to insist on delivery by 15 November 1918 and was estopped from alleging that the period for delivery had terminated on that date. McCardie J held that the purchaser could have given notice in March 1919 fixing a reasonable time within which the supplier was required to supply the undelivered balance of the contract goods, but had not done so. It is implicit in his reasoning and ruling that, if notice had been given and not complied with, it would have been the supplier's failure to deliver after the giving of notice that would have entitled the purchaser to terminate.
>
> 128. *Charles Rickards v Oppenhaim* [1950] 1 KB 616 is direct Court of Appeal authority for the proposition that where time is of the essence of a contract for the sale of goods and, on the lapse of the stipulated time, the buyer continues to press for delivery thus waiving his right to cancel the contract, he has a right to give notice fixing a reasonable time for delivery, thus making time again of the essence of the contract: see Denning LJ at 623-624. <u>However, the giving of such notice does not entitle the buyer retrospectively to rely upon the seller's breach of contract in the period of the waiver or estoppel, since that is the breach which is waived or he is estopped from relying upon. To hold otherwise would retrospectively cancel the effect of equity's protection, which is unconscionable</u>. The requirement that the buyer give notice fixing a reasonable time for delivery, thereby once again making time of the essence of the contract, has the practical effect that the time on which he is entitled to rely starts to run from the date on which notice is given, not from the date of the original and waived breach." (my emphasis)

The FTT's conclusion that the indulgence Yayla had given by making time of the essence could be brought to an end before the stipulated shipment date, 15 April 2017, had arrived is in my view inconsistent with the passage I have underlined in the quotation above.

v) Stuart-Smith J in *Virulite* also cited *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 2, in which the Court of Appeal considered the legal nature of a notice 'making time of the essence'. Nourse LJ and Purchas LJ in that case both cited with approval a passage from the judgment of Mason J in the High Court of Australia in *Louinder v Lewis* 149 CLR 509, 526:

> "Accordingly, delay beyond the stipulated date will give rise to a liability in damages. But because equity treats the time stipulation as non-essential, mere breach of it does not justify

> rescission by the innocent party and will not bar specific performance at the suit of the party in default. Unreasonable delay in complying with the stipulation in substance amounting to a repudiation is essential to justify rescission. It is to this end that, following breach, the innocent party gives notice fixing a reasonable time for performance of the relevant contractual obligation. The result of non-compliance with the notice is that the party in default is guilty of unreasonable delay in complying with a non-essential time stipulation. The unreasonable delay amounts to a repudiation and this justifies rescission."

57. I note in parentheses (for completeness, and by way of qualification to (v) above) that *Benjamin* § 8-026 states, citing more recent case law, that:

> "… there is likely to be little scope for notices making time of the essence in the case of a delay in the delivery of goods in those cases where time was not originally of the essence. If one party is guilty of the breach of a stipulation as to the time of delivery and the stipulation is a condition, the other party is entitled without more to treat the contract as repudiated and there is no need for him to serve a notice giving a further opportunity to deliver within a reasonable time. If the stipulation is not a condition but an intermediate term, then a notice purporting to make time of the essence will not automatically make a failure of performance a repudiatory breach, for one party cannot unilaterally vary the terms of a contract by turning what was previously a non-essential term of the contract into an essential term. Should such a notice be served, the failure to deliver within the time fixed by the notice will not, in itself, constitute a repudiation irrespective of the consequences of the breach" (footnotes omitted)

It is unclear how those principles will apply to a sale of goods contract originally containing a stipulation as to time (likely to be construed as a condition), which has been waived, but where the waiver has been followed by a notice purporting to make time of the essence again by giving a further reasonable time for delivery. Logic would suggest that failure to comply with such a notice should entitle the other party to treat the contract as having come to an end and claim damages. However, it is unnecessary in the present case to decide the point, because Yayla did not wait to see whether Alegrow would ship by 15 April 2017, and the Appeal Board did not make a finding as to whether the period from 29 March to 15 April gave Alegrow a reasonable time to ship.

58. Turning to the actual decision of the Appeal Board in the present case, §§ 6.19 and 6.20 of the Award, quoted in § 45 above, leave it unclear precisely what the Board did decide. In essence, the Board:

i) stated that it upheld the FTT's award that Alegrow was in default by failure to provide the balance of the rice;

ii) emphasised that Yayla was not insisting on shipment before the end of March 2017 but only a shipment schedule;

iii) found that the 29 March 2017 email gave Alegrow adequate time to provide a shipment schedule; and

iv) concluded that by failing to respond to the deadline of 30 March 2017 for receipt of a schedule, Alegrow was in breach as from the following business day, 31 March 2017, which was therefore the "*default date*".

59. Answers 3 and 7 in the Section 57 Response, quoted in § 46 above, make clear that the Appeal Board considered that by 30 March 2017 time had become of the essence again, and that the action which the 29 March 2017 email gave Alegrow a reasonable time to perform was the provision of a shipment schedule.

60. The Appeal Board's finding (i) referred to in § 58 above appears to be of actual breach by failure to deliver. That finding is itself problematic. It may be a reference back to the Board's finding at Award § 6.11 that Alegrow was in breach by failing to ship the outstanding rice by 15 December 2016, albeit the Board stated in the same paragraph that by not declaring Alegrow in default Yayla *"waived their rights to be delivered in accordance with the original stipulated period of the Contract"*. Alternatively the Appeal Board might have meant that Alegrow was in breach by a failure to ship *after* 15 December 2016. On that basis, Alegrow would on ordinary principles have been obliged to deliver the rice within a reasonable time (cf Sale of Goods Act 1979 section 29(3)), but the Appeal Board did not make a finding as to what that time would be.

61. In any event, the finding of breach by failure to deliver does not appear to be logically connected with the Board's conclusion that the 29 March email made time of the essence, resulting in Alegrow being in default by 31 March. The Board makes clear that the 29 March email did <u>not</u> require Alegrow to deliver the outstanding rice by 31 March. Thus it was the failure to respond to the request for a shipment schedule that led the Appeal Board to find Alegrow to have been in default by 31 March.

62. Moreover, had the Appeal Board intended to conclude that the 29 March email made time of the essence by requiring shipment by 15 April, then (a) the Board would have needed to have found that the period from 29 March to 15 April was a reasonable period for shipment of the balance of the rice (including all the necessary steps involved in that process), and (b) any repudiatory breach would have occurred only on or after 15 April. Neither point is reflected in the Appeal Board's findings.

63. It follows that the Appeal Board's findings (ii)-(iv) referred to in § 58 above must have been premised on Alegrow having some form of obligation to provide a shipment schedule, the failure to provide which by 31 March resulted in Alegrow being in repudiatory breach. The fact that the Board in § 7 of the Section 57 Response repeated the point, stating that the 29 March email was a notice which *"gave a reasonable time for Sellers to provide a shipment schedule"*, provides further support for that interpretation. However, the Appeal Board made no finding as to where any obligation to provide a shipment schedule is to be found in the Contract, or why one should be implied.

64. As a result, applying the approach referred to in § 52 above, I consider that the two questions set out in § 2 above do arise from the Award, and that the Appeal Board reached incorrect conclusions on them. The correct answers to those questions are in my judgment that:

    i) the Buyer was not contractually entitled to demand a shipment schedule on 29 March 2017; and

    ii) the Seller was not in repudiatory breach of the Contract in failing to provide such a schedule by the Buyer's deadline of 30 March 2017.

65. In reaching the conclusions set out above, I have considered the possibility that the lack of reasoning in the Award about any contractual duty to provide a shipment schedule could indicate that the Appeal Board in fact considered that, after what had gone before, the failure to provide the requested shipment schedule was a renunciation by Alegrow of the Contract. As to what such a finding would entail, it is sufficient for present purposes to refer to the summary set out in *Chitty on Contracts* (33rd ed.) § 24-018:

> "A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. … An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default:
>
> > "… may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations …"
>
> (footnotes omitted)

66. The Appeal Board did not explicitly address any case of renunciation, and did not record Yayla's case as being based on renunciation. I have already concluded that it was not so based. Nor was Alegrow given the opportunity to meet any case based (expressly or in substance) on renunciation. In any event, in order to apply the correct legal test for renunciation, even in a non-legalistic manner, the Board would have to have found that Alegrow had indicated, clearly and unequivocally, that it refused to perform or could not perform. There is no such finding in the Award. I cannot therefore accept Yayla's suggestion, on this appeal, that the Appeal Board's decision should be upheld as having found renunciation by Alegrow.

67. Nor in my judgment can the Award properly be upheld on the basis that the Appeal Board's conclusion was correct on the facts found because Alegrow had renounced the Contract. As Popplewell J stated in *Novasen*, an award cannot be upheld on a ground on which the tribunal did not make the necessary factual findings:

> "In my view this point is not open to the Buyers. It was not a point taken before the Board of Appeal or before the First Tier Tribunal. It is true that there is a reference in paragraph 28 of the Buyers' Reply Submissions before the First Tier Tribunal to the prohibition not being in force during the contractually defined shipment period expiring on 10 January 2008, but this was quite insufficient to raise the point as now articulated …. Not surprisingly therefore, the Board did not address the argument, nor make any findings as to the nature of the extended shipment period. As the Buyers' formulation of the point itself recognises, the Award did not make the necessary findings of fact upon which the argument depends. It would be contrary to the scheme of s69 of the Act to allow a respondent to seek to uphold an award on a point of law which was not pursued before the chosen tribunal and in respect of which the tribunal was not asked to make, and has not made, the necessary findings of fact. An appellant is not entitled to raise such a point if he has not asked the tribunal to decide it; nor should a respondent be, at least if the result of it not having been raised before the tribunal is that the relevant findings of fact upon which it depends are absent" (§ 29)

68. The facts found in the present case were insufficient for the court to reach such a conclusion. Yayla's 29 March 2017 email recorded Alegrow as having stated at the end of February 2017 that it would provide a new shipment schedule, which it did not provide. However, the Appeal Board made no findings in relation to subsequent communications, such as the 24 March 2017 email quoted in § 27 above or any oral discussions before and after that email. The Appeal Board's finding in Award § 6.15 of lack of response from Alegrow is expressly confined to written responses. Moreover, § 4 of the Section 57 Response states that *"[c]onversations and meetings took place between the parties but there was a lack of written or recorded communications … from 15th December 2016 to 29th March 2017".* In order to decide whether Alegrow had renounced the Contract, the Appeal Board would have needed to consider the sequence of communications as a whole, both oral and written.

69. Nor can the Board's conclusions be upheld on the basis that there was renunciation by silence. Yayla relied in this context on *Stocznia Gdanska v Latvian Shipping* [2002] EWCA Civ 889; [2002] 2 All ER (Comm) 768 and *SK Shipping v Petroexport (The "Pro Victor")* [2009] EWHC 2974 (Comm); [2010] 2 Lloyd's Rep 158.

70. In *Stocznia*, Rix LJ said *"[w]here [silence] is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally"* (§§ 95-96). The facts of that case were unusual. Rix LJ at § 96 said:

> " …The silence was not mere silence, it was overlaid with all that had gone before. It was a speaking silence. The difficulty with silence is that it is normally equivocal. Where, however, it is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally. Where silence speaks, there may be a duty on the silent party in turn to speak to rectify the significance of his silence. The circumstances of this case demonstrate the importance of these principles. This was not a case where a party seeks to derive assent out of mere silence. These parties were in contractual relations, and the question was whether the yard should continue to perform in circumstances where Latreefers had made it clear that it did not want performance on the terms of the existing contracts. The yard needed to know where it stood. Whether the notices were valid or not, if Latreefers wished the yard to proceed with building the vessels in circumstances where it had previously made clear that it did not, then it had an obligation to clarify its new intentions. …"

71. That situation is considerably removed from the present case, where Alegrow's last recorded communications, on 27 February 2017 in Dubai and in its email of 24 March 2017, were both to the effect that it did intend to perform the Contract.

72. In *The Pro Victor*, there was a combination of emails which were held to be expressly renunciatory and emails which failed to provide requested confirmations about contractual performance. Flaux J said:

> "117. … there was in effect a refusal on the part of the defendant to provide that confirmation. Mr Phillips submitted that silence would not suffice for renunciation, because it is equivocal. I do not accept that submission, as it seems to me it must depend on the context. Renunciation may be by words or conduct and where one party is seeking confirmation that the other will perform, a failure to give the confirmation may be renunciatory, especially if, as in the present case, it is preceded by other conduct which is renunciatory.
>
> 118. In any event, in truth this was not a case of silence, since in fact Captain Skarvelis sent his email at 10.35 Singapore time in full knowledge of the confirmation the claimant was seeking and his further email at 12.50 Singapore time in purported response to the claimant's email seeking confirmation. Although he would not accept this in cross-examination, it is perfectly clear what he was seeking to achieve by those emails. Rather than provide the confirmation sought (because by this stage the defendant would have had difficulties performing the charter …), … he was trying to embarrass the claimant into agreeing a mutual termination of the charterparty, with no liability on the defendant for damages. … However, in my judgment the tactic backfired, because the failure to provide the

> confirmation the claimant was seeking was further renunciatory conduct on the part of the defendant."

73. In the circumstances of the present case referred to in § 71 above, *The Pro Victor* is not an apt analogy. In any event, a finding of renunciation by silence could not properly be made without consideration of all the communications, written and unwritten, that *did* take place between the parties during the relevant period.

(E) REMEDIES

74. Section 69(7) of the Act gives the court a measure of discretion when it comes to deciding what order is most appropriate to give effect to its decision on an appeal:

> "On an appeal under this section the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award,
>
> (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
>
> (d) set aside the award in whole or in part.
>
> The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

75. HHJ Thornton QC in *Fence Gate Ltd v NEL Construction Ltd* [2001] WL 1743254, [2001] 82 Con LR 41 § 89 pointed out that the only additional guidance provided as to how the discretion under section 69(7) should be exercised comprises the general principles set out in section 1 of the Act:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part [sections 1–84 of the Act] the court should not intervene except as provided by this Part."

76. The effect of remission of an award following appeal is to allow the tribunal to re-determine the cases that were advanced before it, rather than to present a new case that may have emerged during the appellate process. *Russell on Arbitration* (24th ed.) states the general proposition that:

> "The effect of remission is not to allow a party to run entirely new points, so it may be appropriate to obtain undertakings that new points will not be run before remission is ordered. An award will not be remitted, however, if doing so would serve no useful purpose, for example because it would be inevitable that the award would be varied as proposed by the court, or there is no evidence on which the tribunal could reach any decision other than the one already made, in other words where the conclusion reached by the court is now the one which adopting the proper principles would have to be adopted by the tribunal. Nor will an award be remitted unless there is something further for the tribunal to consider and upon which its judgment could be exercised afresh." (§ 8-172, footnotes omitted)

77. The cases *Russell* cites include *Van Der Giessen-De-Noord Shipbuilding Division B.V. v Imtech Marine & Offshore B.V* [2008] EWHC 2904 (Comm), where Christopher Clarke J said in the context of the setting aside of an Award:

> "113. … it is necessary to consider the position if parts of the Award are set aside. If that is done the formal position would appear to be that the subject matter of those parts falls to be considered entirely afresh. It seems to me most undesirable that the appellants should be able to open up the entire subject matter of those parts, and to run, for instance, points that they have never taken before, or to adduce evidence that they did not choose to adduce before the arbitrators. On the contrary the matters remaining in dispute ought to be determined in the light of the evidence before the arbitrators.
>
> 114. I note that in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 , 286 Toulson. J, who set aside the entirety of an award of the GAFTA Board of Appeal, saw no reason why the Board should not continue to deal with the matter, having received an indication from Counsel for the appellant that the appellant would not seek to widen the points which it took on the appeal. It seems to me that a similar undertaking is appropriate in this case.
>
> 115. If, therefore, GN are prepared to state, and, if necessary, undertake that it will not seek to widen the points which it took on this application, nor to adduce new evidence otherwise than in relation to the question of interest or as permitted by the arbitrators, or, if relevant, the umpire, I propose to set aside the following parts of the Award …"

78. I have already concluded both that Yayla did not put its case before the Appeal Board on the basis of renunciation, and that the Board did not make the necessary findings of fact on which any such case would need to be based. Accordingly it would not be appropriate to remit the Award in order for a case of renunciation to be considered.

79. Alegrow submits that since it was not in repudiatory breach by failing to provide a shipment schedule by 30 March 2017, it follows that Yayla itself renounced the Contract by its email of 1 April 2017 and/or its notice of arbitration, in which it formulated its claim on the basis of having to purchase substitute goods (thus indicating that it regarded the Contract as having come to an end). Alegrow submits in its skeleton argument that:

> "A correct application of the law to the facts (as found by the Appeal Board) would have led to an award in Alegrow's favour and Yayla's claim dismissed. At best (and this is not conceded by Alegrow), the 29 March email made time of the essence and Alegrow had to ship the balance of Cargo by 15 April or within a reasonable period of time which was not before 15 April. However, Yayla's purported acceptance of a repudiatory breach prior to this date was itself a repudiation of the Contract which Alegrow accepted. There can be no other credible analysis."

80. The FTT's decision indicates that Alegrow put the point in this way:

> "Seller stated that the Buyer sent notice of arbitration on 7 April 2017 which evinced its intention to no longer be bound by the contract and/or was a repudiatory breach which the Seller accepted with the commencement of arbitration bringing the contract to an end. Seller argued that the Buyer had no right to do this and the Buyer is in repudiatory breach which the Seller accepted with commencement of arbitration." (§ 5.13)

Alegrow's presentation before the Appeal Board explained that *"The repudiatory breach was accepted by Alegrow (no later than) by means of its submissions dated 21 August 2017"*.

81. Yayla's response to Alegrow's claim of repudiatory breach by Yayla, as set out in Yayla's Concise Submissions, was:

> "The APPELLANT states that YAYLA was in repudiatory breach because of termination of the agreement and that, therefore, it has to indemnify the APPELLANT for its damages. The APPELLANT did not send the goods under the agreement to YAYLA at the specified time. As a result of failure by the APPELLANT to fulfill its obligations under the agreement, YAYLA terminated the agreement and claimed its damages. There is no fault on the part of YAYLA or any claim made by YAYLA for not fulfilling the obligations under the agreement, which resulted in the breach of contract by the APPELLANT. Therefore, the APPELLANT may not claim any damages.
>
> Moreover, the APPELLANT acts with the intention of deriving unfair profit. During the first Tier Arbitration, the APPELLANT alleged that it sold the goods it has failed to deliver to YAYLA in the local market in small lots, and

> claimed damages. At this stage, it claims finance cost and rental cost. If it has sold the goods to the local market, then it is unfair to claim warehouse and finance cost. This conflict shows that the APPELLANTS claim is not true…" (§ 28)

82. It occurred to me that if Yayla's commencement of the arbitration was a renunciation which Alegrow did not accept until August 2017, then it might be argued that Alegrow could itself be held liable for repudiatory breach in failing to ship by 15 April 2017, the Contract having remained on foot in the meantime (cf *Fercometal v Mediterranean Shipping* [1989] AC 788, cited in Chitty § 24-026). However, any such case would depend on establishing that the Contract had remained on foot after the 7 April 2017 notice of arbitration; that 15 April 2017 was a reasonable time by which to require Alegrow to ship the remaining rice; and that Yayla had accepted Alegrow's failure to do so as itself being a repudiatory breach. However, Yayla advanced no such case before the Appeal Board, nor did the Board make the factual findings that would be required, and I do not consider it would be open to Yayla to advance such a case now.

83. As a result, Alegrow's acceptance of Yayla's breach by the time of Alegrow's August 2017 submissions is sufficient for it to claim damages based on Yayla's renunciation of the Contract. It is thus not necessary for me to consider the point made by Alegrow in oral submissions that the nature of Yayla's renunciation made it unnecessary for Alegrow to accept it (cf *Reichman v Beveridge* [2006] EWCA Civ 1659 and *Isabella Shipowner SA v Shagang Shipping Co Ltd ("The Aquafaith")* [2012] EWHC 1077 (Comm)).

84. The Appeal Board rejected Yayla's counterclaim on the ground that the condition of the rice was Alegrow's responsibility (Award § 6.8). However, on the footing that Yayla renounced the Contract, Alegrow may be able to recover the relevant expenditure as wasted expenditure even if it was contractually responsible for the condition of the rice. Whether or not Alegrow is actually entitled to counterclaim on this basis will depend *inter alia* on whether or not Yayla can show that Alegrow was not in a position to perform the Contract, and therefore could not have recouped this expenditure even if Yayla had not renounced the Contract (see the discussion in *Chitty* § 26-027).

85. One final question arises is whether Yayla could recover damages for simple breach of contract, given the FTT's and Appeal Board's conclusions that Alegrow was in breach of contract by failing to ship the goods. I have made the point (§ 60 above) that the Appeal Board has not to date made factual findings as to the date by which Alegrow was required to ship the goods following Yayla's waiver of the right to be delivered in accordance with the original shipment period. It would also be necessary to consider (a) whether or not Yayla advanced a case before the Appeal Board to the effect that it was entitled to damages for non-delivery, independently of its case based on time remaining 'of the essence' throughout, and (b) whether a party held to have renounced a contract may nonetheless sue for damages in respect of an accrued non-repudiatory breach by the counterparty. These matters were not canvassed before me, at least in any detail. I shall therefore hear further argument as to whether, and if so on what basis, any such issues can or should be remitted to the tribunal.

(F) CONCLUSION

86. The appeal is allowed, and the Award must be varied so as to conclude that Alegrow was not in repudiatory (or renunciatory) breach of the Contract, but that Yayla renounced the Contract by its notice of arbitration. Alegrow's counterclaim must be remitted to the tribunal, as regards both liability and quantum, as indicated in § 84 above. I shall hear further argument as to whether Yayla has any extant case of breach by Alegrow that can and should be remitted to the tribunal (§ 85 above).