Neutral Citation Number: [2016] EWCA Civ 982

Case No: A3/2015/1482

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Popplewell
[2015] EWHC 718 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2016

Before :

MASTER OF THE ROLLS
LORD JUSTICE GROSS
and
LORD JUSTICE HAMBLEN

- -

Between :

GRAND CHINA LOGISTICS HOLDING (GROUP) CO. LTD.	**Appellant**
- and -	
SPAR SHIPPING AS	**Respondent**

- -
- -

Michael Coburn QC and Josephine Davies (instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
Simon Rainey QC, Nevil Phillips and Natalie Moore (instructed by **Thomas Cooper LLP**) for the **Respondent**

Hearing dates : 15 and 16 June, 2016

- -

Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. Is charterers' failure to pay an instalment of hire punctually under a time charterparty a breach of condition, strictly so called? Or, without more, does such a failure "merely" entitle shipowners to withdraw the vessel from service under the charterparty in accordance with the express provisions of a withdrawal clause? In *The Astra* [2013] EWHC 865 (Comm); [2013] 2 All ER (Comm) 689, Flaux J held that it was a breach of condition, so not only entitling shipowners to withdraw the vessel but also to claim damages for breach of contract, extending (subject to mitigation) to loss of profit over the remaining period of the charterparty. In the present case, [2015] EWHC 718 (Comm); [2015] 1 All ER (Comm) 879, Popplewell J felt unable to follow Flaux J and came instead to the conclusion that it was not a breach of condition. The first issue on this appeal ("Issue I: The Condition Issue") raises starkly for decision the question whether Flaux J or Popplewell J was right – an issue which has, understandably, attracted much market interest and long generated conflicting observations from Judges of the highest standing.

2. There is a second principal issue on this appeal, namely whether Popplewell J was right to conclude that charterers were in renunciatory breach of the three charterparties in question ("Issue II: The Renunciation Issue").

3. Various other issues which were live before the Judge are no longer pursued and nothing need be said of them.

4. The factual history can be relatively shortly summarised and is (essentially) taken from the judgment of Popplewell J, dated 18th March, 2015 ("the judgment").

5. The Respondent, Spar Shipping AS ("Spar") was the registered owner of three supramax bulk carriers, *SPAR CAPELLA, SPAR VEGA AND SPAR DRACO* (collectively, "the vessels").

6. By three charterparties (collectively, "the charterparties") dated 5th March, 2010 on amended NYPE 1993 forms, Spar agreed to let and Grand China Shipping (Hong Kong) Co. Ltd ("GCS"), as charterers, agreed to hire, the vessels on the terms there set out.

7. The charterparties provided for guarantees to be issued by the Appellant, Grand China Logistics Holding (Group) Co Ltd ("GCL"), the parent company of GCS. Three letters of guarantee were issued on behalf of GCL, dated 25th March, 2010 ("the Guarantees").

8. The charterparties were on identical terms, save as to the rate of hire, period, delivery laycan and vessel details.

    i) The *SPAR DRACO* was chartered for minimum 35 maximum 37 months in charterers' option, with hire of US$16,500 per day payable semi-monthly in advance. The vessel was delivered into service under the charterparty on 31st May, 2010.

ii) The SPAR CAPELLA and SPAR VEGA were newbuildings at a Chinese yard and were delivered into service under their charterparties from the yard on 6th and 12th January, 2011 respectively. Those charterparties were for minimum 59 maximum 62 months in charterers' option, with hire of US$16,750 per day payable semi-monthly in advance.

9. The withdrawal clause, including an anti-technicality clause, was in the same terms in each of the charterparties and provided insofar as material as follows:

> "**11. Hire Payment**
>
> (a) Payment
>
> Payment of Hire shall be made so as to be received by the Owners or their designated payee….in United States currency, in funds available to the Owners on the due date, 15 days in advance…..… Failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever of this Charter Party, the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims they (the Owners) may otherwise have on the Charterers.
>
> At any time after the expiry of the grace period provided in Sub-clause 11(b) hereunder and while the hire is outstanding, the Owners shall, without prejudice to the liberty to withdraw, be entitled to withhold the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which the Charterers hereby indemnify the Owners, and hire shall continue to accrue and any extra expenses resulting from such withholding shall be for the Charterers' account.
>
> (b) Grace Period
>
> Where there is failure to make punctual and regular payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Charterers shall be given by the Owners 3 clear banking days …..written notice to rectify the failure, and when so rectified within those 3 days following the Owners' notice, the payment shall stand as regular and punctual.
>
> Failure by the Charterers to pay the hire within 3 days of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw as set forth in Sub-Clause 11(a) above.
>
> ….."

10. Though it will be necessary to return to the question of arrears in the payment of hire when dealing with the Renunciation Issue, for the moment it suffices to adopt the Judge's summary as to arrears and the withdrawal of the vessels (judgment, at [3]):

> " From April 2011 GCS was in arrears in payment of hire. Spar recouped some of the arrears by exercising its lien on sub freights, but there remained substantial arrears of hire on all three vessels throughout the summer of 2011 and a chronology of missed or delayed payments. Spar called on GCL for payment under the Guarantees on 16 September 2011. On 23 September 2011 Spar withdrew the SPAR CAPELLA and terminated that charterparty. On 30 September 2011 Spar withdrew the SPAR VEGA and SPAR DRACO and terminated those charterparties."

11. Spar commenced arbitration proceedings against GCS, claiming the balance of hire due under the charterparties and damages for loss of bargain in respect of the unexpired term of the charterparties. As the Judge recounted it (at [4]), shortly prior to the hearing of the arbitration GCS went into liquidation in Hong Kong and the proceedings were stayed.

12. Thereafter, the Respondent commenced these proceedings against GCL under the Guarantees. As already foreshadowed, in the judgment, Popplewell J held (at [207]) that payment of hire by GCS in accordance with cl. 11 of the charterparties was not a condition. He went on (at [215]) to conclude that GCS had renounced the charterparties:

> " …at the date of the termination notices, which are to be treated as an election to terminate the charters preserving Spar's common law right to damages for loss of bargain arising out of such termination."

13. In the event, the Judge gave judgment on the Spar claim under the Guarantees against GCL for (1) the balance due under the charterparties prior to termination; and (2) damages for loss of bargain in respect of the unexpired term of the charterparties. The total amount came to some US$25,308,320.35, plus interest. The Judge further ordered that Spar was entitled to recover from GCL its costs of the arbitration proceedings against GCS, stayed when GCS went into liquidation, in the amount of £165,000, plus interest.

14. GCL appeals to this Court, contending that the Judge erred in holding that GCS had renounced the charterparties. Spar submits that the Judge was right on the Renunciation Issue. By way of Respondent's Notice, Spar argues that judgment should have been given in its favour on the additional ground that payment of hire by GCS in accordance with cl. 11 of the charterparties was a condition – and that the Judge had erred in failing so to hold. For its part, GCL seeks to uphold the judgment on the Condition Issue. The quantum of damages (as such) is not in dispute before us.

15. Before proceeding further, I would, with respect, wish to pay tribute to both the judgment of Popplewell J in this case and that of Flaux J in *The Astra*. The thoroughness of their judgments makes it unnecessary to review the authorities at

similar length or anything like it. In similar vein, I was most grateful to both Mr Coburn QC, for GCL and Mr Rainey QC, for Spar, together with their respective teams for the quality of the assistance provided to this Court, in writing and orally. Without more ado, I turn to the principal Issues.

ISSUE I: THE CONDITION ISSUE

16. *(A) Introduction:* This Issue is concerned with the controversy as to whether the obligation to make punctual payment of hire is or is not a condition in standard form time charterparties (subject of course to any specific express wording not found in the charterparties). A "condition" (see further below) is a term any breach of which is sufficient to entitle the innocent party to terminate the contract – and claim damages for loss of bargain (or, where appropriate, reliance loss, to which further reference need not be made).

17. If, as Popplewell J held, the obligation in question was not a condition, then GCS's failure to make punctual payments of hire entitled Spar to terminate the charterparties pursuant to the express provisions of the withdrawal clause in cl. 11 thereof - so putting to an end future performance obligations and also to claim the balances due under the charterparties at the date of termination. However, mere breach of this obligation did not entitle Spar to claim damages for loss of bargain. On the Judge's reasoning, that entitlement flowed instead from GCS having renounced the charterparties. Conversely, if the obligation in question was a condition, then Spar was not only entitled to terminate the charterparties but also, on this ground alone, to claim damages for loss of bargain.

18. *(B) Terminology and classification of terms:* Pausing here, it is convenient to clarify the terminology, together with the classification of contractual terms used in this judgment. The starting point is the "seminal" analysis, as it is commonly described, of Diplock LJ (as he then was) in *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26, at pp. 69-70:

> " No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity ('It goes without saying') to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contact. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a 'condition'. So too there may be other simple contractual undertakings of which it can be predicated that *no* breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a 'warranty'.

> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties'….. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'… "

19. Intriguingly, though this third category of terms have come to be known as "innominate" (or sometimes, "intermediate") and are generally associated with Diplock LJ's analysis, Diplock LJ himself at no point referred to them as "innominate" or "intermediate". With the assistance of counsel, to whose researches I am indebted, it seems that the first reference in any authority to an "innominate" term was that contained in the judgment of Stephenson LJ in *Wickman Machine Tool Sales Ltd v L Schuler A.g.* [1972] 1 WLR 840, at p. 860, where it was described as "Anson's innominate term". Thereafter references to innominate or intermediate terms are to be found in *The Hansa Nord* [1976] QB 44, at pp. 60 and 82. Other references followed, the first in the House of Lords being that contained in Lord Wilberforce's speech in *Bremer Handelsgesellschaft Schaft m.b.h. v Vanden Avenne Izegem p.v.b.a.* [1978] 2 Lloyd's Rep. 109, at p. 113. There Lord Wilberforce spoke, in essence, of the consequences of a breach of an innominate term hinging on the "nature and gravity" of the breach. From the time of *Bunge v Tradax* [1981] 1 WLR 711 in the House of Lords (to which I return below), the description "innominate term" has been in regular use.

20. At all events, the distinction between conditions, warranties and innominate terms is succinctly set out by Prof. Andrew Burrows in para. 19(9) of the Commentary in *A Restatement Of The English Law Of Contract* (2016), at pp. 113-114:

> " A condition is a major term of the contract any breach of which entitles the innocent party to terminate the contract….. a warranty is, in contrast, a minor term of the contract such that no breach will entitle the innocent party to terminate the contract. An innominate term (sometimes referred to as an 'intermediate term') is neither a condition nor a warranty; and it would appear that most terms are now regarded as innominate. Where a term is innominate, the question as to whether the contract can be terminated turns on the seriousness of the consequences of the breach (judged at the time of the termination taking into account what has happened and is likely to happen….) rather than on the importance of the term broken…. "

As Prof. Burrows went on to observe *(loc. cit.)*, the classification of a term turns on the intention of the parties.

21. Breaches of contract entitling the innocent party to treat the contract as at an end may be classified as follows:

    i) *Breach of condition*;

    ii) *Repudiatory breach*, i.e., an *actual* breach of an innominate term where the consequences are such as to entitle the innocent party to treat the contract as at an end;

    iii) *Renunciatory breach*, i.e., an *anticipatory* breach of contract (i.e., in advance of the due date for performance), where the other party makes clear to the innocent party that it is not going to perform the contract at all *or* is going to commit a breach of a condition *or* is going to commit a breach of an innominate term and the consequences will be such as to entitle the innocent party to treat the contract as at an end; in each case here, the innocent party has an election to accept the renunciatory breach at once and to terminate the contract, without waiting for the due date of performance: see, *Burrows, op. cit.*, at pp. 116-117.

22. It will be necessary to return under Issue II to the test for deciding whether the consequences of an actual or anticipatory breach of contract (other than an actual or threatened breach of condition) are sufficiently serious to entitle the innocent party to treat the contract as at an end.

23. *(C) Dicta, decisions, commentaries and market reaction:* On this Issue, there are weighty *dicta* on both sides of the divide. As they are fully discussed in the judgment (at [92] – [207]), it will (in the main) be unnecessary to set them out here.

24. Amongst those of the opinion that the obligation to make punctual payment of hire was a condition, Lord Diplock looms large. He said so on three occasions. First, in *United Scientific Holdings v Burnley Borough Council* [1978] AC 904, at p. 924, considered by Popplewell J at [167]; secondly, in *The Afovos* [1983] 1 WLR 195, at pp. 202-203 ("…failure by the charterers in punctual payment of any instalment, however brief the delay involved may be, is made a breach of condition…"), considered by Popplewell J at [143] – [145]; thirdly, in *The Scaptrade* [1983] 2 AC 694, at pp. 702 D-E and p. 703A, considered by Popplewell J at [146] – [148]. Lord Roskill expressed similar views in *Bunge v Tradax (supra)*, at p.725 C-D, considered by Popplewell J at [158] and following. Subsequently, in *Stocznia Gdanska v Latvian Shipping Co & Others* [2002] EWCA Civ 889; [2002] 2 All ER Comm 768, at [80], Rix LJ said this:

> " Although the point has not been decided and is perhaps controversial, there must be a good argument that it follows that the express right to withdraw in the case of unpunctual payment …[of hire]… is a condition of the contract, breach of which is itself repudiatory. "

    As to this last observation, see Popplewell J, at [172] – [173].

25. On the other side of the divide, there is a likewise formidable array of persuasive *dicta*, suggesting that the obligation in question is *not* a condition. In *The Georgios*

C [1971] 1 QB 488, at p. 494 E-H, Donaldson J (as he then was) said that in relation to payment of hire under a time charterparty, time was of the essence:

> " ….only in the sense that there is a breach of contract if payment is a moment late. It is not of the essence of the contract in the sense that late payment goes to the root of the contract and is a repudiating breach giving rise to a common law right in the owners to treat the contract as at an end. "

When the case (with commendable expedition) came before the Court of Appeal, Lord Denning MR's observations, at p. 504 D-G, were to like effect. In *The Agios Giorgis* [1976] 2 Lloyd's Rep 192, at p.202, Mocatta J was of the same view. Popplewell J dealt with these *dicta* at [115] – [119] and [129] – [131] of the judgment. For my part and in agreement with the Judge (at [132] and following), the subsequent overruling of the *Georgios C* by *The Laconia* [1977] AC 850, did not undermine the above *dicta*. *The Laconia* held that once a punctual payment of any instalment of hire had not been made, a right of withdrawal accrued to owners; unless the default was waived, charterers could not avoid the consequences by tendering an unpunctual payment. It thus reversed the decision in *The Giorgios C* - that the withdrawal clause was operative only for so long as hire remained unpaid - but left the *dicta* in question unaffected.

26. In *The Kos* [2012] UKSC 17; [2012] 2 AC 164, Lord Sumption JSC said this (at [7]):

> " ….It is axiomatic that a withdrawal clause operates at the election of owners, and not automatically. Two main consequences follow from this. The first is that owners will not exercise their right of withdrawal unless it is in their commercial interest to do so. Usually, this will be because market rates of hire have risen. But it may be in owners' interest to withdraw the vessel even if they have not risen, for example, where the charterers are insolvent or owners depend on prompt payment to fund payments under a head charter or charterers' payment record occasions administrative or other difficulties. The second consequence is that any failure on the part of the charterers to pay hire when it falls due will not of itself entitle the owners to damages representing the loss of the bargain or the expenses of termination simply because the owners respond by withdrawing the vessel. This is because the non-payment does not itself destroy the bargain or occasion the expenses, unless in the circumstances it is a repudiation which owners have accepted as such…."

Lord Mance JSC, at [52], spoke to the same effect; it was accepted

> " ….that the mere late payment of one instalment did not constitute a repudiatory breach (or a breach of a condition…) which could entitle the owners to damages for loss of the charter. That loss flowed from the owners' exercise of their option to withdraw…."

Popplewell J dealt with the *Kos* litigation at [151] – [153], fairly noting that in the Supreme Court it had not been argued that a failure to pay hire punctually was a repudiation; indeed, in the Commercial Court, before Andrew Smith J, ([2009] EWHC 1843 (Comm); [2010] 1 All ER (Comm) 669) the repudiation argument had been positively disclaimed. For completeness, it is worth noting the reference by Andrew Smith J (at [37]) to the "general view" of the market that punctual payment of hire was not a condition.

27. It would be invidious to seek to "weigh" all these conflicting, *obiter dicta*, from Judges of great eminence and experience in this field – and I shall not attempt to do so. They are, however, instructive as to the views of the Judges in question and fortify the rival arguments, provided it is kept in mind that the Issue was not before them for decision and that these observations remain *dicta*, not *ratio.*

28. I turn to the only decision on this point, prior to those of Flaux and Popplewell JJ, namely *The Brimnes* [1973] 1 WLR 386, before Brandon J (as he then was) at first instance. The various contentions before Brandon J and the decision of the Court of Appeal ([1975] QB 929) are discussed at length in the judgment (at [120] – [128]) and need not be repeated here. The question whether punctual payment of hire was a condition of the charterparty in question was determined – as part of the *ratio* of the decision – by Brandon J, as both Popplewell J and Flaux J (in *The Astra*) rightly held. It does not appear that this Issue was ventilated in the Court of Appeal, though Popplewell J observed (at [128]) that the silence of a "strong Court of Appeal" (Edmund Davies, Megaw and Cairns LJJ) involved "at least implicit approval" of Brandon J's decision.

29. The argument before Brandon J on this Issue began with a concession by Mr Anthony Evans QC (as he then was) for the owners (at p.407) that *The Georgios C (supra)* was binding on the Judge. Nonetheless, Mr Evans sought to distinguish the clause in the charterparty before the court from that found in *The Georgios C* and it is plain that the decision did not simply entail "nodding through" *The Georgios C.* In resisting owners' case, Mr Robert Goff QC (as he then was) for charterers, submitted (*inter alia)*, at p. 408, "…that reservation of an express right of withdrawal for failure to pay hire tended to show that the obligation was not otherwise of such a character as to be an essential term". Brandon J expressed his decision in these terms (at p.408):

> " I have considered these arguments carefully and I have reached the conclusion that there is nothing in clause 5 which shows clearly that the parties intended the obligation to pay hire punctually to be an essential term of the contract, as distinct from being a term for breach of which an express right to withdraw was given….."

In a nutshell therefore, *The Brimnes* at first instance is *a* decision on this Issue and the only decision prior to those of Flaux and Popplewell JJ. It is plainly entitled to considerable respect, though (1) it is not binding on this Court and (2) its authority is necessarily weakened by Mr Evans' understandable concession.

30. I turn to the decision of Flaux J in *The Astra (supra).* The matter came before the Commercial Court by way of an appeal from an arbitration tribunal under s.69 of the Arbitration Act 1996. Flaux J briskly decided, at [23] – [28], that the arbitrators had

been entitled to conclude that charterers had renounced or repudiated the charterparty and that, therefore, the appeal must be dismissed. Having then dealt with another issue, irrelevant to this appeal, Flaux J turned to the present Issue, at the urging of counsel for both parties, which he analysed at length (at [34] – [121]) of his judgment.

31. For present purposes, I can go directly to Flaux J's conclusions at [109] and following. In *The Astra* charterparty, cl. 5 and the anti-technicality clause, cl. 31, were in materially similar terms to cl. 11 in the charterparties here. Flaux J gave a number of reasons for concluding (at [109]) that "…cl.5 (whether accompanied by cl 31 or not, but *a fortiori* with the addition of that provision) is a condition of the contract….". These may be summarised as follows:

    i) The wording of the clause made it clear that there was a right to withdraw whenever there was a failure to make punctual payment, irrespective of whether the breach was otherwise repudiatory. That the contract treated any such breach as sufficiently serious so as to entitle owners to terminate was "a strong indication" that it was intended that failure to pay hire promptly would go to the root of the contract and that the provision was a condition. ([109])

    ii) The general rule in mercantile contracts (though not for payment under contracts of sale) where there was a "time" provision "requiring something to be done by a certain time or payment to be made by a certain time" was that time was of the essence. The obligation to pay hire punctually was such a provision. The presence of an anti-technicality clause provided a valid ground for distinguishing *The Astra* from the decision of Brandon J in *The Brimnes.* However, even apart from the anti-technicality clause, Flaux J would not have followed the decision of Brandon J. In this regard, Flaux J relied, first, on the *dicta* already set out from the House of Lords favouring the clause being treated as a condition; secondly, on the fact that Brandon J relied on the decision in *The Georgios C*, which itself had been overruled by *The Laconia*; and, thirdly, that the wording of the clauses differed. ([110] – [114])

    iii) The importance to businessmen of certainty in commercial transactions. If the obligation was not a condition, then, in a falling market, owners would be in a "position of uncertainty" as to whether to withdraw the vessel until such time as they were in a position to say that charterers were in repudiatory breach. That "wait and see" approach to a breach of charterparty was "inimical to certainty". ([115] – [116])

    iv) In addition to the supportive *dicta* in the House of Lords, Flaux J relied on the observations of Rix LJ in *Stocznia Gdanska (supra)*, at [80] and those of Moore-Bick LJ in *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27, at [14] – [20] (to which I shall come in due course).

32. Popplewell J's conclusions and analysis are to be found at [188] and following in the judgment. He started (at [190]) with the approach that a contractual termination clause should be treated "as an option to cancel which does not confer greater rights to damages at common law than would exist apart from the clause unless there is clear language to that effect". There was no such clear language in the charterparties. Nor was cl. 11 drafted in terms that "it was to be treated as a condition or that time of payment was to be of the essence…" ([192]). The anti-technicality clause in cl. 11(b)

did not detract from this analysis. Accordingly, Popplewell J rejected the submission that the effect of the withdrawal clause was to make payment of hire a condition.

33. The critical question ([194]) was whether payment of hire would be treated as a condition in the absence of the withdrawal clause. A number of considerations suggested to the Judge that it would not. First (at [195]):

> " ….there is force in the point which formed part of the successful argument of Mr Robert Goff QC ….in *The Brimnes*, that provision for an express right of withdrawal for failure to pay hire tends to show that the obligation was not otherwise of such a character as to be a condition. The very inclusion of the contractual right of withdrawal for non-payment of hire suggests that in its absence there would be no such right. Such a provision would be otiose if the owner had the right at common law to put an end to the contract for any default in payment of hire as a breach of condition…. "

34. Secondly (at [196]), the Judge concluded that the presumption in mercantile contracts was that stipulations as to time of payment were <u>not</u> to be treated as conditions – absent a contrary indication in the contract, of which there were none here.

35. Thirdly (at [197]), "predicated breaches of the term may range from the trivial to the serious." In this respect, the payment term carried "the hallmarks" of an innominate term. As the Judge expressed it:

> " Absent considerations of commercial certainty which dictate a different result, the general approach should be that where predicated breaches of a term may have consequences ranging from the trivial to the serous, that is a strong indication that it is to be treated as an innominate term."

36. Fourthly (at [198]), Popplewell J said that he could not "conceive that in the absence of a contractual withdrawal clause, owners and charterers should be taken to have intended that a payment of hire a few minutes late would entitle the owners to throw up a five-year charter." The importance to owners of punctual advance payment was a good reason for giving "a stringent interpretation to a contractual option to cancel", provided the parties had bargained for such an option in clear terms. Such factors might also:

> " …colour the approach to the factual inquiry whether the default deprives the shipowner of substantially the whole benefit of the contract, and may justify setting the bar at which non-payment is repudiatory or renunciatory at a lower level than would be the case in relation to payment obligations under contracts of a different nature…"

They did not however justify treating *any* failure to pay hire as a breach of condition.

37. Fifthly (at [199]), considerations of commercial certainty did not point to a different conclusion and, in any event, had to be weighed against the need not impose liability

for a trivial breach in undeserving cases. In any event (at [200]), a "very considerable measure of certainty" was conferred by the withdrawal clause itself as an option to cancel. It was significant (at [201]) that the decision in *The Brimnes* had been generally accepted in the market until the decision in *The Astra* – even if the point was not free from controversy. The NYPE, Baltime and Shelltime forms of time charterparty had not been altered to make clear that payment of hire was a condition. Markets, as the Judge pointed out, had not been on "an uninterrupted rise" over this period but had risen and fallen in cycles.

38. Thereafter, at [202] – [206], the Judge responded to each of Flaux J's reasons in *The Astra* (set out above) for concluding that punctual payment of hire was a condition of such charterparties. Essentially, Popplewell J disagreed with each of those reasons on the bases already foreshadowed in the above summary of his conclusions.

39. Following the decision in *The Astra* and, subsequently, the judgment in this case, there has been a considerable literature in legal and industry circles. Broadly (though with at least one notable exception), the writings have expressed surprise and concern at the decision in *The Astra* and have welcomed the judgment of Popplewell J. With respect to those contributions not mentioned here, it is only necessary to refer to the following articles, textbooks and developments:

    i) The 7th ed. of *Wilford* on *Time Charters* (2014) was published after the decision in *The Astra* but before the judgment of Popplewell J. At paras. 16.128 and following, this standard work addresses the question of whether the obligation to pay hire punctually is a condition. At para. 16.130, questions are raised as to the reasoning of Flaux J in *The Astra*. Pausing there, *Wilford* refers to Flaux J's "*obiter* conclusion" that cl. 5 was a condition; with respect and insofar as it matters, I am unable to agree that the Judge's conclusion was "*obiter*". Be that as it may, *Wilford* concludes this discussion (at para. 16.131) by observing that "Flaux J's *obiter* comments have given rise to uncertainty as to whether Clause 5 is a condition which will remain….until the point is decided by the Court of Appeal".

    ii) The 23rd ed. of *Scrutton On Charterparties and Bills of Lading* (2015), post-dates the judgments of both Flaux and Popplewell JJ. At para. 17-023, fn. 91, the view is expressed that "Although the matter is clearly contentious….we would respectfully suggest that the analysis of Popplewell J is to be preferred and that the obligation to pay hire is not a condition."

    iii) A notable contrary view, with respect, is that expressed by Lord Phillips of Worth Matravers, in *The Cedric Barclay Lecture 2015*, at pp. 26 and following. At p. 30, Lord Phillips acknowledged that in *The Kos* he was himself party to the decision and expressed agreement with Lord Sumption's judgment; however, "…the relevant observations were made without reference to authority in circumstances where the owners had conceded that the obligation to pay hire was not a condition". Lord Phillips went on to say that his "current view" (later described as his "provisional view") was that the judgment of Flaux J was to be preferred. Focusing on the position where the market has fallen since the vessel was fixed, Lord Phillips describes the right to withdraw as "worthless" (at p.34) in a falling market; against this background, the reason for preferring Flaux J's judgment was "…because the

judgment of Popplewell J does not lead to a sensible commercial result" (at p.30). Conversely, if the obligation to pay hire punctually was a condition, it would accord with the objective of imposing a sanction "so draconian" that it would induce charterers to make quite sure that hire payments (of great importance to ship owners) were made on time.

iv) In a Case Note entitled "*Withdrawal for late payment of hire under a charterparty*" (2016) 132 LQR 177, Prof. Edwin Peel has expressed a preference for the decision and reasons of Popplewell J in the present case. First (at p.179), the express right to withdraw for late payment, rather than suggesting that the term was a condition, pointed much more obviously to the conclusion that, in its absence, the parties understood that timely payment of hire was not a condition. Secondly (at pp. 179-180), the inclusion of an anti-technicality clause did not support the argument that the term was a condition; it was much more obviously explained as "intended to mitigate the severity of the right of withdrawal…". Thirdly (at pp. 181-182), commercial certainty was an important consideration. However, if the term is indeed a condition, loss of bargain damages would not only be available against the "recalcitrant" charterer but against any charterer "guilty of late payment, however minor", subject to the mitigating effect of an anti-technicality clause. If they so wanted, the parties could always, by appropriate language make it clear that the term was a condition, for example by expressly making timely payment "of the essence".

v) It should be noted that cl. 11 of the *NYPE 2015* form of time charterparty has been amended in the light of *The Astra* (but prior to the judgment of Popplewell J) to give owners an express entitlement to loss of bargain damages for the remainder of the charterparty should they withdraw the vessel. Perhaps significantly, however, The Charterers P&I Club, in its Circular to Assureds (no. 004 2015), while acknowledging the certainty provided by the amended clause goes on to say that "charterers would be advised to reject or amend this wording where commercially possible".

40. *(D) Discussion:* The various strands of Issue I may conveniently be addressed under the following headings:

i) The express option to terminate;

ii) Ascertaining whether a clause is a condition;

iii) General presumptions as to time being of the essence;

iv) The anti-technicality clause;

v) Certainty;

vi) Market reaction.

41. *(1) The express option to terminate:* There is no doubting the longstanding importance of the punctual payment of hire in advance under a time charterparty. As

Lord Wright said in *Tankexpress A/S v Compagnie Financiere Belge Des Petroles S.A., The Petrofina* [1949] AC 76, at pp. 94-95:

> " The importance of this advance payment to be made by the charterers, is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have the periodical payment as stipulated in advance of his performance so long as the charterparty continues. Hence the stringency of the right to cancel."

42. A time charterparty is a contract for services; the owner provides the services of the master and crew in sailing the ship for charterers' purposes: see, *The Laconia, supra,* at p.870, *per* Lord Wilberforce. There were, as Lord Wilberforce observed (*ibid*), very good reasons "…why the charterer should punctiliously comply with the provisions as to the payment of hire…" As Mr Hobhouse QC (as he then was) submitted in the same case (at p.854), "…the owner puts the profit earning capacity of the ship at the disposal of the charterer….The shipowner is not obliged to perform the services on credit; he does so only against advance payment."

43. In *The Scaptrade (supra),* Lord Diplock encapsulated the thinking on this matter (at p. 702):

> " Hire is payable in advance in order to provide a fund from which the shipowner can meet those expenses of rendering the promised services to the charterer that he has undertaken to bear himself under the charterparty; in particular the wages and victualling of master and crew, the insurance of the vessel and her maintenance in such a state as will enable her to continue to comply with the warranty of performance. "

44. In the judgment, Popplewell J (at [135]), rightly in my view, suggested two further reasons why advance payment of hire under a time charterparty might be of importance to shipowners: (1) mortgage and financing commitments; (2) the fact that there might be a string of charters, sometimes on back to back terms.

45. Notwithstanding the importance of the timely payment of hire, it was by no means clearcut (see, for example, *The Petrofina, supra,* at p.90) that breach of that obligation entitled shipowners to withdraw the vessel from time charterparty service. Instead, it appears that the express right of withdrawal became a feature of time charterparties to make it impossible "that there should be any discussion about the matter": *Leslie Shipping Co. v Welstead* [1921] 3 KB 420, at p. 426 (*per* Greer J). As Mocatta J observed in *The Agios Giorgis (supra),* at p.202, if timely payment of hire was a *condition*, "…there would have been no relevance in this comment". It will be recollected that the argument of Mr Robert Goff QC in *The Brimnes (supra),* at p.408 (set out above), was to the like effect. Popplewell J was of the same view: judgment, at [194] – [195]. See too, Prof. Peel, *supra*.

46. As it seems to me, the history of the matter points to the development of withdrawal clauses to put beyond argument shipowners' entitlement to terminate the charterparty where charterers had failed to make a timely payment of hire. If that is right, then the

argument that the punctual payment of hire is a condition because of the inclusion of an express withdrawal clause, begs the question as to the consequences intended by the parties to flow from the exercise of the contractual termination clause. In *The Laconia (supra)*, at p.870, though admittedly not addressing this point, Lord Wilberforce succinctly observed "…all that the withdrawal clause does is to entitle the owner to cease providing the services….". In short, the withdrawal clause furnishes owners with an express contractual option to terminate the charterparty on the occurrence of the event/s specified in the clause. Given the history, however, it is a leap too far to argue from the mere presence of an express withdrawal clause to the conclusion that the punctual payment of hire is a condition.

47. Further, insofar as it was contended that the logical corollary of Diplock LJ's analysis in *Hongkong Fir* (set out above) was that if the contract provides for a right to terminate, that is a very strong indication that the term is condition, I respectfully disagree and part company with Flaux J (*The Astra*, at [109]). In my judgment, Popplewell J was right to say (at [155] and [202]) that such an approach stands the passage from Diplock LJ's judgment on its head. The judgment of Diplock LJ postulated that where it can be predicated that "every breach" of a term "must give rise to an event which will deprive the [innocent] party …of substantially the whole benefit" of the contract, *then* the term would be classified as a condition, with the right to treat the contract as at an end and claim loss of bargain damages. Diplock LJ's judgment neither stated nor implied that the mere inclusion of an express contractual termination option, exercisable on the occurrence of a breach of an obligation thereunder, indicates that the obligation in question is a condition. It might or might not be. The simple and important point to keep in mind is that all conditions entitle the innocent party to terminate the contract – but not all contractual termination clauses are conferred for breaches of condition alone.

48. For completeness, two authorities from different contexts lend support to the view that the question of whether an express termination clause amounts to no more than a contractual option to terminate or is triggered by a breach of condition, depends on the contract and context in question.

49. The first is *Financings Ltd v Baldock* [1963] 2 QB 104, concerning a hire-purchase agreement. The hirer failed to pay the first two instalments; the owners terminated the agreement, pursuant to an express contractual termination clause and re-took the vehicle. This Court held that the hirer had not repudiated the agreement and the owners were not entitled to loss of bargain damages. The case thus furnishes an example of an express contractual termination clause which did not disclose an anterior breach of condition. Whether a termination clause simply defined the events which of themselves or at the option of one or other of the parties brings a contract to an end and relieves both parties from their undertakings further to perform their obligations thereunder *or* whether it did more than that and conferred other rights and remedies on either party, depended on the true construction of the relevant provision: Diplock LJ, at pp. 120-121.

50. Too much cannot be made of *Financings v Baldock.* First, the contract was very different from the charterparties with which we are concerned, as was the context. Secondly, the events triggering termination were not confined to breaches of contract. All that said, the decision furnishes some support for the approach I favour when considering the presence of the express right to terminate in cl. 11 of the

charterparties. Thus, Popplewell J, at [104], after helpfully summarising the differences between that case and this, added that *Financings v Baldock* illustrated "…that the mere fact that a contractual right of termination is conferred for any breach of a term, however trivial, does not answer the question whether the term is a condition". (See too, at [97] of the judgment.)

51. The second decision is *Stocznia Gdynia (supra)*, concerning a shipbuilding dispute. The purchaser terminated the contracts in question, relying on an express contractual termination clause. The Judge held that by exercising its rights under that clause, the purchaser had affirmed the contracts and had lost its right to treat them as repudiated. This court allowed the purchaser's appeal and held that it was entitled to damages for loss of bargain. The question was one of construction of the contracts in question: see the judgment of Moore-Bick LJ, at [12] – [20]. As Moore-Bick LJ explained (at [16]):

> "The nature of the circumstances giving rise to Gearbulk's right to terminate, therefore, was in all cases a serious breach by the yard of its obligations and that, together with the provision for payment of liquidated damages for less serious breaches, provides a strong indication that if the right were exercised the parties intended that Gearbulk should have a right to recover any losses it might have suffered as a result of the loss of its bargain."

The contrast with *Financings v Baldock* is readily apparent from this passage (termination only upon serious breach and liquidated damages for less serious breaches) and leads conveniently to a consideration of the construction of contracts more generally.

52. *(2) Ascertaining whether a clause is a condition:* Building on Diplock LJ's analysis in *Hongkong Fir, Bunge v Tradax (supra)* contains, with respect, helpful general guidance as to whether a term of a contract is to be classified as a condition.

i) First, the question was one of ascertaining the intentions of the parties and thus of the true construction of the contract: As Lord Scarman put it (at p.717):

> " The first question is always, therefore, whether upon the true construction of a stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty."

It follows that where on the true construction of the contract a term was to be classified as a condition, then it was unnecessary and inappropriate to explore the gravity of the breach; it was open to the parties to agree that any breach of a particular obligation (regardless of its gravity) would entitle the innocent party to treat the contract as at an end: Lord Wilberforce, at pp. 715 - 716.

ii) Secondly (Lord Scarman, at p.717), if, on the true construction of the contract, the parties have not made a particular term a condition and if the breach of that term may result in trivial, minor or very grave consequences, then the term is innominate.

iii) Thirdly (Lord Wilberforce, at pp. 715 – 716, Lord Scarman, at p.717, Lord Roskill at p.727), unless the contract made it clear that a particular stipulation was a condition or only a warranty, it was to be treated as an innominate term; the courts should not be too ready to interpret contractual clauses as conditions.

53. All authorities must of course be considered in context. In *Bunge v Tradax* the buyers' obligation was to give 15 days' loading notice; until that notice had been given, the sellers could not nominate the loading port, which it was their right to do. As summarised by Popplewell J (at [166]) a most important feature of that case ("the most important single factor", *per* Lord Roskill, at p. 729) was that the terms in question were inter-dependent:

> " performance of the nomination by the buyers was necessary in order to enable the sellers to fulfil their obligation to nominate the loading port and ship the goods. It was therefore an example of a case in which performance of the relevant term by one party was a condition precedent to the ability of the other party to perform another term which was itself a condition."

Further and with regard to the term under consideration, only one kind of breach was possible: namely, to be late (Lord Wilberforce, at p. 715). Accordingly, the term – which was <u>not</u> a payment term – was a stipulation as to time and, in a context which carefully choreographed the sequence of actions required, there was room to invoke the presumption that, in general, time was of the essence in mercantile contracts.

54. In the present case, cl. 11 of the charterparties with which we are concerned, <u>is</u> a payment term. Further and without diminishing in any way the over-arching importance of the punctual payment of hire in advance to the scheme of the charterparties, compliance by GCS with cl. 11 was not a condition precedent to the performance by Spar of their obligations under the charterparties in the same *direct* or *immediate* sense that the terms were inter-dependent in *Bunge v Tradax*. Put another way, it could not be said that *any* failure to pay hire punctually in advance, no matter how trivial, would derail Spar's performance under the charterparties. For present purposes, the most pertinent guidance from *Bunge v Tradax* is the need not to be "too ready" to interpret cl. 11 as a condition - indeed only to do so if the charterparties, on their true construction, made it clear that cl. 11 was to be so classified.

55. For my part, such clarity as to cl. 11 being a condition does not emerge from the true construction of the charterparties. Thus cl. 11 does not expressly make time of the essence. Nor does cl. 11 spell out the consequences of breach and, in this respect, is to be contrasted with the *NYPE 2015* form of charterparty, noted above. Furthermore, though I return to this consideration below when addressing "certainty", it is readily apparent that the consequences of a breach of cl. 11 can vary dramatically – from the trivial to the grave; in such circumstances it is one thing to give effect to an express contractual termination clause but quite another to treat that clause as a condition.

56. *(3) General presumptions as to time being of the essence:* For two reasons, I am not persuaded that any general presumption as to time being of the essence in mercantile (or commercial) contracts is of significance or assistance in the present case. First, in

the specific, detailed and specialist context of the payment of hire under time charterparties, there could only be limited scope for general presumptions. As already indicated, the charterparties, on their true construction, do not make it clear that cl. 11 is to be classified as a condition. If that be right, then a general presumption as to time being of the essence (even if applicable) would not produce a different conclusion. Secondly, as it seems to me, any presumption that time is generally of the essence in mercantile (or commercial) contracts does not generally apply to the time of payment, unless a different intention appears from the terms of the contract: see, Christopher Clarke J (as he then was) in *Dalkia Utilities v Celtech* [2006] EWHC 63 (Comm); [2006] 1 Lloyd's Rep. 599, at [130]. In this regard, I accept Mr Coburn's submission that s.10 of the *Sale of Goods Act 1979* is an instance of time of payment not being of the essence, rather than an exception to the general position as to time of payment. On this point too, I respectfully prefer the conclusions of Popplewell J (see, for example at [203]) to those of Flaux J.

57. *(4) The anti-technicality clause:* I am wholly unable to accept the submission that the anti-technicality clause (cl. 11(b)) strengthens the case for the timely payment of hire being a condition of the charterparties. To my mind, the anti-technicality clause does no more and no less than that which is expressed in cl. 11(b): where the failure to make punctual and regular payment of hire is due to one or more of the specified causes, namely, "oversight, negligence, error or omissions" on the part of charterers or their bankers, then charterers enjoy a "Grace Period" of 3 days to remedy the failure, following notice from owners to do so. Anti-technicality clauses were developed by the market to protect charterers from the serious consequences of a withdrawal, essentially in the case of a failure to pay hire on "technical grounds" (as aptly expressed by Flaux J, in *The Astra*, at [111]); they were not devised, with respect and contrary to Flaux J's views at [111] – [113] of *The Astra*, to make time for payment of the essence. It is correct that the presence of an anti-technicality clause would mitigate some of the worst hardship were the obligation a condition – in the sense that a truly "accidental" failure to pay a single instalment of hire by 5 minutes would very likely come within an anti-technicality clause. However, that is a point of, at the most, marginal significance; the argument that the timely payment of hire is a condition must acknowledge that the briefest failure to pay a single instalment of hire punctually, falling just outside the terms of an anti-technicality clause, would entitle owners to terminate a long-term charterparty and claim damages for loss of bargain.

58. *(5) Certainty:* Certainty is plainly a consideration of major importance when construing commercial contracts such as the charterparties here. That it should be so is both a matter of legal principle and commercial common sense - having regard to the importance of the framework provided by commercial law for commercial decision-taking. In my judgment, it would be quite wrong to overlook commercial common sense, even recognising that its claims can be over-stated and its application vulnerable to the particular perspective of the party espousing them (see, *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, at [17] – [20], *per* Lord Neuberger of Abbotsbury PSC; Sir Bernard Eder, 33rd Donald O' May Lecture, *The Construction of Shipping and Marine Insurance Contracts: why is it so difficult?* [2016] LMCLQ 220, esp. at pp. 228 and following).

59. The key question, however, is striking the right balance. Classifying a contractual provision as a condition has advantages in terms of certainty; in particular, the innocent party is entitled to loss of bargain damages (such as they may be) regardless of the state of the market. Where, however, the likely breaches of an obligation may have consequences ranging from the trivial to the serious, then the downside of the certainty achieved by classifying an obligation as a condition is that trivial breaches will have disproportionate consequences. In a time charterparty, it is only necessary to contemplate a 5 minute delay in the payment of a single instalment of hire, for whatever reason not covered by an anti-technicality clause. In *Bunge v Tradax*, Lord Roskill, at p.727, expressed this concern as to balance as follows:

> " ….always bearing in mind on the one hand the need for certainty and on the other the desirability of not, when legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy."

60. Where the question arises as to the classification of an obligation breach whereof triggers a contractual termination clause, the achievement of the appropriate balance calls for a still more nuanced approach, as Popplewell J, with respect, perceptively observed (at [161]):

> " It is to be noted that the balance between the need for certainty and the undesirability of treating trivial breaches as carrying the consequences of breaches of condition requires a more nuanced approach where there is a contractual termination clause. In such circumstances the desideratum of certainty may be fulfilled by the contractual right to put an end to the future performance obligations without the full common law consequences of repudiation attaching…."

61. In the present context, Lord Phillips (in the *Cedric Barclay Lecture 2015*) was, with respect, right to say that classification of the obligation to pay hire punctually in advance as a condition, would achieve the greatest certainty. It would avoid the difficulty faced by owners on a falling market of awaiting events to see whether charterers' conduct was repudiatory/ renunciatory before withdrawing the vessel. That said, considerable certainty *is* achieved under the present case law (*The Laconia* and subsequent authorities) by a stringent application of the termination provisions entitling owners to withdraw a vessel where charterers have not made a timely payment of hire. On a rising market, treating the withdrawal clause as no more than a contractual termination option, plainly does achieve a sensible commercial result. So too, in my view, on a flat market. Nor, with great respect, am I able to accept that in a falling market the right to withdraw is "worthless", so that the approach favoured by Popplewell J does not lead to a sensible commercial result. As will be recollected, in *The Kos (supra)*, Lord Sumption remarked (at [7]) that it may be in owners' commercial interests to withdraw the vessel even when market rates have not risen "…for example, where the charterers are insolvent or owners depend on prompt payment to fund payments under a head charter or charterers' payment record occasions administrative or other difficulties."

62. To my mind, the real question lies not between certainty and no certainty but as to the degree of certainty best likely to achieve the right balance of which I have already made mention and to which Lord Roskill referred in *Bunge v Tradax*. In company with the Judge (at [198]), albeit reformulating his observations somewhat, I cannot conceive that the parties intended the withdrawal clause in cl.11 of the charterparties to operate so that a single payment of hire a few minutes late would entitle Spar to throw up a five- or three-year charterparty and claim loss of bargain damages. For my part, therefore, I am not persuaded that considerations of certainty require the obligation to pay hire punctually and in advance under the charterparties to be classified as a condition. The trade-off between the attractions of certainty and the undesirability of trivial breaches carrying the consequences of a breach of condition is most acceptably achieved by treating cl. 11 as a contractual termination option.

63. *(6) Market reaction:* While the question "condition or not?" has long been controversial, I agree that the "general view" of the market (Andrew Smith J, in *The Kos, supra*) has been that the obligation to make timely payments of hire was not a condition. As Popplewell J observed (at [201]), between the decisions in *The Brimnes* and *The Astra*, the major standard forms of time charterparty had not been amended to turn the obligation into a condition nor (as far as I too am aware) was there any regular practice of including bespoke terms to that effect in time charterparties. In my judgment, that is telling. So too, has been the surprise expressed in the literature at the decision in *The Astra*, together with the sense of reassurance furnished by the decision of Popplewell J in the present case. It certainly does not appear to me that the market requires the payment of hire to be a condition – and, in any event, such a result could be simply achieved by appropriate express wording if that was thought desirable.

64. *(E) Conclusions on Issue I:* In coming to my conclusions, I am conscious that on this Issue they involve rejection of Mr Rainey's formidable submissions for Spar, in particular his most helpful list of ten numbered propositions, all of which I have carefully weighed. I am also conscious of departing to some extent from the Judge's stated approach of considering how the matter would have stood *absent* a withdrawal clause (judgment at [194] and following) – though I think there is less to this point than Mr Rainey submitted, in that much of the Judge's reasoning was not in fact premised or did not hinge on the absence of a withdrawal clause (see, [196], [197], [199] and following). Ultimately, however, I am firmly of the view that Popplewell J came to the correct conclusion and that the obligation to make punctual payment of hire is not a condition of the charterparties.

65. Pulling the threads together, for both historical and analytical reasons, I was not persuaded that the inclusion of the express withdrawal clause provided a strong or any indication that cl. 11 of the charterparties was a condition. As a matter of contractual construction, the charterparties did not make it clear that cl. 11 was to be categorised as a condition. Considerations of certainty, most important though they are, did not sway me from this conclusion, in particular given the significant certainty achieved by cl. 11 as a contractual termination option, *simpliciter* and the fact that breaches of cl. 11 could range from the trivial to the grave; greater certainty would be achieved by categorising cl. 11 as a condition but at a cost of disproportionate consequences flowing from trivial breaches – in my view, an unsatisfactory balance. I sense that market reaction is generally supportive of the decision of the Judge on Issue I in this

case and view it as reassuring. I do not regard as significant the arguments advanced on the basis of a general presumption as to time being of the essence in mercantile contracts or those which relied on the anti-technicality clause. For my part, I would reject Spar's arguments on Issue I and I would respectfully hold that *The Astra* was wrongly decided on this Issue.

ISSUE II: THE RENUNCIATION ISSUE

66. *(A) Overview:* Popplewell J dealt succinctly with this Issue at [208] – [215] of the judgment. He concluded that GCS had renounced the charterparties. Given that no criticism could realistically be made of the test adopted by the Judge, Mr Coburn's challenge essentially focused on the Judge's application of that test. As to the facts, the Judge had been too cynical and should have been more "sympathetic" to GCS. Mr Rainey submitted that this Issue, necessarily fact specific, raised no point of principle. This Court should think long and hard before interfering with the Judge's decision. As will be appreciated, provided only that Popplewell J was right on Issue II, the appeal must be dismissed regardless of the outcome on Issue I.

67. *(B) The judgment:* Popplewell J began with a summary of the legal principles (at [208]):

> " (1) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract. Although different formulations or metaphors have been used, notably whether the breach goes to the root of the contract, these are merely different ways of expressing the 'substantially the whole benefit' test: *Hongkong Fir*…at 66, 72; *The Nanfri* …[1979] AC 757, at 778-779.
>
> (2) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory….
>
> (3) Evincing an intention to perform but in a manner which is substantially inconsistent with the contractual terms is evincing an intention not to perform: *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 at 72. Whether such conduct is renunciatory depends upon whether the threatened difference in performance is repudiatory…..
>
> (4) An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. As Devlin J put it in *Universal Cargo Carriers Corpn v Citati* ....[1957] 2 QB 401 at 437, to say: 'I would like to but I cannot' negatives intent just as much as 'I will not'."

68. Popplewell J went on to observe (at [209]) that actual breaches which might be insufficient to amount to a repudiation might nevertheless constitute a renunciation "…because it would lead the reasonable observer to conclude that there was an intention not to perform in the future, and the past and threatened future breaches taken together would be repudiatory…". The reason why a defaulting party committed an actual breach might be "highly relevant to what such breach would lead the reasonable observer to conclude about the defaulting party's intentions in relation to future performance" and therefore to the issue of renunciation. The defaulting party's intention might be "objectively evinced both by past breaches and by other words and conduct."

69. Next, the Judge summarised the factual position at the dates of the withdrawal of the vessels on 23rd an 30th September, 2011. He said this (at [210]):

> " (1) GCS had regularly failed to pay hire punctually since mid-April 2011, a period of over five months. Almost all payments on all three Vessels were unpaid when they fell due. Some were not paid at all, others only months after they fell due. In those months, only in July were instalments paid on time or within a few days of falling due.
>
> (2) For most of the period the arrears fluctuated between about US$1.5m and US$2.5m, and would have been up to US$1m more but for the exercise by Spar of its lien on sub-hire/sub-freights. If one takes a total of US$2m as a very rough average, this is broadly equivalent to about eight instalments over the three vessels; individually the arrears of hire for the Vessels fluctuated between about one and four instalments.
>
> (3) GCS had made clear that non-payment was due to cash flow difficulties caused by the fall in the market which rendered it unable to meet its hire obligations to all the owners of its chartered fleet. Since June it had repeatedly said that it expected cash injection from its parent which would enable it to make punctual payments and pay off the arrears. Despite such indications it continued to fail to make punctual payments on all three Vessels. It twice promised to pay off half the arrears by 31 August but failed to do so.
>
> (4) By the beginning of September GCS was emphasising its cash flow difficulties, providing no concrete payment proposal, and suggesting that it would merely pass on sub-hires when received, which in a market which had substantially fallen since the date of the charterparties was bound to amount to a significant shortfall on the hire due to Spar. It sought to excuse non-payment of a SPAR DRACO instalment by saying that sub-charterers had not paid the sub-hire, suggesting that it would only (part) perform its hire obligations on each vessel if timeously paid the (insufficient) sub hire, an approach aptly described by Spar as hand to mouth.

> (5) At no stage did GCS provide any detail of what amounts were expected to be received from its parent, or when; or of how any such receipts would be allocated amongst competing creditor shipowners. It provided no explanation as to why its avowed expectations were unfulfilled, or why it was unable to fulfil its promise to pay off half the arrears by the end of August.
>
> (6) The only response from GCL to the request to fulfil its guarantee obligations was on 23 September 2011, when it indicated that the group was prioritising payment of bank interest over operational payments such as the hire due to Spar, and that 'financial support will come' in October. This gave no explanation of how much financial support would come in October or when in that month. It made no concrete proposal for discharge of the liabilities and belittled the amount outstanding as a 'relatively small sum.'"

70. On the basis of these facts, Popplewell J held (at [211]) that an objective observer would conclude that GCS was "unwilling, because it was unable" to pay hire punctually for the balance of the charterparty periods or to pay off the arrears – unless, which might never happen, the market rose again to above March 2010 levels. Defaults would likely be substantial in terms both of time and amounts - weeks or months and arrears of US$2m or more. In the light of "the past history of broken promises and confounded 'expectations'", the avowed capital and cash flow injection from GCL in October would "properly have been discounted" by a reasonable owner in Spar's position. It was telling that, in the arbitration, GCS had stated that it was willing to pay hire at the agreed rate but not in advance, due, *inter alia*, to its "temporary cash flow problems". The Judge observed that the objective observer would not have treated such problems as "temporary". The Judge's conclusion followed (at [212]):

> " In those circumstances GCS was objectively evincing an intention not to perform the charters in a way which deprived Spar of substantially their whole benefit."

71. The Judge considered and rejected the submission by Mr Coburn (at [213]) that, comparing the total sums payable under the charterparties with "arrears by a few instalments constituting a small proportion of the total" could not be said to be depriving Spar of substantially the whole benefit of the charterparties. The Judge (at [214]) referred to the many judicial pronouncements emphasising the importance to owners of punctual payment of hire in advance. He added this:

> " If the charterer pays not in advance, but in arrears, even in full, he is performing a substantially different bargain from that which is contained in the charterparty. In assessing repudiation stricto sensu, i.e., past breach, late payment or non-payment of several instalments may well not be repudiatory of a long term charter if, and it will usually be a big if, it casts no doubt on the ability and willingness of the charterer to pay off the arrears promptly and perform prompt payment in full in the future. In

> those circumstances a mathematical comparison of the missed payments and the total hire over the course of the charter may be appropriate. Where, however, such conduct evinces an intention not to make regular and punctual payments in the future the position is different……However described, in substance the position is that throughout the whole of the charter the charterer is getting the services on credit, without paying interest, when the bargain is that the owners should be funded in advance. "

72. *(C) The test in law:* There was no real challenge to the test adopted by the Judge (at [208]) and but for one consideration I would be content to adopt, with respect and without more, the Judge's summary of the applicable legal principles. The one consideration was that there was argument around the edges of the test, seeking to buttress the rival positions on the issue of whether the Judge had failed to apply the test correctly. In the circumstances, I venture the brief observations which follow.

73. First, it is readily apparent that there are a variety of formulations of the test for renunciation in the authorities. Thus, in *Ross T Smyth & Co. Ltd v T. D. Bailey Son & Co.* [1940] 3 All ER 60, Lord Wright put it this way (at p.72):

> " I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so in a manner substantially inconsistent with his obligations, and not in any other way. "

In *Hongkong Fir*, Diplock LJ (at p.72) in the context of repudiation, posed the question whether the events which had occurred as a result of the breach:

> " …deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings."

In *Decro-Wall International SA v Practitioners in Marketing Ltd.* [1971] 1 WLR 361, at p. 380, Buckley LJ expressed the test as follows:

> " To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract….Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages….?"

74. Secondly, although efforts have been made to seize on the difference between "substantially the whole benefit" (*Hongkong Fir*) and "a substantial part of the benefit" (*Decro-Wall*), there is less to this difference than meets the eye. As Lord Wilberforce observed, authoritatively, in *Federal Commerce v Molena Alpha (The Nanfri, Benfri and Lorfri*) [1979] AC 757, at p. 779:

> " The difference in expression between these two last formulations does not….reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to a repudiation a breach must go to the root of the contract."

For my part, I gratefully and respectfully adopt Lord Wilberforce's formulation.

75. Thirdly, although these expressions are necessarily open-textured, that is a consequence of the need to apply them in the widest range of factual circumstances. I respectfully agree with and adopt in this regard the following passage from Arden LJ's judgment in *Valilas v Januzai* [2014] EWCA Civ 436; [2015] 1 All ER Comm 1047, at [59]:

> " The common law adopts open-textured expressions for the principle used to identify the cases in which one contracting party ('the victim') can claim that the actions of the other contracting party justify the termination of the contract. I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression 'going to the root' of the contract conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar expressions. I do not myself criticise the vagueness of these various expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field. "

76. Pausing here, I acknowledge with respect Lewison LJ's criticisms in *Ampurius Nu Homes Holdings v Telford Homes* [2013] EWCA Civ 577; [2013] 4 All ER 377, at [50], that the trouble "with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean" – together with his further observation that the description of a breach "going to the root of the contract" is a "conclusory description" (citing the High Court of Australia in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, at [54]). However, in practice, such expressions are useful and readily capable of application; a search for a more precise test is unlikely to be fruitful. Further, given Diplock LJ's analysis in *Hongkong Fir*, it is perhaps not surprising that the various formulations of the test focus on the nature and gravity of the consequences of the breach and are, in that sense, conclusory.

77. Fourthly, the starting point when considering the seriousness of the anticipated breach of contract is the benefit the innocent party was intended to obtain from performance of the contract: Lewison LJ, in *Ampurius*, at [51]; *Koompahtoo*, at [55]. This intended benefit serves as the yardstick against which the divergence of the anticipated breach is to be measured. In this regard, it is important to keep in mind that a renunciation is not confined to an evinced unwillingness to perform the contract at all; an evinced unwillingness to perform the contract according to its terms (whether through inability or otherwise) may likewise amount to a renunciation if the performance proffered is substantially inconsistent with that party's obligations

thereunder: *Ross T Smyth v Bailey (supra)*. Further, renunciation may be inferred where it is apparent that the defaulting party is doing no more than procrastinating in the hope that something may turn up: *Forslind v Bechely-Crundall* 1922 SC (HL) 173, at p.191, *per* Lord Shaw of Dunfermline.

78. Fifthly, as is clear from the authorities, the test for renunciation is, *mutatis mutandis*, essentially similar to that for repudiation. However, as renunciation looks to the future, it may be inferred from both the nature and causes of past breaches (even if by themselves insufficient or irrelevant for repudiation) and the evinced unwillingness to perform in the future. As the test for repudiation has been equated with that for frustration (Diplock LJ in *Hongkong Fir*, at p.69), the same could be said of the test for renunciation; if so, then it is to be kept in mind that:

> " …frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do."
>
> Lord Radcliffe, in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, at p. 729.

Plainly, this formulation cannot be applied mechanistically to renunciation; no formulation should be. The application of any such test, however precisely formulated, must necessarily be context and fact specific.

79. *(D) Applying the law to the facts:* I come to the true battleground on this Issue, starting with the Judge's conclusions of fact.

80. *(1) The Judge's conclusions of fact:* Mr Coburn concentrated his attack on the Judge's conclusions of fact at [210]. I take those conclusions (set out above) in turn. So far as [210](1) of the judgment is concerned, the Judge's conclusion was amply justified. Mr Coburn's submissions and, in particular, the table at para. 34 of his skeleton argument, with great respect, focus valiantly but selectively on June and July and therefore skew the overall picture for the period April – September. The Judge's findings at [210](2) are indisputable, whatever gloss Mr Coburn has sought to put on them. The figures are stark and the sums significant, *a fortiori*, when it is appreciated that they would have been considerably larger but for the exercise by Spar of its lien on sub-freights. The Judge's conclusions at [210](3) were likewise fair and the GCS plea for sympathy, novel in this area of the law, is neither here nor there; that GCS's difficulties were attributable to market conditions is, if anything, disconcerting rather than reassuring. As [210] (4) – (5), even if Mr Coburn is right in saying that GCS was not asking for "indefinite tolerance", everything said by GCS bore the hallmark of procrastination, hoping that something would turn up. The Judge's summary in these two paragraphs cannot properly be criticised. The GCL response recounted by the Judge at [210] (6), when pressed by Spar in September 2011, spoke volumes as to the GCS/GCL priorities: bankers ranked ahead of shipowners.

81. Pulling the threads together, Popplewell J's conclusions were, in my view, entirely fair and well-founded. The essence of Mr Coburn's submissions was that GCS was struggling with a fall in the market (involving cash flow difficulties occasioned by sub-chartering at a loss when compared to the rates of hire payable under the charterparties); GCS was doing its best, genuinely and courteously, to clear the arrears; it hoped for a cash injection from GCL; it was entitled to sympathy. As it seems to me, all these points – even if well-founded – do no more than establish an evinced inability to perform the charterparties according to their terms. All the more so, given the unmet promises (or expression of good intentions, it matters not which) as recorded by the Judge.

82. *(2) The questions which arise:* In his oral submissions, Mr Rainey helpfully formulated three questions which arise from and cover both the test in law (already set out) and the Judge's conclusions of fact. First, what was the contractual benefit Spar was intended to obtain from the charterparties? Secondly, what was the prospective non-performance foreshadowed by GCS's words and conduct? Thirdly, was the prospective non-performance such as to go to the root of the contract?

83. The *first* question goes to the nature of the contractual bargain under the charterparties. In this regard, there is no room for doubt. As made clear in the earlier citations from *The Petrofina*, *The Laconia* and *The Scaptrade* and is hornbook law, it is of the essence of the bargain under a time charterparty that the shipowner is entitled to the regular, periodical payment of hire as stipulated, in advance of performance, so long as the charterparty continues; hire is payable in advance to provide a fund from which shipowners can meet the expenses of rendering the services they have undertaken to provide under the charterparty; shipowners are not obliged to perform the services on credit; they do so only against advance payment. These familiar statements of principle are as applicable to these charterparties as they are to any others.

84. The unchallenged evidence of Mr Ellefsen, Spar's CEO, reflects these market truths. Hire was payable in advance under the charterparties to provide Spar with the "cash in hand to pay for the maintenance, crewing and insurance of the vessels…". Further assurance was obtained by way of the Guarantees. Both the advance payment and the Guarantees were necessary to ensure that Spar was able to satisfy its mortgage obligations. Mr Ellefsen went on to observe that after April/ May 2011, GCS were "always struggling to pay the hire". Spar was concerned for a number of reasons, primarily cash flow and its potential impact on Spar's ability to service its own borrowings.

85. Mr Coburn's submission that the Judge made no finding of any specific adverse impact on Spar – as Spar was a "blue chip" owner – seems to me, with respect, wholly to miss its mark. First, the financial strength of the particular shipowner has no bearing whatever on the nature of the bargain entered into. The fact, if it be the fact, that Spar could better absorb GCS's failures and prospective inability to perform the charterparties than some other owners does not mean that Spar was therefore obliged to accept payment of hire in arrears when it had contracted for payment in advance. Secondly, the unchallenged evidence from Mr Ellefsen shows that Spar was concerned as to GCS's actual and prospective failure to perform the charterparties according to their terms.

86. The *second* question goes to the non-performance foreshadowed by GCS's words and conduct. On the Judge's conclusions of fact, a reasonable owner in the position of Spar (the formulation adopted in *Universal Cargo Carriers v Citati* [1957] 2 QB 401, at p.436) could have no, certainly no realistic, expectation that GCS would in the future pay hire punctually in advance. On its own case, GCS was in difficulty due to market conditions; it follows (as the Judge observed, at [211]) that GCS's performance in the future turned on market vicissitudes. The best that could be hoped for was that GCS was willing to pay hire – but in arrears; indeed, the judgment (*ibid*) records that such was the effect of GCS's own submissions in the arbitration. All this translates (at its highest) into GCS wishing to perform the charterparties but being unable to do so. As Devlin J (as he then was) observed in *Universal Cargo Carriers v Citati (supra)*, at p.437:

> " Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say: 'I would like to but I cannot' negatives intent just as much as 'I will not'. "

87. The *third* question goes to whether the prospective non-performance was such as to go to the root of the charterparties. In context, I entertain no doubt that it was. My reasons are these:

i) The GCS prospective non-performance would unilaterally convert a contract for *payment in advance* into a transaction for unsecured credit and without any provision for the payment of interest. The importance of the advance payment of hire in time charterparties has already been emphasised and need not be repeated. That any failure to pay a single instalment of hire punctually does not amount to a breach of *condition* (Issue I above) is one thing; an evinced intention not to pay hire punctually in the future is very different (as highlighted by Popplewell J, at [198]) and, in my judgment, goes to the root of the charterparties. Taken to their logical conclusion, Mr Coburn's submissions would mean that charterers could hold owners to the contracts by stating that all payments of hire would be made but late and in arrears – leaving owners obliged to accept this limping performance and attendant uncertainty. In my view, that is not the law, at least in this context. For the avoidance of doubt, whichever test is adopted the answer would be the same; thus I am satisfied that GCS's evinced intention would deprive Spar of "substantially the whole benefit" of the charterparties and, for that matter, that GCS would be seeking to hold Spar to an arrangement "radically different" from that which had been agreed (the test for frustration).

ii) As all such conclusions are context and fact specific, I derive no assistance from the *outcomes* in either *The Brimnes (supra)* or the very different cases of *Dalkia Utilities v Celtech, supra* (provision of energy services to a paper mill, where the contract provided for interest in the event of late payments) and *Valilas v Januzaj* (contract for the use of facilities at a dental practice). By contrast and though I do not rest my decision on it, the present case is much closer to the context and reasoning in *Withers v Reynolds* 109 ER 1370, where in a contract for the supply of straw, one party had sought to convert the agreement to pay on delivery to one for payment in arrears; the court held that it was not incumbent on the innocent party to go on supplying straw.

iii) Like the Judge (at [213] – [214]) I am unable to accept Mr Coburn's "accountancy" argument, namely that an arithmetical comparison between the arrears (even comprising a number of instalments of hire) and the total sums payable over the life of the charterparties demonstrates that Spar would not be deprived of substantially the whole benefit of the charterparties. To my mind, this submission simply does not grapple with the nature and importance of the bargain for the payment of hire in advance.

88. *(E) Conclusion on Issue II:* For my part, no proper criticism can be made of Popplewell J's analysis, findings and conclusions at [208] – [214] of the judgment, with which I respectfully agree and am content to adopt. The Judge utilised a formulation of the test for renunciation as favourable to GCS as any; his conclusions of fact were fair and well-founded. Given the history of GCS's late payments, the amounts and delays involved, together with the absence of any concrete or reliable reassurance from GCS/GCL as to the future, Popplewell J was amply entitled to conclude that GCS had renounced the charterparties at the date/s of the termination notices.

89. Accordingly, I would dismiss the appeal on Issue II.

POSTSCRIPT

90. Although my conclusion on Issue II would suffice to decide the appeal in Spar's favour, it seemed right to decide Issue I so as to resolve it at Court of Appeal level – and indeed we did so with the encouragement and concurrence of both parties.

Lord Justice Hamblen :

91. I agree with the judgment of Gross LJ on both the Condition Issue and the Renunciation Issue. In the light of the disagreement between two experienced Commercial Court judges on the Condition Issue I shall add a few comments of my own.

92. The modern English law approach to the classification of contractual terms is that a term is innominate unless it is clear that it is intended to be a condition or a warranty – see, for example, *Cehave N.V. v Bremer Handelgesellschaft (The Hansa Nord)* [1976] QB 44 at p.70H-71B (Roskill LJ); *Bremer v Vanden* [1978] 2 Lloyd's Rep. 109 at p.113 (Lord Wilberforce); *Bunge v Tradax* at p. 715H-716A (Lord Wilberforce), at p.717G-H (Lord Scarman) and at p.727E (Lord Roskill). As Lord Scarman stated at p.717:

> "Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances…. that a particular stipulation is a condition or only a warranty, it is an innominate term, the remedy for a breach of which depends upon the nature, consequences, and effect of the breach."

93. In my judgment it cannot be said it is clear that the obligation to pay hire timeously is a condition of the charterparties in this case, or of time charterparties generally. In particular:

i) Prior to *The Astra* the only decision on this issue was that of Brandon J in *The Brimnes* who decided that it was not a condition.

ii) Following Brandon J's decision in *The Brimnes* no attempt was made to alter the wording of standard form time charterparties so as to make payment of hire timeously a condition, although this could very easily have been done (as illustrated by the post-Astra NYPE 2015 form).

iii) Despite the dicta to the contrary relied upon by Flaux J and the Respondents, up until *The Astra* Brandon J's decision was widely treated as representing the law and countless disputes settled and decided on this basis. I agree with Gross LJ that this reflected the general market view, as is illustrated by the views expressed in all the editions of *Wilford on Time Charters* (the leading text book on time charterparties) during this period. That is the legal background against which parties would have been contracting.

iv) In agreement with Popplewell J, and Professor Peel in his case commentary, I consider that in this context the inclusion of an express right of withdrawal is an indication that payment of hire timeously is not a condition, since its inclusion would otherwise be unnecessary. On any view it does not make it clear that it is a condition.

v) I agree with Gross LJ that the inclusion of an anti-technicality clause does not bear on the matter. It is included to temper the severity of the operation of the withdrawal clause and to buttress rather than to diminish the charterers' rights.

vi) Unlike the situation considered in the *Stocznia Gdynia* case, the failure to pay hire timeously is not in all cases a serious breach. In many cases its consequences will be trivial. That is the hallmark of an innominate term.

vii) The payment of hire timeously is not a mere time provision and does not involve interdependent obligations such as in *Bunge v Tradax.* This is not a case in which there is a presumption that the obligation to pay hire timeously is of the essence.

viii) Whilst certainty is an important consideration in the construction of commercial contracts, I consider that undue weight should not be given to it in evaluating whether a term is a condition or an innominate term. That is because the operation of a condition is always more certain than that of an innominate term and so over reliance on certainty would lead to a presumption that terms are conditions. There is no such presumption. On the contrary the modern approach is that a term is innominate unless a contrary intention is made clear.

ix) It is not necessary to construe the obligation to pay hire timeously as a condition in order to give it commercial effect on the grounds that it is the owners' only real protection in a falling market. As Gross LJ observes, certainty is provided by the withdrawal clause and there may be good reasons to invoke the clause notwithstanding a falling market. Further, as an innominate term there will be circumstances in which loss of bargain damages will be recoverable for breach of the obligation to pay hire, as the present case illustrates.

94. For the reasons outlined above, and those given more fully by Gross LJ, I agree that the arguments on the Condition Issue made in Spar's Respondent's Notice should be rejected and that we should hold that *The Astra* was wrongly decided. I would add that in circumstances where, as here, the law had apparently been settled by an existing decision for some 40 years, without any indication of market disquiet, I consider that a court should be very cautious before departing from such a decision so as to disturb the predictability of the law and detract from its certainty.

Master of the Rolls :

95. I agree with both judgments.

96. The issues, while important and not straightforward in view of past conflicting judicial statements and the poor drafting of the relevant provisions of the charterparties in question, can be reduced to the following propositions.

97. First, there is no authority binding on the Court of Appeal as to whether or not the stipulated time for payment of hire in each of the charterparties was a condition, the slightest breach of which (subject to the anti-technicality clause) entitled Spar both to treat the charterparty as at an end and to claim damages.

98. Second, whether the time payment stipulation was such a condition, or a warranty sounding only in damages or (what has now come to be known as) an intermediate or innominate term (in the sense described by Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 69-70) is a pure question of interpretation of each of the charterparties.

99. There is some authority (not always expressed in the same language), to which Gross LJ refers in paragraph 52(iii) above and Hamblen LJ refers in paragraph 92 above, to

the broad effect that, in the absence of a clear indication to the contrary, the court leans against the interpretation of a contractual term as a condition. The approach to interpretation on this aspect is best explained on the ground that it is inherently unlikely that the contracting parties would have wished to confer on the innocent party a right to treat the contract as at end for breach of a term which may be broken in ways and with consequences which are objectively not sufficiently serious to warrant such a draconian right.

100. Third, for the reasons so lucidly and comprehensively given by Gross LJ, the time payment stipulation was, on the proper interpretation of each of the charterparties, an innominate term. There is no presumption in a mercantile contract that a stipulated time for payment is a contractual condition the slightest breach of which is a repudiatory breach entitling the innocent party to bring the contract to an end: see the Sale of Goods Act 1893 section 10(1), which codified the position at common law. In any event, there is no scope for any such presumption in view of the comprehensive terms of the charterparties.

101. Fourth, whether or not the combination of the past and anticipated breaches of the time payment stipulation amounted to a renunciation of each of the charterparties involved a multifactorial assessment by the trial judge, with which this court should not interfere unless he made some error of principle or reached a decision which was outside the bounds of any reasonable judicial determination. Popplewell J made no such error or decision.

102. The test for anticipatory breach and repudiatory breach has been described in different ways in the reported cases. The differences were explained by Lord Wilberforce in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757 (The Nanfri) at 778-779 as simply reflecting the different facts and circumstances of the various cases, especially the terms of the particular contract in question. In *Urban 1 (Blonk) Street v Ayres* [2013] EWCA Civ 816, [2014] 1 WLR 756 at [57] I referred to Lord Wilberforce's speech. I said that, for the purpose of resolving the case then before the court, I preferred to adhere to the common formulation of deprivation of "substantially the whole benefit" of the contract but, as is clear, I did not intend in any way to contradict Lord Wilberforce's analysis in *The Nanfri*.

103. In the present case, the conduct of GCS evinced an intention to turn each of the contracts into something radically different from its terms, namely from a contract for payment in advance (for services to be provided by the shipowner and for the important commercial reasons described by Popplewell J at [135] of his judgment) in accordance with all the standard forms of time charter since the first was produced in 1902, to one for payment in arrear - in effect the performance of services by the shipowner on credit. Popplewell J was entitled, and indeed right, to conclude that such conduct was an anticipatory breach amounting to a renunciation of each of the charterparties, whichever of the tests mentioned by Lord Wilberforce (or that for frustration) is adopted.

104. Finally, it is to be noted that in our jurisprudence the reference to time being "of the essence" is used in two very different senses. On the one hand, it is used to describe a contractual time condition any breach of which is a repudiatory breach entitling the other party to bring the contract to an end. On the other hand, in the context of a provision for service of a notice making time of the essence, typically in a

conveyancing contract, subject always to the express terms of the contract it means fixing the time beyond which equity will not intervene to prevent the innocent party being entitled to treat the contract as at an end if the innocent party would otherwise be entitled at law so to do: *Urban 1 (Blonk) Street v Ayres* at [44], esp (6) and (7); *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep 599 at [131].