



Neutral Citation Number: [2026] EWHC 449 (Comm)

Case Nos: CL-2025-000116, 117, 118, 119, 120
121, 122, 123, 124, and 125

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

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

Date: 02/03/2026

Before :

MR JUSTICE CALVER

Between :

SLB AND OTHERS

**Claimants/
Appellants**

- and -

PAK AND OTHERS

**Defendants/
Respondents**

**Michael Ashcroft KC, Socrates Papadopoulos (instructed by Norton Rose Fulbright LLP)
and Richard Southern KC and Marcus Mander (instructed by Reed Smith LLP) for the
Claimants**

**Sean O'Sullivan KC, Alexander Wright KC and Henry Ellis (instructed by Stephenson
Harwood LLP) for the Defendants**

Hearing dates: 03 and 04-02-2026

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Monday 02 March 2026.

Mr Justice Calver :

NATURE OF THE APPEALS

1. These are appeals brought under section 69 of the Arbitration Act 1996 against ten separate arbitral awards all dated 27 February 2025 (“**the Awards**”) with common reasons (“**Reasons**”) published by three experienced maritime arbitrators (“**the Tribunal**”).
2. The Awards and the disputes that led to them arose out of ten individual shipbuilding contracts as novated (“**the SBCs**”), by which each respective SPV Claimant (individually “**the Buyer**” and collectively “**the Buyers**”) agreed to buy, and the Defendants (“**the Yard**” or “**the Seller**”) agreed to build and sell, ten container vessels of either 12,690 or 15,000 TEU¹ (“**the Vessels**”).
3. The Tribunal unanimously held that the obligation in each of the SBCs to provide letters of guarantee (“**Refund Guarantees**”) within 120 days, or such later date as the Buyer may designate in writing from time to time, was an innominate term and not a condition. As such, although the Yard’s admitted failures to obtain those Refund Guarantees within 120 days entitled the Buyers to exercise their contractual rights of cancellation, the Buyers were not entitled to loss of bargain damages.
4. Permission to appeal was granted by Foxton J (as he then was) on 9 June 2025 on the following question of law: “*Whether the [Yard]’s obligation in Article X(A)(f) to provide a refund guarantee within 120 days of the novation of the relevant shipbuilding contract is a condition.*”

PARTIES

5. The First to Eighth Claimants are subsidiaries of C Inc. (“**C Inc**”), which is incorporated outside the UK. C Inc owns a substantial fleet of container and dry bulk vessels.
6. The Ninth and Tenth Claimants are corporations also incorporated outside the UK.
7. The three Defendants are common to each of the ten arbitrations. They agreed to build and sell the Vessels to the Buyers. The Second and Third Defendants own and operate two large shipyards. They are subsidiaries of a company (“**Z Co**”) which is the largest privately-owned shipbuilder in its country of incorporation. The First Defendant is another subsidiary of Z Co, being a trading house. The Second and Third Defendants’ premises include three ultra-large drydocks.

THE CONTRACTS

The novation of the SBCs

8. The disputes in this case arose out of a large number of high value and complex transactions (Reasons [33]). The ten SBCs under consideration in this case were concluded alongside 14 other SBCs concluded by the Yard for the construction of a total of 24 vessels on similar terms.
9. The SBCs are novated contracts based on existing SBCs concluded in 2015 with the original buyer, being a subsidiary of Z Co. The novation agreements (between the relevant Buyer, the original buyer, and the Yard) for the “Stream A Vessels” were dated 5

¹ Twenty-foot Equivalent Unit (TEU) is a standardised measurement used in the shipping industry to describe the capacity of container ships.

November 2021, and for the “Stream B Vessels” 30 December 2021. Apart from necessary differences in the delivery and instalment dates, the material terms of the SBCs were identical (Reasons [33(ii)], [87], [129]) and the parties have proceeded on this basis for the purposes of these appeals. For convenience, in the analysis below I refer to the Novation Agreement dated 5 November 2021.

THE TERMS OF THE SBCs

The essential agreement

10. The preamble to each of the SBCs sets out the parties’ essential agreement, according to which:

“the [Yard] agrees to design, build, equip, launch, test and complete one [vessel] as described in the Specifications attached hereto ... and to deliver and sell the same to the BUYER, and the BUYER after completion and successful trial hereby agrees to purchase and take delivery of the VESSEL from the SELLER and to pay for the same in accordance with the terms and conditions hereinafter set forth...”

Payment in instalments of the contract price

11. Article II.1 defined the “Contract Price” of the Vessel as USD 83,314,980.²
12. By Article II.4, the parties agreed that “[t]he Contract Price shall be due and payable by the BUYER to the SELLER in the instalments as follows”: namely three instalments prior to delivery and acceptance of the Vessel (which are in the nature of advances to the seller³), and one final instalment upon delivery and acceptance of the Vessel.
13. Thus, by Article II.4(a), the first pre-delivery instalment amounting to USD 8,330,000 (approximately 10% of the Contract Price) was “*due and payable within five (5) Banking Days of (i) this CONTRACT becoming effective in accordance with Article XIX hereof and (ii) receipt by the BUYER of the [Refund Guarantee] by SWIFT in accordance with Paragraph 2 of Article X hereof*” (emphasis added).
14. By Article II.4(b), the second pre-delivery instalment also amounting to USD 8,330,000 (approximately 10% of the Contract Price) was “*due and payable on 8 March 2022 but in any event not before (i) the first Installment has become due and payable and (ii) a copy of the certificate of steel cutting issued by the Classification Society has been received by the BUYER and (iii) the date falling sixteen (16) months before the Delivery Date (as defined in paragraph 1 of Article VII hereof)*”.
15. By Article II.4(c), the third pre-delivery instalment amounting to USD 8,330,000 (approximately 10% of the Contract Price) was “*due and payable on 6 July 2022 but in any event not before (i) the first and second Installments have become due and payable and (ii) a copy of the certificate of keel-laying of the first section of the VESSEL issued by the Classification Society has been received by the BUYER [and] (iii) the date falling twelve (12) months before the Delivery Date (as defined in paragraph 1 of Article VII hereof)*”.
16. Finally, by Article II.4(d), the fourth and final delivery instalment, amounting to USD 58,324,980 (approximately 70% of the Contract Price) “*plus any increase or minus any*

² The Contract Price for each of the larger Vessels was US\$99,994,980 with consequential changes to the instalment amounts.

³ See Article X.1.

decrease due to adjustments of the Contract Price under and pursuant to the provisions of this CONTRACT, shall be due and payable upon delivery and acceptance of the VESSEL effected in accordance with Article VII hereinafter”.

17. Accordingly, the three pre-delivery instalments (but not the final, delivery instalment) were all contingent upon the receipt by the Buyer of the Refund Guarantee (in addition to receipt of the steel cutting certification and keel laying certification, in relation to the second and third pre-delivery instalments). Absent the delivery of the Refund Guarantee, there was no obligation upon the Buyer to pay any of the three pre-delivery instalments.
18. The draft Refund Guarantee was attached as Exhibit A to the SBC. It can be seen that it is an on demand guarantee and its key terms are set out in paragraphs 30-32 below.

Adjustment of contract price

19. By Article III, the Contract Price was subject to adjustment by way of liquidated damages⁴ in the event of several specified contingencies, including in particular, if the delivery of the vessel was delayed in a non-force majeure case (Article III.1).
20. In the event of such a delay in delivery, Article III.1 provided as follows:

“(a) No adjustment shall be made and the Contract Price shall remain unchanged for the first thirty (30) days of delay in delivery of the VESSEL beyond the Delivery Date as defined in Article VII hereof (ending as of twelve o'clock midnight of the thirtieth (30th) day of delay).

(b) If the delivery of the VESSEL is delayed more than thirty (30) days but less than one hundred and twenty (120) days after the Delivery Date, the Contract Price shall be reduced by the sum of United States Dollars Twenty Six Thousand (USD 26,000) for each full day for which thereafter delivery is delayed. If the delivery of the VESSEL is delayed one hundred and twenty (120) days or more after the Delivery Date, the Contract Price shall be reduced by the sum of United States Dollars Twenty Eight Thousand (USD 28,000) for each full day for which thereafter delivery is delayed. However, the total reduction in the Contract Price shall be not more than as would be the case for a delay of one hundred and eighty (180) days counting from the midnight of the thirtieth (30th) day after the Delivery Date at the above specified rates of reduction.

(c) However, if the delay in delivery of the VESSEL should continue for a period of two hundred and ten (210) days from the Delivery Date in Paragraph 1 of Article VII, then in such event, and after such period has expired, the BUYER may, at its absolute discretion, rescind this CONTRACT in accordance with the provisions of Article X hereof.

The SELLER may, at any time after the expiration of the aforementioned two hundred and ten (210) days of delay in delivery, if the BUYER has not served notice of rescission as provided in Article X hereof, demand in writing that the BUYER shall make an election, in which case the BUYER shall, within twenty five (25) days after such demand is received by the BUYER, notify the SELLER of its intention either to rescind this CONTRACT or to consent to the acceptance of the VESSEL at an agreed future date. If the BUYER shall not make an election

⁴ Calculated by way of a reduction in the purchase price. The SBC expressly provides that if the Buyer rescinds the SBC under Article III – Adjustment of Contract Price, the Buyer has no entitlement to liquidated damages and Article X applies: see Article III.6.

within twenty five (25) days as provided hereinabove, the BUYER shall be deemed to have accepted such extension of the delivery date to the future delivery date indicated by the SELLER and it being understood by the parties hereto that if the VESSEL is not delivered by such future date, the BUYER shall have the same right of rescission upon the same terms and conditions as hereinabove provided ...” (emphasis added)

21. By Article III.6 the effect of rescission under Article III.1(c) is stated to be as follows:

“It is expressly understood and agreed by the parties that in any case, if the BUYER rescinds this CONTRACT under this Article, the BUYER shall not be entitled to any liquidated damages or any other recourse unless by means of the provisions of Article X hereof.”⁵

Delivery

22. The SBC contained an agreed delivery date in Article VII.1, being “*on or before 6 July 2023 (but not before 6 June 2023)*”. The delivery dates for each SBC were thereafter staggered at two-month intervals, such that the second delivery date was “*on or before 4 September 2023 (but not before 5 August 2023)*”, the third delivery date was “*on or before 3 November 2023 (but not before 4 October 2023)*”, and so on until the final delivery date of 16 August 2024 (Reasons [104]).

23. Article VII.1 provided, in particular, that:

“The VESSEL shall be delivered by the SELLER to the BUYER at the facilities of [the Yard] on or before 6 July 2023 (but not before 6 June 2023), except that, in the event of delays in the construction of the VESSEL or any performance required under this CONTRACT due to causes which under the terms of this CONTRACT permit postponement of the date for delivery, the aforementioned date for delivery of the VESSEL shall be postponed accordingly.”

24. Article VII.2 provided for when and how that delivery of the Vessel would be effected:

“Provided that the SELLER and the BUYER shall have fulfilled all of their obligations stipulated under this CONTRACT, the delivery of the VESSEL shall be effected forthwith by the signature by the SELLER and the BUYER of two originals of the PROTOCOL OF DELIVERY AND ACCEPTANCE, acknowledging delivery of the VESSEL by the SELLER and acceptance thereof by the BUYER and the concurrent delivery of one original thereof by each of the parties hereto to the other.”

Rescission by the Buyer

25. Under the heading “Rescission by Buyer”, Article X provided the Buyer with a right to rescind the SBC under certain circumstances. By Article X.1, the Buyer was required to give notice as follows:

“The payments made by the BUYER prior to delivery of the VESSEL shall be in the nature of advances to the SELLER, and in the event that the BUYER exercises its right of rescission of this CONTRACT in accordance with the terms

⁵ Namely, the refund of any instalments paid by the buyer and then all obligations, duties and liabilities of the parties under the SBC are discharged – see further below.

of this CONTRACT under and pursuant to any of the provisions of this CONTRACT specifically permitting the BUYER to do so, then the BUYER shall notify the SELLER in writing or by telefax, and such rescission shall be effective as of the date when notice thereof is received by the SELLER.”

26. Refund by the Yard was then to be effected in accordance with Article X.2, which provided:

“In case the SELLER receives the notice stipulated in Paragraph 1 of this Article ... the SELLER shall promptly refund to the BUYER the full amount of all sums paid by the BUYER to the SELLER on account of the VESSEL⁶ together with the interest thereon and pay an amount equal to the cost of the BUYER's Supplies, unless the SELLER proceeds to the arbitration under the provisions of Article XII hereof.”

“In such event, the SELLER shall pay the BUYER interest at the rate of six percent (6%) per annum on the amount required herein to be refunded to the BUYER, computed from the date following the date of receipt by the SELLER of each installment or, in the case of the BUYER's Supplies, the date the cost thereof was incurred by the BUYER, to the date of remittance by transfer of such refund to the BUYER by the SELLER...” (emphasis added)

27. Article X.2 further required the Refund Guarantee to be provided to secure the Yard's obligation to refund the instalment payments made by the Buyers to the Yard. It provided:

“As security for any refund under the terms of this CONTRACT of each installment of the Contract Price payable prior to delivery of the VESSEL as well as of the costs for BUYER's Supplies, the SELLER shall furnish the BUYER at least five (5) Banking Days prior to the payment of the first installment with a letter of guarantee (the “[Refund Guarantee]”) by SWIFT of the Bank of China or the Bank of Communications or The Export-Import Bank of China or China Construction Bank, Industrial and Commercial Bank of China or Agricultural Bank of China (the selected bank, the “REFUND GUARANTOR”), covering the amount of each such installment (by way of automatic increase of the sum of each such installment upon payment of each such installment by the BUYER to the SELLER) in favour of the BUYER which [Refund Guarantee] shall have the same form and substance as Exhibit A annexed hereto.”

28. Article X.3 provided that “[u]pon such refund by the SELLER to the BUYER, all obligations, duties and liabilities of each of the parties hereto to the other under this CONTRACT shall be forthwith completely discharged.”

29. I consider the natural and commercial interpretation of Article X.3 to be that if in fact no sums have been paid by the Buyer on account of the Contract Price at the point when it rescinds the contract, and if in fact the Buyer has not incurred the cost of any supplies at that point in time, then under the first part of Article X.3 there is nothing for the Yard to refund and accordingly all obligations, duties and liabilities of the parties to each other are forthwith completely discharged upon the giving of notice of rescission by the Buyer to the Yard.

Terms of the Refund Guarantee

⁶ i.e. the instalment payments.

30. The template Refund Guarantee annexed as Exhibit A to the SBC provided in particular as follows:

“If in connection with the terms and conditions of the CONTRACT the BUYER shall become entitled to a refund of the instalments or advance payments made to the SELLER prior to the delivery of the Vessel, we hereby irrevocably and unconditionally guarantee as primary obligor and not merely as surety the repayment of the same to the BUYER within thirty (30) days after our receipt of your written demand not exceeding United States Dollars Twenty Four Million Nine Hundred Ninety Thousand (USD 24,990,000) plus interest thereon at the rate of six percent (6%) per annum unless the said rescission by you is made under the provisions of Paragraph 4 of Article VIII of the CONTRACT from the date following the date of receipt of each instalment or advance payment by the SELLER to the date of remittance by telegraphic transfer of such refund.”

31. The Refund Guarantee only covers the three pre-delivery instalments, and not the final delivery instalment:

“The amount of this Guarantee shall initially be for United States Dollars Eight Million Three Hundred Thirty Thousand (USD 8,330,000) and will be automatically increased upon SELLER's receipt of the second instalment and the third instalment, by the amount of each instalment or advance payment plus interest thereon as provided in the CONTRACT, but in any eventuality the amount of this Guarantee shall not exceed the total sum of United States Dollars Twenty Four Million Nine Hundred Ninety Thousand (USD 24,990,000) (the “Guarantee Amount”) plus interest thereon at the rate of six percent (6%) per annum from the date following the date of the SELLER's receipt of each instalment or advance payment to the date of remittance by telegraphic transfer of the refund.”

32. Sums under the Refund Guarantee were payable on written demand and the Refund Guarantee would become null and void upon payment to the Buyer of the sum guaranteed or delivery of the Vessel:

“We will pay under this Letter of Refund Guarantee upon BUYER's simple first written statement stating that BUYER's demand for refund has been made in conformity with the CONTRACT and the SELLER has failed to make the refund.

...

This Letter of Refund Guarantee shall expire and become null and void upon the earliest of the receipt by the BUYER of the sum guaranteed hereby together with interest thereon as aforesaid or upon our receipt of a copy of the Protocol of Delivery and Acceptance of the Vessel executed by the BUYER and the SELLER in accordance with the provisions of the CONTRACT or [set out here date falling least 390 days after delivery date].”

Article X(A): Financial Default of the Seller

33. Article X(A) set out six events under the heading “Financial Default of the Seller” by which, “in addition to any other defaults by the Seller” contained in the SBC, the Seller would be considered in default:

“(a) a winding up order is made by any court or a resolution is passed for the winding up of the [Seller]...

(b) an administrator, administrative receiver or similar officer is appointed of the whole or a material part of the assets and undertaking of [the Seller] ...

(c) the [Seller] is dissolved, liquidated or ceases to be registered as a company...

(d) it fails for more than ninety (90) days in the absence of any cause permitting delay in delivery under this CONTRACT to commence or continue the construction of the VESSEL in accordance with this CONTRACT; or

(e) it is incapable, for any reason whatsoever, of completing the VESSEL in compliance with this CONTRACT and the Specifications by the cancellation dates set out in Articles III.1(c)⁷ or VIII.4⁸; or

(f) The [Refund Guarantee] is not delivered to the BUYER in accordance with the terms of this CONTRACT by no later than 120 days after the date this CONTRACT is amended, novated and restated or such later date as the BUYER may designate in writing from time to time,

then and in any such case the BUYER may terminate, rescind or cancel this CONTRACT by notice to the SELLER in writing or by telefax confirmed in writing in accordance with the provisions of Article X hereof.” (emphasis added)

34. It follows that these events of default by the Seller allow the Buyer to terminate the SBC in accordance with Article X, which gives rise to (i) the Seller’s obligation to refund the Buyer and (ii) the discharge of each of the parties’ obligations, duties and liabilities.
35. It is apparent that whilst this clause is headed “Financial Default of the Seller”, it is not so limited, contrary to the Buyer’s submission: it also covers defaults of the Seller which may very well be non-financial defaults – see clauses (d), (e) and even (f).

Article XI - Default of the Buyer

36. The definition of Default, in the case of the Buyer, is set out in Article XI.1 as follows:

“The BUYER shall be deemed to be in default of its performance or obligations under this CONTRACT in the following cases:

(a) If any pre-delivery installment is not paid by the BUYER to the SELLER within five (5) Banking Days after such installment becomes due and payable as provided in Article II hereof; or

(b) If the final installment is not paid by the BUYER to the SELLER concurrently with the delivery of the VESSEL as provided in Article II hereof; or

(c) If the BUYER, when the VESSEL is duly tendered for delivery by the SELLER in accordance with the provisions of this CONTRACT, fails to accept the VESSEL within five (5) days from the tendered date without any specific and valid ground thereof under this CONTRACT.

(d) A winding up order is made by any court... for the winding up of the Buyer

⁷ Delay in delivery of 210 days.

⁸ Delay in delivery of 270 days.

(e) An administrator, administrative receiver or similar officer is appointed of the whole or a material part of the assets and undertaking of the Buyer...”
(emphasis added)

37. The effect of a Default in payment by the Buyer of any instalment payment on or before the delivery of the Vessel is stated to be as follows:

“(a) Should the BUYER make default in payment of any installment of the Contract Price on or before delivery of the VESSEL, the BUYER shall pay the installment(s) in default plus accrued interest thereon at the rate of six percent (6%) per annum computed from the due date of such installment to the date when the SELLER receives the payment, and, for the purpose of Paragraph 1 of Article VII hereof the Delivery Date of the Vessel shall be automatically extended by the period of continuance of such default by the BUYER. In any event of default by the BUYER, the BUYER shall also pay all charges and expenses incurred by the SELLER in consequence of such default.

(b) If any default by the BUYER continues for a period of ten (10) days, the SELLER may, at its option, rescind this CONTRACT by giving notice of such effect to the BUYER by letter or telefax.

Upon receipt by the BUYER of such notice of rescission, this CONTRACT shall be forthwith rescinded and terminated. In the event of such rescission of this CONTRACT, the SELLER shall be entitled to retain any installment or installments already paid by the BUYER to the SELLER on account of this CONTRACT and the BUYER's Supplies, if any.” (emphasis added)

38. It follows that (unless the Buyer consents to an extension of the Delivery Date) the Delivery Date in Article VII is only extended (i) in the case of the Buyer’s default under Article XI or (ii) in the case of a force majeure event under Article VIII.

39. It is accordingly apparent from the foregoing that the parties by their contract made express provision, in particular: for liquidated damages in favour of the Buyer (by way of a reduction in the contract price) in the case of the Yard’s delay in delivery of the vessel; for termination of the contract at the Buyer’s option in the event of delay of more than 90 days in the Yard commencing or continuing the construction of the Vessel (leading to the discharge of each of the parties’ obligations, duties and liabilities); for termination of the contract at the Buyer’s option in the event of delay in delivery of 210 days (leading to the discharge of each of the parties’ obligations, duties and liabilities); for termination of the contract at the Buyer’s option in the event of delay of more than 120 days in the provision of the Refund Guarantee (leading to the discharge of each of the parties’ obligations, duties and liabilities). If, on the other hand, the Buyer is in default in the payment of any instalment under the SBC, then the Delivery Date of the Vessel is extended for the period of default which, if it continues for a period of 10 days, entitles the Yard to rescind the SBC at its option.

40. In other words, in concluding the SBC on the terms which they did, the parties had given careful thought to the extent of the legal remedies which would be available to each other in the case of their respective defaults under the contract.

COMMERCIAL BACKGROUND TO THE MAKING OF THE SBC

41. It must be firmly borne in mind that this is an appeal on a question of law. As Simon J (as he then was) stated in *Dolphin Tanker SRL v Westport Petroleum Inc. (The Savina Caylyn)* [2011] 1 Lloyd's Rep 550 at [29]-[30]:

“29... An appeal on a question of law is confined to facts found by the Award. Steyn LJ conveniently summarised the position under the 1979 Act in Geogas SA v Trammo Gas Ltd, The ‘Balears’ [1993] 1 Lloyd's Rep 215, at 227:

... The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. Later in the same passage Steyn LJ identified the numerous means by which dissatisfied parties have sought to challenge the findings of fact. This catalogue of challenges to arbitrators' findings of fact points to the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged. The same vigilance will be applied to cases under the 1996 Act.

30... Although all contracts must be construed against the commercial background which would have been available to the parties at the time the contract was made, see ICS v. West Bromwich BS [1998] 1 WLR 896, Lord Hoffmann at 912-913, the only admissible findings in relation to the commercial background are those in the award.”

42. So far as the commercial background to the making of the SBCs is concerned, the Tribunal observed (Reasons, [208]) that it was common ground that the question as to whether the express obligation on the Yard to provide the Refund Guarantee within 120 days of signing the SBC was a condition (or deemed repudiatory) was a matter of contractual construction depending on the wording and context of the SBCs. I have set out the relevant wording above. So far as context is concerned, the Tribunal took into account the following, in particular, by way of the commercial background to the making of the SBCs:

- (1) At the time of contracting there was no question as to the Yard's solvency and ability to start work on construction even if the first instalment was not paid (Reasons, [236]).
- (2) While the absence of a Refund Guarantee and instalments would, as a matter of commercial reality, impede practical progress it was incorrect to suggest that the SBC would fall into unworkable disarray unless the obligation was construed as a condition (Reasons, [238]).
- (3) Even if relevant, the witness evidence which was of limited weight, showed no more than the common ground that Refund Guarantees are an important financial cornerstone, and they had previously been provided within a couple of weeks of the shipbuilding contract. It was notable that two witnesses, M (who represented C Inc) and G (C Inc's General Counsel) continued to expect the Yard to perform and not to abandon the SBCs (Reasons, [239(ii)]).
- (4) The Buyers argued that it would be uncommercial for them to have to maintain finance for the first (and subsequent) instalments on a longer term in case the Yard

produced a Refund Guarantee. However, there was no clear evidential weight for this argument (Reasons, [239(iv)]).

- (5) It was significant that the parties had bargained in clear terms to allow the Buyers to cancel the SBCs after 120 days under Article X if refund guarantees had not been provided. The Buyers would not have to wait in limbo for an indefinite period and could properly give an ultimatum requiring an unequivocal indication of intention to perform (Reasons, [240]).

43. This commercial background as found by the Tribunal, coupled with the wording of the SBC led it (rightly) to conclude that the absence of Refund Guarantees would not prevent the SBCs from being performed (for example it would not extend the delivery date, save to the limited extent of a force majeure notice) (Reasons, [239(iii)]). In his submissions on behalf of C Inc, Michael Ashcroft KC (who appeared together with Socrates Papadopoulos) at times impermissibly sought to go behind those findings of the Tribunal or to add to them. It is not open to the Buyers to do so. Thus, despite the Tribunal's findings as to the financial strength of the Yard and the fact that the SBC would not fall into unworkable disarray if obligation was not construed as a condition, Mr. Ashcroft KC impermissibly sought to argue as follows⁹:

“considering the value of the vessels ordered by the Buyers and the volatility of the shipping market, timely delivery was obviously of paramount importance to the Buyers, and failure by the Yard to provide the RGs, despite the lengthy, but final, period of 120 days allowed for doing so, was a red flag which pointed strongly towards the Yard being unable or unwilling to perform as per the agreed timescales, or at all¹⁰. Regrettably, the Tribunal failed to consider these important commercial implications or the consequences of such a serious financial default by the Yard...” (skeleton argument, [48]).

“the practical reality is that, if RGs were not provided, the pre-delivery instalments of the Contract Price would not be paid, and the vessels would not be built” (skeleton argument, [58]).

“the Tribunal seems to have lost sight of the critical importance of the RG to the SBCs as a whole, the interdependence between the provision of a RG and the obligation to pay advance instalments, and the commercial reality that the vessels would not be built absent a RG. Whilst accepting that a RG was of such importance that it could be said to be the “cornerstone” of the SBCs, the Tribunal then failed to carry the implications of this through to the conclusion that a time stipulation requiring the provision of a RG by a “no later than” date was a condition” (skeleton argument, [60]).

44. Similarly, it is not open to the Buyers to advance arguments (which Mr. Ashcroft KC did for the first time orally but not in his skeleton argument), which were not advanced before the Tribunal, based upon the fact that the Refund Guarantee also covers “*buyer's supplies*” and that without the guarantee having been issued the sums paid for those supplies would be imperilled. The Tribunal made no factual matrix findings in this respect as a result. No findings were made as to what buyers' supplies would be ordered and

⁹ Relying heavily upon the *obiter* remarks of Walker J in *Teekay Tankers v STX Offshore* [2018] 1 All ER 279, the facts of which case are different to those as found by the Tribunal here and which I address below.

¹⁰ Nor did the Buyers advance factual matrix evidence before the Tribunal that the Refund Guarantee operated as an “*earnest of performance*.”

when for the SBC, what they would cost, when they would be paid for and so forth, in order to determine their relevance, if any, to the proper construction of the SBC.

45. Nor is it open to the Buyers, as they seek to do in paragraph 81 of their skeleton argument, to maintain that the Yard was in flagrant breach of contract in order to make extra profits (“*a windfall*”) by performing replacement contracts at increased prices. There are no factual findings of the Tribunal to support that submission, and, moreover, the Tribunal held (Reasons, [329]) that: “*Looking at the totality of the evidence we do not accept that the [Yard] evinced an intention not to perform the SBCs.*”
46. It is accordingly not open to the Buyers to advance any of these submissions which seek to undermine the Tribunal’s findings of fact and its findings as to the commercial background to the making of the SBC¹¹. I accordingly reject the criticisms of the Tribunal’s reasoning in paragraph 43 above.

FAILURE TO PROVIDE THE REFUND GUARANTEES; BUYER RESCINDS SBC

47. It was common ground before the Tribunal that the Yard failed to provide the Refund Guarantees no later than 120 days after the novation of the SBC, as required by Article X(A)(f) (Reasons [197]). The SBCs were, as a result, terminated by the Buyers (being 138 days and 140 days from the date the SBCs were signed) (Reasons [246(i)]).

THE CLAIMS IN THE ARBITRATION

48. By Article XII thereof, each of the SBCs provided for arbitration in London. In the arbitrations, each of the Buyers claimed for loss of bargain damages of between around USD 73 to 83 million for loss of profit and the cost of purchasing a substitute vessel¹². The Tribunal was invited to determine issues of liability first, with any issues of quantum to be decided, if necessary, at a later date.
49. The Tribunal was asked to determine the following issues of liability in particular (Reasons, [30.3] and [30.4]):

“3. Was the [Yard’s] failure to provide refund guarantees within 120 days a repudiatory breach and/or a breach of condition of the SBCs?”

4. Did the [Yard] by their words and/or conduct renounce the SBCs by evincing an intention not to perform the SBCs in accordance with their terms?”

THE TRIBUNAL’S CONCLUSIONS

50. As the Tribunal explained (Reasons, [198]), the Buyers’ primary case was that the Yard were under an obligation to provide the Refund Guarantees within a reasonable time of the SBC being signed (because there was no express time limit for when they were to be provided) and that a failure to provide them within 120 days of signature was a

¹¹ The reason the Buyers no doubt felt obliged to do so was because they needed to establish interdependence of the terms as to provision of a Refund Guarantee and payment of the instalments, as I explain below.

¹² The First and Ninth Claimants also each claimed a 50% share of the deposit of USD 3,320,000 paid to the Yard under the “*13K Option Agreement*” (Reasons, [24]).

repudiatory breach. The Tribunal rejected that case (Reasons [203]-[205]) and there is no appeal against that finding:

“Article X(A)(f) contained an express provision stipulating the consequences of a failure to provide the Refund Guarantee. This meant that the parties had agreed a timeframe for the provision of the Refund Guarantees and there was no need for a reasonable time obligation” and the Buyers in any event “did not clearly identify what a reasonable time would have been, and how it would have been identified”.

51. The Buyers’ first alternative case was that the Yard were under an obligation to provide the Refund Guarantees within 120 days of the SBCs and their failure to provide those Guarantees within 120 days was a breach of a condition of the SBCs pursuant to Article X(A)(f). The Yard acknowledged that they were under an obligation to provide the Refund Guarantees but maintained that Article X(A)(f) allowed them up to 120 days to provide the Refund Guarantees and the obligation was an innominate term.
52. The Buyers’ second alternative case was that if the obligation was not a condition, then the Yard’s breach of what should be construed as an innominate term was so serious as to be repudiatory. The Yard accepted that a wrongful failure to provide or maintain a Refund Guarantee could in principle amount to a repudiatory delay but denied that their failure to provide them by the dates when the SBCs were terminated was repudiatory. The Tribunal found that the delay in providing the Refund Guarantees, relied upon by the Buyers, was not repudiatory, not going to the root of the SBCs, nor depriving the Buyers of substantially the whole benefit for which they contracted (or amounting to a frustrating delay).
53. This appeal is concerned solely with the Buyers’ first alternative case that Article X(A)(f) is a condition. The Tribunal rejected that case as well, finding rather that Article X(A)(f) is an innominate term (Reasons, [208]-[241]). I shall return to their reasoning below.

THE LAW

54. Thus, the only live issue on this appeal is whether the Tribunal erred in law in finding that the stipulation as to the time by which the Refund Guarantee must be provided by the Yard is an innominate term rather than a condition. As Lord Scarman explained in *Bunge v Tradax* [1981] 1 WLR 711 at 717:

“A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end¹³. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach... 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. If the stipulation is one, which upon the true construction of the contract the parties have not made a condition¹⁴, and breach of which may be attended by trivial, minor or very grave consequences, it is innominate, and the court (or an arbitrator) will, in the event of dispute, have the task of deciding

¹³ And, it should be added, claim damages for loss of bargain (or, where appropriate, reliance loss).

¹⁴ It should be added, expressly or impliedly (see 717H).

whether the breach that has [actually] arisen is such as the parties would have said, had they been asked at the time they made their contract it goes without saying that, if that happens, the contract is at an end.”

55. Accordingly:

“Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances (“the factual matrix” as spelt out, for example, by Lord Wilberforce in his speech in the Reardon Smith case [1976] 1 W.L.R. 989, 995-997), 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”¹⁵ (emphasis added)¹⁶.

The leading House of Lords’ authorities

56. In *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, Lord Diplock in giving the leading speech explained at 923 that “[t]he question in both of these appeals, which have been heard together, is whether a failure to keep strictly to the time-table laid down in the [rent] review clause deprives the landlord of his right to have the rent reviewed and consequently of his right to receive an increased rent during the period that will elapse until the next review date” (ten years later). In other words, was strict compliance with the timetable set out in the rent review clauses of the essence? The House of Lords unanimously held that it was not.

57. The Court of Appeal had reached a different conclusion. In the first of the two appeals it had held, in particular, that the *commercial character* of the contract contained in a lease incorporating a rent review clause raised the presumption that the parties intended time to be of the essence of the contract in respect of each step required to be taken by the landlord in order to obtain a determination of any increased rent under a rent review clause, and that this presumption will prevail unless there are strong contraindications in the actual wording of the clause.

58. Disagreeing with this approach, at 924B-C Lord Diplock stated that “*I do not think that the question of principle involved in these appeals can be solved by classifying the contract of tenancy as being of a commercial character. In some stipulations in commercial contracts as to the time when something must be done by one of the parties or some event must occur, time is of the essence; in others it is not. In commercial contracts for the sale of goods prima facie a stipulated time of delivery is of the essence, but prima facie a stipulated time of payment is not (Sale of Goods Act 1893, section 10 (1)); in a charterparty a stipulated time of payment of hire is of the essence.*” In other words, simply labelling the contract to be of a “commercial” character is not sufficient to infer that time is of the essence: per Viscount Dilhorne at 938¹⁷.

59. In determining that time was not of the essence, Lord Diplock adopted a balancing exercise by comparing the likely detriment to each of the parties to the lease as a result of delay:

“[t]he absence of any serious detriment to the tenant if the determination of the new rent is postponed until some time after the commencement of the 10 year

¹⁵ *ibid.*

¹⁶ It is clear that the Tribunal approached this question in the right way, see Reasons, [209].

¹⁷ See also *March Engineering v Emblem* [1990] WL 10622727 per Sir John Megaw at 14.

period to which it will relate is to be contrasted with the detriment to the landlord if strict adherence to the date specified in the review clause is to be treated as of the essence of the contract. If it were determined even slightly late the landlord would lose his right to the additional rent for the whole period of 10 years until the next review date”.

60. At 950E-F Lord Salmon stated as follows:

“I recognise that the lease relates to what could be fairly described as a commercial transaction. In commercial transactions, provisions as to time are usually but not always regarded as being of the essence of the contract. They are certainly so regarded where the subject matter of the contract is the acquisition of a wasting asset or of a perishable commodity or is something likely to change rapidly in value. In such cases if, e.g., the seller fails to deliver within the time specified in the contract, the buyer may well be seriously prejudiced. The time provision in a rent revision clause of the present kind, even in a lease concerning a commercial transaction, is however different in character and I regard it as not being of the essence of the contract unless it is made so expressly or by necessary implication. In the present case it is certainly not made so expressly nor, in my view, by implication. Nor is there anything to suggest that the tenant would be prejudiced by determination of the rent for the period from August 31, 1972, to August 31, 1982, being postponed until after August 31, 1972.”
(emphasis added)

61. At 958B, Lord Fraser stated that the law was correctly summarised in Halsbury’s Laws of England as follows¹⁸:

“The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence.” (emphasis added)

62. Four years later, the House of Lords considered a similar issue in *Bunge v Tradax* [1981] 1 WLR 711 (with Lord Fraser once again a member of the court). That case concerned whether or not a time stipulation in a commodity (FOB) sale contract that the buyer give 15 days’ notice of “*probable readiness of vessel(s) and the approximate quantity required to be loaded*” was of the essence. Applying a consistent legal approach to that which the House of Lords had applied in *United Scientific*, both the Court of Appeal and the House of Lords unanimously held that it was, having regard to the circumstances and particular features of that contract.

63. The questions raised on appeal to the House of Lords were, in particular: (i) by what criteria should the court determine whether a provision in a mercantile contract that one party should perform some obligation by a stated time was a strict condition or an “innominate” or “intermediate” term; (ii) was the provision in an FOB contract incorporating the terms and conditions of GAFTA form 119 whereby the buyer was to give to the seller 15 days’ notice of probable readiness of the buyer’s vessel to load a strict condition or an intermediate term?

¹⁸ See also Lord Diplock at 927D-E.

64. Lord Wilberforce explained at 714F that “*The appeal depends upon the construction to be placed upon clause 7 of GAFTA form 119*¹⁹ *as completed by the special contract. It is not expressed as a condition and the question is whether, in its context and in the circumstances it should be read as such.*” He accordingly adopted the same approach to the question of construction as had Lord Fraser in *United Scientific* in the passage from his judgment cited above.
65. Lord Wilberforce roundly rejected the appellants’ submission, based upon a misreading of the judgment of Diplock LJ (as he then was) in *Hong Kong Fir* [1962] 2 QB 26, that the correct approach was to consider the breach *actually committed* and then decide whether that default would deprive the innocent party of substantially the whole benefit of the contract. Rather, the contract must be construed at the time when it was concluded, in its factual setting. Since in *Hong Kong Fir* it could be seen *in advance* (i.e. at the time when the contract was concluded) that the breaches which might occur of an obligation of seaworthiness were various, ranging from the extremely trivial to the extremely grave, “*it was impossible to ascribe to the obligation, in advance, the character of a condition.*”
66. Lord Wilberforce stated that²⁰ “*it remains true ... that the courts should not be too ready to interpret contractual clauses as conditions ... But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts.*”
67. The reason for that conclusion was spelled out by Lord Wilberforce at 716 G-H as follows:
- “In this present context it is clearly essential that both buyer and seller (who may change roles in the next series of contracts, or even in the same chain of contracts) should know precisely what their obligations are, most especially because the ability of the seller to fulfil his obligation may well be totally dependent on punctual performance by the buyer.”*
68. “*After some hesitation*”, Lord Scarman reached the same conclusion²¹ for the same reason – that the clause was intended as a term, the buyer’s performance of which was the necessary condition to performance by the seller of his obligations: “*[t]he seller needed sufficient notice to enable him to choose the loading port: the parties were agreed that the notice to be given him was 15 days: this was a mercantile contract in which the parties required to know where they stood not merely later with hindsight but at once as events occurred.*”
69. But in determining whether or not in a commercial contract a term is a condition, the relevant exercise still remains a question of construction of the particular contract in issue, as Lord Scarman emphasised: “*Because it makes commercial sense to treat the clause in the context and circumstances of this contract as a condition to be performed before the seller takes his steps to comply with the bargain, I would hold it to be not an innominate term but a condition*”²² (emphasis added).

¹⁹ “*Period of delivery – during [May 1975] at buyers’ call. Buyers shall give at least [15] days’ notice of probable readiness of vessel(s)...*”. The buyers were 5 days late in giving notice and the sellers declared the buyers in default and claimed damages for repudiation of the contract on the ground that the term as to notice was a condition.

²⁰ Expressly approved and relied upon in *The Naxos* [1990] 1 WLR 1337 at 1346H per Lord Ackner.

²¹ At 718D-E.

²² *ibid.*

70. Indeed, in his speech, Lord Lowry considered that there is no presumption of fact or rule of law that time limits in mercantile contracts must be treated as conditions. He observed that in so far as it had been said that “*broadly speaking*” time will be considered to be of the essence in mercantile contracts it must be borne in mind that “*contracts are to be performed and not to be avoided*”²³. He considered that the same approach that a court takes in determining whether to imply a term into a contract (where both parties say “*of course, it goes without saying*”) might be adopted as a useful guide in answering the question of whether a stipulation as to time in a mercantile contract should be construed as a condition²⁴.
71. Adopting that approach, Lord Lowry considered that in the case before him the term should be regarded as a condition by reason of a number of features of the contract construed in its factual matrix, including the fact that “*[t]here are enormous practical advantages in certainty, not least in regard to string contracts where today's buyer may be tomorrow's seller. ... Most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions.*”
72. In his speech, Lord Roskill referred to the fact that “*Parties to commercial transactions should be entitled to know their rights at once and should not, when possible, be required to wait upon events before those rights can be determined*”, but recognised that “*in many cases of ... alleged repudiatory delay it may be necessary to await events upon the happening or non-happening of which rights may well crystallise.*” A balance accordingly needs to be struck, as Lord Roskill explained at 727:

“In short, while recognising the modern approach and not being overready to construe terms as conditions unless the contract clearly requires the court so to do²⁵, none the less the basic principles of construction for determining whether or not a particular term is a condition remain as before, 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.” (emphasis added)

73. Where, as here, the contract contains a contractual termination clause, then a more nuanced approach may be called for. As Popplewell J (as he then was) stated in *The Spar Capella* [2015] EWHC 718 (Comm) at [161] (also known as *Spar Shipping*), citing this passage in Lord Roskill’s speech in *Bunge v Tradax*:

“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. This was not a matter which fell to be considered on the facts of that case.”

²³ Echoing Roskill LJ’s words in *Cehave NV v Bremer mbH* [1976] 1 QB 44 at 70-71.

²⁴ *STC v Golodetz* [1989] 2 Lloyd’s Law Reports 277 is a good example of the relevant obligation (a time clause) not being classified as a condition.

²⁵ Again, echoing what Lord Roskill said in *Cehave* at 70-71.

This is of relevance to the present case by reason of the contractual termination clause, Article X(A)(f), and I return to this below.

74. Returning to *Bunge v Tradax*, consistently with the other members of the House, Lord Roskill made clear that the “*long standing rules for determining whether a particular term in a contract is or is not a condition*” are enshrined in the oft quoted judgment of Bowen L.J. in *Bentsen v. Taylor, Sons Co.* [1893] 2 Q.B. 274, 281:

*“There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.”*²⁶ (emphasis added)

75. Lord Roskill also doubted (at 729E) that much help is to be derived in determining the status of a particular term by attaching a particular label to the contract. As he said, “*plainly there are terms in a mercantile contract ... which are not to be considered as conditions.*” That stated, “*the need for certainty in mercantile contracts is often of great importance and sometimes may well be a determining factor in deciding the true construction of a particular term in such a contract.*”

76. On the facts of that case, Lord Roskill stated (at 729F-H):

“To my mind the most important single factor in favour of Mr. Staughton's²⁷ submission is that until the requirement of the 15-day consecutive notice was fulfilled, the [sellers] could not nominate the one Gulf port as the loading port, which under the instant contract it was their sole right to do. I agree with Mr. Staughton that in a mercantile contract when a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a single loading port, the term as to time for the performance of the former obligation will in general fall to be treated as a condition. Until the 15 consecutive days' notice had been given, the respondents could not know for certain which loading port they should nominate so as to ensure that the contract goods would be available for loading on the ship's arrival at that port before the end of the shipment period.”

77. Lords Wilberforce, Scarman, and Roskill all considered this to be an important factor in determining that the term amounted to a condition, as did Megaw LJ in the Court of Appeal. Indeed, this was treated as the critical point of distinction by Clarke LJ in the term of the charter with which the Court was concerned in *Universal Bulk v Andre et Cie* [2001] 2 Lloyd's Law Reports 65 at 71 RHC:

*“26. In my opinion very different considerations apply to clause 42 of the charterparty in this case²⁸. In *Bunge v Tradax* the sellers could not nominate the loading port until the buyers had given the 15 days notice of probable readiness so that clause 7 was an example of a clause in which the performance by A was a condition precedent to the ability of B to perform another term of the contract.*

²⁶ Also cited with approval in *STC v Golodetz* [1989] 2 Lloyd's Law Reports 277 at 282 RHC per Kerr LJ.

²⁷ Leading Counsel for the sellers.

²⁸ A non-payment time stipulation requiring the laycan to be narrowed 32 days prior to the first layday.

Thus the contract could not be performed in accordance with its terms unless the notice was given...

32. Given that the charterparty could be performed in accordance with its terms whether or not the charterers discharged their obligations to narrow the laycan spread in accordance with clause 42, it does not seem to me to be likely that the parties intended that clause 42 was a condition of the contract such that any breach of it would entitle the owners to treat the charterparty as at an end. It makes no commercial sense to hold that the parties intended that the owners should be able to treat the whole contract as at an end if the charterers served a notice, say, two days late.” (emphasis added)

78. In *March Engineering Limited v Emblem BV* [1990] WL 10622727 at 14, Sir John Megaw (who gave judgment in the Court of Appeal in *Bunge v Tradax*) explained that he also considered that the “essential reason“ why the term in question in *Bunge v Tradax* (the requirement of 15 days’ notice of the probable readiness of the vessel and the approximate quantity of soya beans required to be loaded) was a condition of the contract “was that the place (that is, which of several possible ports of loading in the Gulf of Mexico) and the probable date for the delivery of the goods to be loaded at that port, whichever it might be, and also the quantity of the goods to be loaded, depended on the information to be given in the notice to the sellers by the buyers as required by the contract. The sellers might easily be put into serious difficulty in their ability to perform their obligations under the contract if the notice were not given to them by the required time so as to enable them to make the necessary arrangements as to the port to be nominated, as to the correct quantity of cargo to be available at the port at the right time for loading and the arrangements for loading it.” (emphasis added)
79. In my judgment, it follows that *United Scientific* and *Bunge* are authority for the following propositions.
80. First, whether a stipulation as to time in a contract is to be considered to be of the essence is a question of construction of that term in the contract in which it appears, in the light of the surrounding circumstances. Accordingly, time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances clearly show that time should be considered to be of the essence. If on the true construction of the clause it is a condition, it is unnecessary to go on to consider the gravity of the breach.
81. Second, simply labelling the contract to be of a “commercial” or “mercantile” character is not sufficient to infer that a stipulation as to time is of the essence. Courts should not be too ready to interpret contractual clauses as conditions unless the contract in question *clearly* requires the court to do so. However, the need for certainty in mercantile contracts is often of great importance (particularly in string contracts) and that fact is accordingly a factor, and sometimes may well be a determining factor, in determining whether a stipulation as to time is a condition or not.
82. Nonetheless, and third, it is necessary to balance the need for certainty in mercantile/commercial contracts on the one hand and, on the other, the desirability of not treating trivial or technical breaches as allowing rescission for breach of condition, where damages would clearly be an adequate remedy. So, if it can be seen at the time when the contract is concluded that the breaches which might occur of the relevant contractual stipulation were various, ranging from the extremely trivial to the extremely grave, then

that is an indicator which points towards the term being an innominate term, and not a condition.

83. Fourth, in a mercantile contract when a term has to be performed by Party A as a condition precedent to the ability of Party B to perform another term, especially an essential term/condition (such as the nomination of a single loading port)²⁹, the term as to time for the performance of Party A's obligation will *in general* fall to be treated as a condition³⁰ as Party B might thereby easily be put into serious difficulty in their ability to perform their contractual obligation. That is certainly an important factor in considering whether the term is a condition (Lord Roskill referred to it as "*the most important single factor*" in *Bunge*). But even then, whether the contractual stipulation is a condition or not still depends upon the proper construction of the contract in which the term appears, in its factual setting.

Recent Court of Appeal authority

84. More recently, in *The Spar Capella* [2016] 2 Lloyd's Rep 447 and *The Arctic* [2019] 2 Lloyd's Rep 603, the Court of Appeal has had the opportunity to consider the effect of the decisions in *United Scientific* and *Bunge*.
85. *The Spar Capella* was concerned with whether a stipulation as to the *time of payment* of hire was a condition or not. At first instance, Popplewell J (as he then was) held at [195]-[200] in particular that it was not, for a number of reasons:
- (1) The provision in the contract in that case for an express right of withdrawal for failure to pay hire ("the withdrawal clause") tended 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.
 - (2) There is the presumption that in mercantile contracts, stipulations as to the time of payment are not to be treated as conditions absent a contrary indication in the contract, of which there was none in the relevant charters.
 - (3) Predicated breaches of a term regarding time of payment may range from the trivial to the serious. Default in punctual payment may consist in being marginally late, by accident, causing no loss to the owners or loss which is insignificant in the context of the long term charter as a whole. In this respect the payment term carries the hallmarks of an innominate term. *Bunge v Tradax* establishes that this is not determinative, but nor is it irrelevant. 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 serious, that is a strong indication that it is to be treated as an innominate term. This applies as much to a time charter as any other form of contract.
 - (4) Popplewell J 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

²⁹ i.e. there is interdependence.

³⁰ Particularly in a context which "*carefully choreographed the sequence of actions required*" per Gross LJ in *The Spar Capella* at [53].

hire a few minutes late would entitle the owners to throw up a five-year charter. It would not satisfy the test for an implied term which Lord Lowry suggested in *Bunge v Tradax (supra)* as a useful guide.

- (5) Considerations of commercial certainty did not point to a different conclusion. As Lord Roskill observed in *Bunge v Tradax* certainty is a desideratum which must be counterbalanced with the need not to impose liability for a trivial breach in undeserving cases.
- (6) A very considerable measure of certainty was conferred by the withdrawal clause itself as an option to cancel. There was no uncertainty over the ability to put an end to future performance. It is true that if payment of hire is an innominate term and the right to terminate only entitles the owners to termination damages if the breach is repudiatory, the owners will not have absolute certainty in a fallen market in determining when the exact moment comes at which exercising the right will enable them to recover damages for the loss of bargain. But that is an uncertainty regularly faced by commercial parties whose contracts commonly contain innominate terms, and charterparties contain many such terms (for example as to seaworthiness). The Judge could see no reason why shipowners should be treated more favourably in this respect than others; the owners of vessels are not unique in the commercial world in relying on prompt payment by their contractual counterparty to finance their performance of the contract.

86. The Court of Appeal upheld Popplewell J's judgment. Gross LJ explained the issue before the court at [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.”

87. At [52] Gross LJ stated that *Bunge v Tradax* contains “*helpful general guidance*” as to whether a term of a contract is to be classified as a condition. I consider that Gross LJ was making clear that that guidance, and indeed his summary of the guiding principles of construction, apply generally and are not limited to clauses regarding time of payment. The general guidance that he gave is as follows:

“(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 717):

‘The first question is always, therefore, whether, on 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 715–716).

(ii) Secondly (Lord Scarman, (... at 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 715–716, Lord Scarman... at 717, Lord Roskill... at 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.”

88. Gross LJ also expressed the view (at [53]) that a most important feature of the case in *Bunge* was that the terms in question were *interdependent*. He stated that in that case “*the term—which was not 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.*” Whilst Gross LJ referred to this situation as creating a “*presumption*”, the House of Lords in *Bunge* did not in fact refer to a “*presumption*”. Rather, Lord Lowry stated at 719F that “[*t*]he treatment of time limits as conditions in mercantile contracts does not appear to me to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen, just the kind of thing which Bowen L.J. could have had in mind when framing his classic observations on the implied term in *The Moorcock*.”³¹

89. Be that as it may, Gross LJ stated at [54] that:

*“In the present case, cl 11 of the charterparties with which we are concerned, is 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 [the charterers] with cl 11 was not a condition precedent to the performance by [the owner] of their obligations under the charterparties in the same direct or immediate sense that the terms were interdependent 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 [the owner’s] performance under the charterparties... 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.”*

90. Gross LJ was not in any event persuaded that any general presumption as to time being of the essence in mercantile (or commercial) contracts was of significance or assistance in *The Spar Capella*. He gave two reasons for that conclusion. Gross LJ’s first reason in particular, was that “*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*

³¹ Expressly approved and relied upon in *The Naxos* [1990] 1 WLR 1337 at 1347D per Lord Ackner.

*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.*³²

91. The second reason was that, whilst Gross LJ accepted (at [58]) that certainty is plainly a consideration of major importance when construing commercial contracts such as the charterparties with which he was concerned, he considered³³ that the “key question” was “striking the right balance” (at [59]):

“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 five-minute delay in the payment of a single instalment of hire, for whatever reason not covered by an anti-technicality clause.”

92. Further still, as Popplewell J had reasoned at first instance, Gross LJ considered (at [60]) that “[w]here 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 stated, 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. Like Popplewell J, Gross LJ considered (at [62]) that “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.”
93. Hamblen LJ gave a concurring judgment. He stated at the outset of his judgment (at [92]), relying in particular upon passages in the speeches in *Bunge v Tradax* to which I have referred above (in particular in paragraphs 55 and 72), that: “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”, before concluding that it could not be said that it was clear that the obligation to pay hire timeously was a condition of the charterparties in that case, or indeed of time charterparties generally.
94. It is plain that Hamblen LJ was laying down a series of general principles of construction which he drew from the caselaw. One of the key factors which particularly weighed with him (as it did with Popplewell J and Gross LJ) was the inclusion in the charterparty of an express right of withdrawal which he considered to be an indication that payment of hire timeously is not a condition, since its inclusion would otherwise be unnecessary. On any view it did not make it *clear* that the term was a condition.
95. Hamblen LJ further relied upon the following features in that case (at [93]):

(1) 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.

³² Gross LJ also reasoned that 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.

³³ Consistently with the passage in Lord Roskill’s speech in *Bunge v Tradax* at 727 (set out in paragraph 70 above).

- (2) The payment of hire timeously is not a mere time provision and does not involve interdependent obligations such as those 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.
- (3) Whilst certainty is an important consideration in the construction of commercial contracts, 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.
- (4) 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 observed, 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.
96. Gross LJ returned to the topic of the circumstances in which a clause will be determined to be a condition in *The Arctic* [2019] 2 Lloyd's Law Rep. 603. The question of law on that appeal was whether the term contained in clause 9A of the charterparty, 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 or an innominate term. It follows that the court was concerned in that case with neither a time clause nor a payment clause. Nonetheless, Gross LJ once again (at [42]) had regard to the general guidance in *Bunge v Tradax* and *The Spar Capella*.
97. Unlike *The Spar Capella*, the charterparty in *The Arctic* did not contain a withdrawal clause. At [46] Gross LJ again summarised the legal principles, which he had expounded in *The Spar Capella*, on the question of ascertaining, in general terms, whether a particular clause in a contract is a condition:
- “(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.”
- The Judge confirmed that the general guidance which he gave in *The Spar Capella* at [52] was guidance distilled from the collected observations in *Bunge v Tradax* and that he was not giving “general guidance”, *de novo*.
98. In holding that clause 9A relating to the vessel's classification status was not a condition, Gross LJ emphasised that *Bunge v Tradax* was a very different case to *The Arctic* because, unlike *Bunge*, the court in *The Arctic* was not concerned with interdependence of clauses:

“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 para 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”. (emphasis added)

99. On the issue of contractual certainty, Gross LJ repeated his observations in [58]-[62] of *The Spar Capella* and stated (at [48]) that whilst certainty is a consideration of undoubted importance, it is not one entitled to undue weight in determining whether a term is a condition or innominate.

100. Both textually and contextually, Gross LJ held that clause 9A was not a condition by reason of the following features in particular: (i) the term is not expressed to be a condition; (ii) the term is not a time clause unlike the clause in *Bunge v Tradax*; (iii) there was no interdependence of terms – the term was not a condition precedent; (iv) the wording of clause 9A as a whole (placing distinct obligations upon charterers as to maintaining both the physical condition of the vessel and its class status) suggested that a term relating to the vessel’s classification status was not a condition. Far from any breach of the obligation as to the physical maintenance of the vessel 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*”. This “*plethora*” of factors outweighed the fact, in favour of the contention that the term was a condition, that only one kind of breach of the term was possible: either the vessel was in class or she was not.

101. Gross LJ accordingly concluded that the term was not a condition but rather an innominate term, which

“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 paras 52(iii) and 92), together with prior authority (see, especially, Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] QB 44, at pages 70 to 71, per Roskill LJ, as he then was), that the term is an innominate term.”

102. In *The Lila Lisbon* [2025] 1 Lloyd’s Law Reports 101, Dias J was concerned with a Memorandum of Agreement (“MOA”) for the sale of a vessel pursuant to which it was alleged that the sellers had a positive obligation to tender Notice of Readiness by a Cancelling Date. Accordingly, this was a commercial contract which contained a time

clause. In that case, the Buyers accepted that the Sellers' skeleton argument, which cited *The Spar Capella* and *The Arctic*, correctly set out the relevant principles for determining whether or not a term of a contract is to be regarded as a condition any breach of which gives rise to a right to terminate, namely:

“(i) The classification of a term as a warranty, condition or innominate term is a matter of contractual construction.

(ii) The courts should not be too ready to interpret contractual clauses as conditions and unless the contract makes clear that a particular stipulation is intended to be a condition or a warranty, it should be treated as an innominate term.

(iii) Where breach of a term may have a range of consequences from the trivial to the grave, that militates against that term being a condition since otherwise it would lead to results by which trivial breaches would have disproportionate consequences.”

103. That succinct analysis is consistent with *The Spar Capella* and I consider that it correctly summarises the law.

ANALYSIS

Did the Tribunal misstate the relevant legal principles?

104. I consider that the Tribunal was correct to find that Article X(A)(f) is not a condition but rather an innominate term. I set out next my reasoning for reaching that conclusion, although before doing so I must first deal with the Buyers' contention that the Tribunal misstated the relevant legal principles applicable to the issue on this appeal, which gives rise to Ground 1 of their appeal.

105. Ground 1 reads as follows: *“The Refund Guarantee obligation should be construed as a condition in accordance with the usual practice of, or preference for, treating time stipulations (other than those relating to payment) as conditions in mercantile (or commercial) contracts.”*

106. In paragraphs 29-30 of their skeleton argument, the Buyers then contend as follows:

“29. Regrettably, whilst accepting that the SBCs were mercantile contracts, the Tribunal approached the construction of the [Refund Guarantee] obligation from the wrong starting point and with the wrong mindset or emphasis, with a positive disinclination to construe it as a condition (“the starting point is that a term will not be treated as a condition unless its wording or context point otherwise” [217]), and on the incorrect basis that Spar Shipping “makes clear that there is no presumption that a clause fixing time for performance in a mercantile contract should be treated as a condition” [219]. It is, therefore, hardly surprising that the Tribunal came to the wrong conclusion. Given that the RG obligation comprised an important term in mercantile (or commercial) contracts, the Tribunal should have approached its construction, not with some disinclination to conclude that it was a condition, but rather with a preference, indeed a strong preference, for doing so, at least starting with an assumption that, in the interests of certainty, this clearly expressed stipulation as to time is to be strictly construed.

30. *As explained in later sections of this skeleton, there are no countervailing factors to count against, still less outweigh, what should be a clear preference for construing the RG obligation as a condition in the present context; further, there are powerful additional factors that support and reinforce a conclusion that the RG obligation should be construed as a condition.*”

107. I reject these submissions. The Tribunal did not start from the wrong starting point in addressing this question; on the contrary the Tribunal’s starting point accurately stated the law, namely that the starting point is that a term will not be treated as a condition unless its wording or context indicate otherwise³⁴. The Tribunal was thereby accurately explaining that, as the Court of Appeal made clear in *The Spar Capella* and *The Arctic* in summarising the effect of *Bunge v Tradax* and *United Scientific*, unless it is clear that a term is intended to be a condition or (only) a warranty from its wording or context, it will be innominate, and the court should not be too ready to interpret contractual clauses as conditions (Reasons, [217]). But in every case, the central question is (as the Tribunal stated at Reasons, [208]) whether on the true construction of the stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty.

108. The Tribunal’s statement (Reasons, [219]) that *Spar Shipping* “*makes clear that there is no presumption that a clause fixing time for performance in a mercantile contract should be treated as a condition*” is unobjectionable, particularly when read in its context. That context is as follows (Reasons [219]):

“We did not consider that an appropriate analogy could be drawn from a buyer’s obligation to put up a letter of credit in the case of an international sale of goods, since this reflects payment for the goods where there is necessarily interdependence with the seller’s delivery obligations. As explained below, we were not satisfied that there was interdependence between the [Buyers’] right to a refund guarantee to secure the return of instalments when paid, and the [Yard’s] obligation to build the vessel. Spar Shipping makes clear that there is no presumption that a clause fixing time for performance in a mercantile contract should be treated as a condition”.

109. This is consistent with Gross LJ’s judgment in *The Spar Capella*, in which he stated that “*the term—which was not 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.*” In other words, the Tribunal’s reasoning was that in a case such as the present where there is no interdependence between the Buyers’ right to a Refund Guarantee to secure the return of instalments when paid, and the Yard’s obligation to build the vessel, there can be no presumption that the time for performance of the obligation to deliver a Refund Guarantee no later than 120 days after novation should be treated as a condition. I agree with that reasoning, which correctly applies the relevant legal principles (and to which I return below). It follows that I reject Ground 1 of the appeal.

110. I turn now to explain my reasoning for concluding that the stipulation contained in Article X(A)(f) is not a condition but rather an innominate term. Although the Buyers framed their appeal by way of five separate grounds of appeal, those grounds overlap and do not fall easily into separate, self-contained grounds, as ultimately there is only one question before the court which is whether Article X(A)(f) is, on its true construction, a condition or an innominate term. Accordingly, I do not find it helpful to address the

³⁴ See paragraphs 81(2) and 89 above.

grounds of appeal one by one; rather I address below the features of the SBC, construed in its commercial context, which lead to the conclusion that the stipulation is an innominate term, as the Tribunal found. In doing so I necessarily address the Buyers' central submissions in their five Grounds of Appeal.

The wording of Article X(A)(f)

111. As explained above, unless it is clear from its wording or context that a term is intended to be a condition or (only) a warranty, it will be innominate. The starting point is accordingly the language of the clause. So far as that is concerned, in *The Arctic* at [54] Gross LJ stated that “[t]he 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...”. So too in the present case, Article X(A)(f) is not stated to be a condition and that is a consideration of some significance. It is a factor, weighing in the balance in favour of the term being innominate.
112. However, Mr. Ashcroft KC submitted that the words “*by no later than 120 days after the date [the SBC is novated]*” point strongly to the clause being construed as a condition, as, he argued, this express wording emphasised the importance of meeting the deadline and avoiding any delay. This is stated to be Ground 2 of the Grounds of Appeal.
113. In support of his submission, Mr. Ashcroft KC relied upon *Harold Wood Brick Co v Ferris* [1935] 2 KB 198, in which the relevant contract contained a term requiring a purchase of premises “*not later than*” a specified date. Greer LJ stated at 204: “*I agree with the contention that the only way in which effect can be given to these special words is to make completion by September 15 a condition which is of the essence of the contract...*”.
114. In that case the defendant entered into an agreement to purchase certain freehold land and buildings. Clause 15(1) of the sale contract provided for payment by the defendant of the purchase price and completion on 31 August 1933 or at his option completion on 15 August 1933 (with payment of a lesser purchase price) and, by clause 15(3) “*if for any reason the actual completion of the purchase is delayed beyond August 31, 1933, then nevertheless on that date the purchase money . . . shall be placed on deposit in the joint names of [the parties’ solicitors] . . . but the purchase shall in any event actually be completed not later than September 15, 1933...*”. Clause 16 provided: “*Should the purchaser fail to complete the said purchase in accordance with this agreement any deposit paid by the purchaser shall be forfeited to the vendors who may rescind the sale and resell the property either by public auction or private contract subject to such stipulations as they may think fit.*”
115. At 203 Greer LJ observed that “*if in clause 15 there had been nothing but the date for completion primarily fixed for August 31, 1933, there might be some difficulty in saying that the time so fixed should be regarded in equity as well as at law as of the essence of the contract; but there are two other dates mentioned*”. What made clause 15(3) a condition was the fact that 15 September 1933 was a long-stop date and the special words of the clause as a whole accordingly had to be given effect as a condition. The Judge accepted the submission of the seller (at 202) that “*After stating two optional dates it makes September 15 the peremptory date, and as the purchaser did not complete on that date he must be taken to have repudiated the contract, and thereupon a right to damages accrued to the vendors automatically*” (emphasis added).

116. That was the way in which the court construed the particular clause in that case in its contractual context. But, as is clear from my analysis of the law above, everything depends upon the particular contractual context. If Mr. Ashcroft KC were right and simply the fact that the contract uses the words “*no later than*” 120 days were enough to make the term a condition, then the requirement in the Technical Specification of the Vessel³⁵ for the Yard to furnish to the Buyer a complete report of the sea trials (which is itself full of time stipulations) “*no later than 7 days after the sea trials completion date*” would likewise be a condition of the contract, which is very unlikely to be the case.
117. Mr. Ashcroft KC cited a number of other cases in support of his argument that the wording “*no later than*” is the express language of a condition but those cases did not support the generality of that submission. Rather, whether or not a particular term amounted to a condition in each of those cases depended upon the proper construction of that particular stipulation in the particular contract of which it was a part³⁶. As Davis J rightly stated in *Msas Global Logistics v Power Packaging Inc* [2003] All ER (D) 211 at [43], being a case relied upon by the Buyers, “*Ultimately, as it seems to me, the question is one of the interpretation of the particular contract, the words used being set in the factual context in which the contract is made and regard being had to the subject matter of the contract*”.
118. It follows that the wording “*no later than 120 days*” does not provide the Buyers with a free-standing ground of appeal as suggested in Ground 2, and it is not sufficient simply to state, as do the Buyers, that this wording is “*the language of deadlines*” and that makes it a condition without more. Of course, this is a “*deadline*” in the sense that the parties have specified a period of time in Article X(A)(f) in order to set up the Buyers’ contractual option to cancel in the same clause. The parties need to know when that contractual option accrues. But it does not follow from this fact alone that the clause must necessarily be a condition; that depends upon the proper interpretation of the stipulation in its contractual context.
119. That stated, as a factor in their favour in construing the contract, the Buyers can point to the fact that by Article X.2, the Yard is obliged to furnish the Buyers with a Refund Guarantee at least five Banking days prior to payment of the first instalment. The first instalment is due and payable (i) within five Banking Days of the SBC becoming effective in accordance with Article XIX (upon signing) and (ii) receipt of the Refund Guarantee. This is somewhat circular; however, it is open to the Buyers to contend (as they do) that the SBC appears to anticipate (i) the provision of the Refund Guarantee at the outset of the SBC and then (ii) a “*longstop*” date of no later than 120 days after novation of the SBC which must be strictly complied with.
120. On the other hand, militating against the Buyers’ construction in this regard is the fact that the full wording of Article X(A)(f) itself provides that the Yard would be considered to be in default if “[*t*]he [*Refund Guarantee*] is not delivered to the BUYER in

³⁵ Which forms part of the SBC: see Article I.1 thereof.

³⁶ *Gill & Duffus v Societe Pour L’Exportation* [1985] 1 Lloyd’s Rep 621 (Leggatt J) (the commodity sale contract contained an interdependent clause akin to that in *Bunge v Tradax*: “*port to be specified by the defendants at latest Monday 14.11.83*”); *The Seaflower* [2001] 1 All ER 240 (the particular use of the word “*guarantee*” and the nature of the particular contract led to the conclusion that the parties had by necessary implication to have intended that the charterers would have a right of cancellation); *Warde v FedEx* [1985] 2 Lloyd’s Rep 289 (Whilst this was not a case in which the contract simply would not work if the buyer did not perform his obligation at the stated time, continued extensions of the deadline for the completion of the buyer’s obligation to name his bank culminating in a final deadline of “*the 2nd March latest*” amounted to a condition (see in particular Bingham J at 298).

accordance with the terms of this CONTRACT by no later than 120 days after the date this CONTRACT is amended, novated and restated or such later date as the BUYER may designate in writing from time to time” (emphasis added). This underlined part of the clause is a factor pointing away from the clause being a condition³⁷.

121. This clause not only recognises that the Refund Guarantee may not be provided by the Yard’s bank until long after the outset of the SBC but also allows the Buyer continually to extend the so-called “*longstop*” delivery date of the Refund Guarantee. This does not suggest that 120 days is in fact a “*longstop*” date in respect of which time is of the essence, since the Buyer can replace the 120 day deadline with a further deadline or deadlines. As the Tribunal rightly observed (Reasons, [228]): “*The fact that the Claimants were given an option to extend the period as they wished “from time to time” suggested that the parties did not treat the time limit as entitling the Claimants to terminate*”³⁸ regardless of the seriousness of the breach.”

122. In particular, the Tribunal found at (Reasons, [221]) that the SBCs “*contained no clear wording indicating an intention that the obligation relied upon pursuant to Article X(A)(f) was a condition. The wording referring to the Refund Guarantee being presented “no later than 120 days” simply denoted a time limit, it did not make the term into a condition by way of longstop*”. I agree.

123. Accordingly, I do not consider that too much can be read into the wording of “*no later than 120 days*”. There are, however, more substantial factors which militate against Article X(A)(f) being construed as a condition when one considers the nature of the subject matter of the contract and the surrounding circumstances, as follows.

Commerciality and alleged interdependence of terms

124. The Buyers also contend that the Refund Guarantee obligation should be construed as a condition taking into account the commercial and practical significance of the term in the scheme of the contract³⁹. In particular, the Buyers argue that Article X(A)(f), and the provision of a Refund Guarantee, is interdependent with (a) the payment of instalments by the Buyer and (b) the delivery of the Vessel. The Buyers argue that this points firmly to the term being a condition, relying upon *Bunge v Tradax* (supra).

125. But this is not a case (unlike *Bunge v Tradax*) where a term has to be performed by one party, A, as a condition precedent to the ability of the other party, B, to perform an essential term of the contract, such that without A’s performance of that term, B’s performance under the contract cannot be secured. In other words, it cannot be said⁴⁰ that any delay exceeding 120 days in providing the Refund Guarantee, no matter how short, would derail the performance of the SBC.

126. That that is so is apparent from the contractual wording as follows.

³⁷ This clause is different from that which the court considered in *Barclay v Messenger* [1874] 43 LJ Ch 449, relied upon by the Buyers, which concerned a contract for the sale of a leasehold interest in a piece of land where the court held that time was of the essence. The contract contained, “*an agreement to pay on a given day, or at a deferred date if agreed upon, and if not the contract to be void.*” That is unlike this case, where the Buyer is afforded an option to terminate the contract or to extend the delivery date of the Refund Guarantee.

³⁸ i.e. at common law.

³⁹ Ground 3 of their appeal.

⁴⁰ As the Buyers contend in Ground 3 of their appeal, where they argue that the Refund Guarantee obligation should be construed as a condition taking into account the commercial and practical significance of the term in the scheme of the contract, including its alleged interdependence with other terms and obligations.

127. First, so far as any alleged interdependence between the provision of the Refund Guarantee and the payment of the instalments is concerned, by Article II.4(a) the first instalment does not become “*due and payable*” until the Buyer receives the Refund Guarantee. That does not make the payment obligation “*interdependent*” with the provision of the Refund Guarantee (by analogy with *Bunge v Tradax*), as Mr. Ashcroft KC submitted. On the contrary, the payment obligation in respect of each of the three instalments (Article II.4(a)-(c)) does not even come into being if the Refund Guarantee is not provided. The obligation upon the Buyer to make payment is expressly deferred. This is not a case where, if the Yard breaches its obligation to provide the Refund Guarantee, the Buyer will in turn be in breach of its obligation to pay the instalments. If the Yard breaches its obligation to provide the Refund Guarantee, the Buyer’s corresponding obligation to perform - by paying the instalments - is deferred: his position is necessarily protected or “already baked in” to Article II.4(a)-(c) as Mr. O’Sullivan KC, counsel for the Yard (together with Alexander Wright KC and Henry Ellis) put it.

128. Second, so far as any alleged interdependence between the provision of the Refund Guarantee and the delivery of the Vessel is concerned, the Buyers’ argument in this respect was dependent upon the contention that “*the very construction of each vessel was both legally and as a matter of practical reality, dependent on the provision of [the Refund Guarantees]*”: see their skeleton argument at [55]-[59]. But that is wrong.

129. The Buyers are wrong to submit that the “legal position” is that without the provision of the Refund Guarantee they would be under no obligation to pay instalments (see Article II.4) and, without payment of instalments, there would be no obligation on the Yard to build the Vessel. It can be seen from the analysis of the express terms of the SBC above, that in the event of a default by the Buyer or the Yard in fulfilling their respective obligations under the SBC, the contract provides a complete scheme of contractual remedies. But it does not allow the Yard simply to refuse to build the Vessel in the event of its failure to provide the Refund Guarantee.

130. By Article XI, the SBC provides that:

“The BUYER shall be deemed to be in default of its performance or obligations under this CONTRACT in the following cases:

(a) If any pre-delivery installment is not paid by the BUYER to the SELLER within five (5) Banking Days after such installment becomes due and payable as provided in Article II hereof”.

131. As has been explained, if the Refund Guarantee is not delivered to the Buyer in accordance with Article X.2, the pre-delivery instalments do not become due and payable under Article II. If, however, the Refund Guarantee is delivered in accordance with Article X.2, then the first instalment becomes due and payable. If it is then not paid within five banking days after it becomes due and payable, the Buyer is in default. One important effect of that is dealt with in Article XI.2(a), namely the Delivery Date of the Vessel is automatically extended by the length of the Buyer’s default (with rescission at the Yard’s option should the period of the Buyer’s default continue for a period of 10 days – Article XI.2(b)). So the SBC deals with the effect of non-payment of an instalment which falls due and payable. However, there is no entitlement on the part of the Yard to an extension of the Delivery Date if an instalment is not paid which has not yet fallen due and payable because the Refund Guarantee has not been delivered. In that case, the Yard’s obligation to deliver the Vessel on the contractual Delivery Date (under Article VII)

remains unaffected and the Yard continues to be exposed to liquidated damages claims if it falls behind with the construction and delivery of the vessel, see Article III above.

132. In support of its submission that it has no obligation to build and deliver the Vessel if the instalments have not been paid by reason of the Yard's own breach of contract in failing to deliver the Refund Guarantee, the Yard relied upon the judgment of Walker J in *Teekay Tankers v STX Offshore* [2018] 1 All ER 279.

133. In that case, Teekay Tankers Ltd ("TT") and STX Offshore Ltd ("STX") entered into various shipbuilding contracts under which STX agreed to build four ships for TT. The parties also entered into an option agreement ("the option agreement") by which TT was granted three options to order three additional sets of up to four vessels. The option agreement stated in clause 4 that the delivery date for those ships "*shall be mutually agreed upon*", and that STX would "*make best efforts*" to deliver those vessels within certain timeframes. TT sought to exercise the first and second option but STX experienced financial difficulties and was unable to provide refund guarantees as required under the option agreement. As a result, STX was "*wholly unable to finance construction of the Vessels... the vessels simply would not be built and delivered.*"⁴¹ No delivery dates were ever mutually agreed nor any optional agreements concluded. TT claimed that STX had repudiated the option agreement and that it was therefore entitled to terminate the agreement and to damages to compensate for its loss of profits. STX denied liability, arguing that the option agreement was void for uncertainty because it did not specify dates for delivery of the optional vessels.

134. Walker J held that the option agreement was void for uncertainty. However, he still went on to deal with the parties' submissions on quantum, including whether the STX was still under an obligation to build and deliver the relevant vessel within the contractual timescale. It follows that everything that the judge said in this respect was *obiter*.

135. In *Teekay*, the wording of the guarantee clause (article 10(k) was as follows (at [291])):

"As security for the refund of Instalments prior to delivery of the Vessel, the Builder shall (as a condition of the Buyer's obligation to make payment of any of the Instalments of the Contract Price) furnish the buyer with the letter of guarantee covering the amount of the instalments and any interest thereon ..."

136. STX's submission was that because the word "*shall*" is found immediately before the words in brackets, and because art 10(k) contains no express time limit, the requirement imposed by the word "*shall*" is only a requirement (i.e. it is only necessary to furnish a letter of guarantee) if STX wants to receive an instalment of the price, otherwise there was no obligation to furnish a letter of guarantee. It is important to appreciate that the Judge's remarks which follow are made in the context of that argument.

137. Unsurprisingly, the Judge rejected that submission at [294]: "*The SBC plainly contemplates that work will proceed in stages in accordance with these provisions. It would be astonishing if STX had no obligation to provide the refund guarantee, this being the pre-requisite which enables work to proceed in accordance with the stages contemplated by the contract*".

⁴¹ At [230]. *Teekay* was a case where an insolvent yard in the control of its creditors was not permitted to take these loss-making contracts forward by its creditors whose help it needed to obtain the letters of guarantee. That is very far from the facts in this case: see paragraph 47 above.

138. It is in that context that, as the Judge stated at [295], STX sought to answer this point by saying that it would still be under an obligation to build and deliver the relevant vessel within the contractual timescale. Those obligations, submitted STX, would “*exist and persist irrespective of the provision by the builder of a refund guarantee*”. The Judge rejected that submission by reason of the fact that, he said, the SBC simply did not provide for payment of the price independently of the instalments.
139. In the present case, unlike in *Teekay*, it is not suggested that there is *no obligation* to provide a Refund Guarantee. There is such an obligation, and a failure to provide it gives rise to a contractual right (a contractual option) of termination on the part of the Buyer which he may or may not exercise⁴². In any event, the Judge’s *obiter* remarks in respect of the contract in that case cannot influence the proper construction of the SBC in the present case in which, as the Tribunal rightly stated (Reasons, [238]), “*the SBCs had made express provisions with agreed timescales addressing delay in progress, delay in providing the Refund Guarantee and also delay in delivery (including liquidated damages and a range of rights of cancellation). Therefore, while the absence of a refund guarantee and instalments would, as a matter of commercial reality, impede practical progress it was incorrect to suggest that the SBC would fall into unworkable disarray unless the obligation was construed as a condition.*” That finding was consistent with the Tribunal’s factual findings set out in paragraph 42 above, which this court cannot go behind.
140. In short, in the present case a failure to deliver the Refund Guarantee did not entitle the Yard to delay constructing and delivering the Vessel by the Delivery Date (absent force majeure or the Buyer’s default). The Tribunal correctly reached this important conclusion, stating that it was apparent from the wording of the SBC that the absence of Refund Guarantees would not prevent the SBCs from being performed (for example it would not extend the delivery date, save to the limited extent of a force majeure notice) (Reasons, [239(iii)]).
141. It follows that if the pre-delivery instalments are not paid by reason of the Yard’s failure to deliver the Refund Guarantee and as a result the Yard refuses to build the Vessel, then that wrongful refusal would amount to a renunciation of the SBC by the Yard.
142. Mr. Ashcroft KC also sought to argue that the practical reality is that, if Refund Guarantees were not provided, the pre-delivery instalments of the Contract Price would not be paid, and the vessels would not be built (citing *Teekay, Stocznia v LATCO* [2002] 2 All ER (Comm) 768 and *The Hansa Murcia* [2013] 1 All E.R. (Comm) 1277). The parties would, he submitted, have appreciated this at the time of contracting, particularly in the light of the views expressed in the aforementioned authorities.
143. I do not consider that this argument is open to Mr. Ashcroft KC, as he is inviting this court impermissibly to go behind the factual matrix as found by the Tribunal, and in particular the finding that at the time of contracting there was no question as to the Yard’s solvency and ability to start work on construction even if the first instalment was not paid⁴³. The Tribunal found on the facts that the absence of a Refund Guarantee and instalment payments would not mean that the SBC “*would fall into unworkable disarray*” (Reasons, [238]).

⁴² I disagree with the suggestion of Walker J that “*If [the Seller’s] obligation to build and deliver the vessel within the contractual timescale persists irrespective of whether a refund guarantee has been provided, then it is difficult to see why a buyer could possibly wish to terminate the SBC merely because the refund guarantee had not been provided*”. There may be many reasons why he might wish to do so, depending upon the state of the market.

⁴³ See paragraph 42(1) above.

144. Moreover, Mr. Ashcroft KC's submission is inconsistent with the terms of the SBC. Article II.4 expressly envisages that by the time the Yard begins and indeed completes the steel cutting (Article II.4(b) and keel-laying (Article II.4(c)) stages of construction, the Refund Guarantee may not have been provided. So the SBC does not envisage construction work on the Vessel ceasing if the Refund Guarantee is not provided.
145. Mr. Southern KC (appearing with Mr. Mander for the Ninth and Tenth Claimants⁴⁴) submitted that the contracts do not provide for payment of the full contract price on delivery, so that if there was an obligation to build the Vessel regardless of the payment of instalments, the full price would never become payable, even on delivery of the Vessel and the parties cannot have intended that.
146. I do not accept that submission. It was in the Yard's interests to deliver the Refund Guarantee in order to unlock the payment of the pre-delivery instalments by the Buyer and the SBC is premised on the assumption that the Yard intended to do so. Accordingly, I agree with Mr. O'Sullivan KC that at the time of contracting the parties could not have envisaged a situation where the Yard would continue to build the Vessel up to the point of delivery and not issue a Refund Guarantee so as to receive the instalment payments. It would be entirely contrary to their best interests to do so. By the time the Vessel had been constructed and was ready for delivery, a bank would obviously be willing to issue a Refund Guarantee as by that stage the bank would face virtually no risk. By delivering such a Refund Guarantee, the Yard would unlock 30% of the Contract Price (with the other 70% payable on delivery and acceptance of the Vessel) and so it would be bound to do so.
147. However, in the improbable scenario of the Yard refusing or failing to provide a Refund Guarantee at all, the first, second, and third instalments simply do not become due and payable. The Buyer is not in default under Article XI.1(a) because the relevant instalment has not become due and payable. The Yard will then only recover 70% of the Contract Price as the fourth instalment is not dependent upon the provision of a Refund Guarantee.
148. This is because Article II.4 provides that the "*Contract Price shall be due and payable by the BUYER to the SELLER in the instalments as follows ...*". In other words, the Contract Price is only payable in instalments which have become *due and payable* in accordance with the wording of each of Article II.4(a), (b), (c) and (d). If no Refund Guarantee is provided but the Vessel is delivered, then the first to third instalments of the Contract Price never become due and payable – only the fourth instalment does⁴⁵.
149. Mr. O'Sullivan KC argued that a court would imply a term that the Buyers must still pay the total Contract Price as in these circumstances, if the parties were asked at the time of contracting "*what happens in the event that the Yard wrongfully chooses not to deliver a Refund Guarantee and the Vessel is constructed and ready for delivery?*", they would no doubt answer: "*the Buyer must pay the contract price*" and that a court would, if necessary, imply such a term into the SBC to that effect. As Lord Lowry said in *Bunge v Tradax*, "*contracts are to be performed and not to be avoided*".
150. That is an alternative approach to dealing with this improbable factual situation but I do not favour it. It allows the Yard to benefit from the breach of its own obligation to provide a Refund Guarantee (in that the Yard benefits from not having to put up a Refund

⁴⁴ Who adopted and relied upon the submissions of C Inc.

⁴⁵ If the Yard used its own failure to issue a Refund Guarantee at all in order to justify refusing to deliver the vessel, that would amount to a repudiatory breach of contract entitling the Buyer to terminate and sue for damages: see paragraph 141 above.

Guarantee in breach of its contractual obligation, and yet it still recovers the full contract price); and such an implied term is also arguably inconsistent with the express terms of the SBC, namely Article II.4(a)-(c).

151. It follows that I entirely agree with the Tribunal's summary (at Reasons, [236]-[238]):

“236. We do not accept that the provision of the Refund Guarantees was a condition precedent to the Respondents' obligation to construct the Vessels under the SBCs. The comments in Teekay that were said to support this proposition were certainly obiter. We accept the [Yard's] argument that these comments addressed a hypothetical and ambitious submission on the part of a yard that had been financially unstable at the time of contracting and which then denied that it was under an enforceable obligation to provide a refund guarantee. We distinguish them as unlikely to reflect what the parties to the SBCs would have expected, especially where at the time of contracting there was no question as to the [Yard's] solvency and ability to start work on construction even if the first instalment was not paid.

237. In addition, the wording of the SBCs did not support the [Buyers'] case on this (e.g. provisions that the drydock was selected at the outset). In Bunge v Tradax the ability of the seller to fulfil its obligations was found to be totally dependent on the punctual performance of the buyer. The obligations here were not interdependent and we distinguish Bunge v Tradax on this basis. The Respondents would still be under a contractual obligation to build the Vessels even if they failed to provide the Refund Guarantees.

238. It was common ground that the provision of a Refund Guarantee by the Respondents was a necessary pre-condition to the Claimants' obligations to make payment of instalments. In reality no instalments would be paid otherwise. We also accept that where no refund guarantee or instalments are paid then the commercial practical reality is that delay in progress is likely to arise. However, the SBCs had made express provisions with agreed timescales addressing delay in progress, delay in providing the Refund Guarantee and also delay in delivery (including liquidated damages and a range of rights of cancellation). Therefore while the absence of a refund guarantee and instalments would, as a matter of commercial reality, impede practical progress it was incorrect to suggest that the SBC would fall into unworkable disarray unless the obligation was construed as a condition.”

Contract terms carefully formulated

152. The point that the Tribunal is rightly making here is that, as I have explained in paragraphs 33-40 above, the contract terms were carefully formulated so as to make clear that the parties did not regard the timing of the delivery of the Vessel as being of the essence. In particular, the Yard might be up to 209 days late in delivering the Vessel and the Buyer in those circumstances only has a claim for liquidated damages under Article III.1(b). It makes no commercial sense to hold that the parties intended that the Buyer should be able to treat the whole contract as at an end if the Yard provided its Refund Guarantee, say, after 121 days (instead of 120 days), whereas a long delay in the primary obligation to build and deliver the vessel itself would not produce that result. As Mr. O'Sullivan KC put it, what the Buyers wanted out of the SBCs were the Vessels, not the Refund Guarantees securing a contingent right of refund (which would only arise should the SBCs have to be cancelled). This echoes the Tribunal's reasoning (Reasons, [232])

that “... a refund guarantee does not provide the primary intended benefit of the SBCs which the Claimants were bargaining for by way of construction and delivery of the Vessels, and the timing at which they were to be provided did not go to the root of the SBCs.”

153. The scheme of the SBC provides for liquidated damages in the event of 30 days’ delay in the delivery of the Vessel. If the delay extends to seven months, the Buyers have a contractual right to terminate/rescind the SBC. This militates against any suggestion that in the event of one day’s delay in the provision of the Refund Guarantee (beyond 120 days) the Buyers should be entitled to rescind the SBC and make a (potentially very large) claim in damages.
154. Mr. Ashcroft KC submitted that the commercial consequences of the Refund Guarantee obligation being innominate are particularly problematic in a rising market⁴⁶. He posits the case of buyers, as in this case, that have read the market correctly and have ordered vessels at prices which are much lower than the current newbuilding order prices. The shipyard naturally prefers to perform new contracts at much higher contract prices. Accordingly, he asks, what if the shipyard drags its feet in providing a refund guarantee and in building the vessel, prioritising other, new, deals from which it can make more money. The buyer has two options: (1) to rescind the contract with no entitlement to damages or (2) to wait and see, not knowing whether the Yard will ultimately deliver the Vessel and not knowing when a frustrating time will have accrued. Both options are commercially unattractive for the buyer.
155. The answer to this, as the Yard points out, is that this ignores the comprehensive contractual remedies which have been put in place by the parties under the SBC, dealing with delay, liquidated damages, and ultimately, an option to terminate the contract. Any feet dragging by the Yard is provided for, and if the feet dragging ultimately evinced an intention not to build the Vessel, then the Buyer is able to terminate the SBC for repudiatory breach and claim loss of bargain damages.
156. It is also a very unlikely scenario: why would the Yard not simply issue the Refund Guarantee, collect the first or the first and second instalments, and then drag its feet and focus on other projects?
157. Mr. Ashcroft KC further submitted that time stipulations (especially important ones) are generally of the essence in commercial contracts: First, it is generally unacceptable for commercial parties to be told that, when they agreed that something significant must be done by a particular time, a right to terminate and claim damages for loss of bargain in the event of breach will only arise after a frustrating period. Second, identifying such a period involves a wholly uncertain, “*how long is a piece of string?*”, assessment.
158. I do not consider that these generalities assist the Buyers in the present case. These are typical consequences of an innominate term: the breach must go to the root of the contract before the innocent party may terminate the contract and claim damages. Mr. Ashcroft KC’s approach would result in every time stipulation amounting to a condition.
159. This does not turn the SBC into an “*option*” with the consequences suggested by the Buyers in paragraph 77 of their skeleton argument⁴⁷. The Yard has an obligation to build

⁴⁶ Ground 5 of the Grounds of Appeal.

⁴⁷ Ground 5: The Buyers cite the decision of the Court of Appeal in the *Lila Lisbon* [2025] EWCA Civ 1210 in support of their submission, but I do not consider that case to be of any assistance. In that case the contract contained an express entitlement to loss of bargain damages and the claimant did not argue that the relevant term

and deliver the Vessel. As I have explained, the parties have agreed upon a comprehensive regime of remedies in the case of delay, and if the Yard evinces an intention not to build and deliver the Vessel, the Buyer can rescind the contract and claim loss of bargain damages. If the Yard stays on the right side of the line and is not guilty of repudiatory breach, then the Buyer is confined to his contractual remedies, which include the certainty of his right to cancel after 120 days. The Buyer does not have to wait and see; he is not in limbo. As the Tribunal rightly stated (Reasons, [240]):

“It was more significant that the parties had bargained in clear terms to allow the [Buyers] to cancel the SBCs after 120 days under Article X if refund guarantees had not been provided. It would have been more favourable to the [Buyers] if, at that stage, they could also claim damages for repudiatory breach with certainty but there was no clear basis to suggest this had been agreed, and Article X(3) suggested otherwise.”

160. The position in this case is no different to that which obtained in the *Spar Capella*, where Hamblen LJ explained⁴⁸ that it is not necessary to construe the obligation to pay hire (or here, to provide the Refund Guarantee) 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. Certainty is provided by the withdrawal clause (here, the termination 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 relevant obligation. As Hamblen LJ explained (and the Tribunal noted (at Reasons, [239(iv)]), the operation of a condition will always be more certain than an innominate term but this does not give rise to a presumption in favour of finding a condition.

161. Finally on this topic, the Buyers complained that the consequence of the Tribunal’s decision is that if the Buyers wish to maintain a right to claim loss of bargain damages in the face of a Yard that are cynically dragging their feet, the Buyers need to maintain cash tied up indefinitely, in case the Refund Guarantee suddenly materialises and they are called upon to pay instalments within 5 days (with the risk of being in repudiatory breach themselves if they do not). That is said to be uncommercial⁴⁹.

162. However, the Tribunal rejected this submission on the facts, and it is not open to the Buyers to go behind these factual findings on this appeal (Reasons, [239(iv)]):

“The Claimants argued that it would be uncommercial for them to have to maintain finance for the first (and subsequent) instalments on a longer term in case the Respondents produced a Refund Guarantee. However, there was no clear evidential weight for this argument.”

Contractual right to terminate and the consequent discharge of all obligations, duties and liabilities

was a condition.

⁴⁸ See also Popplewell J to like effect in the same case – see paragraph 84(6) above: a very considerable measure of certainty was conferred by the withdrawal clause itself as an option to cancel. There was no uncertainty over the ability to put an end to future performance. It is true that if payment of hire is an innominate term and the right to terminate only entitles the owners to termination damages if the breach is repudiatory, the owners will not have absolute certainty in a falling market in determining when the exact moment comes at which exercising the right will enable them to recover damages for the loss of bargain. But that is an uncertainty regularly faced by commercial parties whose contracts commonly contain innominate terms, and charterparties contain many such terms (for example as to seaworthiness).

⁴⁹ Ground 5: paragraph 77 of the Buyers’ skeleton argument.

163. As in *The Spar Capella*, so too here I consider that the contractual termination clause is a strong factor in the balance coming down in favour of treating the obligation to provide the Refund Guarantee within 120 days as an innominate term.
164. By Article X(A)(f), if the Yard fails to deliver the Refund Guarantee to the Buyer by no later than 120 days after novation of the SBC, then the Buyer has an option to rescind the SBC by notice in writing to the Yard “*in accordance with the provisions of Article X hereof.*”
165. Article X.1 provides for the giving of notice by the Buyer in the event that the Buyer exercises its right of rescission of the contract in accordance with its terms, including under Article X(A)(f). By Article X.2 in case the Yard receives notice under Article X.1, it must promptly refund to the Buyer the full amount of all sums paid by it on account of the Vessel (i.e. any instalment payments), together with interest thereon.
166. Article X.2 further provides that as security for *any*⁵⁰ refund ... of each instalment of the Contract Price payable prior to delivery of the Vessel, as well as of costs for Buyer’s supplies, the Yard shall furnish the Buyer with the Refund Guarantee. Article X.3 then provides, under the heading “*Discharge of Obligations*” that “[u]pon such refund by the SELLER to the BUYER, all obligations, duties and liabilities of each of the parties hereto to the other under this CONTRACT shall be forthwith completely discharged.”
167. In other words, once again there is a clear contractual scheme at work here: the parties have agreed at the outset that if the Refund Guarantee has not been provided within 120 days, then the Buyer has the option to extend time or to rescind the contract. If he chooses to adopt the latter course, then the parties have agreed that all obligations, duties and liabilities of each other shall be *completely discharged*. The parties have accordingly agreed that there is no contractual entitlement to recover loss of bargain damages. In these circumstances, the submission that the parties nonetheless intended that if the Refund Guarantee is not delivered within 120 days there would be a right to terminate the SBC and claim damages at common law is unattractive.
168. Indeed, this was the very point made by Popplewell J and the Court of Appeal in the *Spar Capella* (see paragraphs 72, 84(1), and 91 above), and the same principles apply in the present case:
- (1) The very inclusion of the contractual right to terminate for non-provision of the Refund Guarantee suggests that in its absence there would be no such right. Such a provision would be otiose if the Buyer had the right at common law to put an end to the contract and claim damages for any default in providing the Refund Guarantee after 120 days.
 - (2) 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. The trade-off between the attractions of certainty and the undesirability of trivial breaches carrying the consequences of a breach of condition has been achieved by the parties treating the breach of the obligation to provide a Refund Guarantee within 120 days as a contractual termination option.
 - (3) The Yard’s position is even stronger in the case of the SBC because not only does it contain a termination clause but the parties have gone on to specify in Article

⁵⁰ As there may or may not be any refund.

X.3 that in the event that the Buyer exercises his option to terminate, then all obligations, duties and liabilities of the parties shall be *completely discharged*. As the Tribunal stated at (Reasons [227(vi)]) Article X.3 means that the consequences of a contractual termination triggered under Article X(A)(f) would be a discharge comparable to rescission *ab initio*. This would be different from, and inconsistent with, the consequences of a repudiation (or renunciation) at common law including the recovery of secondary liability for damages at common law⁵¹.

169. The Tribunal itself rightly considered that this was a factor in favour of classifying as an innominate term the obligation to deliver a Refund Guarantee within 120 days at (Reasons, [227(vi)]):

“However, under Article X(3) the parties to the SBCs (unlike the parties in Gearbulk) had expressly agreed that the consequences of a contractual termination would be different to a common law repudiation. Article X(3) means that the consequences of a contractual termination triggered under Article X(A)(f) would be a discharge comparable to rescission ab initio. This would be different from, and inconsistent with, the consequences of a repudiation (or renunciation) at common law including the recovery of secondary liability for damages at common law. This suggested that the parties had not intended to treat the trigger for contractual termination as deeming a repudiation at common law.”

170. Mr. Ashcroft KC suggested in submissions that Article X.3 will “*not apply at all*” where there is a failure to provide a Refund Guarantee because there will be nothing to refund. The discharge of obligations under Article X.3 only occurs “*upon such refund*” and so if there is nothing to refund the clause does not bite. But that misses the point: Article X.3 is important because it informs the reader as to what the parties’ objective intention was at the time when the contract was concluded, namely that upon contractual rescission by the Buyer for any of the six defaults specified in Article X(A), then all obligations, duties and liabilities are mutually discharged - with no entitlement to claim damages - once the Buyer is refunded.

171. The reason the clause is so worded, no doubt, is because the Buyer obviously needs to be refunded (if there is anything to refund) before there is a mutual discharge of liabilities, otherwise it will be too late. Article X.2, third paragraph, reads “*As security for any refund ...*” and Article X.3 then picks up on that with the wording “*Upon such refund*”. In other words, if there is any refund, that refund must first be made by the Yard before the mutual obligations, duties and liabilities are discharged as a whole under the SBC. As Mr. O’Sullivan KC rightly submitted, the Buyers’ submission would lead to absurd consequences: what if a bankruptcy petition is presented and the SBC is terminated just before the first instalment is paid? It cannot be the case that the parties’ obligations, duties and liabilities would not be discharged in those circumstances, but they would be if the petition happened to be presented just after payment of that instalment.

172. It follows that the contractual termination clause is a strong factor in this case to support a finding that Article X(A)(f) is an innominate term.

Technical breaches

⁵¹ The Tribunal added that this suggested that the parties had not intended to treat the trigger for contractual termination as deeming a repudiation at common law, as the Buyers had argued. That point was not pursued on appeal by Mr. Ashcroft KC.

173. Whilst I recognise the need for certainty in a commercial contract such as the SBC, and that is a factor in determining whether the time of delivery of the Refund Guarantee in Article X(A)(f) is a condition or not, it is necessary to balance that need for certainty against the desirability of not allowing rescission where the breach complained of is highly technical. In the present case, it could be seen at the time when the SBC was concluded that the failure to provide a Refund Guarantee would not in all cases amount to a serious breach; the breaches which might occur of the obligation to deliver the Refund Guarantee under Article X(A)(f) might range from the extremely trivial to the extremely grave. The breach might consist in being marginally late in the provision of the Refund Guarantee, by accident, causing no loss to the Buyers or loss which is insignificant in the context of the long term shipbuilding contract as a whole. This is the hallmark of an innominate term⁵² and is accordingly a further factor suggesting that the term in question is not a condition.

Buyers' money not imperilled

174. Since the Buyers were not obliged to pay the pre-delivery instalments, absent the Refund Guarantees, the Yard's failure to issue the Refund Guarantees would, *per se*, be unlikely to go to the root of the contract because the Buyers' money would never be imperilled. As the Tribunal rightly stated (Reasons, [232]): "...the decision in *The Hansa Murcia* suggested that a breach in provision of refund guarantees would not go to the root of the contract unless the buyers are exposed to a real practical risk of losing the instalments to be secured."

175. The issue in *The Hansa Murcia* [2012] EWHC 3104 (Comm) was whether a shipyard's failure to extend a refund guarantee within a reasonable time before its expiry, pursuant to an implied obligation to do so, was repudiatory of the shipbuilding contract. Cooke J held that it was not. It was not argued before Cooke J that the implied obligation was a condition (such argument having been abandoned before the Tribunal). Cooke J held that it was an innominate term and not a warranty as there would be situations in which a breach of the implied obligation would (e.g. a failure to procure the extension of the Refund Guarantee for an entire year) and would not (a one day failure) be repudiatory. At [36] Cooke J explained:

"The Arbitrators did not consider that every breach of the obligation would strike at the root of the contract and constitute a repudiatory breach. Whilst they found a breach at 16 June 2010, they found such breach only became repudiatory when the security of the Refund Guarantee was imperilled, because of the shortness of time and the risk that any claim or notice might prove ineffective or be considered ineffective by the Bank".

176. In that case, the arbitrators recognised that the provision of the Refund Guarantee was, what they called, a "*financial cornerstone*" of the contract, because it was security given by a bank in respect of the return of instalments paid, should the sellers default. However, since the security was not imperilled (as the validity of the Refund Guarantee could be extended by the buyer commencing an arbitration as indeed occurred), the breach by the shipyard of the implied obligation – the delay in extending – was not repudiatory of the shipbuilding contract.

177. The position in this case is not materially different. The Buyer is not obliged to pay the pre-delivery instalments (instalments 1-3) if the Refund Guarantee has not been provided.

⁵² See paragraphs 87 and 91(1) above.

It follows that any delay in providing the Refund Guarantee, regardless of it being a “*financial cornerstone*” of the SBC, does not go to the root of the SBC because the Buyer’s funds are not imperilled. The Buyer is not left unsecured in respect of the refund of any instalment payments.

Buyers’ Analogies

178. Finally, the Buyers argued that their case that the Refund Guarantee obligation is a condition is strongly supported by analogy with cases which have held the following types of time stipulation to be conditions: (1) terms relating to the provision of guarantees; (2) terms relating to the payment of a deposit; and (3) terms relating to the opening of a documentary credit⁵³.

179. However, I do not find these cases, which concern contractual mechanisms in different contexts, of assistance in construing the SBC. The outcome of each case depends upon the particular wording of the contract in issue. Accordingly, I shall deal with this point shortly.

180. *Documentary Credits*: I consider that the Tribunal was right to state (Reasons, [219]) as follows:

“We did not consider that an appropriate analogy could be drawn from a buyer’s obligation to put up a letter of credit in the case of an international sale of goods, since this reflects payment for the goods where there is necessarily interdependence with the seller’s delivery obligations. As explained below, we were not satisfied that there was interdependence between the Claimants’ right to a refund guarantee to secure the return of instalments when paid, and the Respondents’ obligation to build the vessel. Spar Shipping makes clear that there is no presumption that a clause fixing time for performance in a mercantile contract should be treated as a condition.”

181. The Buyers criticise that finding by suggesting that interdependence was not the basis for the court’s reasoning in the authority upon which it relied for this analogy, namely *Trans Trust v Danubian* [1952] 2 QB 297, to the effect that a term concerning the putting up of the letter of credit was a condition. That criticism is mistaken. In fact, as Denning LJ stated at [304] at the start of his judgment:

“This is another case concerned with the modern practice whereby a buyer agrees to provide a banker’s confirmed credit in favour of the seller. This credit is an irrevocable promise by a banker to pay money to the seller in return for the shipping documents. One reason for this practice is because the seller wishes to be assured in advance not only that the buyer is in earnest but also that he, the seller, will in fact obtain his money when he delivers the goods. Another reason is because the seller often has expenses to pay in connexion with the goods and he wishes to use the credit so as to pay those expenses. He may, for instance, be himself a merchant, who is buying the goods from the growers or the manufacturers, and has to pay for them before he can obtain delivery, and his own bank will only grant him facilities for the purpose if he has the backing of a letter of credit. The ability of the seller to carry out the transaction is, therefore, dependent on the buyer providing the letter of credit, and for this reason the seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods.” (emphasis added)

⁵³ Ground 4 of the Grounds of Appeal.

182. This fundamental interdependence of obligations is not present in the case of the SBC for the reasons which I have explained above.

183. *Guarantees*: the case relied upon by the Buyers, *Classic Maritime v Lion Diversified Holdings* [2010] 1 Lloyd's Rep 59 is once again distinguishable from the present case by reason of the clear interdependence of terms in that case. At [39] the Court stated as follows:

“39. By the very nature of the July and August COAs, which each provided for four shipments a year for periods of five and a quarter and six years respectively, with a total value in excess of US\$300 million, and the limited financial standing of Limbungan, a provision for a guarantee in such agreements must be considered so fundamental to them that the obligation to provide the guarantee amounts to a condition precedent to performance by Classic. This is a similar situation to that set out in Trans Trust SPRL v Danubian Trading Co Ltd [1952] 1 Lloyd's Rep 348 where Denning LJ found that the provision of a bankers' confirmed letter of credit was an essential term of the contract of sale and had to be seen as a condition precedent to the obligation of the seller to deliver the goods. There, if the buyer failed to provide the credit, the seller could treat himself as discharged from any further performance of the contract and could sue the buyer for damages for not providing the credit.”

184. In other words, on the facts of that particular case, bearing in mind Limbungan's financial position and the very substantial value of the contracts, the obligation upon Limbungan's parent company to put up the guarantee in return for the making of the shipments by Classic was fundamental and the equivalent to putting up a letter of credit. It was accordingly a condition. That is very different from the present case⁵⁴. In any event, terms concerning the timing of the provision of guarantees will not always amount to conditions. It necessarily depends upon the role of the guarantee in the particular contract in issue. As discussed above, even the refund guarantee in the *Hansa Murcia* (supra) was not a condition.

185. *Terms relating to the payment of a deposit*: A deposit is a sum of money paid by way of an earnest of performance. However, as I have explained above, the Buyers did not advance any factual matrix evidence before the Tribunal that the Refund Guarantee operated as an earnest of performance. So the analogy breaks down immediately in the present case.

186. In any event, cases dealing with deposits have no relevance to the obligations assumed under the SBC in the present case. A deposit is not analogous to a refund guarantee. A deposit is paid by the buyer as an earnest of performance such that if the contract is not completed it is liable to be forfeited. It guarantees the future performance of the buyer. A refund guarantee, in contrast, does not guarantee the future performance of the seller. It simply secures the return of advance payments made by a buyer in the event that a contract is validly rescinded. As the Yard rightly submitted, a shipyard does not need to provide an earnest in the way that a buyer might in respect of a contract for the sale of land. The shipyard is not the party needing to provide an earnest: it demonstrates its commitment by building the Vessel and incurring the cost of doing so.

⁵⁴ The other authority relied upon by the Buyers, *South Oxfordshire DC v SITA* [2007] Env LR 13 is even less relevant to the instant case, as delivery of the performance bond by SITA was not a condition of the contract.

CONCLUSION

187. In all the circumstances I consider that the Tribunal's determination that Article X(A)(f) is not a condition but rather an innominate term is correct. There is no error of law and I accordingly dismiss these appeals.