

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2013

Before:

THE HON MR JUSTICE FLAUX

Between:

KUWAIT ROCKS CO

Appellants/
Charterers

- and -

AMN BULKCARRIERS INC

Respondents/Owners

MV “ASTRA”: Charterparty dated 6 October 2008

Miss Josephine Davies and Mr Rupert Hamilton (instructed by **Watling & Co**) for the
Appellants/Charterers
Mr Robert Bright QC (instructed by **Reed Smith LLP**) for the **Respondents/Owners**

Hearing dates: 28th to 31st January 2013

Judgment

The Hon Mr Justice Flaux :

Introduction and background

1. The Appellants (to whom I will refer as “the charterers”) appeal, with the permission of Christopher Clarke J, two questions of law arising out the Second Partial Arbitration Award dated 11 April 2012 of the arbitrators, Messrs Patrick O’Donovan, Mark Hamsher and Christopher Moss (“the tribunal”) whereby the tribunal found in favour of the Respondents (to whom I will refer as “the owners”) that their claim for damages arising out of the termination of a time charterparty of the vessel ASTRA succeeded. By a Respondents’ Notice, the owners seek to uphold the Award on alternative grounds.
2. The essential facts found by the tribunal which are relevant for the purposes of this appeal are as follows. The owners were the disponent owners of the vessel and chartered her to the charterers for a period of 5 years by a time charterparty dated 6 October 2008 on the NYPE 1946 form as amended.

3. The relevant terms of the charterparty were as follows:

“Clause 5

Payment of said hire to be in London net of bank charges in cash in United States Currency 30 days in advance and for the last 30 days or part of same the approximate amount of hire, hire is to be paid for the balance day by day as it becomes due, if so required by Owners, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. ...

Clause 31

...Referring to hire payment(s), where there is any failure to make ‘punctual and regular payment’ due to oversight or negligence or error or omission of Charterers’ employees, bankers or agents, Owners shall notify Charterers in writing whereupon Charterers will have two banking days to rectify the failure, where so rectified the payment shall stand as punctual and regular payment.”

4. The rate of hire payable under the charterparty was US\$28,600 per day. From the outset of the charterparty, because market rates of hire were falling in the wake of the collapse of Lehman Brothers, this rate was higher than the charterers could hope to command by way of sub-charter rates of hire. The charterparty provided for the charterers to put up a bank guarantee. On 12 November 2008, the charterers asked the owners to waive this requirement and the owners asked for a cash deposit of US\$1 million in lieu, but the charterers refused. In January 2009, the charterers sought a reduction in hire to US\$19,600 per day and similar requests for a reduction, with the balance outstanding to be paid later, were made in February and March 2009. Then on 26 March 2009, the charterers asked for hire to be reduced to US\$22,000 per day from the next hire payment. That request did not include a proposal to pay the balance later and the message through the broking channel which conveyed the proposal stated: “unless the Owners accepting to revise the hire to USD 22,000 pd the owners (Kuwait cement and national industries [i.e. the owners of the charterers]) will simply declare company’s bankruptcy.”
5. A message on 22 April 2009 repeated the request for a reduction in hire to US\$22,000 per day and explained that the various owners of the charterers had sent their lawyers; “to discuss this case and all the eventual consequences for going bankrupt...” In an email on 27 May 2009 the charterers’ broker advised that after completion of the current voyage, the charterers had no more cargoes for the vessel and that, unless the owners agreed to hire of a maximum of US\$20,000 per day, the charterers would have to declare insolvency and redeliver the vessel. On 5 June 2009 when the current loaded voyage was completed, the charterers’ position was that unless the owners agreed to immediate redelivery for three months and reduction in hire to a more reasonable level, the charterers would have no option but to declare immediate bankruptcy.
6. The instalment of hire due on 1 June 2009 was not paid and, on 8 June 2009, the owners served the two day anti-technicality notice provided for in clause 31 of the charterparty. The owners extended the deadline and following without prejudice

negotiations, the parties entered into an agreement set out in Addendum no. 1 to the charterparty dated 7 July 2009 which provided for a reduced rate of hire of US\$21,500 per day for the period 7 July 2009 to 7 July 2010. Clause 4 of the Addendum (the so called “compensation clause”) provided as follows:

“4. In the event of the termination or cancellation of the Charter by reason of any breach by or failure of the Charterers to perform their obligations, Charterers shall, in addition to any amounts due to Owners at the date of termination or cancellation, pay to the Owners compensation for future loss of earnings in respect of the unexpired period of the Charter on the basis of the difference between the market rate and USD 28,600.-.”

7. On 18 July 2009, the vessel was delivered into a sub-charter with Western Bulk Carriers (“WBC”), who had the option to keep the vessel until March 2010. On 20 November 2009, the charterers requested the owners to reduce the hire to the same level as being paid by WBC, US\$16,000 per day, until the end of the WBC sub-charter and thereafter at the reduced rate provided for in Addendum no. 1. The charterers’ message said the situation in the company was very critical and the shareholders might decide to liquidate the company at their forthcoming meeting. The owners did not agree and the correct amount of reduced hire was paid for December 2009, albeit four days late. The charterers did not pay the instalment of hire due on 3 January 2010, so the owners exercised a lien on sub-freights coming into the hands of WBC, which led to the outstanding hire being paid on 5 January 2010.
8. In March 2010, the charterers refixed the vessel to WBC for a further 5/7 months at a rate of hire which, net of brokerage, was slightly less than US\$20,000 per day. The chairman of the charterers wrote to the principal of the owners again requesting a reduction in hire, including from July 2010 when the charterers were due to start paying the full charter rate again. He stated that making payment of US\$28,600 would surely lead to them declaring bankruptcy.
9. The charterers did not pay the hire due on 2 July 2010 and on 7 July the owners issued an anti-technicality notice pursuant to clause 31. The charterers asked for more time to pay, then on 13 July 2010 asked the owners to extend the reduced rate beyond the period stipulated in addendum no. 1, stating that they could not pay the full rate under the charterparty. The owners offered to extend the reduced rate for a further 22 days to 29 July 2010, on terms that the charterers pay the outstanding hire for the period from 2 to 29 July by 16 July and that they pay the next 30 days of hire due on 29 July 2010, at the full charterparty rate, the owners reserving their right to withdraw the vessel and claim damages. This proposal was accepted by the charterers on 13 July 2010 and the owners were asked to send a draft Addendum. The charterers also indicated that they wanted a meeting to discuss matters before 29 July 2010.
10. The owners in fact sent the charterers two versions of Addendum no. 2 both in similar terms, but one of which preserved the owners’ rights to claim damages, including under Addendum no. 1 whereas the other included at clause 6 a provision in the same terms as clause 4 of Addendum no. 1. Neither draft was signed by the charterers. There was an exchange about the terms of addendum no. 2 and the charterers sought to renegotiate the terms, challenging that any agreement had been made on 13 July 2010, although they accepted that they had agreed to pay hire on 16 July 2010. However, in view of the arbitrators’ finding that the charterers had accepted the owners’ proposal, the charterers now accept that Addendum no. 2 was agreed on 13 July 2010.

11. In fact, the charterers failed to pay anything at all on 16 July 2010 and then failed to pay the next hire instalment due on 29 July 2010 (which, pursuant to what had been agreed on 13 July 2010, was to be paid at the full charterparty rate). On 30 July 2010, the owners served an anti-technicality notice in respect of that instalment. On 3 August 2010 the charterers paid US\$568,788.75 in respect of the outstanding balance of hire at the reduced rate which had fallen due on 2 July 2010 and which they had agreed to pay by 16 July 2010, saying it was being paid “to show goodwill”. However, the owners pointed out that the next instalment of US\$858,000 (i.e. at the full charterparty rate) had been due on 29 July 2010 and remained unpaid. The owners advised that unless payment was made by midnight on 3 August 2010, the owners would withdraw the vessel and they reserved the right to treat charterers’ conduct as repudiatory.
12. Payment was not received by midnight on 3 August 2010 and on 4 August 2010 the owners withdrew the vessel from the charterers’ service and terminated the charterparty. The owners were able to conclude a substitute charter with Louis Dreyfus on 3 September 2010 for the balance of the charter period at a rate of US\$17,500 per day.

The arbitration and the relevant parts of the Reasons

13. In the arbitration, the owners claimed damages for loss of earnings for the period from 4 August 2010 to 9 November 2013 (the earliest date when the vessel could have been properly redelivered by the charterers) in the sum of US\$13,109,977, obviously giving credit for the earnings made under the substitute charterparty. Following agreement over accounting issues, the issue which was the subject of the particular arbitration hearing which led to the Award was whether, as the charterers contended, whilst the owners had been entitled to withdraw the vessel, they were only entitled to recover hire that had accrued up to the date of the withdrawal or whether, as the owners contended, they were entitled to recover damages for loss of bargain calculated by reference to their net loss of earnings over the unperformed balance of the charterparty, on the basis that the charterers were in breach of condition in not paying hire (entitling the owners not only to withdraw the vessel but to claim damages for breach of condition) and/or in renunciatory and/or repudiatory breach of charterparty.
14. In relation to owners’ argument that the obligation to pay hire under clause 5 of the charterparty was a condition, the tribunal stated (at [59] of their Reasons) that, whilst their instinct as commercial arbitrators would be to treat it as a condition, they were not persuaded that was the current state of English law. Rather they considered that the generally accepted position under English law is that failure to pay charterparty hire is not a breach of condition. They also rejected (at [60] of their Reasons) the owners’ alternative argument that clauses 4 of addendum no. 1 and 6 of Addendum no. 2 respectively elevated the payment obligation in clause 5 of the charterparty into a condition. The rejection of the owners’ arguments that clause 5 is a condition is the subject of the Respondents’ Notice and I will consider those arguments later in the judgment.
15. At [61-62] of the Reasons, the tribunal upheld the owners’ alternative argument that clauses 4 and 6 respectively of the Addenda entitled the owners to recover damages for future loss of earnings in the event of termination or cancellation of the charterparty “by reason of any breach or failure of the charterers to perform their obligations.” They rejected the charterers’ argument that this was a penalty clause because the clause could only come into effect where the charterers’ breach led to termination or cancellation of the charterparty, not where there was a whole range of

breaches of greater or lesser seriousness. They also held that the entitlement to damages set out in the clause merely echoed the measure of damages in English law in cases where there is a market at the time of termination of the contract.

16. From [66] onwards, the tribunal considered the owners' argument that the charterers' conduct had evinced an intention no longer to be bound by the charterparty, in other words that there had been a renunciation of the charterparty. They found that apart from in June 2009 and July/August 2010 hire payments paid late were only a few days late and were not evidence of repudiatory or renunciatory conduct, just "the actions of a charterer suffering from a bad market and taking advantage of the fact that, precisely because the charterparty rate was above the market rate, the owners were unlikely to withdraw the vessel". They accepted that the charterers' actions may have added to the owners' unease, but held they did not have the contractual significance for which the owners contended [67]. They also rejected any suggestion that the failure of the charterers to provide a bank guarantee at the outset of the charterparty was repudiatory [68].

17. At [69] they found as follows:

"However, it seemed to us that the owners were on stronger ground when they pointed to the repeated threats by the charterers that they would have to declare bankruptcy unless the owners agreed to adjust the charterparty rate. That was the background to addendum no. 1 and was also the background to the events in July 2010. ...it did not matter whether the dangers of bankruptcy were true or not; the effect of the statements was to be considered objectively."

18. They then went on at [70]-[72] to set out the legal test for renunciation or repudiation. Since this part of the Reasons was subjected to particular criticism by the charterers and is central to this appeal, it is appropriate to set it out in full:

"70 We were referred to the standard textbooks and cases in which it has been emphasised that a party may have repudiated a contract if there is a determination to perform inconsistently with the agreement. For instance in *Ross T Smyth & Co v T.D. Bailey & Son* [[1940] 3 All ER 60 at 72] Lord Wright commented:

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

71. In *Decro-Wall International S.A. v Practitioners in Marketing Ltd* [[1971] 1 WLR 361 at 380] Lord Justice Buckley said:

"Each party to an agreement is entitled to performance of the contract according to its terms in every particular, and any breach, however slight, which causes damage to the other party will afford a cause of action for damages; but not every breach, even if its continuance is threatened throughout the contract or the remainder of its subsistence, will amount to a

repudiation. To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The measure of the necessary degree of substantiality has been expressed in a variety of ways in the cases. It has been said that the breach must be of an essential term, or of a fundamental term of the contract, or that it must go to the root of the contract...I venture to put the test in my own words as follows: Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as and when a breach or breaches may occur? If this would be so, then a repudiation has taken place.”

72. In *Federal Commerce & Navigation Co v Molena Alpha Inc.*[[1979] AC 757 at 778-9] Lord Wilberforce quoted with approval the comments of Lord Wright [in *Ross T Smyth*] and those of Lord Justice Buckley in [*Decro-Wall*] both of which have been quoted above. He also quoted with approval the comments of Lord Justice Diplock in the *Hong Kong Fir Shipping* case that the test was whether the breach was such as to deprive “the charterers of substantially the whole benefit which it was the intention of the parties. . . . that the charterers should obtain from the further performance of their own contractual undertakings”. On the facts of the case which the House of Lords was considering, which involved the owners announcing that their masters would refuse to issue freight pre-paid bills of lading, he said:

“If the charterers had not given way, the charters would have become useless for the purpose for which they were granted. I do not think that this was disputed by the owners - in any event it was not disputable.”

He rejected an argument that the steps taken by the owners were merely “interim” and concluded that the charterers were entitled to determine the contract.”

19. Having set out the legal test, the tribunal then concluded at [73]-[75] as follows:

“73. It seemed to us that in July 2010 the [charterers] were determined to perform the charterparty inconsistently with it and the addenda....on 13 July the charterers advised the owners that they were not able to pay more than US\$21,500. A compromise agreement was reached on that date with the full charterparty rate of US\$28,600 being payable from 29 July onwards. The charterers failed to pay hire due on 16 July or on the promised date of 18 July. They insisted on their own (and non-contractual) version of the addendum being signed before they were prepared to pay any further sums of money. They refused to pay the instalment of hire due on 29 July (US\$858,000) and on 2 August only paid the penultimate instalment which it had been agreed was to be received by the owners by 16 July (US\$580,500).

74. Clearly the charterers were hoping that before the full charterparty rate kicked in again on 28 July they would be able to meet with the principal of the owners' managers and negotiate, again, a reduced rate that was lower than the charterparty rate.

75. We considered that the earlier conduct of the charterers both in repeatedly threatening bankruptcy and in failing to perform the compromise agreement of 13 July 2010 did colour the failure to pay the hire that was due on 28 July. This was not a mere failure to pay a single instalment of hire on time. It was a failure to pay an instalment of hire in the context of a history of threats by the Charterers to declare themselves bankrupt compounded by a failure to comply with the compromise agreement of 13 July which required hire to be paid at the charterparty rate from 28 July. The earlier conduct of the charterers compounded the failure to pay the first instalment of hire at the full charterparty rate that was due following addenda nos. 1 and 2 for the first time in just over a year. Viewed objectively, the totality of the evidence could only be interpreted as an intention by the charterers to perform at the very least the forthcoming part of the contract in a manner that was not consistent with it."

20. On the basis of those findings, the tribunal concluded that the owners' claim for repudiatory or renunciatory breach succeeded and the owners were entitled to recover damages in an amount of US\$12,492,966.

The question of law

21. The charterers sought permission to appeal under section 69 of the Arbitration Act 1996 in respect of two questions of law said to arise out of the Award:
- (1) Whether evincing an intention to perform a contract in a manner which is inconsistent in some non-fundamental way with the terms of the contract, and which does not deprive the innocent party of substantially the whole of the benefit of the contract is capable in law of amounting to a repudiation or renunciation.
 - (2) Whether, on the true construction of the Charterparty...and the addenda thereto, clause 4 of Addendum 1 and/or clause 6 of Addendum 2 ["the Compensation Clause"] are penalty clauses, by reason of which the Respondents are precluded from relying on them.
22. The argument mounted by the charterers in their Skeleton Arguments in support of their application for permission on the first question (and repeated before me) was to the effect that the tribunal had applied a test derived from the *Ross T Smyth* case without the qualification specified in *Federal Commerce and Navigation (The Nanfri)*, namely that the manner in which the contract breaker is intending to fulfil the contract is "such as to deprive the [innocent party] of substantially the whole benefit which it was the intention of the parties that the [innocent party] should obtain from the further performance of [its] own contractual undertakings." It is clear from his Ruling giving permission to appeal that Christopher Clarke J saw some force in that argument and considered it open to serious doubt whether the tribunal adopted the right test in respect of repudiation and whether, if there was no repudiation, the tribunal were right not to regard the Compensation Clause as penal.

The first question: have the tribunal applied the wrong test for repudiation/renunciation?

23. In support of her argument that the tribunal had applied the wrong test or misapplied the right test, Miss Davies on behalf of the charterers submitted that the first sentence of [70] of the Reasons and the omission of the word “substantially” from the passage: “a party may have repudiated a contract if there is a determination to perform inconsistently with the agreement” demonstrated that the tribunal had applied a less stringent test than *The Nanfri* test. I cannot accept that submission since, in the very next sentence the tribunal quote Lord Wright’s words: “but may be determined to do so only in a manner substantially inconsistent with his obligations”. At best this is a nit-picking criticism of the wording of the Reasons, not a point of substance.
24. Furthermore, in my judgment, there is no such thing as *The Nanfri* gloss on the *Ross T Smyth* test or the *Decro-Wall* test. They are simply three ways of saying the same thing, of enunciating the relevant legal principle. It is quite clear that Lord Wilberforce in *The Nanfri* itself did not think he was putting a gloss on those earlier cases. Quite the contrary, he cites the judgments in those cases with approval and states in terms that any differences in formulation of the test are not divergence in principle but applications to different contracts of a common principle. That is absolutely clear from the passage in his judgment at 778-9 where he cites these authorities, which merits full quotation:

“I shall not set out at any length the numerous authorities on anticipatory breach: this is one of the more perspicuous branches of the law of contract and the modern position is clear. The form of the critical question may differ slightly as it is put in relation to varying situations:

' . . . an intimation of an intention to abandon and altogether to refuse performance of the contract . . . ' or 'evince an intention no longer to be bound by the contract . . . ' (*Freeth v. Burr* (1874) L.R. 9 C.P. 208, 213, *per* Lord Coleridge C.J.)

'I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way' (*Ross T. Smyth & Co. Ltd. v. T. D. Bailey, Son & Co.* [1940] 3 All E.R. 60, 72, *per* Lord Wright) such as to deprive 'the charterers of substantially the whole benefit which it was the intention of the parties. . . . that the charterers should obtain from the further performance of their own contractual undertakings' (*Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1962] 2 QB 26, 72 *per* Diplock L.J.).

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

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

25. When that passage is seen in full, it is apparent that far from misapplying the so-called *Nanfri* gloss, the tribunal have taken the authorities they cited and the test they have applied from Lord Wilberforce’s speech in *The Nanfri*. I agree with Mr Bright QC on behalf of the owners that this so-called *Ross T Smyth* question or *Nanfri* gloss is an Aunt Sally. There was no issue at the arbitration as to the test to be applied for renunciation and the tribunal have not misapplied or misunderstood the test.
26. Miss Davies submitted that the findings made by the tribunal in [73]-[75], in which they concluded there had been repudiatory or renunciatory breach, demonstrated that they had applied the wrong test, essentially for two reasons. First, she submitted this was apparent from the first sentence of [73]: “It seemed to us that in July 2010 the [charterers] were determined to perform the charterparty inconsistently with it and the addenda” which did not use the word “substantially” or some other phrasing such as “going to the root of the contract”, which would indicate that the tribunal was applying the right test. That point seems to me no more meritorious than the similar point about [70] of the Reasons which I dealt with in [23] above. It essentially involves the suggestion that, having set out the correct legal test in the previous paragraph of their Reasons, the tribunal then forgot what they had said and applied the wrong test. That suggestion seems to me unreal. I agree with Mr Bright that it is implicit that although they might have expressed themselves more felicitously in the first sentence of [73], they were applying the correct test.
27. Second, Miss Davies submitted that the findings made at [73]-[75] demonstrated that the tribunal were applying a lower test of “inconsistent performance” as stated in the first sentence of [73] because the findings made were insufficient to amount to a finding of renunciation or repudiatory breach applying the right test. It seems to me that submission comes perilously close to seeking to go behind the tribunal’s findings of fact which is not open to the appellant in an arbitration appeal, unless it can be said that, applying the right legal test, no reasonable arbitration tribunal could have reached the conclusion they did. Miss Davies eschewed, understandably, so extreme a submission. In any event, in my judgment, the factual findings which the tribunal made (concerning the threats of bankruptcy, the failure to perform the compromise agreement and specifically the failure to pay the full charterparty hire when it became payable again after more than a year) all justified the conclusion that the charterers were determined to perform the charterparty in a manner which deprived the owners of the substantial benefit they should have obtained from further performance.
28. Contrary to Miss Davies’ submission, I consider that in the last sentence of [75] the tribunal were saying that, on the totality of the evidence, the charterers intended to perform the balance of the charterparty (which is what the tribunal meant by “at the very least the forthcoming part of the contract”) in a manner which was not consistent with it. The tribunal clearly considered that, viewed objectively, the charterers had no intention of paying the full charterparty rate of hire but were only prepared to pay US\$21,500 per day, a substantial daily shortfall of more than US\$7,000, for more

than three years remaining of the charter period. On the evidence the tribunal were entitled to conclude that that amounted to a breach which went to the root of the contract. In my judgment, there was no error of law in applying the legal test for renunciation or repudiation and, as a consequence, the appeal on the first question should be dismissed.

The second question: was the Compensation Clause a penalty clause?

29. In the light of my conclusion on the first question of law, the second question concerning the Compensation Clause is academic, as the owners were entitled to recover the damages they did pursuant to normal principles of the law of contract, without any need to resort to the Compensation Clause. However, I should deal with it briefly. The essence of Miss Davies' submission was that the tribunal had construed the clause as providing that any termination or cancellation of the charterparty (including a withdrawal under clause 5, breach of which the tribunal had found was not a breach of condition) would entitle the owners to recover damages for future loss of earnings. She submitted that the words "any breach" in the clause should be read as limited to repudiatory breach or breach of condition, which was essentially the approach of the arbitration tribunal in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* ("The Antaios") to the words "or on any breach of this charterparty" in clause 5 of the NYPE form, an approach which was approved and upheld by the House of Lords: [1985] 1 AC 191 per Lord Diplock at 200E-201E, with whom the other Law Lords agreed.
30. However, once it is accepted, on the basis of *The Antaios*, that the reference to "any breach" in clause 5 is only to a repudiatory breach or a breach of condition, it becomes clear that the right to claim damages conferred by the Compensation Clause is not a general one applicable to any breach, but is limited to those breaches which are sufficiently serious to justify termination or cancellation (including breach of the obligation to make punctual payment of hire under clause 5 and/or 31). In that respect, I agree with the tribunal's reasoning at [62] of the Award.
31. Furthermore, if the obligation to make punctual payment of hire in clauses 5 and/or 31 was not originally a condition, I see nothing penal in the amendment effected by the Addenda making it clear, by providing for the right to claim damages for loss of bargain, that the obligation to make punctual payment of hire is now a condition. That conclusion is entirely consistent with the analysis of the Court of Appeal in *Lombard North Central Plc v Butterworth* [1987] 1 QB 527, per Mustill LJ at 535C-537H and Nicholls LJ at 545F-546C. In this context I was not assisted by the analysis of Kitchin J in *Office of Fair Trading v Ashbourne Management services Ltd* [2011] EWHC 1237 (Ch) at [185]-[190] upon which Miss Davies relied. That case was concerned with a very different type of contract to the present: contracts for membership of gym clubs where issues of consumer protection arise, whereas a time charter is a mercantile contract where the parties have or at least are taken to have equal bargaining power.
32. Given that the very loss which the owners would suffer on a falling market (such as existed at the relevant time in this case) by virtue of early withdrawal of the vessel for breach of the obligation to make punctual payment of hire is loss of future earnings (on the basis that any substitute charter would inevitably be at a lower rate than the charter rate), it is difficult to see how the reservation of the right to compensation for future loss of earnings in the Compensation Clause can be said to be penal. The Clause is not saying that the owners will be entitled to such "compensation" even if they have not suffered a loss, for example because the market rate has risen again. In the circumstances, I would answer the second question of law in the negative.

Is the obligation to make punctual payment of hire a condition?

Introduction

33. In view of my conclusion that the appeal fails on the first question of law, so that the Award will be upheld on the ground that the tribunal was right to conclude that the charterers were in renunciatory or repudiatory breach, it could also be said that the issue raised by the Respondents' Notice was equally academic. This is the owners' contention that the tribunal should also have decided that the owners were entitled to recover substantial damages for the charterers' non-payment of hire on the basis that clause 5 (whether on its own or with the anti-technicality clause 31 and/or the Compensation Clause in the two addenda) was a condition breach of which entitles the owners to recover not only unpaid hire at the date of withdrawal but damages for future loss of earnings. However, on instructions, both parties' counsel urged me to decide this issue and therefore I propose to do so. It is fair to say, it was the argument on this issue which took up the majority of the time at the hearing.

The tribunal's decision on the issue

34. I have already recorded at [14] above the tribunal's conclusion at [59] of the Reasons that, whatever their instinct as commercial arbitrators, they considered that the generally accepted position under English law is that clause 5 is not a condition. It is clear from the previous two paragraphs of the Reasons that the tribunal were strongly influenced in reaching that conclusion by the view expressed at [16.132] of the current (sixth) edition of *Wilford on Time Charters* (and indeed in previous editions) that despite various dicta to the effect that clause 5 of the NYPE form and other similar hire payment provisions are conditions, to which the editors refer (and which I analyse in more detail below):

“it is thought that the better view is that the obligation to pay hire is by nature an intermediate term, so damages for the loss of the charter are recoverable only where the failure to pay hire by the due date can be shown to be repudiatory. It may be that the judicial remarks recorded above should not be understood as meaning that Clause 5 is a condition, but only that its draftsman, by adding an option to withdraw to the obligation to pay hire, has given to that obligation one characteristic of a condition, namely that any breach gives a right of termination. But uncertainty will remain until the House of Lords has shed more light on this important question”.

35. That last sentence is evidently a reference back to the citation at [16.129] of the judgment of Brandon J in *The Brimnes* [1973] 1 WLR 386, affirmed by the Court of Appeal [1975] 1 QB 929. It was that decision (which I consider below) which the tribunal in the present case clearly regarded as setting out the position under English law that clause 5 is not a condition. In his written and oral argument on this issue, Mr Bright QC was critical of both the editors of *Wilford* and the tribunal for over-reliance on *The Brimnes* because that was a case where there was no anti-technicality clause and *Wilford* simply fails to recognise that anti-technicality clauses are now commonplace, it being Mr Bright's submission that the effect of such a clause is to make time for payment of hire by the end of the relevant grace period (in the case of clause 31 two banking days after notice) of the essence, so that the clause is a condition.

The classification of contractual terms

36. The starting point for any consideration of the contractual status of any particular term of a contract has to be the judgment of Diplock LJ in *Hongkong Fir Shipping v Kawasaki Kishen Kaisha* [1962] 2 QB 26. Quite apart from the fact that his survey of the history of the status of different contractual terms and his analysis of the law are masterly, it is significant that several of the dicta to which *Wilford* refers and on which Mr Bright relies are those of Lord Diplock subsequently in the House of Lords. Consideration of his earlier judgment in *Hongkong Fir* seems to me to be important in evaluating the view of the editors of *Wilford* that the dicta are to be interpreted not as saying clause 5 is a condition but that it has one characteristic of a condition.
37. Mr Bright referred first to the familiar passage at 65-6 where Diplock LJ states the test as to the circumstances in which a party will be relieved of his future obligations under the contract (where the contract does not define what is to happen in a particular event) in the terms quoted with approval by Lord Wilberforce in *The Nanfri* in the passage at 779 which I quoted in [24] above. Diplock LJ then embarks on his historical survey of the development of the law as to contractual terms and the distinction which developed between conditions and warranties, before recognising that not all terms can be so categorised, hence the recognition of intermediate or innominate terms, breach of which may or may not entitle the innocent party to regard himself as relieved from further performance, depending upon whether or not the effect of the breach is to deprive him of substantially the whole benefit of the contract.
38. For present purposes, it is only necessary to refer to that part of the judgment at 69-70 where Diplock LJ analyses the difference between a “condition” and a “warranty”:
- “No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity (“It goes without saying”) to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract and such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a ‘condition’. So too there may be other simple contractual undertakings of which it can be predicated that no breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a ‘warranty’.”
39. Mr Bright submitted that the logical corollary of that analysis of what constitutes a condition is that, if the contract provides that breach of a particular term gives a right to terminate, that is a very strong indication that the term in question is a “condition”. It is also to be noted that to the extent that, taken literally, Diplock LJ appears to be saying that the test whether a term is a condition is whether every breach of it must give rise to an event which will deprive the innocent party of substantially the whole benefit of the contract, that does not represent the law. Where there is a breach of condition, the innocent party does not have to demonstrate that he has been deprived of substantially the whole benefit of the contract. This is made quite clear in *Bunge v Tradax* per Megaw LJ in the Court of Appeal: [1980] 1 Lloyd’s Rep 294 at 307-8 and per Lord Wilberforce and Lord Roskill in the House of Lords: [1981] 1 WLR 711 at

715G-716D and 727F respectively, both endorsing Megaw LJ's judgment on this point.

The nature of a time charterparty

40. In reviewing the authorities on hire payment clauses and withdrawal, it is important to have in mind the nature of a time charterparty, which is a contract for the provision of services, those of the master and crew, in performing voyages for the charterers pursuant to their orders: see per Lord Diplock in *The Scaptrade* [1983] 2 Lloyd's Rep 253 at 256-7 and, perhaps more pertinent in the present context, per Lord Wilberforce in *The Laconia* [1977] AC 850 at 870A-C:

“As has often been pointed out, the description of a time charter as a hire or demise of a ship is very misleading: all that the owner does, in fact, is to agree to provide services, those of the master and the crew (whose wages the owner has - punctually - to pay) in sailing the ship for the charterers' purposes, and all that the withdrawal clause does is to entitle the owner to cease providing these services (for example see Lord Porter in the *Tankexpress* [1949] A.C. 76, 90). It must be obvious that this is a very different type of creature from a lease of land. I would certainly go so far as to agree that the owner has to show that the conditions necessary to entitle him to withdraw have been strictly complied with: but equally I would not overlook the fact that there are very good reasons why the charterer should punctiliously comply with the provisions as to the payment of hire, in which the owner has an interest very different from that of a landlord whose essential interest is to receive the rent.”

41. Lord Wilberforce's reference to there being very good reasons why the charterer should punctiliously comply with the obligation to pay hire seems to me to be an implicit acceptance of the submission addressed to their Lordships by Mr Hobhouse QC (whose experience of this area of the law was considerable) at 854A-C:

“A time charter is a contract for the provision of services. Much of its language has historical origins and is not appropriate to modern times... During the provision of the services the shipowner bears the cost of running the vessel from day to day. For this he is to get the hire in advance because the owner puts the profit earning capacity of the ship at the disposal of the charterer. The freights are collected by the charterer; the shipowner never sees these profits. The shipowner is not obliged to perform the services on credit; he does so only against advance payment. He stipulates for and is entitled to advance payment monthly or fortnightly. He is not obliged to provide the services here for a given fortnight until he has had payment in full in respect of it...”

42. Mr Bright QC made a very similar submission as to why punctual payment of charter hire was critical, that a shipowner has continuous expenses incurred on a daily basis, whether direct expenses such as crew wages and vessel running costs or the costs of technical and operational support, office administrative expenses, fixed overheads and financing costs, which are met from the charter hire. As Mr Hobhouse QC had submitted in *The Laconia*, Mr Bright submitted that the owners were not intended to fund the costs or take any credit risk, hence time charters invariably provide for hire

to be paid in advance. Miss Davies submitted in effect that there was no evidence that these owners could not have afforded to fund their running expenses and overheads, but that seems to me to miss the point that, looking at the matter objectively, what the parties are to be taken to have intended and, thus, what is the commercial rationale for punctual payment of hire being critical, is as Mr Bright described it.

43. It is striking that whilst there were a number of cases in the 1970s and early 1980s in which the law on withdrawal clauses in time charters was developed (specifically in the context of charterers seeking to avoid the consequences of late payment of hire) in very few of them is there any consideration of whether such a provision constitutes a condition of the contract in the classic sense recognised by Diplock LJ in *Hongkong Fir* and in none of them is there any consideration of whether a breach of such a provision leading to withdrawal of the ship would entitle the owners to claim damages for loss of future earnings. The reason for this paucity of authority may not be hard to discern: those cases were ones which arose in a market of rising freight and charter hire rates, where owners had commercial reasons for wishing to withdraw a ship from a charterer's service with a view to chartering the ship to another charterer at a higher rate. In such market conditions, there would be no need for the owner to consider whether he had suffered loss and damage as a consequence of early withdrawal of the ship, because the reverse was true.

Review of the authorities

44. In reviewing the authorities which bear on the issue whether clause 5 of the charterparty is a condition, it is important to have in mind that not all the cases use or refer to the word "condition". In many the discussion is whether the particular term is an "essential term" of the contract or a term which "makes time of the essence". In my judgment, it is clear that these phrases are equally describing a "condition" of the contract in the classic sense identified by Lord Diplock in *Hongkong Fir*. That synonymy between a term making time of the essence and that term being a condition was noted by Megaw LJ in *Bunge v Tradax* [1980] 1 Lloyd's Rep 294 at 307 rnc:

"In my opinion in the term with which we are concerned the provision as to time is of the essence of the contract. The term is a condition."

45. In terms of chronology, the earliest case which might be said to touch on the issue I have to consider is *Italian State Railways v Mavrogordatos* [1919] 2 KB 305. The vessel was chartered to the charterers by a time charterparty dated 21 January 1916 for 12 months with hire payable each month in advance. Clause 6 of the charter provided: "and failing the punctual and regular payment the hire and any breach of charterparty, the owner to be at liberty to withdraw the vessel from the service of the charterers without prejudice to any claim they the owners may otherwise have on the charterers in pursuance of this charter".¹ Since Miss Davies relied upon the decision of the majority of the Court of Appeal in that case as authority for the proposition that, where the owner withdraws the vessel there is no right to claim damages for loss of hire, it is necessary to look quite closely at the facts and the argument.
46. Only eight days into the charter period the vessel was requisitioned by the Greek government. Some seven months later on 18 December 1916, the vessel was released to the charterers at Algiers and ordered by them to Barry in South Wales. The next month's hire in advance was payable on 10 January 1917 at the latest, but by some

¹ Wording which was thus essentially the same as clause 5 of the NYPE form in the present case.

mistake was not paid by the charterers on that day. Accordingly, the next day 11 January 1917, the owners gave notice that in consequence of that failure, the charterparty was cancelled. When that notice was received by the charterers' agents in South Wales, the vessel was at Lisbon en route to Barry, where she arrived on 23 January. The charterers brought an action claiming a declaration that the charterparty was subsisting and the owners counterclaimed for the hire due on 10 January 1917. Sankey J dismissed the charterers' claim and, on the counterclaim, held that since the owners had cancelled the charterparty on 11 January, the charterers were not liable for the hire.

47. The owners appealed. In the Court of Appeal, the basis for the owners' argument that they were entitled to the hire for the period from 10 January to 23 January was that the withdrawal was "without prejudice to any claim the owners might otherwise have on the charterers" (i.e. pursuant to clause 6) and the charterparty required redelivery at a port in the United Kingdom or West Italy and, since the vessel was on a voyage pursuant to the charterers' orders at the time of cancellation, she had to perform her current engagements (i.e. the approach voyage to Barry) and the charterers had to pay the hire up to 23 January either under the charterparty or as damages for not paying the hire promptly on 10 January (see p 308). The counter argument from the charterers' counsel (who were stopped by the Court) was that the obligation to redeliver at a certain port is inserted in the charterparty for the benefit of the owner and, if the charterer commits a breach of charter which leads to forfeiture of his rights under it, he cannot insist on having the services of the vessel until he redelivers it under the charterparty. The owner may withdraw the vessel there and then, as happened here on 11 January, but cannot have hire for the use of the vessel after the date of withdrawal.
48. It can be seen that the real question on the appeal was whether, as the owners contended, the vessel was not redelivered to them by the charterers until she arrived at Barry and that is how Bankes LJ approached the appeal. He made the point at 311-2 (essentially repeated in the later cases to which I have referred above) that, since the charterparty is not a demise charter but a contract for services, "redelivery" is a misnomer and what it means is that the vessel and her master are no longer under the charterers' orders but once again under the orders of the owner. By withdrawing the vessel from the charterers' service whilst she was at sea, the owner withdrew from the charterers the power to give any further directions to the master and there was nothing more the charterers could do to redeliver the vessel. Dealing with the owners' argument that the withdrawal was "without prejudice to any claim the owners might otherwise have on the charterers", he held at 312-3 that clause 6: "saves the rights of the owner in reference to breaches of the charterparty which may have been committed, or any right which may have already accrued; it does not place the charterers under any fresh obligation coming into force after the date when the ship has been withdrawn". Thus, at least on the basis of his judgment, it would seem that he was reserving and not deciding the question what damages the owner might recover for breach of clause 6 of the charterparty and only deciding that there was no accrued right to hire for the period from 10 to 23 January, because the vessel had been redelivered on 11 January.
49. Duke LJ at 313 agreed with Bankes LJ that the notice of 11 January that the charterparty was cancelled put an end to the charterers' right to issue orders to the master and was a resumption of control of the vessel by the owners which, in turn, brought to an end any further obligation on the charterers to surrender control. However he goes on to deal with the alternative argument that, if the owners were not entitled to hire under clause 6, they were entitled to damages in an equivalent amount for the charterers' breach of contract in failing to pay hire punctually on 10 January,

which was a breach which occurred whilst the vessel was beyond the reach of the owners so that they could not resume effective control of her. Accordingly, the owners contended they were entitled to damages in an amount equivalent to the hire for 11 to 23 January when the owners got possession of the vessel at Barry.

50. Duke LJ rejected that argument in these terms at 314:

“The non-payment of the hire was not the cause of loss, if any, incurred by the owner through not getting possession of his ship till January 23. The real cause was his own act in withdrawing his ship of his own volition on January 11 when he was well able to make an advantageous choice between leaving control to the charterers and assuming it himself. Having done that act, presumably with a just view of his own interest, he cannot rely upon it as giving him a right to damages.”

51. A.T. Lawrence J agreed that the contract was one for services and that, when the owners intervened and withdrew the vessel from the service of the charterers, the charterers could not redeliver the vessel thereafter. He viewed the question of whether the owners could recover hire from 10 January somewhat differently from the other two members of the Court of Appeal although he agreed the owners could recover nothing. At 315 he said:

“It is said that this left unaffected a cause of action in respect of the month's hire. I think in one sense it did. There was a vested cause of action. But to my mind it was not an action of debt but one for damages for breach of a promise to pay hire, the consideration for which was not executed. Therefore the shipowner can recover the damages he has actually suffered, but no more; and as he resumed control on January 11 he cannot claim in respect of hire after that date. It is not a case of debt for an apportioned part of the month's hire, or upon a partial failure of consideration, but rather a question of the true measure of damages sustained by the shipowner through non-performance of the charterers' promise to pay a month's hire in advance on January 10.”

52. Despite Miss Davies' submissions to the contrary, I do not consider the decision in that case is authority for the proposition that the provision for payment of hire is not a condition. The case is only concerned with the hire for the period prior to the vessel's arrival at Barry or an equivalent sum by way of damages and is not concerned at all with damages for future loss of earnings, no doubt because during the First World War the demand for shipping was such that the owners could procure more advantageous hire rates elsewhere. The three judgments reach the same result for different reasons. Bankes LJ only deals with the matter in terms of hire, A.T. Lawrence J seems to have thought that in principle the owners could claim damages, but they had not suffered any loss and only Duke LJ considered there was no right to claim damages, though as I read his judgment he was only considering the question of whether hire from 11 to 23 January was recoverable as damages, not the wider question whether the owners could recover damages for future loss of earnings.

53. However that question did come up in the slightly puzzling case of *Leslie Shipping v Welstead* [1921] 3 KB 420. That case concerned a time charter on the Baltime form dated 29 March 1920 for 36 months. Under clause 5 of the charter, hire was payable

monthly in advance and the clause then provided: “in default of such payment the owners shall have the faculty of withdrawing the [vessel] from the service of the charterers, without prejudice to any claim [the owners] may have on the charterers under this charter”. The defendant charterer paid the first two instalments of hire but failed to pay the third instalment. Instead, by agreement two bills of exchange covering that hire were drawn by the owners upon and accepted by the charterer. The defendant dishonoured the bills and failed to pay the fourth instalment. On 22 September 1920, exercising their right under clause 5, the owners withdrew the vessel from the charterer’s service, without prejudice to any claim they might have under the charterparty.

54. In the proceedings, the owners advanced various claims, not just for hire unpaid at the date of withdrawal but also, as damages for breach of charterparty, the difference between the hire payable for the balance of the charter period and a market rate of hire. As that claim demonstrates, that time in 1920 was a previous occasion when market conditions were akin to those in the period 2008-2010 existed (that is a sudden and extreme drop in freight and hire rates from a previous high). Immediately after the First World War, a demand for shipping drove up rates but by early 1920 the market had slumped and freight rates had collapsed.²
55. The owners’ argument was that the loss and damage they had suffered was a natural consequence of the non-payment of the third and fourth instalments of hire, whereas the charterer contended that any loss and damage suffered by reason of loss of hire over the balance of the charterparty did not arise from the charterer’s default in not paying the hire, but from the owners’ own act in withdrawing the vessel and that the owners’ only remedy was to recover unpaid hire up to the date of withdrawal and to get the vessel back. In an unreserved judgment, Greer J said: “the point is not free from difficulty and if I had not already expressed my opinion upon it in a previous case against the same defendant I might have taken time to consider the point, but having regard to my previous expression of opinion, I do not think it is necessary that I should do so”. This statement is puzzling, since the case to which he refers, *Merlin Steamship v Welstead* (1921) 7 Ll. L.R. 185, whilst it is a case of withdrawal where the owners recovered damages for loss of bargain, contains no analysis of whether this entitlement was because of breach of condition or repudiatory breach. At all events, in *Leslie Shipping* Greer J then says (at 425-6):

“On the whole my view is that the damages arise as the natural and probable consequence of the defendant's breach of contract in failing to pay the two instalments of hire which were due at the time of the withdrawal.”

56. He then concludes that, quite apart from clause 5, the conduct of the defendant in not paying two instalments of hire and allowing his own bill of exchange to be dishonoured was such as to amount to a repudiation of the contract. He continues at 426:

“It seems clear that clause 5, which is inserted in the charterparty not to the detriment of the plaintiffs, but for their benefit, gives them in these circumstances an express right to withdraw the vessel, and makes it impossible that there should be any discussion about the matter. This clause cannot, I think, be treated as cutting down the rights which the plaintiffs would have had in the absence of such a clause. For these reasons I am

² See per Scrutton LJ in *Lloyd del Pacifico v Board of Trade* (1929) 35 Ll. L. Rep. 217 at 218 rhc and 220 rhc.

against the somewhat belated argument that has been put forward on behalf of the defendant [evidently a reference to the argument that any damage the owners suffered was caused by their own act of withdrawing the vessel pursuant to clause 5], and my judgment is that the plaintiffs are entitled not only to recover the hire due on September 22, 1920, the date of the withdrawal, and to withdraw the vessel, but also to damages calculated on the basis of the evidence that has been given and in the manner that has been put forward and agreed upon during the hearing of the case.”

57. Although the reasoning in that case is broadly helpful to the owners’ argument in the present case, it seems to me a somewhat uncertain foundation upon which to base any firm conclusion that the obligation to make prompt payment of hire under a time charter is a condition. It may be that that is what Greer J had in mind in rejecting the charterer’s argument, but equally he was clearly of the view that the charterer was in repudiatory breach of the charter.
58. For present purposes, it is only necessary to refer briefly to the decision of the House of Lords in *Tankexpress A/S v Compagnie Financiere Belge des Petroles S.A.* [1949] AC 76, (where the provision for payment of hire was in similar terms to that in *Leslie Shipping*) for a passage in the speech of Lord Wright at 94 which makes the same point concerning why prompt payment of hire is so important as Lord Wilberforce later accepted in *The Laconia*:

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

The significance of that passage, as I see it, is that although it does not state in terms that the provision for payment of hire is a condition, Lord Wright’s reasoning is clearly predicated upon it being an essential term of the contract, which, as other cases demonstrate, is synonymous with the provision being a condition.

59. *Empresa Cubana de Fletes v Lagonisti Shipping Co Ltd (“The Georgios C”)* [1971] 1 QB 488 was a case where the owners chartered the vessel to the charterers on the Baltime form, clause 6 of which provided for hire to be paid half monthly in advance and that “in default of payment the owners had the right of withdrawing the vessel from the service of the charterers ...without prejudice to any claim the owners may otherwise have on the charterers under the charter.” Hire was paid regularly on or before the due dates for the best part of six months. The date when the particular hire payment in dispute was due, 3 October 1970, was a Saturday. Early on the Friday, the charterers’ London bank received instructions from Cuba to make the payment on Monday 5 October. The market rate of hire and freight had risen since the charterparty was concluded. On the morning of 5 October, before the owners’ London bank opened the envelope containing the payment advice note from the charterers’ bank, the owners’ bank had clear instructions from the owners to refuse to accept payment. The issue for Donaldson J and the Court of Appeal was whether the words “in default of payment” in clause 6 of the Baltime form meant “if there has been default in payment”, in which case the charterer cannot retrieve the position by tendering payment of hire late or “whilst there is default in payment”, in which case

the charterer can retrieve the position if he pays or tenders the hire before the owner seeks to withdraw the vessel.

60. Both Donaldson J and the Court of Appeal concluded that the latter construction of the provision was the correct one (see per Donaldson J at 494G-495A and per Lord Denning MR at 504C-E, Phillimore and Cairns LJJ delivering concurring judgments). As Lord Denning put it, unless the non-payment of hire was a repudiation of the contract, which it was not in that case because the charterers mistakenly thought that as the banks were closed on Saturday, payment on Monday would do, the owners only had a right to withdraw if payment was not made or tendered, which it was in that case before the owners sought to withdraw the vessel. Hence, it was held the owners were not entitled to withdraw.
61. At first instance Donaldson J, dealing with an argument of Mr Hobhouse for the owners that time was of the essence in relation to payment of hire, said at 494E-F:

“It is important to remember that in relation to the payment of hire under a time charterparty, time is of the essence of the contract only in the sense that there is a breach of contract if payment is a moment late. It is not of the essence of the contract in the sense that late payment goes to the root of the contract and is a repudiating breach giving rise to a common law right in the owners to treat the contract as at an end. The right to withdraw the vessel and thus bring the charterparty to an end is contractual and the situations in which this right is exercisable depend upon the true construction of the contract.”
62. In the Court of Appeal, Lord Denning MR addressed the submission by Mr Hobhouse (at 498C), that the obligation to pay hire in advance is an essential condition of the contract and not a mere warranty and that the provision made time of the essence, in these terms at 504D:

“The effect of a stipulation as to time always depends on the true construction of the contract. A default in payment does not automatically give the other a right to determine it. Usually it does not do so. It only does so if there is an express provision giving the right to determine, or if the non-payment is such as to amount to a repudiation of the contract.”
63. Although those passages are cited by Brandon J in *The Brimnes* as authority for the proposition that the obligation to pay hire by the due date is not an essential term of the contract (i.e. a condition), it important to have in mind that the actual decision in *The Georgios C* was subsequently overruled by the House of Lords in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation (“The Laconia”)* [1977] AC 850. Lord Denning’s view that a withdrawal clause in a time charter is in the nature of forfeiture clause was the subject of stringent criticism in the House of Lords both in that case and subsequently in *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co (“The Mihaios Xilas”)* [1979] 1 WLR 1018. In those circumstances, in my judgment considerable caution must be exercised in placing much reliance on any of the judgments in *The Georgios C*.
64. In *Tenax Steamship v Reinante Transoceanica Navegacion S.A. (“The Brimnes”)* [1973] 1 WLR 386 (Brandon J); [1975] 1 QB 929 (Court of Appeal), the charterparty was on the NYPE form and clause 5 (a provision essentially in the same terms as in the present case) provided for hire to be paid monthly in advance in cash to Morgan Guarantee Trust (“MGT”) in New York for the credit of the owners’ account and that

“failing the punctual and regular payment of the hire...or any breach of this charterparty, the owners shall be at liberty to withdraw the vessel...without prejudice to any claim they...may have on the charterers.” The dispute which arose concerned the alleged late payment of the monthly instalment of hire payable on 1 April 1970. The charterers’ bank, Hambros, usually used a method of transferring funds which involved their sending a telex to MGT, with whom they had an account asking them to pay the hire to the owners’ account, specifying the value date, that is the date for delivery of the US dollars under the relevant exchange sale. On receipt of the telex, procedures would be gone through in MGT, the end result of which was that Hambros’ account would be debited and the owners’ account credited with the relevant dollar amount. Debit and credit advices would be sent to Hambros and the owners’ London agents respectively.

65. At the trial before Brandon J, it was in dispute between the owners and the charterers when the time of payment was under this method of transfer. The charterers contended it was the time of receipt on MGT’s telex machine of Hambros’ order to pay or, if the telex came before the value date, when MGT first opened for business on the value date. The owners contended that the time of payment was later, when MGT took the decision to debit Hambros’ account and credit the owners’ account. On either view, the charterers consistently paid hire late from December 1968 onwards. The owners tolerated this until January 1970, when they started complaining and requested the charterers to ensure payment was made on the first of every month. The dispute concerned the April hire payment which, even on the charterers’ case, was admittedly made late and the owners withdrew the vessel. A number of issues arose before Brandon J which included: (i) whether the owners had withdrawn the vessel before or after the admittedly late payment of hire; (ii) whether the obligation to pay hire punctually under clause 5 was an essential term of the contract (in other words a condition), on breach of which the owners were entitled to treat the contract as at an end; and (iii) whether because the payment of hire made was late it was not “punctual and regular payment” so that, subject to any question of waiver, the owners retained an express right to withdraw the vessel under clause 5 even if the late payment was made before the time of withdrawal. It is worth noting (because it assumes some relevance in relation to how the matter proceeded in the Court of Appeal) that there was also an issue raised by the owners that the late payment of hire by charterers, viewed as a whole, amounted to a repudiation of the charterparty, an issue on which Brandon J found against the owners at 409F-410A.
66. The first issue, whether the owners had withdrawn the vessel before or after the payment of hire, was hotly disputed factually and was the subject of extensive evidence on both sides at trial. Brandon J concluded that the time of payment was, as the owners contended, when MGT made the decision to debit Hambros’ account and credit the owners’ account (402C) and that the notice of withdrawal was received by the charterers before payment was made (406B-D). The learned judge then said at 406E: “In dealing with the rights of the parties I shall proceed primarily on the basis that the withdrawal was before the payment. I shall, however, consider also what those rights would be if I am wrong about that and either the payment was before the withdrawal or the evidence leaves in doubt which of the two events preceded the other”.
67. He then considered the second and third issues which were issues as to the correct construction of clause 5 of the charterparty, firstly at 407D-408D the owners’ contention that clause 5 of the NYPE form was an essential term of the contract, breach of which entitled the owners to treat the contract as at an end. He referred to the courts in *The Georgios C* as having held that the obligation to pay hire by the due date was not an essential term of the contract, citing the passages from the judgments

of Donaldson J and Lord Denning MR which I have set out at [60] and [61] above. At 407H-408C he referred to the rival contentions as to whether that case could be distinguished and then set out his conclusion that clause 5 was not an essential term of the contract (i.e. a condition) in these terms:

“It was argued by Mr. Evans that there were two features of clause 5 of the charterparty in this case, not present in clause 6 of the charterparty in [*The Georgios C* i.e. the Baltime form] which showed that the parties intended the obligation to pay hire by a certain date to be of the essence of the contract. These were, first, the use in relation to the word “payment” of the epithets “punctual” and “regular,” and, secondly, the presence of the words “or any breach of this charterparty.” As regards the epithets “punctual” and “regular” he said that these emphasised the importance of the obligation, and he relied, in support of this proposition, on *Maclaine v. Gatty* [1921] 1 AC 376 and particularly on the observations of Viscount Finlay, at p. 389. As regards the words “or any breach of this charterparty” he said that it was necessary to imply the words “in the event of” between the words “or” and “any,” and that what was then meant was that, in the event of a breach of any essential term of the charterparty, other than failure to pay hire punctually, the owners should have the right to withdraw the ship. It followed that failure to pay hire punctually was being treated as being in the same category as breach of any other essential term. Against that Mr. Goff contended that the use of the epithets “punctual” and “regular” added nothing or little to the word “payment” standing alone; and that reservation of an express right of withdrawal for failure to pay hire tended to show that the obligation was not otherwise of such a character as to be an essential term.

I have considered these arguments carefully and I have reached the conclusion that there is nothing in clause 5 which shows clearly that the parties intended the obligation to pay hire punctually to be an essential term of the contract, as distinct from being a term for breach of which an express right to withdraw was given. It follows that I decide the first point of construction in favour of the charterers.”

68. The other issue of construction of clause 5 also turned upon the effect of *The Georgios C*, where “in default of payment” had been construed as meaning “in default of payment and so long as payment continues” (per Lord Denning MR at 504). Relying upon that case, the charterers contended that the words “failing the punctual and regular payment” in clause 5 meant, in effect “failing punctual or any payment”. Brandon J dealt with this issue at 409A-F. He preferred the construction for which the owners contended, that the words meant “where there has been a failure to pay punctually”. It followed that, even if (contrary to his primary findings of fact) the charterers had made payment of hire, late, before the notice of withdrawal, then, subject to any question of waiver, the owners still had a right to withdraw the vessel.
69. The learned judge concluded as follows at 409D-F in relation to these two issues of construction of clause 5:

If my finding that the time of the belated payment of hire on April 2 was later than the time of withdrawal is correct, the second point of construction on which I have just expressed my opinion does not arise. If that finding is wrong, however, and the correct view is that the time of payment was before the time of withdrawal, or that the owners, having the burden of proving otherwise, have not discharged such burden, then the result of my opinion on the second point of construction is that it makes no difference. In either case, there having been a failure by the charterers to pay the hire punctually by April 1, the owners were (subject to the question of waiver which I shall discuss later) entitled under clause 5 to withdraw the ship when they did.

My decision on the first point of construction means that the owners were not also entitled to withdraw the ship on the ground that the charterers' failure to pay hire by April 1 was a breach of an essential term of the contract which gave them the right to treat the contract as at an end."

70. In his submissions before me Mr Bright QC was initially inclined to submit that Brandon J's decision that clause 5 was not an essential term was only obiter because, on the basis of the learned judge's findings of fact, he had concluded that the owners were entitled to withdraw the vessel anyway. Ultimately, Mr Bright did not feel able to press this point, essentially conceding that *The Brimnes* was one of those cases where the court had determined the case on a number of grounds or alternative ratios, so that this part of Brandon J's judgment could not be regarded as merely obiter. It follows that, quite apart from the respect one would accord to any decision of Lord Brandon's, whilst it is not strictly binding upon me, I should follow it unless there is a cogent basis for distinguishing it or concluding that it is wrongly decided. I will return to consider that question later in the judgment.
71. The charterers appealed the decision of Brandon J, contending that (i) the learned judge had been wrong to conclude on the evidence that the notice of withdrawal preceded payment and (ii) on that basis, the learned judge should have followed *The Georgios C* and concluded that following payment, the right to withdraw had been lost. The Court of Appeal upheld both Brandon J's findings on the evidence and his conclusion that "failing punctual...payment" in clause 5 meant that, even if late payment had been made before the notice of withdrawal, the owners were still entitled to withdraw the vessel, therefore distinguishing *The Georgios C* (see per Edmund Davies LJ at 953G-H; Megaw LJ at 958B-C and Cairns LJ at 971D-G).
72. There was a cross-appeal by the owners against the judge's finding that there was no repudiation by the charterers, but in argument, Mr Anthony Evans QC said (as recorded at [1975] 1 QB 929 at 939G) that the question of repudiation, apart from the contractual right to withdraw was academic since no damages were claimed by the owners, no doubt because the vessel was withdrawn on a rising market. The Court of Appeal was pretty dismissive of the argument in any event (see per Edmund Davies LJ at 956C-E, Megaw LJ at 963A-B and Cairns LJ at 972F). Despite Miss Davies' argument (founded on Edmund Davies LJ's reference to the owners' pleaded case that the charterers' failure to pay hire punctually "constituted a breach of condition and/or repudiation and/or fundamental breach of the charterparty"), I can discern nothing from the judgments to suggest that the cross-appeal also involved what might be described as the "essential term issue", the second issue of the three before Brandon J I identified above) or that the Court of Appeal was dealing directly with the essential

term issue or thought it was doing so. It does not seem to me that there is anything in the judgments in the Court of Appeal which assists in relation to the issue whether clause 5 of the NYPE form is a condition.

73. In chronological terms, the next case on withdrawal was the decision of Mocatta J in *Steelwood Carriers v Evimeria Compania Naviera* (“*The Agios Georgis*”) [1976] 2 Lloyd’s Rep 192, where the vessel was chartered on the NYPE form. The charterers made a deduction from a hire payment which the owners disputed and they instructed the master not to allow discharge of the cargo at a particular port. The owners sought to justify this as a withdrawal of the vessel under clause 5, contending that “withdrawal” in the clause encompassed temporary withdrawal of the vessel as well as complete withdrawal or cancellation. That submission was rejected by the learned judge who held at 202 that withdrawal was synonymous with cancellation and that payment of hire is not a condition precedent to immediate further performance by the owner, relying upon the passages in the judgments at first instance and in the Court of Appeal in *The Brimnes*, where it was held that late payment of hire was not of itself repudiation of the contract entitling the owner to treat the contract as at an end in the absence of the withdrawal provision in clause 5.
74. That case clearly involved a completely different factual situation from the present case and there is nothing in the judgment which has any bearing on the issue whether clause 5 is a condition. Miss Davies relied upon the case essentially for the passage at 202 *lhc* where the learned judge accepted the submission by the owners that, if withdrawal under clause 5 included temporary withdrawal or deprivation of use of the vessel, it was rather surprising that there was no previous authority to that effect. Miss Davies relied upon that point by analogy, submitting that the absence of any clear authority that clause 5 or provisions like it were conditions of the contract somehow reflected a “market understanding” that such provisions would not constitute conditions.
75. In my judgment, there are two answers to that submission. First, there are clearly dicta from the highest courts that clause 5 and similar provisions are conditions (see below) so that, in contrast to *The Agios Georgis*, there are dicta which support the owners’ case. Second, unlike in that case, at least one explanation for the absence of authority is the point to which I have alluded earlier, that historically the exercise of the right to withdrawal has occurred at times when the market rate of hire is higher than the charter rate, so that the owners have not suffered any loss of bargain for which they would wish to claim damages. Furthermore, there is simply no evidence to support an alleged market understanding. On the material before the court, the highest it can be put is that some judges and academic commentators consider that clause 5 is not a condition, but an innominate term, whereas other judges consider that it is a condition. That falls a long way short of evidence to support a market understanding.
76. *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation* (“*The Laconia*”) [1977] AC 850 was another case of a NYPE charterparty. The relevant hire payment fell due on a Sunday. The charterers paid the hire on the Monday afternoon and thus late and that evening the owners withdrew the vessel. The arbitrators (whose decision Donaldson J affirmed on appeal) held that “punctual payment” under clause 5 should have been made by 3pm on the Friday and so the owners had been entitled to withdraw the vessel. The Court of Appeal by a majority (Lord Denning MR and Lawton LJ) reversed Donaldson J, essentially concluding, in accordance with its own previous decision in *The Georgios C* that the clause was a forfeiture clause which the law would not enforce if the charterers had remedied the breach by payment before notice of withdrawal.

77. The House of Lords reversed the decision of the Court of Appeal in the case before it and also overruled, in fairly trenchant terms, the decision of the Court of Appeal in *The Georgios C*. Their decision, following the Court of Appeal in *The Brimnes*, was that once there had been a breach of clause 5 by a failure to make punctual payment of hire, it was not remediable and, subject to any question of waiver, the owners were entitled to withdraw the vessel, even if payment of hire had been made, albeit late. In doing so, several of their Lordships emphasised the importance to the owners of punctual payment and the importance of certainty in commercial transactions (see per Lord Wilberforce at 870A-C in the passage which I have already quoted at [40] above, per Lord Salmon at 878E-G and per Lord Fraser of Tullybelton at 882H-883E. Although nowhere in the speeches is there an express reference to clause 5 being a condition of the contract, I agree with Mr Bright that the emphasis on the importance of certainty where punctual payment of hire is required tends to point to the clause being a condition. That would seem to be how Lord Roskill in *Bunge Corporation v Tradax S.A.* [1981] 1 WLR 711 at 725C-D viewed *The Laconia*, that evidently being one of the decisions of the House of Lords to which he was referring.
78. To the extent that requiring the payment obligation to be complied with strictly, failing which the owners would be entitled to withdraw the vessel, might be regarded as a harsh construction of the charter from the charterer's perspective, as Lord Fraser pointed out at 883E, a charterer who wished to avoid having a vessel withdrawn because of accidental or inadvertent non-payment of hire, could include an anti-technicality clause in the charter. Such provisions had evidently begun to appear in time charters in the 1970s.
79. Notwithstanding the availability of anti-technicality clauses and the overruling of the decision of the Court of Appeal in *The Georgios C*, Lord Denning MR remained undeterred in his determination to relieve charterers from what he saw as the unreasonable strictness of withdrawal clauses literally construed. In *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co* ("*The Mihalios Xilas*") [1978] 1 WLR 1257, the owners gave notice of withdrawal but retained a balance of hire. A majority of the Court of Appeal held that this retention of hire amounted to a waiver by the owners. In reaching that conclusion, Lord Denning was clearly influenced by his view that clause 6 of the Baltime form was in the nature of a forfeiture clause.³ The House of Lords [1979] 1 WLR 1018 reversed the decision of the Court of Appeal and were particularly critical of Lord Denning's approach: see per Lord Diplock at 1024H-1025A, Lord Scarman at 1036D-H and, in particular, Lord Salmon at 1032B-G.
80. He emphasised again the importance of certainty in commercial contracts:
- "My Lords, it would seem that there are some members of the Court of Appeal who do not approve of the Baltime form of charter and other forms of charter such as the New York Produce Exchange and the Shell-time forms which closely resemble it. These forms of charter are undoubtedly very strict in relation to the due payment of hire: their meaning, however, is perfectly clear and it is not permissible to put a construction upon them which would depart from that meaning. Unless the full amount of hire is paid by its due date the owners have the undoubted right to withdraw their vessel providing they do so within a reasonable time of the charterers' default. The only exception is when the parties by their course of conduct (a) have as in the present case accepted that disbursements made

³ Eveleigh LJ found in favour of the charterers on different grounds and Geoffrey Lane LJ dissented.

by the charterers in respect of the owners' liabilities may be deducted from the hire subject to vouchers being produced, or e.g., (b) have accepted as in *Tankexpress A/S v. Compagnie Financiere Belge des Petroles S.A.* [1949] A.C. 76 that the amount of hire posted two days before it falls due shall be deemed to have been paid in time. Otherwise, unless the full hire is paid by the time it falls due the charterers are in default and the vessel may be withdrawn. On the appeal to your Lordships' House in *The Laconia* [1977] A.C. 850 I ventured to point out that the law relating to the owners' rights under a Baltime form of charter to withdraw their vessel should the charterers fail to pay the hire in time had been clearly stated by your Lordships' House in the *Tankexpress* case; but that a great deal of doubt on the subject had since been generated by the Court of Appeal in *The Georgios C* [1971] 1 Q.B. 488 and had troubled the waters ever since. I expressed the hope that those doubts might finally be dispelled by your Lordships' reversal of the Court of Appeal's decision in *The Laconia* and overruling its decision in *The Georgios C*. These doubts were, however, temporarily revived by the decision of the Court of Appeal in the present case but will now, I think, permanently be laid to rest by your Lordships' decision allowing this appeal. Certainty of meaning is of primary importance in all commercial transactions. Commercial contracts all over the world, having nothing to do with the United Kingdom, have for generations provided that any dispute arising under the contract shall be decided in the English commercial court or by arbitration in London according to English law. This is because of the confidence which exists throughout the commercial world in the administration of English justice. I fear that this confidence will hardly be strengthened should there be any further decisions in the Court of Appeal similar to those in *The Georgios C*, *The Laconia* and the instant case."

81. *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 was not a time charter case at all but concerned rent review clauses in commercial tenancy agreements. However, at 924 Lord Diplock drew the contrast between provisions in commercial contracts as to the time of performance where time was of the essence and those where it was not, in these terms:

"I shall have to examine rather more closely what are the legal consequences of "time being of the essence" and time not being of the essence; but 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. Moreover a contract of tenancy of business premises would not appear to be more of a commercial character than a contract for sale of those premises.

Nevertheless, the latter provides a classic example of a contract in which stipulations as to the time when the various steps to complete the purchase are to be taken are not regarded as of the essence of the contract.”

82. *Bunge Corporation v Tradax SA* [1981] 1WLR 711 was a case of a FOB contract for the sale of soya bean meal on GAFTA terms where the buyer was required to give 15 days notice of readiness of the vessel. The buyers gave the notice ten days late and the sellers subsequently held the buyers in default and claimed damages for repudiation of the contract on the ground that the notice provision was a condition. The House of Lords upheld the decision of the Court of Appeal that the notice provision was a condition. The significance of their decision lies in the analysis to the effect that in general in mercantile contracts, the courts required strict compliance with stipulations as to time so that time was of the essence, and this included provisions as to payments of hire in time charterparties.

83. In that case, the buyers relied upon the innominate term analysis derived from the judgment of Diplock LJ in *The Hongkong Fir*, where the question whether breach of the term entitles the innocent party to treat the contract as at an end depends upon the gravity of the breach, in contending that the effect of the breach of the notice provision in that case was not to deprive the sellers of substantially the whole benefit of the contract. Lord Wilberforce pointed out at 715D that the fundamental fallacy of that argument:

“lies in attempting to apply this analysis to a time clause such as the present in a mercantile contract, which is totally different in character. As to such a clause there is only one kind of breach possible, namely, to be late, and the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence, and secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole.”

84. Lord Wilberforce went on at 715E-716E to explain why the buyers’ submission was unacceptable in law:

“One may observe in the first place that the introduction of a test of this kind would be commercially most undesirable. It would expose the parties, after a breach of one, two, three, seven and other numbers of days to an argument whether this delay would have left time for the seller to provide the goods. It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so. It would fatally remove from a vital provision in the contract that certainty which is the most indispensable quality of mercantile contracts, and lead to a large increase in arbitrations. It would confine the seller — perhaps after arbitration and reference through the courts — to a remedy in damages which might be extremely difficult to quantify. These are all serious objections in practice. But I am clear that the submission is unacceptable in law. The judgment of Diplock L.J. [in *The Hongkong Fir*] does not give any support and ought not to give any encouragement to any such proposition; for beyond doubt it recognises that it is open to the parties to agree that, as regards a particular obligation, any breach shall entitle the party not in

default to treat the contract as repudiated. Indeed, if he were not doing so he would, in a passage which does not profess to be more than clarificatory, be discrediting a long and uniform series of cases — at least from *Bowes v. Shand* (1877) 2 App.Cas. 455 onwards, which have been referred to by my noble and learned friend, Lord Roskill. It remains true, as Lord Roskill has pointed out in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. (The Hansa Nord)* [1976] Q.B. 44, that the courts should not be too ready to interpret contractual clauses as conditions. And I have myself commended, and continue to commend, the greater flexibility in the law of contracts to which *Hongkong Fir* points the way (*Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen (trading as H.E. Hansen-Tangen)* [1976] 1 W.L.R. 989, 998). 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. To such cases the “gravity of the breach” approach of the *Hongkong Fir* case [1962] 2 Q.B. 26 would be unsuitable. I need only add on this point that the word “expressly” used by Diplock L.J. at p. 70 of his judgment in *Hongkong Fir* should not be read as requiring the actual use of the word “condition”: any term or terms of the contract, which, fairly read, have the effect indicated, are sufficient. Lord Diplock himself has given recognition to this in this House: *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, 849.

....

In conclusion, the statement of the law in Halsbury's Laws of England, 4th ed., vol. 9 (1974), paras. 481–482, including the footnotes to paragraph 482 (generally approved in the House in the *United Scientific Holdings* case), appears to me to be correct, in particular in asserting (1) that the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in “mercantile” contracts — with footnote reference to authorities which I have mentioned.

85. The other main speech was delivered by Lord Roskill (with whom Lord Wilberforce and the other Law Lords agreed). He also rejected the buyers’ submissions that after the judgment of Diplock LJ in *The Hongkong Fir*, the modern approach is to regard all contractual terms as innominate terms. He pointed out at 724G-725D that there have been many cases where terms, the breach of which does not deprive the innocent party of substantially the whole benefit of the contract, have nonetheless been held to be conditions, any breach of which entitles the innocent party to rescind the contract and, specifically in the context of contracts for the sale of goods, many obligations, such as those relating to opening of letters of credit and payment against documents, had been held to be conditions. He, like other judges before him emphasised the need for certainty in commercial transactions (at 725C-D):

“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. Of course, in many cases of alleged frustration or of alleged repudiatory delay it may be necessary to await events upon the happening or non-happening of which rights may well crystallise. But your Lordships' House has recently reiterated in a series of cases arising from the withdrawal of ships on time charter for non-payment of hire the need for certainty where punctual payment of hire is required and has held that the right to rescind automatically follows a breach of any such condition.”

86. Although Lord Roskill does not identify the cases he had in mind, they evidently included *The Laconia*. In rejecting the suggestion that *The Hongkong Fir* had led to an abandonment of the classification of terms as conditions, he said this at 727E-F:

“In short, while recognising the modern approach and not being over-ready to construe terms as conditions unless the contract clearly requires the court so to do, 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. It is therefore in my opinion wrong to use the language employed by Diplock L.J. in the *Hongkong Fir* case [1962] 2 Q.B. 26 as directed to the determination of the question which terms of a particular contract are conditions and which are only innominate terms. I respectfully agree with what Megaw L.J. [1980] 1 Lloyd's Rep. 294, 307–308 said in the passage in his judgment in the instant case. The explanation of the passage which he quotes is that which I have just given.”

87. In agreeing with Lord Wilberforce and Lord Roskill that the term in question was a condition, both Lord Scarman at 718D and Lord Lowry at 720E emphasised the importance of certainty in commercial transactions of this kind. Lord Lowry at 719F-G reiterated that generally time is of the essence and time limits will be treated as conditions in commercial contracts:

“The second general point which I desire to mention concerns stipulations as to time in mercantile contracts, in regard to which it has been said that, broadly speaking, time will be considered to be of the essence. To treat time limits thus means treating them as conditions, and he who would do so must pay respect to the principle enunciated by Roskill L.J. in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.* [1976] Q.B. 44, 71A, that contracts are made to be performed and not to be avoided.

The 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* (1889) 14 P.D. 64.”

88. *Afivos Shipping Co SA v R Pagnan* (“*The Afivos*”) [1983] 1 Lloyd’s Rep 355 concerned a NYPE time charter for two years which, like the present case, included not only the payment provision in clause 5 but an anti-technicality clause providing that if hire was not paid, the owners were to give the charterers 48 hours notice and would not withdraw the vessel if the hire was paid in that 48 hours. On 11 June 1979, the charterers instructed their bank to remit the hire due on 14 June to the owners’ bank in London as required by clause 5. The charterers’ bank purported to comply by sending a telex transfer to the owners’ London bank on 13 June, but in error, the telex was sent to a sand and silica merchant in Reigate. The owners served a 48 hour notice at 16.40 on 14 June, to which the charterers replied that the hire had been sent by telex transfer. The owners reiterated that hire had not been received by their bank and, when payment had still not been received on 18 June, the owners withdrew the vessel. The error in relation to the telex was only discovered on 19 June.
89. The dispute concerned whether the 48 hour notice had been given prematurely. Both the Court of Appeal and the House of Lords held that it had, since at 16.40 on 14 June, the charterers were not yet in breach of clause 5. The significance of the case for present purposes is in a passage in the speech of Lord Diplock, dealing with the owners’ argument that at the time the notice was served, the charterers were in anticipatory breach of contract, because at that time, the charterers had disabled themselves from paying the instalment of hire due on 14 June, in that by 16.40 it was impossible to transfer money that day. Lord Diplock (with whom the other Law Lords, who included Lord Roskill, agreed) held at 341 that the doctrine of anticipatory breach applied only to what he described as “fundamental” breach, by which in context (given his own disavowal of the doctrine of fundamental breach in *Photo Production v Securicor* [1980] AC 827) he clearly meant repudiatory breach, in the sense of a breach which deprived the owners of substantially the whole benefit of the contract.
90. Lord Diplock pointed out in relation to the first part of clause 5, the obligation to pay hire semi-monthly in advance, that failure to comply with that obligation by delay in payment of one instalment was incapable of amounting to repudiatory breach because it would not have the effect of depriving the owners of substantially the whole benefit of the contract. However he went on to discuss the second part of the clause: “otherwise failing the punctual and regular payment of the hire...the owners shall be at liberty to withdraw the vessel” in these terms:
- “The second part of clause 5, however, starting with the word “otherwise” goes on to provide expressly what the rights of the owners are to be in the event of any such breach by the charterers of their primary obligation to make punctual payment of an instalment. The owners are to be at liberty to withdraw the vessel from the service of the charterers; in other words they are entitled to treat the breach when it occurs as a breach of condition and so giving them the right to elect to treat it as putting an end to all their own primary obligations under the charterparty then remaining unperformed. But although failure by the charterers in punctual payment of any instalment, however brief the delay involved may be, is made a breach of condition it is not also thereby converted into a fundamental

breach; and it is to fundamental breaches alone that the doctrine of anticipatory breach is applicable.”

91. No doubt recognising that this statement of the law, albeit only obiter, presents difficulty for the charterers’ case that clause 5 is not a condition, Miss Davies contended that Lord Diplock was misapplying the concept of a “condition”. This contention seems to echo the explanation which the editors of *Wilford* seek to place upon authorities which characterise clause 5 as a condition, namely that the provision has some of the characteristics of a condition, i.e. a right to terminate, but not others. However, in my judgment, it is impossible to place such a gloss on Lord Diplock’s speech. What he says in *The Afovos* reflects what he and other Law Lords had said in the earlier cases, *The Laconia*, *United Scientific Holdings* and *Bunge v Tradax*, that the obligation to pay hire (whether under clause 5 of the NYPE form or another similar provision) is an essential term or “condition” in the sense in which that expression is used in the law of contract, a term any breach of which entitles the innocent party to treat the contract as at an end.
92. Mr Bright placed particular reliance on a passage from the judgment of Rix LJ in *Stocznia Gdanska S.A. v Latvian Shipping Co* [2002] 2 Lloyd’s Rep 436. That case was not one of a time charter, but of a series of shipbuilding contracts for the construction of six reefer vessels. The particular dispute to which the passage in his judgment relates concerned the buyers’ failure to pay the keel laying instalments under two of the contracts. Clause 5.05 of each contract provided that if the buyer defaulted in payment of any instalment for 21 days after payment was due, the seller was entitled to rescind the contract. In each case the sellers served notice of rescission. Rix LJ held at [76] (450 lhc) that non-payment of the keel laying instalment leading to a notice of rescission constituted breach of a condition of the contract.
93. At [77] to [81] Rix LJ dealt with the buyers’ argument that time for payment is not normally a condition of the contract, citing the passages from the judgments of Donaldson J and Lord Denning MR in *The Georgios C*, to which I have referred at [60] and [61] above. Rix LJ dealt with that argument in these terms at [79] and [80]:

“79. Moreover, the *Georgios C* is in my judgment of little assistance. It may be the case that in a withdrawal clause construed to mean “and for so long as default continues” the clause itself does not amount to a condition and thus the breach of non-payment does not ipso facto amount to a repudiation. Since the clause only permitted withdrawal if the default was still continuing at the time of withdrawal, any remarks on the subject were in any event necessarily obiter. Our clause, however, is different from that in *The Georgios C*, not because it did not permit late payment as a remedy preventing rescission, for it allowed a period of grace of 21 days (clause 5.05 first paragraph), but because it stated that those 21 days were the limit of such period of grace. There was in fact no right of rescission immediately Latreefers failed to pay by the due date, but only upon default 21 days after the due date of payment. In a contract where a vessel is to be built with funds provided by the purchaser in stages, an instalment notice is to be given requiring payment within 5 banking days, and a further 21 days of grace are then allowed, I do not see why provision for what is then called default entitling rescission should not be regarded as setting a condition of the contract.

80. In any event, the jurisprudence regarding time charter withdrawal clauses does not end with *The Georgios C*, which was itself overruled in *Mardorf Peach & Co Ltd v. Attica Sea Carriers Corporation of Liberia (The Laconia)* [1977] AC 850. In *Antaios Compania Naviera SA v. Salen Rederierna AB (The Antaios)* [1985] AC 191 the withdrawal clause under consideration operated “failing the punctual and regular payment of the hire or on any breach of this charter party”. The House of Lords held that “any breach” meant any repudiatory breach – “that is to say: a fundamental breach of an innominate term or a breach expressly stated to be a condition, such as would entitle the shipowners to elect to treat the contract as wrongly repudiated by the charterers” (*per* Lord Diplock at 200F). Although the point has not been decided and is perhaps controversial, there must be a good argument that it follows that the express right to withdraw in the case of unpunctual payment under such a clause is a condition of the contract, breach of which is in itself repudiatory.”

94. The analysis dealing with the 21 day grace period in clause 5.05 and the fact that it was the limit of the period of grace seems to me of particular relevance to the present case, where clause 31, the anti-technicality clause, is to the same effect. The charterers are given two banking days to pay hire where there has been an inadvertent failure to pay pursuant to clause 5, but if the charterers do not pay within those two banking days, there is a failure to make punctual payment and the owners can withdraw the vessel.
95. Mr Bright also relied upon what he described as the complementary reasoning (i.e. complementary to that of Rix LJ in the *Latco* case) in *Stocznia Gdanska v Gearbulk Holdings* [2009] 1 Lloyd’s Rep 461 at [15]-[20]. That was another case of a series of shipbuilding contracts. The shipyard failed to carry out work on the contracts and the buyers exercised their contractual right to terminate the contracts. They subsequently sought to recover damages for the loss of bargain. The shipyard sought to contend that the termination provisions in the contracts constituted a complete code which meant that having exercised the right to terminate, their remedy was limited to recovery of instalments of the price paid under the contract. Moore-Bick LJ (with whose judgment the other members of the Court of Appeal agreed) rejected the shipyard’s argument. He pointed out at [14] that where one party committed a breach which deprived the other of substantially the whole benefit of the contract, which went to the root of the contract (in other words a repudiatory breach) the innocent party will be entitled to recover damages for the loss of his bargain.
96. He then went on at [15] to discuss the fact that it was open to the parties to agree that breach of a particular term, however slight, is to be treated as going to the root of the contract, in the following terms:

“Whether a breach is sufficiently serious to go to the root of the contract depends on the terms of the contract and the nature of the breach, but it is open to the parties to agree that the breach of a particular term, however slight, is to be treated as having that effect and shall therefore entitle the other to treat the contract as repudiated. Different words have been used to express that intention. The use of the word “condition” will usually (though not always – see *Wickman Machine Tool Sales v Schuler (L.) A.G.* [1974] A.C. 235) be sufficient, but many

other forms of wording can be found. Sometimes the consequences of a breach are spelled out and sometimes they are not; in each case it is necessary to construe the contract as a whole to ascertain what the parties intended.”

97. Moore-Bick LJ then referred at [16] to the various provisions in the shipbuilding contract which entitled the buyers to terminate the contract and contrasted those with other provisions for the payment of liquidated damages for less serious breaches:

“It is clear, and was not in dispute, that if either party exercised a right to terminate the contract pursuant to any of those terms, all obligations which remained for performance in the future would be discharged. The nature of the circumstances giving rise to Gearbulk's right to terminate, therefore, was in all cases a serious breach by the Yard of its obligations and that, together with the provision for payment of liquidated damages for less serious breaches, provides a strong indication that if the right were exercised the parties intended that Gearbulk should have a right to recover any losses it might have suffered as a result of the loss of its bargain.”

98. At [19] of the judgment, in reasoning which echoes that of Greer J in *Leslie Shipping*, he went on to distinguish the decision of the Court of Appeal in *Lockland Builders v Rickwood* [1995] CLR 142 on the basis that that case turned entirely on the construction of the contract in question which was very different in nature from the shipbuilding contract before the Court. He continued:

“Whenever one party to a contract is given the right to terminate it in the event of a breach by the other it is necessary to examine carefully what the parties were intending to achieve and in particular what importance they intended to attach to the underlying obligation and the nature of the breach. The answer will turn on the language of the clause in question understood in the context of the contract as a whole and its commercial background. Sometimes, as in *Lockland Builders v Rickwood*, the parties will have intended to give a remedy of a limited nature for breaches of a certain kind; in other cases the terms of the contract may reflect an intention to treat the breach as going to the root of the contract with the usual consequences, however important or unimportant it might otherwise appear to be. Inevitably, therefore, there can be no hard and fast rule.

20...

In this case I would go further. In my view it is wrong to treat the right to terminate in accordance with the terms of the contract as different in substance from the right to treat the contract as discharged by reason of repudiation at common law. In those cases where the contract gives a right of termination they are in effect one and the same.”

99. Since Moore-Bick LJ was not purporting to lay down a general principle of law that every provision which gives a right to terminate is a condition, it seems the reference to “cases” in that last sentence may well be to the termination provisions in the contract he was considering. Furthermore, there are obvious differences between the structure of that contract and the charterparty in the present case, for example clause 5

only operates one way, in favour of the owners and there are no terms of the charterparty which provide a remedy of liquidated damages. Nonetheless, it does seem to me that the reasoning of Moore-Bick LJ is of some assistance, particularly because it makes clear that where the right to terminate for a particular breach indicates that, on the true construction of the contract in question, the breach goes to the root of the contract, in other words the term is a condition or essential term, upon termination, the innocent party will be entitled to claim damages for loss of bargain.

100. In *ENE Kos v Petroleo Brasileiro S.A.* the charterparty was on the Shelltime 3 form which contained at clause 8 a provision for payment of hire and for the right of withdrawal in default of payment in very similar terms to clause 5 in the present case, though there was no anti-technicality clause. The owners withdrew the vessel for non-payment of hire. At the time the notice of withdrawal was given, the vessel was loading cargo in Brazil. A dispute having arisen as to the validity of the notice, the charterers demanded security which the owners provided. Once it became clear that the owners were not going to revoke the notice, the charterers made arrangements for discharge of the cargo. The owners claimed some \$400,000 for the charterers' use and detention of the vessel for 2.64 days between the notice of withdrawal and disconnection of hoses, together with bunkers for that period. The claim was put in various ways, including (i) as damages for the charterers' breach in not paying hire when it was due and (ii) as an indemnity under clause 13 of the charter, which provided for the charterers to indemnify the owners against the consequences of the master obeying the charterers' orders. The claim on the latter basis was ultimately successful in the Supreme Court.
101. At first instance before Andrew Smith J [2009] EWHC 1843 (Comm); [2010] 1 Lloyd's Rep 87, the owners' counsel made clear that the claim for damages for the charterers' breach of contract in not paying hire was not being put forward on the basis that that non-payment was a repudiation of the charterparty. Andrew Smith J recorded this and reached the conclusion that the cause of any loss was the owners' decision to withdraw the vessel so that any claim for damages failed⁴ in these terms at [37]-[38]:

"37. In presenting this part of the Owners' argument, Mr Eder emphasised that the Owners do not contend that it was a repudiation of the charterparty not to pay hire, at least in the case of a failure to pay for as short a period as in this case. The point is not straightforward: as Rix LJ said in *Stocznia Gdanska v Latvian Shipping*, [2002] EWCA Civ 889, [2002] 2 Lloyd's LR 436 at para 80, there must be a good argument that "the express right to withdraw in the case of unpunctual payment under such a clause is a breach of a condition of the contract, breach of which is in itself repudiatory". However, the general view is, I think, that a failure to pay hire when it is due is a breach of an intermediate term, and not necessarily repudiatory and does not in itself entitle the owner to claim damages for loss resulting from the termination of the charterparty: see *Time Charters* (2008) 6th Ed at paras 16.128, 16.132. Even if the Owners had argued otherwise and I had been persuaded to award damages for such loss, the damages resulting from the termination of the charterparty would not be based upon the market rate of hire but the contractual rate, and no such claim has been advanced.

⁴ Thus a process of reasoning not dissimilar to that of Duke LJ in the *Italian State Railways* case, although that case is not referred to in Andrew Smith J's judgment.

38 In these circumstances, I cannot accept that the Owners' claim is recoverable as damages for the failure to pay hire. I agree with the Charterers' submission that, once the breach is not said to be repudiatory, it is an answer to the claim that the loss was not effectively caused by their failure to pay hire on time because the Owners' decision to withdraw the vessel breaks the chain of causation. This is, I think, why Lord Denning MR said in *Tropwind AG of Zug v Jade Enterprises Ltd. (The "Tropwood") (No 2)*, [1982] 1 Lloyd's LR 232 at p.237 (in a passage to which I refer further below), "The damages for such a breach would be trifling".

102. Miss Davies relied upon this passage as an instance of a current judge of this Court concluding that provisions for payment of hire are innominate terms, not conditions, and endorsing the approach of the editors of *Wilford on Time Charters*. However, what emerges from [37] is that, for whatever reason, Mr Eder QC did not advance the owners' case on the basis that clause 8 was a condition, so that breach of it not only entitled the owners to withdraw the vessel but to claim damages. It follows that it does not appear that the point was fully argued and, in any event, what Andrew Smith J said was obiter.
103. Miss Davies also relied upon two passages in the judgments in the Supreme Court [2012] UKSC 17; [2012] 2 AC 164. First, at [6]-[7] of the judgment of Lord Sumption JSC:

"6 Under all the remaining heads of claim, the charterers' argument is substantially the same, namely that any delay or loss arising from the need to discharge the cargo results from the owners' decision to withdraw. That was a decision made at their own election and for their own commercial purposes. The owners, it is said, must bear the adverse as well as the beneficial consequences of an optional decision made in their own interest. It is clear that this consideration influenced both courts below, and that it was decisive in the minds of the Court of Appeal.

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

the non-payment of the June 2008 hire payment in this case was not a repudiation. This, however, is as much as can usefully be said. The fact that rather than perform the contract the owners found it more advantageous to exercise an express right of termination is morally and legally neutral. There are no standards by which the owners' reasons may be judged, other than those to be found in the contract. There is no legal policy specific to termination rights restricting their availability or the consequences of their exercise more narrowly than does the language of the contract or the general law. More generally, the reasons for any particular withdrawal cannot affect the principle to be applied in resolving an issue like the present one."

104. Second, she relies on a passage at [52] in the dissenting judgment of Lord Mance JSC (although on this point he reached the same conclusion as Lord Sumption):

"52 The general contractual context in my view also supports a conclusion that the express indemnity clause is inapt to apply to the present situation. Clause 8 of the charterparty gives owners a simple contractual option. It is accepted that the mere late payment of one instalment did not constitute a repudiatory breach (or a breach of a condition in a sense like that used in the Sale of Goods Act 1979) which could entitle the owners to damages for loss of the charter. That loss flowed from the owners' exercise of their option to withdraw. The phrase in clause 8 "without prejudice to any claim owners may otherwise have on charterers under this charter" does not create a right of action, and looks on its face only to pre-existing claims. So there is no way in which the time spent discharging in Angra dos Reis can be claimed as damages."

105. It is quite clear from the words in parenthesis in that paragraph that, for whatever reason, it was conceded in that case that clause 8 was not a condition and indeed, examination of the owners' grounds of appeal and argument at 167-170 of the report of the case before the Supreme Court that the claim was no longer being put on the basis of damages for breach of charterparty. It follows that whilst, as Mr Bright rightly accepted, anything said, even obiter, by such eminent commercial judges as Lord Sumption and Lord Mance has to be taken seriously, these statements of principle can only take the charterers so far in the present case, since it was simply not being argued that the provision for payment was a condition. It follows that none of the earlier authorities to which I have referred (and specifically those cases where the House of Lords had expressed the opinion, albeit obiter, that the payment clause in a time charter was a condition) were cited to their Lordships.
106. Miss Davies relied upon a number of other authorities in support of her submission that the court should be reluctant to find clause 5 and/or clause 31 was a condition, but the cases relied upon were not of direct relevance, since none of them concerned payment and withdrawal provisions in time charters.

Summary of parties' submissions

107. Following that detailed review of the authorities, I can summarise the parties' submissions, to the extent that they are not already apparent from that review. Mr Bright QC's submissions on behalf of the owners can be summarised as follows:

- (1) Clause 5 of the NYPE form, specifically when accompanied by the anti-technicality clause 31, does make time of the essence, in the sense that, if charterers do not pay hire within the two banking days referred to in the notice, then owners are entitled to bring the charterparty to an end by withdrawing the vessel. In other words a failure to pay within that notice period of two banking days amounts to a breach which goes to the root of the contract, and thus a breach of condition.
 - (2) The decision of Brandon J in *The Brimnes* that clause 5 is not an essential term or condition can be distinguished on the basis that there was no anti-technicality clause in that case making time of the essence. A failure to recognise the significance of anti-technicality clauses also explains the views of the editors of *Wilford*. If necessary, the owners would contend that Brandon J's judgment in *The Brimnes* was wrongly decided on this point because (i) the argument of Mr Robert Goff QC which he accepted, that "punctual" in clause 5 did not add anything to the obligation to pay hire, was based on the flawed reasoning in *The Georgios C* and (ii) Brandon J's analysis is contradicted by a number of statements of the highest authority in the House of Lords, albeit obiter, that the obligation to pay hire on time is an essential term or condition.
 - (3) In cases such as the present where the market rate of hire was falling as against the charter rate, the right to withdraw the vessel was not an adequate remedy unless the owners had a right to claim damages for loss of the bargain, such as the owners claimed in the present case. Once it was accepted that clause 5, either on its own or in conjunction with clause 31 was a condition, breach of the provision would entitle the owners, upon withdrawal pursuant to the clause, to claim damages for loss of the bargain.
 - (4) If, contrary to those submissions, clause 5 and/or 31 was not a condition, the position was made entirely clear by the Compensation Clause in the Addenda, which expressly reserved the owners' right to claim damages for loss of bargain in the event of their terminating or cancelling the charterparty. As Mr Bright put it, in picturesque terms, if an amphibious avian walks like a duck and talks like a duck, it probably is a duck. Accordingly, he submitted that the Compensation Clause, although it does not expressly state that it is a condition, has all the hallmarks and characteristics of a condition and should be construed as such.
108. Miss Davies made detailed and lengthy submissions in opposition to Mr Bright's arguments on this issue, but helpfully summarised the charterers' position in a manner which I can adopt:
- (1) The obligation in clause 5 to make punctual payment of hire in advance simply means there is certainty as regards payment, but the provision is not a condition, but an innominate term. She relied in this context not only upon Brandon J in *The Brimnes* and the passage in *Wilford* but upon Andrew Smith J in *The Kos*. She submitted there was a market understanding to that effect demonstrated by the judgments of Lord Sumption and Lord Mance in *The Kos*.
 - (2) Anti-technicality clauses such as clause 31 extended the time for punctual payment through a deeming provision. They did not make time of the essence in the manner of the clauses in the Polish shipbuilding cases. Because they were intended to work in favour of the charterers by precluding the owners from withdrawing on purely technical grounds, it would be quite wrong to construe clause 31 as making time of the essence, where it would not have been had that anti-technicality clause not been present. Miss Davies relied upon the analysis of

such clauses by Christopher Clarke J in *Owneast Shipping Ltd v Qatar Navigation QSC* (“*The Qatar Star*”) [2010] EWHC 1663 (Comm); [2011] 1 Lloyd’s Rep 350 at [8]-[12]. She submitted that the right of withdrawal was a species of cancellation of the contract, not a right given for breach of condition which sounded in damages.

- (3) The charterers’ construction of clause 5 accorded with business commonsense, providing an appropriate balance between the interests of the parties. In a rising market the charterers will lose out through being deprived of the vessel, in a falling market the only situation in which the owners would wish to withdraw the vessel would be if they were fed up with persistent late payment by the charterers, but that would amount to repudiatory breach, which would entitle the owners to claim damages. In those circumstances, there was no need to hold that clause 5 was a condition, breach of which would give rise to a right to claim damages independently of any repudiation.
- (4) The charterers’ approach was supported by the authorities, specifically *The Brimnes* and *Italian State Railways*, whereas the cases relied upon by the owners arose in different circumstances. Furthermore, the modern approach, typified by Lord Mustill’s speech in *Torvald Klaveness A/S v Arni Maritime Corporation* (“*The Gregos*”) [1994] 1 WLR 1465 at 1475-6, is a reluctance to decide that a particular term of a contract is a condition. In the absence of any binding authority that clause 5, with or without clause 31, was a condition and, on the contrary, in the light of the decision of Brandon J in *The Brimnes*, that clause 5 of the NYPE form was not a condition, the court should decide that the provision was not a condition.
- (5) The Compensation Clause would not make the obligation to make punctual payment of hire a condition where it had not previously been. On the contrary, the reservation of the right to claim damages was an indication of the penal nature of the clause.

Analysis and conclusions

109. In my judgment, clause 5 (whether accompanied by clause 31 or not, but *a fortiori* with the addition of that provision) is a condition of the contract for several related reasons. First, the wording of the clause makes it clear that there is a right to withdraw whenever there is a failure to make punctual payment, in other words irrespective of whether the breach is otherwise repudiatory, the contract treats it as sufficiently serious as to entitle the owners to terminate. In my judgment, this is a strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that the provision was a condition.
110. Second, the general rule in mercantile contracts, where there is a “time” provision requiring something to be done by a certain time or payment to be made by a certain time, is that time is considered of the essence, subject, as Lord Roskill pointed out in *Bunge v Tradax* to section 10 of the Sale of Goods Act, so far as time for payment under contracts of sale is concerned, not relevant in the present case. The dicta in the House of Lords to which I have referred⁵ are all consistent with the obligation to pay hire punctually being such a provision where time is of the essence and hence a condition, although the judgment of Brandon J in *The Brimnes* is to contrary effect.

⁵ Lord Wright in the *Tankexpress* case, the speeches in *The Laconia* referred to at [73] above, the speeches in *The Mihaios Xilas* referred to at [75] above, Lord Diplock in *United Scientific Holdings*, the speeches in *Bunge v Tradax* referred to at [78] to [82] above and Lord Diplock in *The Afvos*.

111. In my judgment, an obvious ground of distinction between *The Brimnes* and the present case is the presence in this case of clause 31, the anti-technicality clause, but the question then arises whether that clause makes time of the essence where it would not otherwise be so. In support of their case that it does not, the charterers rely upon the fact that the clause is designed to protect the charterers. However, it seems to me that the fact that, in one sense the anti-technicality clause is intended to protect the charterers from the risk of termination on technical grounds, does not preclude the clause from having the effect of making time of the essence, even if clause 5 alone did not make time of the essence. What a clause like clause 31 does make clear is that there is a defined period of grace, here two banking days, after which, provided the notice has been given, the owners are entitled to withdraw the vessel. I can see no sensible distinction as a matter of principle between clause 31 and the first paragraph of clause 5.05 in *Stocznia v Latco*: they both establish the limit of any period of grace, after which if the other party remains in default, the innocent party is entitled to bring the contract to an end. It seems to me that the reasoning of Rix LJ that this creates a condition of the contract is equally applicable to the present case.
112. That reasoning, that although the anti-technicality clause is granting the charterers an indulgence in terms of time for payment, it makes the obligation to pay hire a condition of the contract is supported by [31] of the decision of Eder J in *Parbulk II A/S v Heritage Maritime Ltd SA* (“*The Mahakam*”) [2011] EWHC 2917 (Comm); [2012] 1 Lloyd’s Rep 87, albeit that the contract in that case provided expressly for time to be of the essence in relation to punctual payment of hire. Furthermore, I do not consider that there is anything in the decision of Christopher Clarke J in *The Qatar Star* which is to contrary effect or otherwise assists the charterers. All the learned judge was saying was that the anti-technicality clause should be interpreted beneficially to the charterers. He was not saying that if, notwithstanding that beneficial interpretation, the charterers were in breach of the obligation to make prompt payment of hire, they were to be relieved in some way of the consequences of that breach. That approach would be to revive the approach to clauses such as clause 5 of the NYPE form and clause 6 of the Baltime form adopted by Lord Denning MR which was disapproved in trenchant terms by the House of Lords.
113. It follows in my judgment that the presence of the anti-technicality clause in this charter does provide a valid ground for distinguishing Brandon J’s judgment in *The Brimnes* and that, even if Brandon J is right that clause 5 standing alone does not make time of the essence, the effect of clause 31, making it clear that there is a limit to the period of grace of two banking days after the notice, does make time of the essence.
114. However, even if clause 31 were not in the present charter, I would, albeit with some hesitation, decline to follow Brandon J on this issue for a number of reasons. First, his conclusion that the clause is not an essential term cannot really be reconciled with the dicta of the House of Lords to which I have referred. Second, as is clear from the passages in his judgment which I have cited at [67] above, his reasoning was based in large measure upon the decision in *The Georgios C* which was subsequently overruled by *The Laconia*. Third, and following on from the second reason, his conclusion involved acceptance of the argument of Mr Robert Goff QC, that the word “punctual” added little or nothing to the word “payment” standing alone, an argument the validity of which depended on the correctness of *The Georgios C*. It is quite clear from the speeches in *The Laconia* that the House of Lords regarded punctual payment of hire as of considerable commercial importance, discrediting the argument that “punctual” added nothing to “payment”.

115. The third reason why in my judgment the obligation to make punctual payment of hire is a condition is related to the second and is the point emphasised time and again in the speeches in the House of Lords to which I have referred, namely the importance to businessmen of certainty in commercial transactions. As I see it, an aspect of that need for certainty is that, if it were the case that the right to withdraw the vessel for non-payment of hire left the owners with no remedy in damages on a falling market, save in cases where the charterers' conduct could be said to be repudiatory, that would leave the owners in a position of uncertainty as to whether to withdraw the vessel or to soldier on with a recalcitrant charterer until such time as the owners were in a position to say that the charterers were in repudiatory breach, essentially what happened on the facts in the present case.
116. Contrary to Miss Davies' submission that somehow business commonsense supports the charterers' construction of the provision, it seems to me that "wait and see" approach to breach of charterparty is inimical to certainty. That is undesirable for the reasons given by the House of Lords in *Bunge v Tradax* in the passages I have set out at [83] to [87] above. Equally, if the obligation to make punctual payment of hire is a condition, the charterers have a corresponding certainty, that if they fail to make prompt payment of hire and the owners withdraw the vessel, at a time when the market rate is falling, they will be liable for damages for loss of bargain.
117. The fourth reason why I consider that the obligation to make punctual payment of hire (whether clause 5 on its own or clause 5 in conjunction with clause 31) is that, not only is that conclusion supported by the dicta in the House of Lords to which I have referred, but also by the obiter statements of Rix LJ in *Stocznia v Latco* referred to at [93] above and the reasoning of Moore-Bick LJ in *Stocznia v Gearbulk*. In view of that judicial support, albeit obiter, it seems to me that this court need not show any reluctance to hold that the obligation is a condition. The reluctance demonstrated by Lord Mustill in *The Gregos* was really limited to the particular provisions he was considering and did not extend to the obligation to make punctual payment of hire. Furthermore, as Lords Wilberforce and Roskill made clear in *Bunge v Tradax* (in the passages quoted at [84] and [86] above), in the case of so-called time clauses in mercantile contracts, of which this obligation is one, the courts should not show any reluctance to find that such provisions are conditions and, indeed, should usually do so.
118. For all those reasons, in my judgment the obligation to make punctual payment of hire (whether clause 5 on its own or when combined with clause 31) is a condition of the contract. Once it is recognised that the obligation is a condition, then as Moore-Bick LJ recognises in *Stocznia v Gearbulk* (and as is implicit in [52] of Lord Mance's judgment in *The Kos*) the owners have a right to claim damages upon termination for loss of the bargain. The suggestion in *Wilford* that the various dicta should somehow be understood as meaning not that the obligation is a condition, but that it has one characteristic of a condition, namely that any breach gives rise to a right of termination, seems to me not only contrary to the dicta themselves, which clearly contemplate the obligation being an essential term or condition or time being of the essence, all synonymous as I have said with a condition in the classic sense, but also somewhat heretical. The obligation either is a condition or it is not. If it is not, then it is an innominate term, if it is a condition then all the "usual consequences" as Moore-Bick LJ puts it, follow, including the right to claim damages for loss of bargain.
119. My conclusion that the obligation to make punctual payment of hire in the original charterparty was a condition makes it strictly unnecessary to decide whether (assuming clauses 5 and/or 31 were not conditions), the Compensation Clause made the obligation to make punctual payment of hire a condition. However, the point

having been argued, albeit mainly in writing, I will deal with it. I have already found in dealing with the second question of law at [29] to [32] above, that the Clause is not penal.

120. I agree with Mr Bright that, in the context of termination or cancellation (which obviously encompasses withdrawal - see *The Agios Georgis*) for failure to make punctual payment of hire, the express reservation of the entitlement to compensation for future loss of earnings (i.e. loss of bargain) makes it clear, if that was not clear before, that the obligation to make punctual payment of hire is a condition or essential term. There is nothing penal in the Clause making the obligation a condition, albeit by amendment, since, at least on a falling market, as in the present case, future loss of earnings is precisely the loss which the owners will suffer by reason of early withdrawal. See in this context the passages from the judgments in the decision of the Court of Appeal in *Lombard North Central Plc v Butterworth* to which I referred in [31] above.
121. The charterers submitted that case was authority for the proposition that clear words would be needed to convert a clause into a condition, although it is accepted that actual use of the word “condition” is not necessary. Clause 2 (a) in that case, which was held to be a condition, did not state expressly that it was a condition and any suggestion that a clause had to state expressly that it was a condition before it could be construed as such, would be contrary to House of Lords authority: see per Lord Wilberforce in *Bunge v Tradax* at 716C, citing Lord Diplock in *Photo Production v Securicor* [1980] AC 827 at 849. In my judgment, the Compensation Clause does contain sufficiently clear words and on its true construction it does make the obligation to make punctual payment of hire a condition, even if clauses 5 and/or 31 in the original charterparty did not.

Conclusion

122. It follows that the answers to the two questions of law raised by the charterers are (1) the first question does not arise because the tribunal did not apply the wrong legal test for renunciation or repudiation, but applied the right test to the facts and reached a conclusion that they were entitled to reach on those facts, that the charterers had renounced or repudiated the charterparty; (2) the Compensation Clause in the Addenda was not a penalty clause.
123. So far as the questions of law raised by Paragraph 2 of the Respondents’ Notice are concerned: (1) the obligation to make punctual payment of hire (whether in clause 5 on its own or in clause 5 in conjunction with clause 31) was a condition of the contract, breach of which entitled the owners to withdraw the vessel and claim damages for loss of bargain; (2) even if that conclusion were wrong, the Compensation Clause elevated the obligation to pay hire to the status of a condition. Accordingly, the tribunal’s conclusion that the owners were entitled to the damages awarded was correct both for the reasons given by the tribunal and on the grounds advanced by the owners. The appeal is dismissed.