Neutral Citation Number: [2019] EWCA Civ 1161

Case No: A4/2019/0597

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION,
COMMERCIAL COURT
MRS JUSTICE CARR
AD2018000045

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2019

Before :

LORD JUSTICE GROSS
LORD JUSTICE MCCOMBE
and
LORD JUSTICE LEGGATT

- -

Between :

ARK SHIPPING COMPANY LLC	**Appellant**
- and -	
SILVERBURN SHIPPING (IOM) LTD	**Respondent**

- -
- -

Simon Rainey QC and Natalie Moore (instructed by **Stephenson Harwood LLP**) **Appellant**
Alexander Wright and Ed Jones (instructed by **Wikborg Rein LLP**) for the for the **Respondent**

Hearing dates : 18 June 2019

- -

Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. By a bareboat charterparty on an amended standard BARECON 89 Form, dated 17 October 2012 ("the charterparty"), the Respondent, Silverburn Shipping (IoM) Ltd, an Isle of Man company ("Owners"), bareboat chartered their vessel, the tug "ARCTIC" ("the vessel"), to the Appellant, ARK Shipping Company LLC, a Russian company ("Charterers"), for a period of 15 years, on the terms and conditions set out therein.

2. The sole question of law on this appeal is whether the term ("the term"), contained in cl. 9A of the charterparty ("cl. 9A"), obliging Charterers to:

> "….keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times…."

was a condition (strictly so called) or an innominate term.

3. In their Partial Final Award dated 12 March 2018 ("the award"), two maritime arbitrators ("the arbitrators") held that the term was not a condition.

4. Reversing the arbitrators and allowing Owners' appeal, brought pursuant to s.69 of the *Arbitration Act 1996* ("the 1996 Act"), Carr J, in her judgment dated 22 February 2019 ("the judgment") [2019] EWHC 376 (Comm); [2019] 1 Lloyd's Rep. 554, held that the term was a condition.

5. From that judgment, Charterers appeal to this Court.

THE CHARTERPARTY

6. A bareboat charterparty involves a lease of the ship. By contrast, a time charterparty does not involve a lease and is a contract for the provision of services; so too, no question of a lease arises in connection with a voyage charterparty. As explained in Davis, *Bareboat Charters* (2nd ed., 2005), at para. 1.1:

> " A fundamental distinction is drawn under English law between charterparties which amount to a demise or lease of a ship, and those which do not. The former category, known as charters by demise, operate as a lease of the ship pursuant to which possession and control passes from the owners to the charterers whilst the latter, primarily comprising time and voyage charters, are in essence contracts for the provision of services, including the use of the chartered ship. Under a lease, it is usual for the owners to supply their vessel 'bare' of officers and crew, in which case the arrangement may correctly be termed a 'bareboat' charter. The charterers become for the duration of the charter the *de facto* 'owners' of the vessel, the master and crew act under their orders, and through them they have possession of the ship."

The "hallmarks" of a bareboat charter were summarised by Evans LJ in *The Guiseppe di Vittorio* [1998] 1 Lloyd's Rep 136, at p.156, as follows:

> "What then is the demise charter? Its hallmarks, as it seems to me, are that the legal owner give the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting – a lease, or demise, in real property terms – of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a 'bareboat' lease or hire arrangement."

7. As already noted, the charterparty was on the BARECON 89 Form, as amended. This is a standard form of bareboat charter in common use in the industry. In *The Ocean Victory* [2017] UKSC 35; [2017] 1 WLR 1793, Lord Sumption at [95] spoke of the BARECON 89 Form in these terms:

> "…The form was originally drafted in 1974 by the Documentary Committee of the Baltic and International Maritime Council, and revised in 1989. It is said to have become, in one or other of its variants, the most commonly used form of bareboat charter worldwide…."

8. The charterparty provided, in Box 10, for the vessel to be classed by Bureau Veritas ("BV"). Cl.26 stipulated that the charterparty was governed by English law and that any disputes arising out of the charterparty were to be referred to London arbitration.

9. Cl.9 was headed "Maintenance and Operation" and cl. 9A (in full) was in these terms:

> " The Vessel shall during the Charter period be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and~~, except as provided for in Clause 13(l),~~ *they shall keep the Vessel with unexpired classification of the class indicated in Box 10 [i.e., BV] and with other required certificates in force at all times*. The Charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Vessel from the service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter."

For convenience, I have italicised the wording central to this dispute.

10. Cl. 13 is headed "Insurance, Repairs and Classification". Cl. 13B provides as follows:

> "During the Charter period the Vessel shall be kept insured by the Charterers at their expense against Protection and Indemnity risks in such form as the Owners shall in writing approve which approval shall not be unreasonably withheld. If the Charterers shall fail to arrange and keep any of the insurances provided for under the provisions of sub-clause (b)….the Owners shall notify the Charterers whereupon the Charterers shall rectify the position within seven running days, failing which the Owners shall have the right to withdraw the Vessel from the service of the Charterers without prejudice to any claim the Owners may otherwise have against the Charterers."

Though not plainly worded, the reference to "sub-clause (b)" must be construed as a reference to this clause, 13B itself.

11. The cross-reference in cl. 9A to cl.13(l) was deleted. Cl. 13(l) was itself deleted but would otherwise have provided that, notwithstanding anything contained in cl. 9A, Owners were to keep the vessel "with unexpired classification in force at all times" during the charterparty period. In the event, therefore, the obligation to keep the vessel in class (as provided in cl.9A) rested squarely on Charterers.

THE FACTS

12. The facts are essentially undisputed and may be taken from the award and the judgment.

13. The vessel was entered in the St. Kitts and Nevis International Ship Registry ("the St. Kitts Registry") which had given a dispensation allowing Owners to bareboat charter the vessel outside of St Kitts and Nevis and to allow it to operate under the flag of the Russian Federation ("the Dispensation").

14. The vessel was delivered into service under the charterparty on or about 18 October 2012.

15. Various disputes, it would seem as to hire payments, had simmered under the charterparty and Owners purported to withdraw the vessel (contractually) in March 2017. The arbitrators held that that withdrawal was wrongful and invalid – but, as it had not been accepted by Charterers, the Charterparty continued. Other than as a matter of history, we are not concerned with the March withdrawal.

16. As helpfully summarised by the Judge (at [7]):

> "….The Vessel….arrived at the Caspian port of Astrakhan for repairs and maintenance on 31 October 2017. Her class certificates expired on 6 November 2017, before she entered dry dock for repairs, some five years after her last special survey."

Box 11 in the charterparty recorded that the last special survey took place in 2012.

17. On 7 December 2017, Owners sent a "Notice" ("the December Notice") to Charterers, purporting to terminate the charterparty and demanding redelivery of the vessel. The December Notice, aside from dealing with the issue of hire payments, included the following:

> "….Without prejudice to the previous termination of the charter on 15 March 2017 it has recently come to our attention that the vessel is currently in a very poor condition and, of very serious concern that the vessel's class certificates have expired. It is your position that the charter between us continues….and if that position is correct (which we do not accept) then it is your responsibility to strictly comply with your obligations under the bareboat charter. Clause 9 of Part II of the above charter expressly states that as Charterers you must maintain the Vessel in a good state of repair, in an efficient operating condition and in accordance with good commercial maintenance practice. Further, you have an express obligation to keep the vessel with unexpired classification certificates in force. You are also required to take immediate steps to have any necessary repairs done to the vessel within a reasonable period of time which you have clearly failed to do.
>
> The notification that we have received is that the vessel's class certificates have been overdue since 6 August 2017 and that the vessel's class, Load Line, SOLAS, MARPOL, BWM [i.e., Ballast Water Management] convention and AFS [i.e., Anti-Fouling System] convention certificates all expired on 6 November 2017….. Not only have you failed to immediately inform us of the fact that the vessel is out of class, it is clear that no steps have been taken by you to restore the vessel's condition and ensure that the vessel remains in class with unexpired class certificates.
>
> …..
>
> Given your continuing failure to pay hire in full for the vessel, your serious failure to maintain the vessel in class and in a good state of repair and in particular your failure to take immediate steps to repair the vessel as required by Clause 9 of the bareboat charter, and further without prejudice to our position that this Charter has already been terminated on 15 March 2017, we notify you that we are today immediately withdrawing the vessel from your service under Clause 9 of the charter. This termination is effective immediately and we require you forthwith to place the Vessel at our disposal at the port of Astrakhan. Further and in the alternative your conduct in relation to performance of this charter has evidenced a complete disregard by you to comply with your obligations which conduct we consider to be repudiatory and which we accept as terminating the charter with immediate effect….."

18. By their replies, dated 8 and 11 December 2017, Charterers resisted Owners' demand for the return of the vessel, denied any breach and contended that the charterparty remained alive. As the Judge put it (at [9]):

> "….They denied Owners' allegations of disrepair and stated that Owners were fully aware that the Vessel was currently undergoing scheduled maintenance works. The Vessel had arrived at the dock prior to expiration of the documents and representatives of BV were constantly monitoring the Vessel during her repairs and maintenance works. The Vessel was not out of class. Upon completion of the works, the BV surveyors would undertake a final inspection and a new set of documents would be issued accordingly….."

Further exchanges between the parties continued until Owners commenced arbitration in January 2018, requesting relief including an order for delivery up of the vessel under s.48(5) of the 1996 Act.

THE AWARD

19. The arbitrators dismissed Owners' application. With regard to the alleged non-payment of hire, the arbitrators held that the December Notice (like the purported termination in March) was wrongful and invalid. It therefore amounted to a repudiation of the charterparty but was not accepted by Charterers.

20. There remained the question of whether the December Notice was effective to terminate the charterparty, on the ground that Charterers were in breach of their cl. 9 maintenance/repair obligations and their obligation to maintain the vessel in class.

21. In the event, the arbitrators held that Charterers' obligations under cl. 9 were not "absolute" but merely required the exercise of due diligence. As, looking ahead, this conclusion was overturned by the Judge and there is no appeal against her ruling on that issue, it follows that the reliance to be placed on the award is necessarily limited; but, for my part, it does not follow that no regard should be had to the views of commercial arbitrators.

22. The arbitrators (at [90]) rejected the submission that Charterers' obligation to maintain the vessel's class was separate from their obligation to maintain and repair the vessel. Instead, their view was:

> "…that the Charterers' obligation to maintain and repair the Vessel goes hand in hand with and is part and parcel of their obligation to maintain class."

Accordingly, the arbitrators rejected Owners' submission that Charterers' obligation to maintain the vessel in class was both absolute and a condition of the charterparty. The "preferable and correct construction" of cl. 9 (at [91]) was that if Charterers were in breach of any of their obligations under cl.9:

> "….they must immediately take steps to carry out the necessary repairs and reinstate the class certificates etc. within a reasonable time, failing which the Owners would have the contractual right to withdraw the vessel from service pursuant to the provisions of Clause 9(a) of the Charterparty."

23. The arbitrators next turned to the question of whether a reasonable time had elapsed before Owners' December Notice (given on 7 December 2017). It was common ground (at [98]) that the vessel required dry-docking in order to carry out some of the necessary maintenance and repairs. In the arbitrators' view (at [99]), it was therefore for Owners to establish that Charterers should have dry-docked the vessel and completed the necessary repairs and reinstatement of class before 7 December 2017.

24. On such evidence as there was before them, the arbitrators were not persuaded (at [100]) that Owners had discharged this burden of proof. Their conclusion was expressed (*ibid*) in these terms:

> "…The Owners did not submit or provide any evidence that the necessary maintenance/repairs required the Vessel to be immediately dry-docked or indeed at any time before she actually was dry-docked. In this connection the frequency of dry-docking was agreed in the Charterparty to be in accordance with the classification documents and no evidence was put before us to suggest that BV required any earlier dry-docking of the Vessel."

25. For completeness, there was what might be described as a side-issue going to the Dispensation. In August 2017, Owners had urged the St Kitts Registry not to prolong or extend the Dispensation beyond 31 December 2017 (award, at [22]). On 5 December (at [27]), the St Kitts Registry wrote to Charterers, saying that they had been advised by Owners that hire had not been paid in accordance with the terms of the charterparty and that Owners had requested that the Dispensation should be revoked – which it would be within 21 days unless Owners withdrew their request. Further correspondence between Charterers and the St Kitts Registry then ensued, which it is unnecessary to recount here. It suffices to record that on 2 January 2018 (at [38]), at the request of Owners, the St Kitts Registry wrote to the Harbour Master at Novorossiysk withdrawing the Dispensation. The arbitrators (at [104]) regarded this (apparent) revocation as irrelevant to the question, as between Owners and Charterers, whether the charterparty remained extant. I agree. In circumstances where (apparent) withdrawal of the Dispensation was prompted by Owners on the basis of, at best, partially accurate facts, it can have no relevance to determining the sole issue before us.

THE JUDGMENT

26. In a careful and thoughtful judgment, Carr J held ("Question 1", as it was termed) that the classification obligation was "absolute" rather than merely requiring the exercise of due diligence. As already foreshadowed, there is no appeal from that decision. She then turned to the sole question of law before us ("Question 2", in the language of the judgment), namely, whether the term was a condition or an innominate term.

27. Having reviewed the authorities (to which I shall presently come), the Judge concluded (at [54]) that the "classification obligation" was a condition of the charterparty. In the Judge's view (at [55] – [56]):

> "55. The classification obligation creates an obligation on Charterers breach of which is immediately, readily and objectively ascertainable. Whether or not the classification

> obligation in Clause 9A is a time clause strictly speaking, on any view it has an obvious temporal element. The Vessel's class must be maintained 'at all times'. Only one kind of breach of the classification obligation is possible…. Either the Vessel is in class or it is not. The language of the obligation is in no way inconsistent with the concept of its being a condition, and if anything suggests that it is. It is clear and absolute with a fixed time limit, redolent of a condition.
>
> 56. …. 'total loss' is not the test. A breach of the classification obligation cannot be said to be trivial or 'ancillary'. Charterers' obligation to keep certificates valid is an integral feature of a bareboat charter….. Loss of class can have (potentially immediate and irreversible) adverse consequences not only for the parties but also third parties and regulatory authorities. It can affect insurance, ship mortgage and flag. Additionally, damages for breach of the classification obligation may be difficult to assess."

28. It was not fatal (at [58]) that the classification obligation was not a condition precedent; the categories of conditions were not closed. Though not a condition precedent, the classification obligation was not (at [59]) a "contractual island"; breach of that obligation had "significant sequencing consequences". Those consequences did not simply impact on the parties; they affected cargo interests, sub-charterers, regulatory issues, ports and flags. The Judge here made reference to the St Kitts Registry Dispensation and its (purported) withdrawal. Equally, it was not determinative (at [60]) that the classification obligation was not "labelled a condition" and that express rights of withdrawal were not provided for in the event of its breach but were provided for elsewhere. The arbitrators' reliance on the status of the classification obligation in the NYPE (standard) form of time charter was "misplaced" (at [61]); the language and commercial context were different; moreover, the consequences to an owner of the vessel being out of class were more serious than to a time charterer.

29. The key question (at [62]) was to strike "the right balance" as identified in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (the "Spar Capella", "Spar Vega" and "Spar Draco"* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447. In that regard, categorising the classification obligation as a condition carried "clear and important advantages in terms of certainty". Unlike the failure to make punctual payment of an instalment of hire, "breach of the obligation to maintain the Vessel in class is likely to be serious". Treating the classification obligation as a condition did not engage the risk of "permitting trivial breaches to have disproportionate consequences". The upshot (at [63]) was a commercially sensible rather than a commercially unrealistic result and did not involve undue harshness to Charterers. At all times, Charterers knew when the vessel's class would expire and were in a position to take the necessary steps to renew classification before expiry.

30. The Judge then considered and rejected (at [64]) a variety of individual points raised by Charterers, including the following. As to Charterers' reliance on the apparently wide wording in cl. 9A relating to "other required certificates in force at all times", this only applied to "certificates" (not plans) and must be taken to refer only to that which was required for class purposes. With regard to Charterers having no control over failures

by a third party, BV, which could result in a breach of the classification obligation, there was nothing unusual about risk allocation of this nature. As to the vessel not being at risk on the facts of the present case, this was no answer to the Judge's "principled approach" to construction.

31. Even if the arbitrators' conclusion involved a "value judgment", there could be no principled opposition to the Court's intervention, especially (at [65]) given that the arbitrators' conclusion "was based on a material error of law as to the scope of the classification obligation"; that error fundamentally infected the arbitrators' conclusion as to the status of that obligation.

THE RIVAL CASES

32. For *Charterers*, Mr Rainey QC (who, together with his junior, Ms Moore, did not appear below and to whom we were most grateful), submitted that the Judge had fallen into error; the term was innominate, not a condition. Categorisation of the term as a condition was uncommercial.

33. The term was not expressed to be a condition, a matter of significance in a modern standard form contract. It was neither a time clause in the sense relevant to the present debate nor was it a condition precedent. The obligation to maintain class was bound up with the maintenance of the minimum physical condition of the vessel; the balance of cl. 9A, within which the term as to class was contained, was plainly not a condition; contextually, it would be odd if, alone in cl.9A, the term as to class was a condition. It was to be underlined that the obligation was to maintain class throughout a 15 years' period, in contradistinction to clauses dealing with class status at the commencement of a charterparty. The width of the obligation was startling, not least given the wording "…and with other required certificates in force at all times…". The obligation as to "certificates" covered a wide variety of matters, ranging from the trivial to the major, rendering it implausible that the parties intended that wording to comprise a condition. The Judge's attempt to narrow the obligation as to "certificates" was unavailing; no "other" certificates were required to maintain class.

34. When considering the consequences of breach, the correct focus was to consider the terms of and the parties to this contract – rather than third parties - and the facts of the present case. Those facts were not a-typical. In that regard, as appeared from the charterparty (cl. 11A), there was no mortgage. As to flag, the involvement of the St Kitts Registry was a red herring. The scheme of the charterparty with regard to insurance told against the term constituting a condition; it was difficult to contend that the *risk* of losing insurance cover should be a condition when the charter (cl. 13B) made it plain that a breach of Charterers' obligation to keep the vessel insured (at least as to P&I Cover) did not amount to a breach of condition. The facts of the case were telling; the expiry of class on 6 November 2017 had involved no or no grave consequences, whether in respect of flag or insurance. Here, Mr Rainey's submission essentially repeated Charterers' argument, recorded by the Judge (at [32 v) g)] of the judgment):

> "…the Vessel arrived at port for the purpose of carrying out maintenance and repairs before class expired where class did not require the Vessel to be dry-docked any earlier and the condition of the Vessel was not such as to require maintenance or repairs

> to be carried out any earlier. The vessel was not at risk in any way."

35. Considerations of certainty did not require the term to be classified as a condition; where serious consequences did indeed arise from a failure to maintain class, the breach might well be repudiatory – but that was not this case. The balance struck by the Judge in seeking to apply *Spar Shipping*, was wrong and her conclusion was unduly harsh to Charterers.

36. For *Owners*, Mr Wright, in his very able submissions, contended that the Judge was right and her decision should be upheld. The present case was "one dimensional" or "binary"; the vessel was either in class or not. Maintenance of class was to be distinguished from maintenance of the physical condition of the vessel; maintaining class was a matter of status, a consideration which justified categorisation of the term as a condition. That the gravity of the consequences flowing from breach were not always serious was not determinative. In any event, the consequences of not maintaining class were likely to be serious, even if not invariably so. Those consequences went to matters of flag, finance and insurance. Breach of the classification obligation therefore had knock-on consequences going beyond the individual claimant. These were matters of particular concern to owners under a bareboat charterparty, who were out of possession. Those consequences might be irreversible; Mr Wright posited, for example, a breach of the term leaving the vessel uninsured when a disastrous fire took place. Moreover, damages for breach of the term as to maintaining class might be difficult to assess.

37. As to considerations of certainty, Mr Wright focused on the importance to owners under a bareboat charter of obtaining the return of their ship; they were exposed to problems of different order from those confronting time charterers under a time charter. Further, if the term was innominate, the position was *less* certain than that in the case of repairs – where cl. 9A imposed an obligation to undertake the repairs within a reasonable time; that seemed improbable. Still further and unlike *Spar Shipping*, there was no equivalent of the withdrawal clause here to ensure certainty of redelivery for Owners.

38. With regard to the obligation to keep "…other required certificates in force at all times…", Mr Wright underlined that these needed to be "certificates"; a "garbage plan", which Charterers had used as an example to demonstrate the unattractiveness of the term being a condition, was not a *certificate* at all. Asked by the Court as to which "certificates" came within cl. 9A, Mr Wright answered "those required by class in order to issue the main classification certificate". Mr Wright resisted the suggestion that this rendered the "certificates" requirement redundant.

39. Mr Wright supported the Judge's reasoning as to commercial common sense. Here, as elsewhere, matters should not be left to the last minute. If need be, temporary classification/cover should be sought: what if, he asked, hot work was undertaken by way of repairs; with the vessel out of class, if a fire resulted, there would be an uninsured loss.

DISCUSSION

40. *(1) The nature of the issue:* Though there was some debate in the judgment and the skeleton arguments before us, the question as to the classification of the term is clearly

one of construction: see, e.g., *Spar Shipping*, at [52]. This is not an evaluative exercise where a range of conclusions is open. In any event, if it had been, the Court's reluctance to interfere with the commercial judgment of arbitrators would have applied to the appeal from the award to the Commercial Court, not the appeal from the Commercial Court to this Court. That said, Courts do not interpret or classify contractual terms in a vacuum. Insofar as commercial value judgments arise for consideration – of the nature canvassed by Kerr LJ in *State Trading Corporation of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep 277, at p.284 - they form part of the construction and classification exercise.

41. Rather than adding to an all too well travelled area, it suffices to adopt (with respect) Lord Hodge's synthesis as to interpretation in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, at [10] – [15]:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning……[including] the potential relevance….of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations…..
>
> 11. ….Interpretation is….a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…..
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…..
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement…..
>
> 15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

See too, Popplewell J's helpful summary, in *The Ocean Neptune* [2018] EWHC 163 (Comm); [2018] 2 All ER 108, at [8], together with that of Carr J in the present case, at [26].

42. *(2) Authority:* Argument before us focussed on three authorities in particular: *Bunge v Tradax* [1981] 1 WLR 711; *The Seaflower* [2001] 1 All ER (Comm) 240; and *Spar Shipping (supra)*. Owners placed much reliance on *Bunge v Tradax* and *The Seaflower*, in seeking to uphold the Judge's classification of the term as a condition. Charterers submitted that these authorities were clearly distinguishable. *Spar Shipping* was said by both Owners and Charterers to support their respective cases.

43. The issue in *Spar Shipping* was whether charterers' failure to pay an instalment of hire punctually under a time charterparty was a breach of condition or whether, without more, such a failure "merely" entitled owners to withdraw the vessel from service under the charterparty in accordance with the express provisions of a withdrawal clause. If it was a breach of condition, owners were not only entitled to withdraw the vessel but also to claim damages extending over the remaining period of the charterparty. If charterers' obligation to pay instalments of hire punctually was no more than an innominate term, then, unless a case of repudiatory or renunciatory breach could be established, owners were restricted to withdrawing the vessel (and claiming damages for any breaches of contract to date). The decision was that the obligation to make punctual payments of hire was an innominate term not a condition. To the extent that it matters, *Spar Shipping* differs from this case insofar as there is here no comparable "withdrawal clause" in the charterparty.

44. No useful purpose would be served by re-tracing the ground covered in *Spar Shipping*. Accordingly, a very brief summary suffices, also encompassing all that needs to be said, for present purposes, of *Bunge v Tradax*.

45. First, I would adopt, without setting out here, the outline contained in *Spar Shipping*, at [18] – [21], dealing with terminology and the classification of terms.

46. Secondly, on the question of ascertaining whether a clause is a condition, there is nothing to add to the treatment of this topic in *Spar Shipping*, at [52] and [92], save for repeating that: (i) it is a matter of the intention of the parties on the true construction of the contract; (ii) where, upon the true construction of the contract, the parties have not made the term a condition, it will be innominate if a breach may result in trivial, minor or very grave consequences; (iii) unless it is clear that a term is intended to be a condition or (only) a warranty, it will be innominate. For the avoidance of doubt (in the light of certain of the arguments addressed to us), the "general guidance" set out in *Spar Shipping* (at [52]) reflected my summary, distilled from the collected observations in *Bunge v Tradax*; I was not giving "general guidance" *de novo.*

47. Thirdly, for the reasons set out in *Spar Shipping*, especially at [53], *Bunge v Tradax* was a very different case and, for my part, provides no significant support for Owners here. *Bunge v Tradax* plainly involved a paradigm time clause (a time by when loading notice was to be given); performance of that obligation by buyers was a condition precedent to the ability of sellers to perform their obligation (nominating a loading port). The terms were thus inter-dependent. The context, as explained in *Spar Shipping* (*ibid*) "carefully choreographed the sequence of actions required". The term in the present case is not a time clause; other than requiring the maintenance of class

throughout the (15 year) charterparty, there is no reference to time whatever. It is, as is common ground, not a condition precedent. Though, as the Judge rightly said (at [59]) the term is not a "contractual island", there was no inter-dependence to speak of. While, self-evidently, *breach* of the term would or could have a variety of consequences or knock-on consequences, the sequencing in issue in *Bunge v Tradax* involved actions required for *performance* of the contract, rather than the consequences flowing from a breach of contract.

48. Fourthly, certainty is a consideration of undoubted importance, but one not entitled to undue weight in determining whether a term is a condition or innominate. Given the emphasis placed on certainty in the present case, it is worth reiterating the central observations on this topic in *Spar Shipping.* My judgment included the following (at [58] – [62]):

> "58. …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….
>
> 59. The key question, however, is striking the right balance. Classifying a contractual provision as a condition has advantages in terms of certainty; …… 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…..
>
> 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….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."

For his part, Hamblen LJ (if I may say so), expressed the matter crisply as follows (at [93 (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."

49. Turning to *The Seaflower*, it concerned a time charterparty, including a "major approvals" clause (cl. 46) that the vessel was then:

> "Mobil…Conoco…BP….and Shell….acceptable. The owners guarantee to obtain with 60 days Exxon approval in addition to present approvals…"

Cl. 46 went on to set out a discount to the hire rate for each missing approval. In the event of any of the approvals being lost during the charter period, charterers were permitted to terminate the charter if the approval was not reinstated within 30 days, or alternatively to continue at the discounted rate. Subsequently, charterers arranged for the vessel to load a cargo of Exxon products. Approval had not, however, been obtained from Exxon. Charterers terminated the charterparty and redelivered the vessel. The Judge held that, on the true construction of the charterparty, cl. 46 was not a condition. This Court allowed charterers' appeal and held that it was.

50. This Court's reasoning helpfully appears from the head note. The parties were to be assumed to have intended consistency as to the importance of obtaining and maintaining the approval of the oil majors. It would therefore have been surprising if the loss of one major and a failure to reinstate within thirty days provided a right to cancellation, whereas the failure in effect to reinstate Exxon within 60 days did not do so. The word 'guarantee' in cl.46 demonstrated that the 60 days was the outside limit for obtaining Exxon approval. The nature of the contract led to the conclusion that the parties had by necessary implication intended that charterers would be entitled to cancel, i.e., to accept a repudiation, if Exxon approval was not obtained within 60 days.

51. As is apparent, *The Seaflower* itself turned on the construction of cl. 46 of the charterparty then before the Court, somewhat removed from the issue before us. However, the judgment of Rix LJ (at [63] – [64]) included observations meriting consideration in the present case.

> "63. The judge's second reason was that approval by the oil majors was an aspect of the condition of the vessel, just like seaworthiness or class. That, if correct, would be an important link in his or any chain of reasoning, because it is of course well established that the obligation of seaworthiness is not a condition, but an innominate term….However, the position regarding class would appear to be different and more complex. *Scrutton on Charterparties* (20th edn, 1996) p 90 submits….that a statement of the ship's class (at the time of contract) is a condition. Wilford *Time Charters* (4th edn, 1995) p 101 agrees….However, a statement as to a vessel's class does not involve a promise that she will remain in class throughout the charter period. For that purpose a warranty is usually given, as it is in the present case in cl 3 of the Shelltime 4 form. It was presumably this warranty, which is closely allied with the warranty of seaworthiness, that Aikens J had in mind when he said that seaworthiness and class were both analogous with oil majors' approvals.
>
> 64. In my judgment this analogy breaks down. An oil company's approval may reflect the vessel's condition, but it is a matter of status rather than condition. Similarly, a vessel's class is a matter of status – although that status may be affected in many different

> ways: at one extreme a vessel may be completely out of class which is a most serious matter, because such a vessel cannot trade, but at another extreme there may be only a recommendation or even a mere notation of class that something relatively minor be attended to within a certain date. In the case of an oil majors' approval, however, the vessel either has it or it does not. In that respect it is like a term as to the vessel's class at the time of contract: if the vessel is out of class the condition as to her class is broken. As for unseaworthiness…there is no proper analogy at all between that and an oil major's approval; and unseaworthiness is not a matter of status."

52. Based on *The Seaflower*, Owners are entitled to and do underline that class is a matter of *status* as distinct from the physical condition of the vessel. Furthermore, there is powerful support in these observations for the proposition that a statement as to the vessel's class – *at the time of contract* – is a condition. Conversely, Charterers properly point to the fact that Rix LJ confined those observations to statements as to the vessel's class at the time of the contract; he said nothing to suggest that a continuing warranty as to maintaining class throughout the charterparty period amounted to a condition. Accordingly, there is something in *The Seaflower* for both parties and it assists in providing the relevant context for considering matters of class. It does not, however, significantly advance the argument on the question whether the term was or was not a condition.

53. *(3) Considerations and decision:* Both "textually and contextually" (*Wood v Capita,* at [13]), I have come to the firm conclusion that the term is not a condition. That the term related to the vessel's classification status – important though classification status is - does not suffice to make it a condition. I therefore differ, respectfully, from the Judge's decision. My reasons follow.

54. *(A) Wording:* The term is not expressed to be a condition. This is in no way decisive; conditions may indeed be found where the word "condition" has not been used, or where the consequences of breach have not been spelt out. But it is a consideration of some significance, especially so, given that the BARECON 89 Form is an industry standard, drafted as Mr Rainey told us (without opposition), after consideration by an industry drafting committee. Had the industry and the parties wished to make the position plain, they could have used the language of condition; they did not choose to do so.

55. *(B) Not a time clause:* For the reasons already given, the term is not a "time clause" of the nature under consideration in *Bunge v Tradax*. The term obliged Charterers to maintain class throughout the charterparty, a matter to which I return later. I cannot, however, agree with the Judge (at [55]) in regarding that feature of the clause as a "temporal element" rendering it in any way analogous to a time clause strictly so called.

56. *(C) No inter-dependence*: Again and for the reasons already given, there is simply not the inter-dependence here which weighed so heavily in *Bunge v Tradax*; the term was not a condition precedent. I part company with the Judge, insofar as she placed reliance on the "significant sequencing consequences" in the judgment (at [59]). With respect too, on the facts as explained above, the emphasis attached by the Judge (*ibid*) to the actions of the St Kitts Registry was mis-placed.

57. *(D) Type of breach:* The term goes to the classification status of the vessel, the importance of which, at least in general, I would not at all seek to minimise. As the Judge rightly observed (at [55]), only one kind of breach of the term is possible: either the vessel is in class or she is not. This is a relevant factor and it was so regarded in *Bunge v Tradax.* Of itself, it lends support to Owners' case and the Judge's conclusion. To my mind, however, it is outweighed by a plethora of other factors discussed above and below.

58. *(E) Cl. 9A as a whole:* The term is found in the middle of cl. 9A, a clause (set out above) headed "Maintenance and Operation". The first sentence makes plain the bareboat nature of the charterparty. The second sentence deals with the maintenance of the vessel's physical condition. The third sentence contains the term, including the provision as to "other required certificates" (see further below). The fourth sentence obliges Charterers to take immediate steps to undertake the necessary repairs within a reasonable time and entitles Owners, *inter alia*, to withdraw the vessel in the event Charterers fail to do so.

59. I would not subscribe to the description of the term as "ancillary" to Charterers' maintenance obligations, as submitted in Charterers' skeleton argument; a description of that nature does not properly reflect the importance to be attached to class status. Cl. 9A, correctly analysed, places distinct obligations on Charterers, as to maintaining both the physical *condition* of the vessel and its class *status.* That said, the obligations though distinct, are closely connected – as the arbitrators held (set out above). As classification status hinges (at least in large measure) on the maintenance of the vessel to a minimum physical standard – the *raison d' etre* of classification societies being the safety of life and property at sea - the obvious way for Charterers to breach their obligation to maintain class status is to fail in their duty with regard to physical maintenance. Plainly, however, Charterers' obligation as to the physical maintenance of the vessel is not a condition of the charterparty; far from any breach of this obligation entitling Owners without more to treat the charterparty as at an end, Charterers must take immediate steps to remedy the matter by completing the necessary repairs "within a reasonable time". That is not the language or substance of a condition. It would in any event be wholly exceptional for a term as to physical maintenance, extending over the entirety of a charter period, to constitute a condition.

60. Viewed in this light, Owners' case requires the term, alone within the body of cl. 9A, to be classified as a condition – in stark contrast with the connected obligations as to physical condition by which the term is surrounded. Having regard to cl. 9A as a whole, had the intention been to constitute the term as a condition, that is a surprising place to find it. In my judgment, the structure of cl. 9A, in an industry standard contract, strongly suggests that the term is not to be construed as a condition.

61. It is unnecessary to reach a concluded view as to whether, on its true construction, the fourth sentence of cl. 9A, though expressed in terms of physical repairs, requires Charterers to restore class status within a reasonable time. If it does, then, in that fashion, class status is directly addressed. However, even if the fourth sentence is confined to physical repairs, the restoration of class is, at least in large measure, indirectly catered for under the clause. The obvious and typical reason for a vessel being out of class is her physical condition; if that condition requires remedying within a reasonable time, then so too the basis for restoring class status will be re-established

within a reasonable time. On either view, there is no damaging uncertainty with regard to remedying the loss of class status.

62. *(F) "other required certificates…":* The term requires Charterers to keep "…other required certificates in force at all times". Owners' case, as will be recollected, was that the certificates in question were those "required by class in order to issue the main classification certificate". I readily accept and proceed on the basis (as Owners contended) that this wording is confined to "certificates", rather than extending more widely to plans or documents. Even so, I am unable to accept Owners' construction and, if that is not what these words mean, then the width of the obligation thus resting on Charterers is such as itself to tell powerfully against the classification of the term as a condition.

63. By way of elaboration, as it seems to me, Mr Wright's construction is not well-founded because (as put to him in argument) the wording as to "other required certificates" would be redundant; it would add nothing to Charterers' obligation to maintain class which would cover the entire ground. For essentially similar reasons, I am likewise unable to accept the Judge's construction of these words (at [64 iii)]).

64. If, however, the wording keep "…other required certificates in force at all times" cannot be limited in the manner contended for by Owners, then the obligation thus assumed by Charterers is startlingly extensive, encompassing a range of matters, from the trivial to the those of serious consequence. An indication of the ambit of any such obligation is given by (Owners') December Notice (set out above) – referring in terms to an assortment of required certificates. Additionally, we were shown (without objection) an International Maritime Organisation ("IMO") document entitled "List of Certificates and Documents required to be carried on board ships, 2017); though by no means all the documents are "certificates", it is noteworthy that the Annex, listing the certificates and documents, runs to 30 pages.

65. In my judgment, this consideration of "other required certificates" is very damaging to Owners' case. Owners are driven to say either that only a part of the term is a condition (not including the "other required certificates" wording) *or* that Charterers' obligation as to "other required certificates" forms part of the condition for which they contend. If the former, then the balance of the term (dealing with "other required certificates") and the remainder of clause 9A are innominate. This is a still more unattractive and improbable construction than that earlier considered where the whole of the term was said to be a condition, in contradistinction to the remainder of the clause dealing with physical maintenance and repairs. If the latter, then, with respect, Owners' case seems hopelessly open-ended. It would mean, for instance, that this 15 years' charterparty could be terminated by Owners if Charterers committed *any* breach in respect of the certificates required under the BWM or AFS conventions. I decline to accept that such a construction could realistically accord with the intention of the parties.

66. *(G) The scheme of the charterparty: insurance:* An important strand of Owners' case is that breach of the term puts at risk Owners' flag, finance and insurance arrangements. Flag was mentioned earlier; finance will be addressed in due course. Here, the focus is on the scheme of the charterparty so far as it bears on insurance.

67. Cl. 13B of the charterparty, dealing with P&I insurance has already been set out; Charterers are to keep the vessel insured against P&I risks. But, as is apparent, cl.13B

is not a condition of the charterparty. A breach by Charterers of its cl.13B obligation does not entitle Owners, without more, to terminate the charterparty. Instead, cl.13B provides for Owners to notify Charterers, whereupon Charterers have a period time within which to remedy the breach.

68. This too undermines Owners' submission that the term is a condition. The gravamen of Owners' case is that a breach of the term *potentially* puts the vessel's insurance at risk and that the term should therefore be classified as a condition. However, that argument is unsustainable once it is appreciated that a breach of contract by Charterers which *actually* leaves the vessel without P&I cover does not, of itself, entitle Owners to terminate the charterparty. If leaving the vessel uninsured does not constitute a breach of condition, I cannot accept that putting the vessel at risk of being uninsured is or ought to be classified as a breach of condition.

69. It is correct, as far as it goes, that cl.13B deals only with P&I cover. In the event, as I understood to be undisputed, the charterparty did not impose any obligation on either party to take out and maintain either hull or war risks cover. It is, though, noteworthy that had cl.12 of the standard BARECON 89 Form not been struck through, its scheme – extending to hull and war risks – was to the same effect as that found in cl.13B pertaining to P&I cover. A breach by Charterers of a cl.12 obligation in respect of hull or war risks would not of itself entitle Owners to treat the Charterparty as at an end. Accordingly, the likely hull and marine war risks scheme to be found in cl.12 of the standard BARECON 89 Form (if not struck through), is itself very difficult to reconcile with Owners' submission that the term is to be classified as a condition because of its potential impact on that cover.

70. Although we were referred to two standard forms of typical hull insurance cover, I do not think that they significantly assist. Mr Wright underlined that loss of class would lead to termination of such hull insurance cover, so highlighting the likely gravity of the consequences of a breach of the term. Mr Rainey pointed to the fact that the cover contained an in-built mechanism for "waiver", by agreement of the underwriters, of any such failure to maintain class. As it seems to me:

    i) The fact that underwriters *might* waive a breach of the term provides, at best, limited comfort – as underwriters are not bound to do so.

    ii) However, such considerations as to the likely insurance cover on the market do not assist Owners to overcome the hurdles placed in their way by the scheme of the charterparty itself in the event of Owners or the vessel being left without insurance cover.

    iii) Moreover, there is an inherently greater likelihood of underwriters waiving the loss of the vessel's class where the consequences of loss of class (to which I next turn) are no more than trivial. Conversely, if the consequences are grave (for example, a catastrophic fire at a time when, by reason of loss of class, the vessel was uninsured), it must be likely that Owners would be in a strong position to advance a case of repudiatory breach of the charterparty.

71. On any view, these tentative reflections on the hull insurance cover likely to be available on the market do not outweigh the views expressed earlier as to the scheme

of the charterparty in respect of insurance. That scheme serves equally strongly to support Charterers' case and to undermine Owners' case.

72. *(H) The consequences of breach of the term:* In the light of the arguments addressed to us, it is convenient to begin by outlining the parameters of the inquiry as to the consequences of breach of the term. First, with a view to classification as a condition or innominate term, the correct starting point is to consider the term in the context of the standard BARECON 89 Form of charterparty. Secondly, however, that can only be a starting point. Here, as is so frequently the case, the BARECON 89 Form was amended by the parties to reflect their individual requirements. When considering the likely consequences of breach of the term with a view to its classification, it is necessary to have regard to the terms of the actual charterparty. The addition, omission or deletion of terms contained in the "standard" form of BARECON 89 charterparty is capable of impacting on the likely consequences of breach of the term and, consequently, on its classification. Thirdly, when considering the consequences of breach of the term for present purposes, I accept Mr Wright's submission that the fact that the consequences of breach might not *always* be serious would not be determinative. Fourthly, I think it is appropriate to have regard to the knock-on consequences of breach of the term, with regard to Owners' situation *vis a vis* third parties. Fifthly, the inquiry must go to the *likely* consequences of breach of the term – not the actual consequences, save insofar as the actual consequences shed light on the likely consequences. The reason is that the rationale for constituting a term as a condition is that any breach thereof entitles the innocent party to treat the contract as at an end; no inquiry as to the gravity of the actual consequences is necessary. Sixthly, the inquiry should be undertaken with the importance of class status generally, well in mind.

73. Approached in this manner, in large measure in accord with Charterers' arguments, I am satisfied that breach of the term may likely result in trivial, minor or very grave consequences – thus suggesting (*Spar Shipping*, at [52] and [92]) that the term is innominate rather than a condition.

74. Much of Owners' emphasis rested on the likely impact of loss of class on flag, finance and insurance. I readily accept (as was not in dispute) that loss of class is *capable* of having grave consequences in this area. I would not, however, go further and a consideration of flag, finance and insurance matters in the present case indicates why.

75. For the reasons already given, the involvement of the St Kitts Registry in the present case (at Owners' instigation) cannot be relied upon in support of the classification of the term as a condition. So far as concerns Owners' financing arrangements, there was no mortgage in the present case and no evidence as to Owners' finances or the likely impact of loss of class on them. It could not be right to treat the term as a condition in the present case because the loss of class might impact on another owner's borrowing covenants, when there was no mortgage here; in any event, any such exercise would involve speculation about a matter on which we had no evidence. There is thus nothing before us with regard to the financing of the vessel capable of supporting Owners' case as to the classification of the term as a condition. As to insurance, for reasons already given, the scheme of the charterparty tells against classification of the term as a condition.

76. It is unnecessary to multiply examples. However, it is not unrealistic to contemplate expiry or loss of class, lasting for no more than a day, consequent upon an

administrative error on the part of a classification society. The likelihood is that such a loss of class would not (and certainly should not) have any let alone serious consequences. To my mind, it is improbable that the parties intended such a breach – say, early in the 15 years' period – to have the status of breach of condition. If, *per contra*, the upshot was unexpectedly grave (impacting immediately and irretrievably on flag, finance or insurance), then, as already intimated, Owners would likely be well-placed to treat the charterparty as terminated on the ground of a breach going to the root of the contract.

77. While the outcome of the issue before the Court cannot turn on the actual facts of the present case, those facts do provide a helpful "reality check". On the facts found by the arbitrators, the vessel arrived at Astrakhan on 31 October 2017 for repairs and maintenance. She was at the time in class. There is nothing to suggest that repairs and maintenance were required at any earlier time, nor that dry-docking was required immediately or at any time before she was actually drydocked. The vessel's class certificates expired on 6 November. The repair and maintenance work conducted in drydock thereafter, took place under the supervision of BV. No doubt, in the light of the impending expiry of class certificates, Charterers could and should have dealt with the matter in such a way as either to advance the visit to Astrakhan, alternatively to arrange temporary certification while at Astrakhan and in drydock. That said, the breach of the term resulted in no adverse consequences. If, however, Owners' case is well-founded then in these or like circumstances, Owners would be entitled to treat the charterparty as at an end. For my part, loss of class amounting to a breach of condition, at the very time the vessel was undergoing repairs under class supervision, is not a result to which I would accede unless driven to it – and I do not think I am.

78. *(I) A continuing obligation:* It is one thing to conclude that a statement as to the vessel's class at the commencement of the charterparty is a condition or condition precedent (*The Seaflower, supra*); it is quite another to hold that a 15 years' warranty to maintain the vessel in class *at all times* is a condition. Typically, continuing time charter warranties as to the vessel's physical condition do not constitute conditions. It is fair to say (as Rix LJ underlined in *The Seaflower*, at [63] – [64]) that class is different, comprising a matter of status. Our attention was not, however, drawn to any authority which points to, still less decides, that a continuing warranty as to classification status is to be categorised as a condition. For the reasons already discussed, I am not persuaded that the law should be developed in that direction. In my judgment, the advantages of certainty, achieved by categorisation of the term as a condition, are clearly outweighed by the risk of trivial breaches having disproportionate consequences; in short, it would not be an acceptable trade-off: *Spar Shipping*, at [58] – [62] and [93 (viii)].

79. *(J) Miscellaneous matters:* For completeness:

i) Mention was made by Charterers of Owners' right to require the vessel to be dry-docked for inspection, contained in cl. 7 of the charterparty. For my part, I do not think that this additional right conferred on Owners is of any material assistance in determining whether or not the term is to be classified as a condition. Likewise, I do not think that cl. 10E dealing with non-payment of hire assists the argument one way or another.

ii) Arguments were addressed by both parties as to the significance to be attached to the fact that no express "withdrawal" provision was attached to the term.

Having regard to the discussion in *Spar Shipping* (at 47]), I do not think that this consideration provides any reliable pointer as to the determination of the issue before us – quite apart from the need, which would otherwise arise, to reach a concluded view as to the scope of the withdrawal provision contained in the fourth sentence of cl. 9A.

80. *(K) Final considerations:* I have had well in mind throughout that this is a bareboat not a time charterparty and that Charterers, not Owners, were in possession of the vessel at all material times. I appreciate the sensitivities and concerns to which this feature is capable of giving rise but the differences between bareboat and standard form time charterparties should not be over-stated; at all events, they do not persuade me to elevate the status of the term to that of a condition.

81. For all the reasons given, having approached the construction of the charterparty "iteratively" (*Wood v Capita,* at [12]), I am satisfied that the term was not a condition and is properly to be regarded as innominate. In my judgment, this conclusion best accords with the language, structure and scheme of the charterparty, together with business common sense. While the categories of conditions are not closed, the term simply lacks the hallmarks of a condition. The alternative, already emphasised, is to risk trivial breaches having disproportionate consequences destructive of a long-term contractual relationship. In any event and on any view, it is not *clear* that the term was intended to be a condition; it follows, applying *Spar Shipping* (at [52 (iii)] and [92]), together with prior authority (see, esp., *Cehave v Bremer, The Hansa Nord* [1976] QB 44, at pp. 70-71, *per* Roskill LJ, as he then was), that the term is an innominate term.

82. Accordingly, I would allow the appeal.

Lord Justice McCombe

83. I agree.

Lord Justice Leggatt

84. I also agree.