



Neutral Citation Number: [2024] EWHC 2075 (Comm)

Case No: CL-2023-000675

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: 9th August 2024

Before :

THE HONOURABLE MRS JUSTICE DIAS

Between :

ORION SHIPPING AND TRADING LTD

**Claimant/
Respondent**

- and -

GREAT ASIA MARITIME LIMITED

**Defendant/
Claimant**

Alexander Wright KC (instructed by **Preston Turnbull LLP**) for the **Claimant**
David Lewis KC (instructed by **MFB Solicitors**) for the **Defendant**

Hearing date: 11 June 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 9th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Dias:

1. This is an appeal under section 69 of the Arbitration Act 1996 from a Partial Final Award dated 7 September 2023 (the “Award”) of a highly experienced arbitration Tribunal. The underlying dispute concerned the cancellation by the Defendant Buyers (“Buyers”) of a Memorandum of Agreement dated 4 June 2021 (the “MOA”) for the sale of a Capesize bulk carrier, the MV “LILA LISBON” (the “Vessel”).
2. Pursuant to the Award, Buyers were awarded, *inter alia*, the sum of US\$1,850,000 by way of damages pursuant to clause 14 of the MOA following their cancellation of the contract as a result of the “*proven negligence*” of the Claimant Sellers (“Sellers”) in having failed to give notice of readiness by the agreed cancelling date or to be ready to complete transfer of the Vessel. The damages so awarded reflected the usual measure of damages in sale of goods cases for non-delivery under section 51 of the Sale of Goods Act 1979, namely the difference between the market price of the Vessel and the contract price as at the date of termination of the contract.
3. Permission to appeal was granted on the papers by Bright J on 20 March 2024 in respect of the following question of law on the basis that the question was one of general public importance and that the decision of the Tribunal was at least open to serious doubt:

“If a Memorandum of Agreement on the SALEFORM 2012 form is lawfully cancelled by a buyer under clause 14 because the vessel is not delivered by the cancelling date as a result of the seller’s “proven negligence”, is that buyer entitled to recover loss of bargain damages absent an accepted repudiatory breach of contract?”

The MOA

4. The relevant provisions of the MOA for present purposes are as follows:

“5. Time and place of delivery and notices

(a) The Vessel shall be delivered and taken over safely afloat at a safe and accessible berth or anchorage at/in mainland China exclude Taiwan, Macao, Hong Kong in the Sellers’ option.

Notice of Readiness shall not be tendered before: 20th July 2021

Cancelling Date (see Clauses 5(c), 6(a)(i), 6(a)(iii) and 14): 20th August 2021

However, the Vessel shall effect delivery to Buyers immediately after present laden voyage from South Africa to Qingdao China (ETA Qingdao on around 18th July 2021) and no more laden voyage allowed.

(b) The Sellers shall keep the Buyers well informed of the Vessel’s itinerary and shall provide the Buyers with twenty (20), ten (10), five (5) and three (3) days’ notice of the date the Sellers intend to tender Notice of Readiness and of the intended place of delivery.

(c) If the Sellers anticipate that, notwithstanding the exercise of due diligence by them, the Vessel will not be ready for delivery by the Cancelling Date they may notify the Buyers in writing stating the date when they anticipate that the Vessel will be ready for delivery and proposing a new Cancelling Date. Upon receipt of such notification the Buyers shall have the option of either cancelling this Agreement in accordance with Clause 14 (Sellers' Default) within three (3) running days of receipt of the notice or of accepting the new date as the new Cancelling Date.

...

If this Agreement is maintained with the new Cancelling Date all other terms and conditions hereof including those contained in Clauses 5(b) and 5(d) shall remain unaltered and in full force and effect.

(d) Cancellation, failure to cancel or acceptance of the new Cancelling Date shall be entirely without prejudice to any claim for damages the Buyers may have under Clause 14 (Sellers' Default) for the Vessel not being ready by the original Cancelling Date.

...

13. Buyers' Default

Should the Deposit not be lodged in accordance with Clause 2 (Deposit), the Sellers have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest.

Should the Purchase Price not be paid in accordance with Clause 3 (Payment), the Sellers shall have the right to cancel this Agreement, in which case the Deposit together with interest earned, if any, shall be released to the Sellers. If the Deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest.

14. Sellers' Default

Should the Sellers fail to give Notice of Readiness in accordance with Clause 5(b) or fail to be ready to validly complete a legal transfer by the Cancelling Date the Buyers shall have the option of cancelling this Agreement... In the event that the Buyers elect to cancel this Agreement, the Deposit together with interest earned, if any, shall be released to them immediately.

Should the Sellers fail to give Notice of Readiness by the Cancelling Date or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the Buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the Buyers cancel this Agreement.”

5. For ease of reference, the parties designated the two paragraphs of clause 14 “14A” and “14B” and I shall do likewise.

Background facts

6. There were a very large number of issues which fell to be determined in the arbitration, as to which the Tribunal’s decisions are not challenged. For the purposes of this appeal, it is sufficient to note only the following.
7. The MOA was concluded on 4 June 2021 on an amended Norwegian Saleform 2012 form (“NSF 2012”) and provided for delivery in mainland China with a Cancelling Date of 20 August 2021.¹ As found in the Award, Sellers had originally planned to deliver the Vessel on 2 August 2021, but a dispute arose in late July 2021 following the imposition of a Recommendation by the Vessel’s classification society. The dispute was settled on the terms of an Addendum No. 2 to the MOA dated 6 August 2021 which contemplated delivery taking place instead between 12 and 14 August 2021.
8. In the event, Sellers were unable to tender delivery on 12-14 August 2021 and requested an extension of the Cancelling Date to 15 October 2021. This was agreed by Buyers, without prejudice to their right to claim damages under clause 14 on the basis that the failure to meet the Cancelling Date was due to Sellers’ proven negligence. Such a claim was in due course made and the Tribunal held that Sellers’ failure to be ready to deliver the Vessel and complete a legal transfer by the original Cancelling Date of 20 August 2021 was due to their “*proven negligence*” in having failed to take reasonable care in making arrangements for the disembarkation of the crew. The Tribunal awarded Buyers damages for loss of use of the Vessel between 20 August 2021 and 15 October 2021 in the sum of US\$1,650,992. This aspect of the Award is not the subject of any challenge.
9. Unfortunately, the Vessel was not delivered by the extended Cancelling Date either and Buyers arrested her on 18 October 2021 in Zhianjiang seeking security for a claim for damages for the difference between the contract price and market price of the Vessel. In relation to this, the Tribunal held as follows and, again, there is no appeal from its decisions in this regard:
 - i) Buyers’ conduct in arresting the Vessel and seeking security for market damages unequivocally evinced an intention to bring the MOA to an end;
 - ii) Sellers’ failure to be ready to deliver by 15 October 2021 was attributable to their proven negligence in failing to take reasonable steps to arrange for delivery to take place;
 - iii) While negligent, however, Sellers’ conduct was not repudiatory and Buyers were accordingly not entitled to terminate on grounds of repudiatory breach;

¹ Even though they were not specifically defined terms, both Notice of Readiness and Cancelling Date were capitalised in the MOA and I adopt the same orthography in this judgment.

- iv) Nonetheless, Buyers were entitled to cancel the MOA on grounds of Sellers' default under clause 14 and their termination of the MOA was therefore valid.
10. In relation to damages, the Tribunal's key findings were as follows:
- i) Paragraph 157: There is no universal rule that a party who cancels a contract pursuant to a contractual right must show that the other party has committed a repudiatory breach and that it has terminated the contract at common law on the basis of that breach in order to claim loss of bargain damages;
 - ii) Paragraph 159: The effect of clauses which provide for an express right of termination upon the occurrence of stipulated criteria without causing the counterparty to be liable for the consequences of the termination depend on their wording. Where the criteria are not defined by reference to fault, the party's election to exercise the right to terminate is treated as the cause of the termination;
 - iii) Paragraph 160: Clause 14 confers a right to cancel by reason of the sellers' failure to deliver on time, together with a right to compensation where the failure is due to proven negligence. The failure to deliver on time is a breach of the MOA and the sellers are in default. The default causes the cancellation and will be treated as such;
 - iv) Paragraph 162: On its ordinary meaning, the parties would have understood clause 14 to provide for compensation extending to the consequences of cancellation, including loss of profit;
 - v) Paragraph 164: Textbook commentary suggests that the ordinary market measure of damages applies and it would be inconsistent with the wording conferring the right to compensation to suggest that a cancelling buyer must establish an independent repudiatory breach;
 - vi) Paragraph 165: The cause of Buyers' loss of profits was Sellers' failure to deliver and this caused Buyers to bring the MOA to an end. Buyers were accordingly entitled to recover loss of market damages as compensation for Sellers' default under clause 14.
11. It is in these circumstances that the main question on this appeal arises, namely whether Buyers are entitled to claim market damages under clause 14 as awarded by the Tribunal or whether, as Sellers argue, such damages are only recoverable in respect of a repudiatory breach or breach of condition.
12. Buyers argue that the Tribunal's award was correct for the reasons they gave but by a Respondent's Notice they advance an alternative case to the effect that time of delivery was of the essence and that their cancellation under clause 14 was in substance a termination for breach of condition which entitles them to damages on the basis awarded in any event. This was a question which the Tribunal did not consider it necessary to address and upon which it expressed no view.

(1) Breach of condition

13. It is convenient to address Buyers' alternative case first for two reasons. First, if they are right that they effectively terminated for breach of condition, Sellers accept that market damages were properly recoverable and the appeal falls away. Secondly and more importantly, any determination as to the nature and scope of the right to damages conferred by clause 14B necessarily depends on having ascertained the nature of the obligations in respect of which those damages are recoverable.
14. The argument before me was framed by asking whether clause 14 was a condition of the contract. However, clause 14 does not itself impose any obligations. Rather it is clause 5 of the MOA which sets out Sellers' obligations relating to time of delivery. Clause 14 is effectively an adjectival clause providing for the consequences of particular conduct but does not actually contain any primary obligations itself. Indeed, the first line of clause 14 expressly recognises this in so far as it refers back to Clause 5(b). Accordingly, the correct question in this regard is that identified in the Respondent's Notice, namely whether time was of the essence of Sellers' delivery obligation, and it is primarily by reference to clause 5 that this falls to be determined.
15. In my judgment, the answer to this question is dictated by the fact that neither clause 5 nor any other provision of the MOA imposes any obligation of any description to deliver nor give Notice of Readiness *by the Cancelling Date*. To the contrary, the only obligation imposed by clause 5 is to give a written Notice of Readiness "*when the Vessel is at the place of delivery and physically ready for delivery in accordance with this Agreement.*" There is thus no positive obligation to deliver or tender Notice of Readiness nor be ready to complete a legal transfer by 20 August 2021 or any other date, merely a permissive provision in clause 14 which allows Buyers to cancel if in fact no Notice of Readiness has been given by the stipulated Cancelling Date. The situation is therefore distinguishable from that in *Bunge Corporate v Tradax Export SA*, [1981] 1 WLR 711 where the last day for delivery of the cargo was 30 June 1975 and there was a positive obligation on the buyers to give notice of readiness by 15 June 1975 at the latest.²
16. The analogy with delivery into a time charter seems to me to be apt here. In that context, it is well-established that failure to deliver by the cancelling date gives rise to a right to cancel which is wholly independent of breach: see *Carver on Charterparties* (2nd ed., 2021) §§7-147, 10-067-069. The regime for extending the Cancelling Date set out in clauses 5(c) and 6(a)(i) and (iii) of the MOA is also consistent with this analysis. If anything, the regime's implicit recognition of the need for flexibility underlines the fact that there is no positive obligation to tender notice of readiness by a particular date.³

² It is true that clause 5 positively obliges Sellers to give advance notice of their intended date of notice of readiness but the trigger for clause 14 is the failure to tender actual Notice of Readiness by the Cancelling Date.

³ I leave the extension provisions in clause 20 out of account in this respect, since it seems to me that clauses which were clearly agreed specifically to address the COVID pandemic cannot carry any great

17. Further support can be found in clause 5(d) which makes clear that the buyers may not automatically have a claim for damages if the vessel is not ready by the Cancelling Date. That necessarily presupposes that a mere failure to tender Notice of Readiness by the Cancelling Date is not in itself a breach of contract and confirms that any right to damages under clause 14 depends entirely on the express terms of that clause. Clause 14 further contemplates that there may be a failure to tender Notice of Readiness or to be ready to complete a legal transfer by the Cancelling Date which is not due to negligence.⁴ This again underscores the fact that no breach of contract is necessarily involved, other than the mere failure to tender Notice of Readiness by the Cancelling Date which of course begs the question.
18. On behalf of Buyers, Mr David Lewis KC relied on the specific amendment to clause 5(a) which provided for immediate delivery of the Vessel after completion of her current laden voyage. However, in my judgment this merely makes clear that Sellers were not permitted to “squeeze in” another voyage, and “*immediately*” in this context is to be read as simply a belt and braces emphasis of “*no more laden voyage allowed*”. I agree with Mr Alexander Wright KC for Sellers that this provision creates an independent right but does not otherwise affect the construction of clauses 5 or 14.
19. Basing himself on *Bunge v Tradax (supra)*, Mr Lewis also argued that the parties’ obligations under the MOA were interdependent and that delivery of the Vessel was the essential trigger for the release to Sellers of the deposit and balance of the purchase price as well as the provision by Sellers of the Vessel’s documentation and the conduct of a joint bunker survey. This, he said, underlined the importance of delivery in the scheme of the MOA. I was not persuaded by this argument. First, it does not meet the point that the MOA imposes no positive obligation to deliver by a particular date in the first place. Secondly, it is self-evident that further performance of the obligations in the MOA depended on delivery but, critically, under the MOA Buyers had a right to cancel which meant that they were not bound to carry on with the contract. *Bunge v Tradax* is distinguishable since there was no right of cancellation in that case which meant that unless the buyers’ obligation to serve notice of readiness was construed as a condition allowing the sellers to terminate, performance of the contract would have had to continue which would have been practically impossible since the sellers could not nominate a load port until after service of the buyers’ notice of readiness.
20. For these reasons I conclude that there was no positive obligation on Sellers to tender Notice of Readiness nor to be ready to deliver by the Cancelling Date which was capable of giving rise to a breach of contract. The question of whether any such obligation was a condition or an innominate term therefore does not arise. On a natural and ordinary reading of the MOA, there was simply a contractual right to cancel the contract if, for whatever reason, Notice of

weight in relation to the construction of essentially standard form provisions. However, they are not inconsistent with the analysis.

⁴ Unless the context otherwise dictates, references to a “failure to tender Notice of Readiness” in this judgment should be understood to include also a failure to be ready to validly complete a legal transfer as provided by clause 14.

Readiness was not tendered by the Cancelling Date, to which clause 14 attached certain specific consequences. I do not regard the heading of clause 14, “*Sellers’ default*”, as capable in itself of creating a positive obligation to tender Notice of Readiness by the Cancelling Date. Rather it seeks to distinguish matters falling within the sellers’ purview from those for which the buyers are responsible as in clause 13.

21. I regard this conclusion as supported by the reasoning of the Court of Appeal in *The Griffon*, [2014] 1 Lloyd’s Rep. 471 at [10], [11] where it was held that the parallel right of Sellers to cancel under clause 13 was not dependent on establishing any repudiation. On the contrary, cancellation was a valuable contractual remedy in its own right and was not relevant to the proper characterisation of the rights and obligations of the parties in relation to payment of the deposit under clause 2. So too here, clause 14 is irrelevant in my judgment to the proper characterisation of the rights and obligations of the parties in relation to delivery under clause 5.
22. Even if I were wrong about that and clause 5 did impose a positive obligation on Sellers to tender Notice of Readiness by the Cancelling Date, I would not in any event have held it to be a condition of the contract.
23. It was accepted that Sellers’ skeleton argument 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.

See generally, *The Spar Capella*, [2016] EWCA Civ. 982; [2016] 2 Lloyd’s Rep. 447 at [52], *The Arctic*, [2019] EWCA Civ. 1161; [2019] 2 Lloyd’s Rep. 603 at [46].

24. In this case, there was no clear wording indicating that tender of Notice of Readiness by the Cancelling Date should be a condition of the contract. While breach of such a term is binary in the sense that notice of readiness is either tendered late or not, it may stem from a wide range of culpability and lead to an equally wide range of consequences, in either case from the trivial to the grave. Moreover, the severity of the consequences is not necessarily linked to the degree of culpability since a long delay leading to serious consequences may be occasioned without any fault on the sellers’ part and *vice versa*.

25. In argument, Buyers placed some emphasis on the judgment of Mr Justice Popplewell (as he then was) at first instance in *The Spar Capella*, [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep. 407 and, in particular, on what was described as his "counterfactual test" at paragraph 194 where he stated:

"I therefore reject the submission that the effect of the withdrawal clause is to make payment of hire a condition. The critical question which arises is whether payment of hire would be treated as a condition in the absence of the withdrawal clause."

26. With respect, this seems to me to be a misreading of his judgment. As I read this paragraph, Popplewell J was not saying that this counterfactual analysis was the sole touchstone of whether a particular term was to be regarded as a condition or not; simply that this was the only question left once he had concluded that the right of withdrawal itself did not render the obligation to pay hire a condition and so effectively added nothing to the bare obligation. I therefore agree with Mr Wright that the court's assessment must look at the totality of what the parties have agreed, which in this case is a contract including the provisions of clause 14. The contract must be construed as a whole, even if it might be a useful cross-check to ask what the position would be without clause 14. This seems to me to be entirely in accordance with the approach of Gross LJ in *The Spar Capella* (*supra*).
27. While it is true that the express right of cancellation in clause 14 is not necessarily inconsistent with Sellers' obligation being a condition, in my judgment it nonetheless has a two-fold significance. First, its very insertion suggests that there would otherwise be no right to cancel: *The Spar Capella* (*supra*) at [194]-[195] (first instance) and at [93(iv)] (Court of Appeal).
28. Secondly, the provision of an express right to cancel means that there is no compelling need to construe the obligation as a condition so far as performance of the contract is concerned. The critical incidents of a condition are the right of the innocent party to bring the contract to an end in the event of breach and the recovery of damages for loss of bargain. The former is encompassed by the right of cancellation, in which regard Buyers' argument that the needs of commercial certainty are nonetheless better served by construing it as a condition proves too much. Conditions are always more certain than innominate terms (see the judgment of Gross LJ in *The Spar Capella* (*supra*) at [93(viii)]) but the logic of that argument would lead to the conclusion that all innominate terms are conditions, which is plainly nonsense. As Gross LJ pointed out at [58]-[62], the question is one of balance and in relation to performance of the contract, a right of cancellation provides the parties with as much certainty as a condition in enabling them to know where they stand irrespective of any need to prove fault or any particular degree of fault.
29. So far as concerns the right to recover damages for loss of bargain, these are of course recoverable if the breach in question is repudiatory and since recovery under clause 14 depends on "*proven negligence*", the question only arises in relation to conduct which is negligent but falls short of being repudiatory. Moreover, there could only ever be any substantial loss of bargain claim if the market had risen since the date of the contract, when *prima facie* buyers would

not be expected to cancel unless the breach in question was repudiatory or renunciatory. Mr Lewis argued that if the obligation were not construed as a condition, buyers would be unfairly prejudiced because if there was any uncertainty as to whether the sellers' conduct was repudiatory or not, they would have to "hang fire" until they were certain of the position in order to be assured of recovering any loss of bargain damages. But this is a problem which any innocent party faces in deciding whether to terminate a contract or not and I do not see that this case raises any special considerations. Certainly it does not seem to me to outweigh the unattractiveness of equating what might be a comparatively trivial default with repudiatory conduct.

30. The extension regime referred to in paragraph 16 also militates against construing the obligation as a condition for the reasons already given. Mr Wright indeed went further and argued that a necessary incident of a condition was the ability to terminate for anticipatory repudiatory breach which was inconsistent with the extension procedure. However, in this particular respect, I agree with Mr Lewis that there is no necessary inconsistency with the doctrine of anticipatory repudiation. It may be difficult on the facts to establish a repudiatory breach if it is still possible for the sellers to request an extension to the Cancelling Date, but that is a purely factual question and does not in any event exclude the possibility of a wholesale renunciation.
31. Finally, there is force in Sellers' argument that if the parties really intended the obligation to tender Notice of Readiness to be a condition, it is surprising that they sought to exclude any damages at all unless negligence was proved. This was the so-called "condition and exclusion" construction which, on the one hand, turned Sellers' obligation into a condition, but then excluded damages for non-negligent breach on the other. Mr Wright submitted that this was rather an odd way to go about things, and I agree.
32. Both sides referred to authorities which they suggested supported their respective arguments. However, I derived little assistance from any of them. Delivery deadlines in shipping contracts sometimes are and sometimes are not of the essence. It all depends on the terms of the particular contract and its context. As the Court of Appeal made clear in *The Spar Capella (supra)* at [56], there can be no general presumptions in this respect. Nor, in my judgment, does it make any difference that a ship sale contract is a contract for the sale of goods. To the contrary, section 10 of the Sale of Goods Act 1979 confirms that whether a stipulation as to time (other than for payment) is of the essence depends on the terms of the contract. More apt to my mind is the analogy with failure to meet a time charter delivery laycan which is not usually treated as a condition: *Carver on Charterparties (op. cit)* §§7-174; 10-067-069.
33. Accordingly, even if I had concluded that there was a positive obligation on Sellers to tender Notice of Readiness by the Cancelling Date, I would not have construed it as a condition. In those circumstances, it was common ground that Buyers could not claim loss of bargain damages on that ground, and that recovery of such damages depends solely on the construction of clause 14 to which I now turn.

Clause 14

34. Given my findings above, the construction of clause 14 must be approached from the starting point that Sellers were not in breach of any condition and that clause 14A provides for a contractual right of termination to which clause 14B attaches certain specific consequences.
35. To some extent the written skeleton arguments of the parties on this point were like ships passing in the night. By the time of the hearing, however, it had become apparent that there was considerable common ground as follows:
- i) Loss of bargain damages cannot be recovered on the exercise of a contractual right of termination unless the claimant can show a repudiatory breach and that it exercised its common law right to terminate for repudiation: see *Phones 4U Ltd (in administration) v EE Ltd*, [2018] EWHC 49 (Comm); [2018] Bus. L.R. 574; *The Kos*, [2012] UKSC17; [2012] 2 AC 164; *The Spar Capella (supra)*.
 - ii) However, it is open to the parties to make express provision as to the consequences of cancellation pursuant to a contractual right. Thus, they may stipulate that a right of cancellation carries no additional rights, or carries equivalent rights to termination for repudiatory breach, or carries some different rights.
 - iii) In this case, clause 14:
 - a) Provided in clause 14A for a right of cancellation which was independent of breach or negligence and entitled the buyers in all cases to recover the deposit;
 - b) Provided in clause 14B for recovery of compensation (of a nature and to an extent which was contentious) but only where negligence was proved.

Sellers' submissions

36. The principal arguments advanced by Sellers on the construction of clause 14 were as follows:
- i) There is no clear wording which provides for buyers to recover the market measure of damages for loss of bargain, in contradistinction for example to clause 20 of GAFTA;
 - ii) “*Due compensation*” means compensation which is due at law, such that clause 14B merely preserves such legal right to damages as already exists at the date of cancellation, subject to proof of negligence;
 - iii) Such a construction is necessary otherwise there would be no limit to the scope of the damages recoverable, and the traditional common law principles of causation, remoteness and mitigation would not apply;

- iv) The addition of the words “*all expenses*” in NSF 1993 must have been intended to expand the ambit of the losses covered by the clause. They give colour to what the clause is intended to encompass, namely reliance expenditure (crewing and legal costs, drydocking expenses etc.) and any loss of profits that could have been earned during the period of delay;
- v) If, as must be the case on this hypothesis, tender of Notice of Readiness by the Cancelling Date is not a condition, there is no obvious reason why the parties would have agreed that near-identical results should ensue by virtue of clause 14B. The reasons why there is no condition with regard to the tender of Notice of Readiness equally militate against construing clause 14B as covering market losses. Given that such losses would be recoverable in the usual way for repudiatory or renunciatory breach, there is no obvious lacuna to be filled.

Buyers’ submissions

37. These were met by the following principal submissions on behalf of Buyers:
- i) There is no express limitation on the word “*loss*” in clause 14B and no implicit limitation by reference to “*expenses*”. There is therefore no reason why “*loss and all expenses*” cannot encompass different losses depending on whether Buyers cancel or not. The provision for recovery to be made whether or not Buyers cancel does not mean that the scope of recovery has to be same in both cases;
 - ii) “*Due compensation*” simply means “appropriate” compensation by reference to the usual principles of causation, remoteness and mitigation;
 - iii) Clause 14B does no more than give effect to the normal measure of damages for non-delivery pursuant to section 51(3) of the Sale of Goods Act 1979;
 - iv) If the clause does not include loss of bargain damages, it is unclear what losses would be covered. A limitation to wasted expenses would be illogical since the expenses are only “wasted” as a result of the cancellation and there is no justification for allowing one type of loss caused by the cancellation (wasted expenses) but not another (loss of bargain);
 - v) Sellers’ construction is uncommercial. If loss of bargain damages are not recoverable, buyers who cancel on a rising market are unfairly penalised while the *ex hypothesi* negligent sellers gain an unwarranted windfall in being left with a vessel worth more than the contract price. The buyers, by contrast, are out of pocket to a similar amount and can only recover their loss by waiting to cancel until it is certain that a repudiatory or renunciatory breach can be established;
 - vi) Sellers’ construction also creates an imbalance with clause 13 where, on materially identical wording, loss of bargain damages have been held recoverable: see *The Griffon (supra)*;

- vii) Buyers' construction is supported by all relevant authority and commentary and there is no contrary authority.

Discussion and analysis

38. There was considerable argument before me as to whether there was any formal requirement for "clear wording" in order for clause 14B to be construed as including loss of bargain damages. Ultimately it seemed to me that this was an arid debate. The task of the court is to construe the contract, which means ascertaining the deemed intention of the parties in accordance with well-known principles. In this case, the starting assumption (given my findings on breach of condition) must be that the parties have agreed that the right to cancel in itself confers no entitlement to loss of bargain damages absent a repudiatory/renunciatory breach. The intention of the parties therefore falls to be ascertained against that background.
39. Sellers placed reliance on the references in the judgment of Popplewell J in *The Star Capella (supra)* at [98] and [190] to the need for "clear language". In my view, that reliance was misplaced. What the judge was referring to in those paragraphs was the need for clear wording before a mere right of termination could be said in and of itself to elevate the underlying obligation into a condition so as to confer a right to damages over and above what would otherwise be the position at common law. He was not addressing an express provision specifying the consequences of contractual termination such as exists here.
40. It is for this reason that the decision of the Court of Appeal in *Financings Ltd v Baldock*, [1963] 2 QB 104 is likewise irrelevant. In that case, there was a right of cancellation and a minimum payment clause which was held to be unenforceable because it amounted to an unlawful penalty. There was no other express provision conferring any right to damages for prospective losses. However, the mere existence of the minimum payment clause demonstrated that the parties had applied their minds to future losses by means of a bespoke clause and it is unsurprising that when that proved to be unenforceable the court held that the contract could not be construed to permit recovery by the back door on the basis of the cancellation clause alone.
41. Here, by contrast, there is an express provision in the form of clause 14B which does purport to confer an additional right and the only question is what it means. In this context there is no presumption that the clause was intended to produce the same results as the compensatory principle would produce at common law, merely a presumption that it was not intended to operate arbitrarily, for example by producing a result unrelated to anything which the parties can reasonably have expected to approximate to the true loss: *Bunge SA v Nidera*, [2015] UKSC 43; [2015] 2 Lloyd's Rep. 469 at [26].
42. That said, it is a matter of common sense that where the parties have not made tender of Notice of Readiness by the Cancelling Date a condition of the contract, the court will need to be adequately satisfied that they nonetheless intended to provide for equivalent consequences by means of clause 14B.

43. I confess that my initial reaction to the arguments presented in this case was that loss of bargain damages were recoverable under clause 14B for much the same reasons as given by the Tribunal. On closer analysis, however, I am not persuaded that this is in fact the case.
44. I start from the position that there is no clear wording in clause 14 itself which puts the matter beyond doubt either way. Furthermore, for the reasons already given in paragraph 20 above, I do not gain any assistance from the fact that clause 14 is headed “*Sellers’ default*”. To my mind this is simply a reference to matters dependent on the sellers’ conduct as opposed to matters dependent on the buyers’ conduct. Some support for this can be derived from the drafting of the original NSF 1966 which distinguished between a default in executing a transfer and a default for which the sellers were responsible, thereby recognising that a “default” for the purposes of the clause could be non-culpable.
45. So far as the natural and ordinary meaning of the words are concerned:
- i) I agree with Buyers that “*due compensation*” means compensation which is appropriate applying the usual common law principles of causation, remoteness and mitigation. I do not accept Sellers’ case that the phrase has the effect of limiting recovery to accrued damages which would otherwise be recoverable in any event. That, it seems to me, would be a very strained construction to put on the words;
 - ii) As a matter of construction, the provision for compensation “*to the Buyers for their loss and for all expenses... if [the Sellers’] failure is due to proven negligence and whether or not the Buyers cancel this Agreement*” can only refer to the failure identified in the opening words of clause 14B, namely the failure to give Notice of Readiness or to be ready to validly complete a legal transfer by the Cancelling Date;
 - iii) It follows that the loss and expenses recoverable under clause 14B must be caused by that specific failure. *Prima facie*, therefore, this is a reference to accrued losses and expenses which have crystallised at the point of cancellation and not to prospective losses and expenses caused by the cancellation. This suggests that the losses and expenses ought to be the same where the buyers cancel and where they do not. It is not immediately obvious that in circumstances where the right to terminate is at the option of the buyers, the clause creates a significantly enlarged right to claim loss of bargain damages in the event that they decide to cancel.
46. It seems to me that this construction is confirmed by clause 5(d) which makes clear that the buyers’ potential claim for damages under clause 14 is “for the Vessel not being ready by the original Cancelling Date” (emphasis added), not for damages for loss of bargain. This makes sense in circumstances where cancellation does not automatically result from the mere fact that the vessel is not ready but depends on the buyers’ election.
47. Thus far, therefore, my provisional view is that clause 14 does not on its natural and ordinary meaning give rise to a right to claim loss of bargain damages where

cancellation takes place in accordance with the clause, absent an accepted repudiatory or renunciatory breach.

48. What compensation does it then allow? The Tribunal was troubled by what it regarded as Sellers' failure to articulate clearly what was recoverable under the clause and this was a refrain echoed in argument by Mr Lewis. However, it seems to me that this is an illusory concern. On the construction above, the recoverable damages under clause 14B include expenses incurred by the buyers in making arrangements to crew the vessel, carrying out inspections, legal costs and preparing for delivery generally. They will also encompass any loss of profits that could potentially have been made between the date when the vessel should have been delivered but for the sellers' negligence and the date of cancellation. In the present case of course, Buyers have already been compensated for such lost profits for the period from 20 August 2021 to 15 October 2021.
49. I was referred by both parties to the drafting history of clause 14. In this regard, the wording of the original NSF 1966 was very different and provided expressly for the sellers to make due compensation for "*any loss caused to the Buyers by non-fulfilment of this contract*". In 1987 the wording of clause 14 was amended so that it no longer referred to non-fulfilment of the contract, but instead to a "*failure to execute a legal transfer or to deliver the vessel in the manner and within the time specified in line 38 [the Cancelling Date], if such are due to the proven negligence of the Sellers.*" The new clause also introduced the "*proven negligence*" qualification for the first time. In 1993, the wording was further amended to take the form in which it has since remained and which features in the present MOA. Thus, (a) "*all expenses*" were added to the scope of recovery, (b) the required causal link was no longer expressly spelled out, and (c) it was clarified that the losses were recoverable irrespective of whether the buyers cancelled or not.
50. At first blush, the changes introduced in 1987 look fairly radical. As well as introducing the negligence qualification, the amended version of clause 14 specifically tied the recoverable losses to the failure to execute the transfer, rather than, as previously, to the non-fulfilment of the contract. It may well be, therefore, that the amendments in 1987 had the effect of removing the right which previously existed to recover loss of bargain damages (see *The Solholt*, [1981] 2 Lloyd's Rep. 574; [1983] 1 Lloyd's Rep. 605). I do not accept Buyers' argument that "*loss*" which, as I have held above, must refer to loss caused by the failure to give Notice of Readiness by the Cancelling Date, is necessarily wider than loss caused by the non-fulfilment of the contract. Likewise, it may be that the addition of "*all expenses*" was to avoid a potential lacuna where the delay had not caused any loss or expense which would not have been incurred in any event.
51. However, this is all speculation and even if the drafting history were a permissible aid to construction (as to which, see *The Rewa*, [2012] EWCA Civ. 153; [2012] 1 Lloyd's Rep. 510 at [30]) there was no actual evidence before me as to the rationale for the various amendments. In those circumstances, however tempting it may be, I consider that it would be unsafe to draw any conclusions one way or the other from what could only be a more or less educated guess. I

therefore proceed on the basis of construing the wording as it stands, as to which my provisional conclusion is set out above in paragraph 47 above.

52. As it seemed to me, the most powerful argument against that provisional conclusion was Buyers' argument that the situation contemplated by clause 14 is to be equated with non-delivery and that clause 14B therefore permits recovery of the normal market measure stipulated in section 51(3) of the Sale of Goods Act. It was not controversial that section 51(3) reflects the ordinary compensatory principle: see *Sharp Corp Ltd v Viterra BV*, [2024] UKSC 14 at [96]. Nonetheless, it should not be forgotten that while section 51(3) sets out a default rule, the overriding principle is that set out in section 51(2), namely that the measure of damages is "*the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract*". In other words, the starting point must be to identify the particular breach or trigger in respect of which damages are recoverable.
53. In my judgment, for the reasons already given, the relevant trigger is the failure to give Notice of Readiness by the Cancelling Date and it is only losses caused by that specific failure which are recoverable under clause 14B, not losses caused by the loss of the contract more generally. On that basis (and *a fortiori* if there was no positive obligation to give Notice of Readiness by the Cancelling Date) this is not equivalent to a case of non-delivery at all. It is simply a failure to tender Notice of Readiness by a particular date, which leaves open the possibility that notice may be given at a later date. I do not accept that Buyers' unilateral decision to terminate pursuant to a cancellation right can transform the case as a matter of law into one of non-delivery.
54. If that is right, then the authorities to which I was referred do not affect the analysis:
- i) *The Solholt (supra)*: This was a decision on the NSF 1966 wording which, as set out in paragraph 49 above was very different. On this wording, it is unsurprising that Mr Justice Staughton held at 579R that: "*The clause itself contemplates that the buyers may cancel and therefore that the contract will be wholly unperformed, so far as its main object is concerned, that is to say, transfer of the property in the vessel. It is that loss which is, in my judgment, plainly provided for in the words, 'loss caused to the buyers by non-fulfilment of this contract.'*" Moreover, as appears from the headnote, there was in that case a positive obligation on the sellers to deliver no later than 31 August. Accordingly, the Court of Appeal's acceptance that the loss caused by the buyers' cancellation was directly attributable to the sellers' breach of contract was almost inevitable given the finding that the sellers were in breach of that obligation.
 - ii) *The Al Tawfiq*, [1984] 2 Lloyd's Rep. 598: In this case the court upheld the tribunal's award of loss of bargain damages for failure by the sellers to deliver by a specific date, holding that the obligation was absolute even though the sellers bore no culpability for the delay. However, since this was a decision on the same wording as in *The Solholt* and where

there was a similar positive obligation to deliver by a specific date, it adds nothing to the latter.⁵

- iii) *Parbulk AS v Kristen Marine SA*, [2010] EWHC 900 (Comm); [2011] 1 Lloyd's Rep. 220: This was a summary judgment application arising out of what appears to have been an amended NSF contract. The purchase of the vessels in question had been financed by bank lending and clause 14 included an additional bespoke paragraph providing for the recovery of proven expenses including, but not limited to legal and breakage costs. The provision equivalent to clause 14B in this case was not directly in issue before Mr Justice Burton and, while he considered that it provided for a wider measure of damages than the bespoke provision, including loss of profits, he did not need to consider the limits of such measure. I note in passing that his reasoning at [20] accepts that it is the failure to give Notice of Readiness which is the trigger for damages under clause 14B.
- iv) *The Ile Aux Moines*, [1974] 2 Lloyd's Rep. 502: Market loss damages were again awarded in this case but the contractual provisions on which the claim was based are obscure and the basis of termination is likewise unclear. There was, however, a positive obligation to deliver by a stipulated date so that the case could properly have been regarded as one of non-delivery.
- v) Textbook commentary: *Goldrein (op.cit.)* §19.11 states that the section 51(3) measure of damages is recoverable "*where the seller breaches the sale contract by failing to deliver the ship...*" This proposition is not controversial where the sellers are under a positive obligation to deliver by a particular date. *Strong & Herring, Sale of Ships* (3rd ed., 2016) §17-20 seems to assume that this will always be the case where sellers fail to meet a cancelling date but for the reasons given above, I do not accept that this is so. The negligence contemplated by clause 14B is negligence in failing to tender Notice of Readiness by the Cancelling Date and the compensation provided by the clause is in respect of that negligence, not the loss of the contract as a whole.

- 55. Accordingly, I do not consider that there is any binding authority which is contrary to my preferred analysis of the clause.
- 56. Nor does it seem to me that this analysis is in any way uncommercial. Clause 14B permits recovery of damages in cases of negligence falling short of repudiation or renunciation of the entire bargain. In circumstances where Buyers would otherwise recover no damages at all, I see no great injustice in limiting recovery to accrued losses and wasted expenses. On the contrary, it is difficult to see why, in circumstances where Sellers are not in breach of

⁵ Although it does not bear on the issues in this case, both parties accepted that it was this decision which was the impetus for the introduction of the negligence qualification in the NSF 1987 form: see also *Goldrein on Ship Sale and Purchase* (7th ed., 2024) §19.6.

condition, they should nonetheless be liable for the loss of the entire bargain when Buyers have a choice whether to cancel or not.

57. In relation to the windfall argument much pressed by Mr Lewis, it is trite that markets move down as well as up and, as already pointed out, it is inherently unlikely that buyers will elect to cancel on a rising market since it would make no commercial sense to do so unless sellers were in repudiatory or renunciatory breach when loss of bargain damages would be recoverable in any event. To accede to this argument would be to allow the tail to wag the dog. While it is true that Staughton J in *The Solholt (supra)* at 581L expressed some doubt about allowing the sellers to retain the benefit of the increased value of the vessel, this was in a wholly different context, where he had already held that loss of bargain damages were available in principle and the only question related to the buyers' failure to mitigate. In any event, he had clearly overcome such doubts by the next column of his judgment such that "*it does not greatly disturb me that these sellers have made an adventitious profit merely because the buyers failed to adopt the course which would have secured that profit to themselves...*"
58. Finally, there is no necessary imbalance with clause 13. The only relevant case in relation to clause 13 is *The Griffon (supra)* which, as Mr Lewis accepted, was a case where the buyers were in repudiatory breach in any event. Counsel were not able to identify any case where clause 13 has been tested in non-repudiatory circumstances.
59. Where, then, does this leave the Award? Mr Wright made certain criticisms of the Tribunal's reasoning in paragraphs 157 and 158 where it (a) seemed to regard designation of a term as a condition as an exception to, rather than a reflection of, the rule that a mere right of cancellation does not give rise to loss of bargain damages absent a repudiation and (b) appeared to hold that the burden of proof lay on Sellers to establish that damages for loss of bargain would not be recoverable unless Buyers could prove that Sellers were in repudiatory breach. Mr Wright may strictly be right about the first of these and it is undoubtedly right that the burden is on Buyers to establish a right to the damages which they claimed. However, neither point was material to the Tribunal's decision since it further held, correctly, that the entitlement to damages under a contractual cancellation clause depended critically on what the parties had agreed and its decision in that regard was not based on the incidence of the burden of proof.
60. The substance of paragraphs 159 and 160 of the Award have been set out in paragraph 10 above. No criticism can be made of paragraph 159 which is incontrovertibly correct, nor of paragraph 160 – at least insofar as it reflects the general proposition that a breach consisting of a failure to deliver on time can be treated as the cause of a subsequent contractual cancellation. However, it follows from my conclusions as to the correct construction of the MOA that in my view the Tribunal erred in regarding Sellers as having been under any positive obligation to deliver the Vessel by the Cancelling Date and thereby being in breach of contract.
61. That error in turn undermines the critical finding in paragraph 162 of the award that the parties would have understood clause 14B on its natural and ordinary

meaning to provide for compensation covering the consequences of cancellation, including loss of bargain. I have set out above my reasons for reaching a contrary conclusion and, in my judgment, it follows that the Tribunal's decision to award loss of bargain damages was wrong in law.

62. Mr Lewis pointed out that the Tribunal had found in paragraph 165 that the cause of Buyers' loss of profits was Sellers' failure to deliver and that this caused Buyers to bring the MOA to an end. He submitted that this was a finding of fact which could not be challenged and that Buyers were accordingly entitled to recover the damages claimed. It is of course correct that the Tribunal's findings on causation cannot be challenged. However, its construction of clause 14 led it to look at causation through the wrong lens. If loss of bargain damages had been properly claimable under clause 14 for breach of an obligation to deliver the Vessel by the Cancelling Date and Buyers had cancelled for that reason, then the finding that the cancellation was caused by the failure to deliver would have been incontrovertible. On what I have held to be the correct construction of clause 14, however, damages are not recoverable on this basis because the right to claim damages is only in respect of the failure to give a Notice of Readiness by the Cancelling Date, and not breach of an obligation actually to deliver by that date. On the view I take of the MOA, the Tribunal's finding on causation is therefore legally irrelevant.

Conclusion

63. In the light of my findings, it seems to me that the formulation of the question of law posed for the determination of the court is inapt in so far as it addresses cancellation for failure to deliver by the Cancelling Date. In my view, it should more accurately be re-worded as follows:

“Where a Memorandum of Agreement on the SALEFORM 2012 is lawfully cancelled by a buyer under clause 14 in circumstances where the seller has failed to give notice of readiness or failed to be ready to validly complete a legal transfer by the Cancelling Date and such failure is due to the seller's “proven negligence”, is that buyer entitled to recover loss of bargain damages absent an accepted repudiatory breach of contract?”

64. I would answer this question in the negative.
65. It follows that the appeal succeeds and paragraphs (E) and (F) of the dispositive section of the Award must be set aside in so far as they award such damages. I will hear counsel on the appropriate form of order.
66. In these circumstances, the question of potential double recovery raised by the court arising out of the award of lost profits for the period from 20 August to 15 October 2021 does not arise and I say no more about it.