Neutral Citation Number: [2019] EWHC 376 (Comm)

Case No: AD-2018-000045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

In the matter of the Arbitration Act 1996
In the matter of an arbitration claim

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2019

Before :

THE HONOURABLE MRS JUSTICE CARR

- -

Between :

SILVERBURN SHIPPING (IoM) LTD	**Claimant / Appellant**
- and -	
ARK SHIPPING COMPANY LLC	**Defendant / Respondent**

In the matter of an arbitration: M/V "ARCTIC"

- -

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Mr Alexander Wright and Mr Edward Jones (instructed by **Wikborg Rein LLP**) for the **Claimant**
Mr Nicholas Craig (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing date: 7th February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE CARR

Mrs Justice Carr :

Introduction

1. This is an appeal pursuant to s. 69 of the Arbitration Act 1996 ("the 1996 Act") by the Claimant owners ("Owners") against a Partial Final Award dated 12 March 2018 ("the Award") of a LMAA arbitral tribunal ("the Tribunal"). Leave to appeal was granted by Phillips J on 14 September 2018 on the basis that the Tribunal reached conclusions on two points of law that were "at least open to serious doubt" and qualified as being of general public importance.

2. By the Award the Tribunal dismissed Owners' application against the Defendant charterers ("Charterers") for a final injunction requiring delivery up of M/V ARCTIC ("the Vessel"). That application was based on Owners' claim that Owners had lawfully terminated a bareboat charter dated 17 October 2012 ("the Charterparty") by which the Vessel had been let to Charterers for a period of 15 years. Amongst other things and materially for present purposes, Owners relied on the expiration of the Vessel's classification certificates on 6 November 2017.

3. The Charterparty was on an amended standard BARECON '89 form. Clause 9A) of the Charterparty ("Clause 9A)") provided that Charterers "shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times." Although it was common ground that the Vessel's class certificates were allowed to expire, the Tribunal held that there had been no breach of what it concluded was a qualified obligation only to take steps to reinstate expired class certificates within a reasonable time. It held that that this obligation was not a condition but rather an intermediate obligation. Owners had failed to prove a breach of that obligation since they had not advanced a good evidential case as to what would have been a reasonable time to reinstate the Vessel's class. Thus Owners' application failed.

4. The appeal is said to raise two questions of law:

   i) Is Charterers' obligation in Clause 9A) "to keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times" ("the classification obligation") an absolute obligation, or merely an obligation to reinstate expired class certificates "within a reasonable time"? ("Question 1")

   ii) Is the classification obligation a condition of the contract or an innominate term? ("Question 2")

5. The two questions need to be addressed separately and in logical order: whether or not the classification obligation is to be treated as a condition of the Charterparty cannot properly be determined until the nature and scope of the obligation itself have been ascertained.

6. The BARECON '89 form is an industry standard form. In *The "Ocean Victory"* [2017] 1 WLR 1793 Lord Sumption JSC (at [95]) referred to it as follows: "…. The form was originally drafted in 1974 by the Documentary Committee of the Baltic and International Maritime Council, and revised in 1989. It is said to have become, in one

or other of its variants, the most commonly used form of bareboat charter world-wide". The questions raised can therefore be said to be of general public importance.

The relevant facts

7. The relevant facts are to be taken from the face of the Award and can be stated shortly. Owners are the registered owners of the Vessel which was classed by Bureau Veritas ("BV"). On 17 October 2012 Owners let the Vessel to Charterers under the Charterparty for a period of 15 years. The Vessel was delivered in the charter service on or about 18 October 2012. She arrived at the Caspian port of Astrakhan for repairs and maintenance on 31 October 2017. Her class certificates expired on 6 November 2017, before she entered dry dock for repairs, some five years after her last special survey.

8. On 7 December 2017 Owners terminated the Charterparty *inter alia* because the Vessel's class had expired and so Charterers were in breach of Clause 9A) ("the Termination Notice"). The Termination Notice included the following:

> "Without prejudice to the previous termination of the charter on 15 March 2017 it has recently come to our attention that the vessel is currently in a very poor condition and, of very serious concern that the vessel's class certificates have expired. It is your position that the charter between us continues (despite the fact that until 6 December 2017 no hire at all has been paid hire continues to be outstanding) and if that position is correct (which we do not accept) then it is your responsibility to strictly comply with your obligations under the bareboat charter. Clause 9 of Part II of the above charter expressly states that as Charterers you must maintain the Vessel in a good state of repair, in an efficient operating condition and in accordance with good commercial maintenance practice. Further, you have an express obligation to keep the vessel with unexpired classification certificates in force. You are also required to take immediate steps to have any necessary repairs done to the vessel within a reasonable period of time which you have clearly failed to do.
>
> …
>
> Given your continuing failure to pay hire in full for the vessel, your serious failure to maintain the vessel in class and in a good state of repair and in particular your failure to take immediate steps to repair the vessel as required by Clause 9 of the bareboat charter, and further without prejudice to our position that this Charter has already been terminated on 15 March 2017, we notify you that we are today immediately withdrawing the vessel from your service under Clause 9 of the charter. This termination is effective immediately and we require you forthwith to place the Vessel at our disposal at the port of Astrakhan. Further and in the alternative your conduct in relation to performance of this charter has evidenced a

> complete disregard by you to comply with your obligations which conduct we consider to be repudiatory and which we accept as terminating the charter with immediate effect…"

9. Owners thus demanded the return of the Vessel. On 8 and 11 December 2017 Charterers resisted that demand, denying any breach and contending that the Charterparty remained alive. They denied Owners' allegations of disrepair and stated that Owners were fully aware that the Vessel was currently under going scheduled maintenance works. The Vessel had arrived at the dock prior to expiration of the documents and representatives of BV were constantly monitoring the Vessel during her repairs and maintenance works. The Vessel was not out of class. Upon completion of the works, the BV surveyors would undertake a final inspection and a new set of documents would be issued accordingly. Further exchanges continued between the parties until Owners issued their application on 12 January 2018.

10. On that day Owners applied to the Tribunal on an urgent basis for a Partial Final Award for a declaration that the Charterparty had been lawfully terminated inter alia due to Charterers' breach of Clause 9A) and requesting relief that included an order for delivery up of the Vessel under s. 48(5) of the 1996 Act.

11. By consent of the parties, the Tribunal proceeded to its Award on the basis of written submissions alone. As already indicated, it dismissed Owners' application.

12. Since the Award dismissing Owners' injunctive application, the Tribunal (now including a third arbitrator) has recently published two further awards (in November 2018 and January 2019), determining that Owners were entitled to withdraw the Vessel and terminate the Charterparty for non-payment of hire in June 2018. It has also ordered delivery up of the Vessel.

13. The outcome of this appeal nevertheless remains material, since it will affect the calculation of Owners' claims for damages and mesne profits. Further, Charterers have sought leave to appeal the award of November 2018.

The terms of the Charterparty

14. The Charterparty was in standard form (as amended by the parties) and, as usual, contained Parts 1 and II.

15. Part 1 contained the following box entries:

    i) Box 8: When/Where built

    2012, Turkey;

    ii) Box 10: Class (Cl. 9)

    Veritas Bureau, perpetual;

    iii) Box 11: Date of last special survey by the Vessel's classification society

    2012;

iv) Box 14: Time for delivery (Cl. 3)

01-30.11.12;

v) Box 16: Port or Place of redeliver (Cl. 14)

-Astrakhan, Russia;

vi) Box 18: Frequency of dry-docking if other than stated in Cl. 9f)

In accordance with the classification documents;

vii) Box 20: Charter period

15 years;

viii) Box 30: Latent defects (only to be filled in if period other than stated in Cl. 2)

No.

16. Part II included the following clauses:

"**2. Delivery** (not applicable to newbuilding vessels)

> The Vessel shall be delivered and taken over by the Charterers at the port or place indicated in Box 13, in such ready berth as the Charterers may direct. The Owners shall before and at the time of delivery exercise due diligence to make the Vessel seaworthy and in every respect ready in hull, machinery and equipment for service under this Charter. The Vessel shall be properly documented at time of delivery. The delivery to the Charterers of the Vessel and the taking over of the Vessel by the Charterers shall constitute a full performance by the Owners of all the Owners' obligations under Clause 2, and thereafter the Charterers shall not be entitled to make or assert any claim against the Owners on account of any conditions, representations or warranties expressed or implied with respect to the Vessel but the Owners shall be responsible for repairs or renewals occasioned by latent defects in the Vessel, her machinery or appurtenances, existing at the time of delivery under the Charter, provided such defects have manifested themselves within 18 months after delivery unless otherwise provided in Box 30.
>
> **…**
>
> **7. Inspection**
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> The Owners shall have the right at any time to inspect or survey the Vessel or instruct a duly authorized surveyor to carry out such survey on their behalf to ascertain the condition of the Vessel and satisfy themselves that the Vessel is being properly

repaired and maintained. Inspection or survey in dry-dock shall be made only when the Vessel shall be in dry-dock for the Charterers' purpose. However, the Owners shall have the right to require the Vessel to be dry-docked for inspection if the Charterers are not docking her at normal classification intervals. The fees for such inspection or survey shall in the event of the Vessel being found to be in the condition provided in Clause 9 of this Charter be payable by the Owners and shall be paid by the Charterers only in the event of the Vessel being found to require repairs or maintenance in order to achieve the condition so provided. All time taken in respect of inspection, survey or repairs shall count as time on hire and shall form part of the Charter period. The Charterers shall also permit the Owners to inspect the Vessel's log books whenever requested and shall whenever required by the Owners furnish them with full information regarding any casualties or other accidents or damage to the Vessel. For the purpose of this Clause, the Charterers shall keep the Owners advised of the intended employment of the Vessel.

…

9. Maintenance and Operation

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

…

B. The Charterers shall at their own expense and by their own procurement man, victual, navigate, operate, supply, fuel and repair the vessel whenever required during the Charter period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the vessel under this Charter, including any foreign general municipality and/or state taxes. The Master,

officers and crew of the Vessel shall be the servants of the Charterers for all purposes whatsoever, even if for any reason appointed by the Owners. Charterers shall comply with the regulations regarding officers and crew in force in the country of the Vessel's flag or any other applicable law.

C. During the currency of this Charter, the Vessel shall retain her present name as indicated in Box 5 ~~and shall remain under and fly the flag as indicated in Box 5~~. Provided, however, that the Charterers shall have the liberty to paint the Vessel in their own colors, install and display their funnel insignia and fly their own house flag. Painting and re-painting, installment and re-installment to be for the Charterers' account and time used thereby to count as time on hire.

…

E. The Charterers shall have the use of all outfit, equipment, and appliances on board the Vessel at the time of delivery, provided the same or their substantial equivalent shall be returned to the Owners on redelivery in the same good order and condition as when received, ordinary wear and tear excepted. The Charterers shall from time to time during the Charter period replace such items of equipment as shall be so damaged or worn as to be unfit for use.

…

F. The Charterers shall dry-dock the Vessel and clean and paint her underwater parts whenever the same may be necessary, but not less than once in every eighteen calendar months after delivery unless otherwise agreed in Box 18.

10. Hire

…

E. Time shall be of the essence in relation to payment of Hire hereunder. In default of payment beyond a period of seven running days, the Owners shall have the right to withdraw the Vessel from the service of the Charterers without noting any protest and without interference by any court or any other formality whatsoever, and shall, without prejudice to any other claim the Owners may otherwise have against the Charterers under the Charter, be entitled to damages in respect of all costs and losses incurred as a result of the Charterers' default and the ensuing withdrawal of the Vessel.

…

> **13. Insurance, Repairs and Classification**
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> …
>
> B. During the Charter period the Vessel shall be kept insured by the Charterers at their expense against Protection and Indemnity risks in such form as the Owners shall in writing approve which approval shall not be unreasonably withheld. If the Charterers fail to arrange and keep any of the insurances provided for under the provisions of sub-clause (b) in the manner described therein, the Owners shall notify the Charterers whereupon the Charterers shall rectify the position within seven running days, failing which the Owners shall have the right to withdraw the Vessel from the service of the Charterers without prejudice to any claim the Owners may otherwise have against the Charterers."

17. The deletion of the reference to Clause 13(L) in Clause 9A) made clear that the parties chose to agree that the classification obligation lay on Charterers. Where Clause 13(L) is not deleted, that obligation rests on Owners. Clause 9A) reflects the essential difference between bareboat and time charters. In the latter, whilst the charterers have the commercial use of the vessel, the vessel's operation stays with the owners. In a bareboat charter, charterers have full possession and operational control.

The Award

18. Those parts of the Award dealing with Owners' claims based on non-payment of hire or general condition and lack of maintenance or repair are not relevant for present purposes. What matters are the Tribunal's reasoning and findings in relation to the classification obligation.

19. In this regard, having rehearsed the parties' submissions, the Tribunal reasoned as follows:

> "86. In support of their submission that the Charterers' obligation to maintain the Vessel's class is an absolute obligation and a condition of the Charterparty, the Owners relied, inter alia, on the decision in the "Seaflower". We do not think that this assisted them as we think that that case can be distinguished on the facts.
>
> 87. The Owners also submitted that their position was consistent with the rule in time charters that a vessel must have her relevant certificates in place as a condition precedent to delivery. Again, we do not think that this submission assisted their case.
>
> 88. Although we agree that there is limited authority in a bareboat chartering context, as concerns time charters, the NYPE Form requires Owners to "*maintain her class and keep*

the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service". Our understanding is that this wording does not impose an absolute obligation but merely an obligation to exercise reasonable diligence. Furthermore, we understand that this is an intermediate obligation (and not a condition of the charter) which would allow termination of the charter only if any breach was serious enough to deprive the party of the substantial benefit of the charter. Whilst this is our understanding of the position under time charters, we do not see why there should be much difference as concerns the contractual obligations set out in Clause 9 of the Charterparty.

89. As regards the Owners' submission that Clause 9(a) permitted latitude in the case of general repairs but no such latitude for expiration of the Vessels' classification certificates which suggested that none was intended; we were not persuaded that this was a material consideration. To the contrary, if no such latitude was intended, it would have been an easy task for the draftsman to make clear that the obligation to maintain the Vessel's class was absolute and a condition of the contract and/or that, if class expired, the Owners were entitled to immediately withdraw the Vessel from service.

90. Accordingly, we do not consider that the Charterers' obligation to maintain the Vessel's class is separate from their obligation to maintain and repair the Vessel in the manner as submitted by the Owners. We think that the Charterers' obligation to maintain and repair the Vessel goes hand in hand with and is part and parcel of their obligation to maintain class. We consider that this is the correct and natural reading of Clause 9. Accordingly, we do not accept the Owners' submission that the Charterers' obligation to maintain class is an absolute obligation and condition of the Charterparty which, if breached, would allow the Owners to immediately terminate the Charterparty for breach of condition and/or repudiatory breach by the Charterers.

91. We consider that the preferable and correct construction of Clause 9 is that, if the Charterers are in breach of their obligations to maintain/repair the Vessel and to maintain her class, they must immediately take steps to carry out the necessary repairs and reinstate the class certificates etc. within a reasonable time, failing which the Owners would have the contractual right to withdraw the vessel from service pursuant to the provisions of Clause 9(a) of the Charterparty.

92. The Owners rely on their December Notice, submitting that this was valid to terminate the Charterparty. Insofar as the

> Charterers' obligation was to take the required steps to have the repairs/maintenance and reinstatement of class carried out within a reasonable time (as is our view), we consider that the burden of proof is on the Owners to establish that the Charterers were in breach of their obligations as of 7 December 2017.
>
> …
>
> 100. No evidence was put forward by the Owners concerning this question. They simply sought to rely on their surveyor's report of 24 December 2017 as evidencing that the Charterers were in breach of their obligations to maintain/repair which allowed them to terminate the Charterparty on 7 December 2017. We do not think that this is sufficient to discharge the burden of proof on the Owners. The Owners did not submit or provide any evidence that the necessary maintenance/repairs required the Vessel to be immediately dry-docked or indeed at any time before she actually was dry-docked. In this connection the frequency of dry-docking was agreed in the Charterparty to be in accordance with the classification documents and no evidence was put before us to suggest that BV required any earlier dry-docking of the Vessel.
>
> 101. We do not consider that the evidence put before us by the Owners discharges the burden of proof upon them to establish that the Charterers were in breach of their obligations under the Charterparty as of 7 December 2017 which was the date upon which the Owners served their notice terminating the Charterparty."

Principles to be applied on appeal

20. As stated in *John Sisk & Son Limited v Carmel Building Services Limited (in administration)* [2016] EWHC 806 (TCC); [2016] BLR 283 (at [30] and [31]), appeals from arbitrators are not granted lightly. As a matter of general approach, the courts strive to uphold awards. Where a tribunal's experience assists it in determining a question of law, such as the interpretation of contractual documents, the court will accord some deference to the tribunal's decision on that question. When a tribunal has reached a conclusion of mixed fact and law, the court cannot interfere with that conclusion just because it would not have reached the same conclusion itself.

21. There is a debate between the parties as to the extent to which the Tribunal's findings are ones of pure law or mixed fact and law. In "*The Sylvia"* [2010] EWHC 542 (Comm); [2010] 2 Lloyd's Rep 81 (at [54] and [61] ("*The Sylvia"*), Hamblen J (as he then was) confirmed, in the context of a tribunal's findings on remoteness, that on a mixed question of law and fact the relevant question was whether the conclusion reached was one which on the facts as found no reasonable arbitrator could have reached applying the proper legal test. This was "a heavy burden to discharge".

22. Lewison on Interpretation of Contracts, 6th Ed., comments (at 16.10) that the categorisation of contractual obligations between conditions, warranties and intermediate terms is a question of interpretation. Likewise in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982; [2016] 2 Lloyd's Law Reports 447 ("*Spar Shipping"*) Gross LJ (at [52]) stated that the question of classification was one of ascertaining the intentions of the parties and thus of the true construction of the contract.

23. In *State Trading Corporation of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep 277 ("*Golodetz"*) Kerr LJ (as he then was) commented that in situations where it was not clear that the performance of a term was in effect a condition precedent to the performance of one or more other terms by the other party, or to other actions which fall to be taken in pursuance of the contract in the ordinary course of business, the issue whether or not a particular term of a contract was to be characterised as a condition "must inevitably involve a value judgment about the commercial significance of the term in question". In that case he considered the question of whether or not a contractual obligation had the character of a condition precedent. He concluded independently that it did not. He found that the tribunal below had not made any error of law and went on to say this (at 284):

> "…even if I had been in any doubt on this aspect, and finding no error of law nor indication of any misdirection in the arbitrators' reasoning…, I should have accepted their conclusion on this issues, because I regard it as one of commercial judgment."

He went on to emphasise the importance to be attached to the views of trade tribunals on questions which do not involve pure points of legal construction.

The approach to construction

24. The correct approach to construction of the Charterparty was essentially common ground between the parties. Ordinary contractual principles apply. Those well-known principles are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

25. The court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding the subjective evidence of the parties' intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of

the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision.

26. In *Wood v Capita Insurance Services Ltd* (supra) at [9] to [11] Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a "parsing of the wording of the particular clause"; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.

An overview of the parties' respective cases

Owners' position in summary

27. Owners contend that the Tribunal's approach and its answer to both questions of law the subject of this appeal were wrong. Its conclusions were underpinned by two lines of reasoning: first, by a wholly unsuitable analogy with the Tribunal's understanding of a different clause in a different contract (the NYPE form) and secondly, by a textual conflation of obligation as regards repair and obligation as regards the maintenance of unexpired class certificates. Nothing in the language of Clause 9A) or the wider commercial context justified its conclusion on Question 1.

28. As for the finding that the classification obligation was an intermediate obligation, the Tribunal's reasoning is flawed and in any event as a matter of proper construction the classification obligation is to be construed as a condition:

    i) Stipulations as to the time for performance (other than for payment) are of the essence in mercantile contracts. The temporal boundaries of the classification are drawn in absolute, binary terms unlike the remedial maintenance obligation. That distinction supports the proposition that the classification obligation is in the nature of a condition. The use of the word "unexpired" is a strong indicator that the obligation is to ensure that certificates do not expire, failing which Owners have the right immediately to terminate;

    ii) There is only one type of breach possible and one sufficiently fundamental to undermine the whole contract. The obligation to keep the vessel in class is an integral feature of a bareboat charterparty. Loss of class is likely to have potentially immediate and irreversible consequences for owners. It may prevent owners from complying with their own obligations under the charterparty because of interface between classification and insurance, ship mortgages and flag;

    iii) There is no resulting undue hardship on charterers. It is readily ascertainable when a vessel's class certification is due to expire. Conversely, if the classification obligation is innominate, owners (and their financiers) are at very considerable risk. There is considerable uncertainty for owners who

would be required to second-guess the termination of a (potentially long term) charter. Certainty is highly important in commercial transactions such as this;

iv) The result contended for is consistent with the general rule in time charters that a vessel must have the relevant certificates in place as a condition precedent to delivery (see *Time Charters* 7th ed. 2014 at paragraphs 8.3 and 8.12). Again in the time charter context, owners' undertaking as to class is said to be a condition (see *The Seaflower (No 2)* [2001] 1 Lloyd's Rep 341 ("*The Seaflower"*) at [63] and *Time Charters* (supra) at paragraphs 3.25 and 3.46). The Tribunal did not articulate any good grounds for distinction between the general principles identified in *The Seaflower* and the instant situation. The justification for the categorisation as a condition is that matters of class are matters affecting status and not seaworthiness;

v) The result reached by the Tribunal fails to recognise the good commercial sense in distinguishing between an obligation to repair and an essentially documentary obligation to maintain class. There can be no room for debate on class and so no resulting harshness in immediate enforcement of a right to terminate.

Charterers' position in summary

29. Charterers submit that the appeal represents an impermissible attempt to try to persuade the court to replace the value judgment of two very experienced maritime arbitrators with its own value judgment. The classification of a term is strictly a matter of the proper construction of the relevant agreement; however, it not something with which a court should normally interfere, particularly when the arbitrators have relevant expertise and knowledge.

30. Fundamentally, Charterers submit that Owners have mischaracterised the Tribunal's findings. They suggest that there was no dispute that there was a "technical breach" by Charterers of the obligation to maintain the Vessel's class. However, the Tribunal determined that it did not give rise to an immediate right on the part of Owners to withdraw the Vessel.

31. The Tribunal's reasoning was to apply its understanding of the intermediate nature of the classification and maintenance obligation in time charters to Clause 9A). It concluded that Charterers' obligation to maintain and report goes hand in hand with and is part and parcel of their obligation to maintain class. The preferable and correct construction of Clause 9A) was that, if Charterers are in breach of their obligations to maintain/repair the Vessel and to maintain her class, they must immediately take steps to carry out the necessary repairs and reinstate the class certificates within a reasonable time. Charterers submit that this conclusion is not susceptible of challenge.

32. In any event, Charterers submit that the Tribunal's conclusion was obviously correct. Addressing in particular the guidance of the Supreme Court in *Arnold v Britton* (supra) at [15], Charterers contend:

i) Clause 9A) breaks down into three separate sentences. The second sentence is concerned with maintenance. The third sentence addresses the position when

repairs are necessary. In other words it addresses circumstances which include where the Vessel is not kept in class. It relates to the whole of the second sentence and not just to the maintenance and repair obligations;

ii) The Tribunal's construction is supported by a number of other clauses in the Charterparty:

a) Those where an express right of withdrawal was identified (Clauses 9A), 10E) and 13B));

b) Clause 7 where the right of Owners to require the Vessel to dry-dock only arises where Charterers fail to dry-dock in accordance with her normal classification intervals. In other words, the remedy for a failure to maintain class is not a right of withdrawal but a right to require the Vessel to be dry-docked;

c) The remainder of Clause 9A) (deleted in the Charterparty) provides that in the event of new class requirements making necessary, for example, structural changes or expensive new equipment, the parties are, in the event of their not reaching agreement, to arbitrate over a rate of hire which reflects an appropriate and equitable share in the additional cost. The Vessel might become temporarily out of class during the period of negotiation/arbitration. Self-evidently this would not result in Owners having a right to withdraw the Vessel;

iii) The overall purpose of Clause 9A) was to put the Vessel at the absolute disposal for all purposes of the Charterers. The purpose of the Charterparty overall was not to keep the Vessel maintained but to give full possession to Charterers. Maintenance is simply ancillary to this;

iv) The Tribunal took into account the factual/commercial background under time charterparties;

v) From a commercial perspective, the construction contended for by Owners is in truth "nonsensical". Various illustrations of absurdity are suggested:

a) "[R]equired certificates" could cover many which are in real terms of no great significance and purely administrative, such as a garbage management plan;

b) On Owners' construction they could withdraw the Vessel by reason of some internal failing of BV (such as a surveyors' strike);

c) In the event of a collision involving the Vessel, including one where the fault was not that of the master/crew, class would be suspended. On Owners' case this would give them a fortuitous automatic right to terminate;

d) The consequences of a breach of the classification obligation could have trivial, minor or very grave consequences (see *Spar Shipping* (supra) at [52(ii)]);

e) A vessel could be delivered by Owners (under Clause 2) with certificates that would expire the day after delivery or with a latent defect. On Owners' construction, Owners could terminate immediately after delivery or where a latent defect was discovered after delivery which meant that the Vessel was no longer in class;

f) A change in class rules over the course of the Charterparty, for example under a new International Convention could require substantial structural or new safety changes. On Owners' construction a failure by Charterers to effect all changes required would entitle Owners immediately to withdraw;

g) On the facts of this case, the Vessel arrived at port for the purpose of carrying out maintenance and repairs before class expired where class did not require the Vessel to be dry-docked any earlier and the condition of the Vessel was not such as to require maintenance or repairs to be carried out any earlier. The Vessel was not at risk in any way.

What did the Tribunal decide?

33. As indicated above, Charterers sought to persuade me that the Tribunal did not in fact decide the two points of law identified by Phillips J when granting leave. The Tribunal only decided a single question, namely whether there was any breach of an absolute obligation the breach of which entitled Owners to terminate the Charterparty. It did not decide separately that the classification obligation was not an absolute obligation (or that there was no breach of that absolute obligation).

34. This was a hopeless submission. First, I refer to *Agile Holdings Corp v Essar Shipping Ltd* [2018] EWHC 1055 (Comm) at [30] and [31]. There HHJ Waksman QC (sitting as a Judge of the High Court) (as he then was) commented that once the route to appeal under s. 69 of the 1996 Act had been navigated, there is every reason to move onto the merits of the question of law posed without the distraction of tangential points which had already been decided. The appeal court should at the very least given considerable weight to the decision by the Judge granting leave on the merits.

35. Here Phillips J when granting leave on questions 1 and 2, having considered Charterers' submission that the Tribunal's decision was not one susceptible to challenge as a matter of law, stated:

> "1. The questions of law were identified by the Tribunal in paragraphs 47 and 48 of the Partial Award. It is apparent from paragraphs 90, 91 and 101 that they decided both of those questions against the claimant.
>
> 2. It is serious arguable that a) the obligation of a charterer under clause 9(a) of the BARECON 89 form is to maintain the vessel's class and not merely to take steps to reinstate an expired certificate within a reasonable time and b) that

> the obligation is a condition of the contract. The Tribunal's decision to the contrary is at least open to serious doubt…."

36. There is no good reason to depart from Phillips J's conclusion that the Tribunal decided Questions 1 and 2. I have in any event independently reached the same conclusion. The Tribunal concluded that there had been no breach of contract by Charterers, separate from the question of the status of the classification obligation. Far from ever accepting a "technical" breach of clause 9A), Charterers always denied any breach of Clause 9 whatsoever (as recorded in paragraphs 57 and 61 of the Award). The Tribunal accepted that submission. So much is clear from paragraph 101 of the Award where the Tribunal found no breach of Charterers' obligations. That could only have been because it construed Charterers' obligation not as an absolute one but only as an obligation, upon expiry of class certification, to reinstate expired class certificates within a reasonable time.

Question 1: Is Charterers' obligation in Clause 9A) "to keep the Vessel with unexpired classification of the class … and with other required certificates in force at all times" an absolute obligation, or merely an obligation to reinstate expired class certificates "within a reasonable time"?

37. This is a pure question of law, as Phillips J identified, and clearly susceptible to challenge. The answer, as Charterers in fact accepted at the hearing before me, was that the classification obligation was an absolute one to keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all time.

38. This is the natural and ordinary meaning of the second sentence of Clause 9A). That sentence contains on the one hand a clause containing a maintenance obligation and on the other, a clause containing a classification obligation, the two being separated by the use of the word "and" between the two separate clauses in the sentence.

39. The maintenance obligation is an obligation to maintain the Vessel, her machinery, boilers, appurtenances and spare parts i) in a good state of repair ii) in efficient operating condition and iii) in accordance with good commercial maintenance practice. The author of *Bareboat Charters* 2nd ed. 2005 ("*Bareboat Charters")* (at paragraph 11.3) describes these as three "distinct but overlapping obligations on charterers to maintain the vessel, her machinery, boilers, appurtenances and spare parts". The obligation targets both preventative and remedial maintenance.

40. The classification obligation is to be treated as distinct from and additional to the maintenance obligation (see eg. *Bareboat Charters* at paragraph 11.4) as a matter of syntax and through the use of the word "and". Conceptually, the obligations are different in quality. The classification obligation is essentially documentary. Charterers can be in breach of the classification obligation without being in breach of the maintenance obligation. The two obligations may be related, but they are not "part and parcel of" a single obligation as the Tribunal appears to have held. Comparisons with the positions under time charters on different wording cannot legitimately affect this construction. The nature of the obligation must depend on the exact words used and to be construed in their own context. In similar vein, the maintenance obligation is to be performed by reference to qualitative considerations

(such as "good" and "efficient"). The question of classification is to be judged simply as a question of fact.

41. There is a natural and ready distinction to be drawn between a vessel's physical condition/maintenance status and its classfication status (see for example the comments of Rix LJ in *The Seaflower* at [63] and [64]). A vessel's class is a matter of status. Unseaworthiness is not a matter of status. The reference to "other required certificates" in Clause 9A) reinforces that the classification obligation is not a clause targeted at maintenance.

42. As indicated, Mr Craig for Charterers in fact accepted that the classification obligation was an absolute obligation. However, he described Charterers' breach of that obligation as being "technical" only. The crux of his submission is that the third sentence of Clause 9A) should be read so as to attach to (and qualify) the classification obligation as it attaches to the maintenance obligations.

43. This approach does not withstand scrutiny. It involves writing into the Charterparty substantive wording in the third sentence of Clause 9A) that is conspicuously (and to be presumed deliberately) absent. The second sentence of Clause 9A) identifies the different (maintenance and classification) obligations quite separately. There is no basis for then eliding them in the very next sentence of the same clause. The third sentence is not therefore to be read as qualifying or diluting the absolute nature of the classification obligation in the second. Rather it provides Owners with a specific contractual remedy, over and above any right to damages (to which the right to withdraw is expressed to be "without prejudice") against Charterers in the event of a breach of the maintenance obligation. It is also difficult to see how one could marry an obligation to take immediate steps to have repairs done with a classification breach that might be wholly unrelated to any need to carry out repairs.

44. Thus, the Tribunal erred in law in finding that the classification obligation was only an obligation to reinstate expired class certificates within a reasonable time. The classification obligation was an absolute one.

45. This is an important conclusion when one comes to consider the second question of law to which I now turn. It creates an obligation the breach of which is immediately, readily and objectively ascertainable.

Question 2: Is Charterers' obligation in clause 9A) "to keep the Vessel with unexpired classification of the class … and with other required certificates in force at all times" a condition of the contract or an innominate term?

The authorities

46. A convenient starting point is the authority of *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711 ("*Bunge Corporation"*). The appeal there turned on the construction to be placed on clause 7 of GAFTA form 119 as completed by the special contract. Buyers' obligation to give 15 days' loading notice was interdependent with the right of sellers to nominate the loading port. Clause 7 was not expressed as a "condition" and the question was whether, in its context and in the circumstances, it should be read as such. The House of Lords held that it was. The court required precise compliance with stipulations as to time wherever the

circumstances of the case indicated that that would fulfil the intentions of the parties. In general, time was of the essence in mercantile contracts. In a mercantile contract, where (as was the case with the clause under consideration) a term had to be performed by one party as a condition precedent to the ability of the other party to perform another term, the term as to time for performance of the obligation would in general fall to be treated as a condition. Lords Lowry and Roskill in particular emphasised the importance of certainty in mercantile contracts. Lord Lowry said this (at 720D-H) in reaching the conclusion that Clause 7 was a condition:

> "Among the points which have weighed with me are the following: (1) There are enormous practical advantages in certainty, not least in string contracts where today's buyer may be tomorrow's seller. (2) Most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions. (3) Decisions would be too difficult if the term were innominate, litigation would be rife and years might elapse before the results were known. (4) The difficulty of assessing damages is in indication in favour of condition…. (6) To make "total loss" the only test of a condition is contrary to authority and experience…"

47. Lord Roskill also commented (at 725C) that:

> "[p]arties 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."

48. In *The Seaflower*, in the context of a time charter, there was no dispute that Charterers had an express right of cancellation if EXXON approval was lost and not reinstated within 30 days. What was in dispute was whether Owners' guarantee to obtain EXXON approval within 60 days, in respect of which there was no express right of cancellation, was to be construed as a condition. The Court of Appeal held that it was. At [69] Rix LJ emphasised the fact that, broadly speaking, time was to be considered of the essence in mercantile contracts. He rejected (at [64]) the notion that there was any analogy between EXXON approval, a matter of status, and unseaworthiness. He emphasised (at [77]) the uncertainty that would prevail where the obligation were not a condition, as did Jonathan Parker LJ (at [83] and [84]).

49. In *Spar Shipping* the Court of Appeal concluded that an obligation to make punctual payment of hire was not a condition of the charterparties. Gross LJ, building on what he described as the "helpful general guidance" in *Bunge Corporation*, stated (at [52]) under the heading "Ascertaining whether a clause is a condition":

> "(i) First, the question was one of ascertaining the intentions of the parties and thus of the true construction of the contract….it follows that where on a true construction of the contract a term was to be classified as a condition, then it was unnecessary and inappropriate to explore the gravity of the breach….

> (ii) Secondly…if, on the true construction of the contract, the parties have not made a particular term a condition and if the breach of that term may result in trivial, minor or very grave consequences, then the term is innominate.
>
> (iii) Thirdly…unless the contract made it clear that a particular stipulation was a condition or only a warranty, it was to be treated as an innominate term; the courts should not be too ready to interpret contractual clauses as conditions."

50. This latter sentiment is also consistent with the statement of Roskill LJ in "*The Hansa Nord"* [1975] 2 Lloyd's Rep 445 at 457:

> "In my view, a Court should not be overready, unless required by statute or authority so to do, to construe a term in a contract as a "condition" any breach of which gives rise to a right to reject rather than as a term any breach of which sounds in damages….In principle, contracts are made to be performed and not to be avoided according to the whims of market fluctuation and where there is a free choice between two possible constructions I think the Court should tend to prefer that construction which will ensure performance and not encourage avoidance of contractual obligations."

51. Gross LJ went on in *Spar Shipping* (at [53]) to state that all authorities needed to be considered in context. On the facts of that case, he was not persuaded that any general presumption as to time being of the essence in commercial contracts was of significance or assistance. As for certainty, (at [58], [59] and [62]), he stated:

> "58. Certainty is plainly a consideration of major importance when construing commercial contracts such as the charterparties here. That it should be so is both a matter of legal principle and commercial common sense – having regard to the importance of the framework provided by commercial law for commercial decision-taking……
>
> 59. The key question, however, is striking the right balance. Classifying a contractual provision as a condition has advantages in terms of certainty…Where, however, the likely breaches of an obligation may have consequences ranging from the trivial to the serious, then the downside of the certainty achieved by classifying an obligation as a condition is that trivial breaches will have disproportionate consequences…
>
> 62. To my mind, the real question lies not between certainty and no certainty but as to the degree of certainty best likely to achieve the right balance of which I have already made mention…"

52. Hamblen LJ in his concurring judgment added (at [93]):

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

The authorities applied

53. I bear in mind at the outset that the court should not be overready to construe a clause as a condition, nor should it overplay the importance of certainty, which cannot be deployed as some trump card. Clause 9A) is not a condition precedent, nor did the parties choose expressly to label it a condition. Elsewhere they expressly provided for Owners' rights to withdraw but they chose not to in relation to the classification obligation in Clause 9A).

54. However, for the reasons set out below, I have reached the conclusion that the classification obligation is to be construed as a condition of the Charterparty.

55. The classification obligation creates an obligation on Charterers breach of which is immediately, readily and objectively ascertainable. Whether or not the classification obligation in Clause 9A) is a time clause strictly speaking, on any view it has an obvious temporal element. The Vessel's class must be maintained "at all times". Only one kind of breach of the classification obligation is possible, a relevant factor (see for example the comments of Lord Wilberforce in *Bunge Corpn* (at 715B)). Either the Vessel is in class or it is not. The language of the obligation is in no way inconsistent with the concept of its being a condition, and if anything suggests that it is. It is clear and absolute with a fixed time limit, redolent of a condition.

56. Charterers submit that the overall purpose of the Charterparty was not to keep the Vessel maintained but to give full possession of the Vessel to Charterers. Maintenance is simply ancillary to this. However, as Lord Lowry made clear in *Bunge Corpn* (at 720), "total loss" is not the test. A breach of the classification obligation cannot be said to be trivial or "ancillary". Charterers' obligation to keep certificates valid is an integral feature of a bareboat charter (see *Bareboat Charters* at para. 11.1). Loss of class can have (potentially immediate and irreversible) adverse consequences not only for the parties but also third parties and regulatory authorities. It can affect insurance, ship mortgage and flag. Additionally, damages for breach of the classification obligation may be difficult to assess.

57. As Mr Craig put it in the course of his submissions on the obligation question, one "would think that something would be intended to happen in the event of Charterers' failure to maintain class". I agree. On the basis of my findings as to the proper construction of Clause 9A), in particular that the third sentence does not apply to the classification obligation, the obvious intention of the parties would be that that "something" would be that Owners would have the right of termination.

58. The fact that the classification obligation is not a condition precedent is not, as Charterers submitted, fatal to the proposition that it is a condition. The fact that the obligation under scrutiny in *Bunge Corpn* was a condition precedent was clearly an important and relevant factor. But *Bunge Corpn* is not authority for the proposition that absent such status an obligation can never be a condition. The categories of conditions are not closed (see Rix LJ in *The Seaflower* at [75]).

59. Here the classification obligation is not a condition precedent but nor is it a contractual island: breach has significant sequencing consequences. Those consequences are not merely commercial or affecting the parties alone, but also affecting cargo interests and subcharterers. As already indicated, it also relates to regulatory issues, ports and flags. The facts of this case themselves reveal the potential complexities involved. Here the Vessel was entered in the St Kitts and Nevis International Ship Registry ("the St Kitts Registry") which had given a dispensation or permission allowing Owners to bareboat charter the Vessel outside of St Kitts and Nevis and to allow it to operate under the flag of the Russian Federation ("the Dispensation"). By 5 December 2017 the St Kitts Registry was writing to Charterers threatening withdrawal of the Dispensation on the basis of Owners' position. Charterers resisted and alleged that Owners' requests for termination of the bareboat registration and alleged cancellation of the Charterparty were misleading and untrue.

60. The fact that that the classification obligation was not labelled a condition (or that express rights of withdrawal were not provided for in the event of its breach but were provided for elsewhere – as in Clause 13B) of the Charterparty for example) is not determinative. So much is clear from both *The Seaflower* (at [66] to [73]) and also *Spar Shipping* (at [33]): the very inclusion of the contractual right of withdrawal suggests that in its absence there would be no right. Such a provision would be otiose if the right existed without more at common law for breach of a condition. Express rights may thus elsewhere be provided for in the Charterparty for the simple reason that, without such provision, the obligation in question is not a condition and will not otherwise give rise to such a right. (The express right to withdraw in Clause 13B) for example related to a failure by Charters to keep the Vessel insured against Protection and Indemnity risks.)

61. The Tribunal's reliance (at paragraph 88 of the Award) on its understanding of the status of a classification obligation in the NYPE form is misplaced when that form is different both in language and commercial context. As set out elsewhere, the consequences to the owner of a vessel being out of class are more serious than to a time charterer. In any event, no authority is cited in support, nor is the Tribunal's "understanding" particularised in any way.

62. Ultimately, the key question is to strike the right balance as identified in *Spar Shipping*. To classify the classification obligation as a condition carries clear and important advantages in terms of certainty. Unlike breach of an obligation of punctual payment, which may be very trivial or minor, breach of the obligation to maintain the Vessel in class is likely to be serious. It is not a situation where, as Gross LJ put it in [62] of *Spar Shipping*, a single payment of hire a few minutes late would entitle Spar to throw up a five- or three- year character and claim loss of bargain damages. To treat the classification obligation as a condition does not engage

the risk identified of permitting trivial breaches to have disproportionate consequences.

63. This does not produce a commercially unrealistic result but rather a commercially sensible one. Charterers will be on notice at any one time of when a vessel's class certification is due to expire in order to be able to take the necessary steps to renew classification before expiry. There is no undue harshness to Charterers if Owners can terminate for breach, about which there is no room for doubt, given the absolute nature of the classification obligation. If, on the other hand, the classification obligation is innominate, Owners and financiers may be placed at considerable and uncertain financial risk, with affected third parties also unsure as to their position both in practical and commercial terms.

64. As set out above, Charterers raise a number of further individual points or examples designed to demonstrate that the classification obligation cannot have been intended to be a condition of the Charterparty:

i) Charterers suggest that Owners' remedy for a failure to maintain class is not a right of withdrawal, but rather a right to require the Vessel to be dry-docked under Clause 7 of the Charterparty. Whilst Clause 7 does provide Owners with a right of inspection, that it is all that it does. It is difficult to see how a bare right of inspection was intended by the parties to be the (and an effective) remedy for breach of the classification obligation;

ii) Charterers point to the remainder of Clause 9A) (deleted in this Charterparty). The suggestion is that the Vessel goes out of class during the course of negotiations or arbitration over the sharing of any additional costs arising out of new class requirements. This cannot have been intended to give Owners the right to withdraw the Vessel. But this ignores the reality that new class requirements involving significant changes will be trailed well (ie months and years) in advance;

iii) Charterers point to the additional words in the classification obligation relating to "other required certificates in force at all times". The parties cannot have intended that a failure to maintain, for example, a garbage management plan or a ratings certificate, could entitle Owners to withdraw a vessel. Owners make the simple point that a plan is not a "certificate"; in any event, the reference to "required" in context must be a reference to what is required for class purposes;

iv) Charterers suggest that performance of the classification obligation is dependent on a third party, namely the classification society, BV, over which Charterers have no control. They point to the possibility of a surveyors' strike meaning that no surveyors were available at the required time. This is not a reasonable or commercial construction of the risk that Charterers agreed to bear. Ignoring whether or not this is a remotely realistic scenario, there is nothing unusual about parties agreeing to allocate risk involving third parties in this way (as was the case in *The Seaflower*). Charterers accepted an absolute obligation to maintain class;

v) Charterers suggest that a collision involving the Vessel (including one where the fault was not that of the master/crew) would result in automatic suspension of class. The parties could not have intended this to lead to an automatic right to terminate the Charterparty. Owners disputed this: it would be most unlikely for class to be removed completely in the event of such a collision. No reference to this argument was made by the Tribunal, nor is there any evidence before me properly to resolve it. In the circumstances, it cannot advance matters materially for present purposes;

vi) Charterers submitted that Clause 2 of the Charterparty did not apply in this case because the Vessel was a newbuild. However, as a matter of principle Charterers refer to Clause 2 of the Charterparty in two particular respects:

- Owners' obligation extends only to delivery of the Vessel in class at the time of delivery. If class expired the day after delivery, on Owners' construction, Owners would be entitled immediately to terminate. Again, this hypothetical scenario lacks total realism. Part I of the Charterparty reveals full details of the Vessel's class and date of last special survey;

- Owners' obligation is to exercise due diligence to make the Vessel seaworthy and ready for service under the Charterparty. On Owners' construction they would be entitled to terminate the Charterparty where a latent defect was discovered after delivery meaning that the Vessel was no longer in class. What if Owners were to breach their latent defect obligation, putting the Vessel out of class and then using the opportunity to terminate? Again, it is difficult to see how a situation could arise whereby Owners could properly rely on a loss of class as a basis for termination if that loss arose out of their own breach of obligation;

vii) Charterers referred again to the possibility of a change in class rules over the course of the Charterparty requiring substantial structural changes or new expensive safety equipment. On Owners' construction a failure to effect all necessary modifications without for example any recompense in hire would constitute a breach entitling them immediately to withdraw the Vessel. This has already been addressed, at least in part, in sub-paragraph ii) immediately above. Beyond that, the full version of Clause 9A) provides the answer. The fact that the parties chose here to proceed on an abridged version of Clause 9A) was a matter of commercial judgment for them;

viii) Finally, Charterers suggest that on the facts here the Vessel was not at risk in any way. This is no answer to the principled approach to construction identified above.

65. To the extent that the Tribunal's conclusion on the condition obligation can be said to involve a mixed question of law and fact or a "value judgment", I do not consider that there can be any principled opposition to disagreement by this court on appeal (by reference to the principles identified in *Golodetz* and *The Sylvia* or otherwise). Perhaps most materially, the Tribunal's conclusion was based on a material error of law as to the scope of the classification obligation. That error fundamentally infects the Tribunal's conclusion as to the status of the classification obligation. Thirdly, it is difficult to read into the Tribunal's reasoning on this issue any, or any significant,

reliance on commercial experience and judgment. The highpoint might be the reference in paragraph 88 of the Award to the Tribunal's "understanding" of the status of breach of maintenance clauses in the context of time charters. That understanding was not explained by way of any particular justification, nor has any authority been cited in support.

Conclusion

66. For these reasons, the appeal will be allowed. The classification obligation in Clause 9A) is both an absolute one and a condition of the Charterparty.

67. I will hear the parties on the appropriate form of relief accordingly but in principle, and subject to any further submissions, the Award should be varied to the effect that Owners were entitled to terminate the Charterparty by the Termination Notice and so entitled to delivery up of the Vessel. Charterers should be ordered to pay the costs of and occasioned by the Award.