Trinity Term
[2026] UKSC 23
On appeal from: [2025] EWCA Civ 1210

JUDGMENT

Great Asia Maritime Limited (Respondent) *v* Orion Shipping and Trading LLC (Appellant)

before

Lord Briggs
Lord Hamblen
Lord Burrows
Lord Stephens
Lord Doherty

JUDGMENT GIVEN ON
22 July 2026

Heard on 2 June 2026

Appellant
John Russell KC
Jakob Reckhenrich
(Instructed by Preston Turnbull LLP)

Respondent
David Lewis KC
Eliza Bond
(Instructed by MFB Solicitors)

LORD HAMBLEN AND LORD BURROWS (with whom Lord Briggs, Lord Stephens and Lord Doherty agree):

1. Introduction

1. The Norwegian Saleform ("NSF") has long been the most commonly used standard form contract for the sale and purchase of second-hand ships. This appeal concerns the interpretation of clause 14 of the 2012 version of the NSF. It also raises some fundamental issues on the relationship between termination for a repudiatory breach and termination under an express termination clause.

2. Clause 14 is headed "Sellers' default". It confers a right of cancellation (ie termination) on buyers if sellers fail to give the required notice of readiness for delivery or fail to be ready validly to complete a legal transfer by the Cancelling Date. It also confers on buyers a right to recover "due compensation" for "their loss and for all expenses together with interest" if sellers' failure is due to "proven negligence", "whether or not the Buyers cancel this Agreement".

3. It is now accepted, as held by the Court of Appeal, that sellers are under an obligation to exercise reasonable diligence to be ready by the Cancelling Date ("the readiness obligation") and that in this case the breach of the readiness obligation involved "proven negligence", as found by the arbitrators.

4. In these circumstances, the dispute between the parties concerns the "loss" which is recoverable by buyers if they cancel (ie terminate) the contract and, specifically, whether that includes loss of bargain damages—ie (as explained at para 20 below) damages for the loss of bargain consequent on the termination of the contract. If there is an available market, that loss will normally be measured by the difference between the contract price and the market price at the date of cancellation. In this case the market had risen and the loss of bargain measure of damages was found by the arbitrators to be US$1.85 million.

5. The Court of Appeal, differing from the Commercial Court judge, Dias J, held that the respondent buyers ("the Buyers") were entitled to loss of bargain damages under clause 14, in agreement with the decision of the arbitrators. The appellant sellers ("the Sellers") contend that they were wrong so to conclude. Their primary reason for so contending is that, as a matter of law, loss of bargain damages are only recoverable following the exercise of a contractual right to terminate a contract if there has been a repudiatory breach of that contract (the precise meaning of which is explained at para 20 below). As is common ground, there was no such breach in this case. The readiness obligation was an innominate term and its breach did not deprive the Buyers of substantially the whole benefit of the contract and was therefore not repudiatory. When

clause 14 is construed against that legal background, on the Sellers' argument, "loss" does not cover loss of bargain or is insufficiently clear to do so.

2. Factual background

6. The relevant factual background is set out in the award of the arbitrators (Ms Clare Ambrose, Mr Peter Jago and Mr Toh Kian Sing SC) dated 7 September 2023 ("the Award").

7. On 4 June 2021, the Sellers and the Buyers entered into a Memorandum of Agreement on amended NSF 2012 terms ("the MOA") for the sale by the Sellers and the purchase by the Buyers of the M/V LILA LISBON ("the Vessel") for US$15 million.

8. The MOA provided (inter alia) as follows:

> "**5. Time and place of delivery and notices**
>
> (a) The Vessel shall be delivered and taken over safely afloat at a safe and accessible berth or anchorage at/in *mainland China exclude Taiwan, Macao, Hong Kong* (~~state place/range~~) in the Sellers' option.
>
> Notice of Readiness shall not be tendered before: *20th July 2021* (~~date~~)
>
> Cancelling Date (see Clauses 5(c), 6(a)(i), 6(a)(iii) and 14): *20th August 2021*
>
> *However, the Vessel shall effect delivery to Buyers immediately after present laden voyage from South Africa to Qingdao China (ETA Qingdao on around 18th July 2021) and no more laden voyage allowed.*
>
> (b) The Sellers shall keep the Buyers well informed of the Vessel's itinerary and shall provide the Buyers with twenty (20), ten (10), five (5) and three (3) days' notice of the date the Sellers intend to tender Notice of Readiness and of the intended place of delivery.

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

[…]

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

[…]

14. Sellers' default

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

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

(Deletions are struck through; amendments are in italics).

9. For convenience, the first paragraph of clause 14 will be referred to as clause 14A and the second paragraph as clause 14B.

10. On 12 August 2021, the Sellers wrote to the Buyers informing them that “the Vessel will not be ready for delivery within the Cancelling Date”. On 14 August 2021, the Buyers agreed to a new Cancelling Date of 15 October 2021, but without prejudice to their rights under the MOA.

11. The Vessel was not ready for delivery by, or on, 15 October 2021 and on 18 October 2021 the Buyers applied to arrest the Vessel in Zhanjiang as security for claims of US$5 million. The application to court stated that the revised Cancelling Date had expired and that the Buyers were “entitled to withdraw the MOA and claim all the losses thus incurred, including but not limited to the gap between the contract price and the market price”. The arbitrators held that this arrest was a purported cancellation (ie termination) by the Buyers.

3. The findings of the arbitrators

12. The arbitrators found that the Sellers failed to give notice of readiness by the original Cancelling Date due to their proven negligence in failing to take reasonable care in making arrangements for the disembarkation of crew at Qingdao to enable delivery to take place by 20 August 2021. The Buyers were entitled to compensation under clause 14 calculated by reference to the actual profit that would have been earned if the Buyers had possession of the Vessel by the original Cancelling Date, and those damages were assessed at US$1,650,992.

13. The arbitrators further found that the Sellers failed to give notice of readiness by the revised Cancelling Date. This was due to the Sellers’ proven negligence in undertaking an intervening voyage charter and their failure to take adequate steps to make arrangements by 29 September 2021 to enable delivery to take place by 15 October 2021. The Buyers were entitled to compensation under clause 14 of US$1,850,000 based on the difference between the market price of the Vessel as at 18–22 October 2021 (US$16,850,000) and the MOA price (US$15,000,000).

14. The arbitrators’ reasons for holding that the Buyers were entitled to loss of bargain damages under clause 14 were as follows:

> “157. The authorities relied upon by Sellers do not suggest a universal rule to the effect that where a party cancels a contract pursuant to a contractual right it is not entitled to loss of bargain damages unless it shows that the other side has committed a

repudiatory breach and it has terminated the contract at common law on the basis of that breach. To the contrary, they merely suggest that an option to cancel will not of itself entitle the cancelling party to loss of bargain damages. A party's entitlement to damages under a contractual cancellation clause will depend on the terms agreed…

…

163. Clause 14 confers an option to cancel for failure to deliver on time and also expressly allows recovery of compensation where the failure is caused by proven negligence. The compensation is recoverable whether the contract is cancelled or not. The starting point is that compensation will be recoverable where the contract has been cancelled (and also if the MOA is kept alive). If compensation is not recoverable for the consequences of cancellation (including loss of the bargain) it would be unclear what compensation means. Sellers failed to put forward a satisfactory alternative explanation since it cannot have been intended to be limited solely to reliance losses.

164. Commentaries from Strong & Herring, and Goldrein on clause 14 suggest without hesitation that the ordinary measure of damages for non-delivery [applies], namely the difference between contract and market damages. There is no suggestion of a requirement to show a repudiatory breach (or breach of condition). It would be inconsistent with the wording conferring the right to compensation to suggest that a cancelling buyer will not be entitled to compensation for losses caused by such cancellation including loss of profit, and must instead establish an independent repudiatory breach.

165. Accordingly, the cause of the Buyers' loss of profits was Sellers' failure to deliver, and this caused Buyers to bring the MOA to an end. Buyers are entitled to recover damages assessed on the difference between market and contract price as compensation for Sellers' default under clause 14. Clause 14 confers a contractual right to cancel and also confers a right to compensation extending to loss of market damages."

4. The court proceedings

15. On 20 March 2024, Bright J granted permission to appeal from the arbitrators under section 69 of the Arbitration Act 1996 on the following question of law:

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

16. This question was answered in the negative by Dias J who allowed the appeal. In her judgment of 9 August 2024, she held that neither clause 5 nor any other provision of the MOA imposed any obligation to deliver, to give notice of readiness, nor to be ready to validly complete a legal transfer by the Cancelling Date. She further held that the arbitrators were wrong to conclude that, on a proper construction of Clause 14, the Buyers were entitled to loss of bargain damages. Her essential reasons for so concluding were as follows:

> (1) "Due compensation" means "compensation which is appropriate applying the usual common law principles of causation, remoteness and mitigation" (para 45(i)).
>
> (2) The provision for compensation "'to the Buyers for their loss and for all expenses… if [the Sellers'] failure is due to proven negligence and whether or not the Buyers cancel this Agreement'" can only refer to the failure identified in the opening words of clause 14B, namely the failure to give Notice of Readiness or to be ready to validly complete a legal transfer by the Cancelling Date" (para 45(ii)).
>
> (3) "It follows that the loss and expenses recoverable under clause 14B must be caused by that specific failure. *Prima facie*, therefore, this is a reference to accrued losses and expenses which have crystallised at the point of cancellation and <u>not</u> to prospective losses and expenses caused by the cancellation. This suggests that the losses and expenses ought to be the same where the buyers cancel and where they do not. It is not immediately obvious that in circumstances where the right to terminate is at the option of the buyers, the clause creates a significantly enlarged right to claim loss of bargain damages in the event that they decide to cancel" (para 45(iii)).

(4) Clause 14 "does not on its natural and ordinary meaning give rise to a right to claim loss of bargain damages where cancellation takes place in accordance with the clause, absent an accepted repudiatory or renunciatory breach" (para 47).

(5) The recoverable damages under clause 14B "include expenses incurred by the buyers in making arrangements to crew the vessel, carrying out inspections, legal costs and preparing for delivery generally. They will also encompass any loss of profits that could potentially have been made between the date when the vessel should have been delivered but for the sellers′ negligence and the date of cancellation" (para 48).

17. Dias J gave permission to appeal from her decision on the following grounds:

> Ground 1: The Judge was wrong to conclude that there was no obligation on the Sellers to tender Notice of Readiness nor to be ready to validly complete a legal transfer by the Cancelling Date. There were such obligations.
>
> Ground 2: The Judge was wrong to conclude that Clause 14 only allows the Buyers to recover losses and expenses which have accrued prior to cancellation. Clause 14 entitled Buyers to recover loss of bargain damages.

18. The Court of Appeal allowed the Buyers' appeal on both grounds and restored the Award of the arbitrators. The lead judgment was given by Nugee LJ with whom Phillips and Birss LJJ agreed. Nugee LJ's essential reasons for allowing the appeal on Ground 2 were as follows:

(1) "Due compensation" means "proper or appropriate compensation" (para 71); and he approved what Dias J had said as to the applicability of the common law principles of causation, remoteness and mitigation.

(2) The natural and ordinary meaning of "loss" extends to the Buyers' loss of bargain (para 75). The Buyers did not get the ship they had contracted for. By the time the contract was cancelled, the ship was worth US$16.85m, but the Buyers were only due to pay US$15m for it. "Having thus lost the benefit of the contract, its loss was the loss of that bargain" (para 76).

(3) There is no difficulty over factual causation. The Buyers did not get the Vessel because the Sellers were not ready to deliver it in time; the Buyers were

therefore entitled to, and did, call off the contract; and the Sellers were not ready to deliver because they had failed to exercise due diligence to be ready by the Cancelling Date (para 77).

(4) Contrary to the conclusion of Dias J, there is no reason why the Buyers' losses have to be crystallised at the point of cancellation. As a matter of fact, the losses the Buyers have suffered depend on what actually happened (para 80).

(5) On "the Judge's view the losses recoverable under Clause 14 do include losses which only arise because of the cancellation. That might be thought to cast some doubt on whether it is really the case that they do not include the most obvious loss arising from the cancellation, namely the loss of bargain if the market has risen. Quite apart from that, Clause 14(b) expressly provides for compensation for 'all expenses' in any event, so one would expect compensation for loss to have been intended to cover something else" (para 88).

(6) In agreement with the arbitrators, "it is not obvious what loss was intended to be compensated under Clause 14(B) (in the case of the Buyers electing to cancel) if it did not include loss of bargain" (para 90).

(7) Where the Sellers are not in a position to deliver by the Cancelling Date as a result of a breach of their obligation to use reasonable or due diligence, and the Buyers cancel, that is or is to be equated with a case of non-delivery (para 104).

(8) Even if the Sellers were right that, in the absence of the express right to claim damages under Clause 14B, the Buyers would have no claim to damages for loss of bargain if they terminated under Clause 14, that did not tell one anything very much about what damages are recoverable where Clause 14B does contain an express right to compensation for the Buyers' loss (paras 122–123).

5. Terminology

19. There are two terminological points that need to be addressed.

20. The first is that the term "loss of bargain" damages is here being used in a limited sense. In a wide sense, loss of bargain damages may be regarded as synonymous with saying that damages for breach of contract protect the expectation interest by aiming to put the claimant into as good a position as if the contract had been performed. See, for example, the treatment of damages under the heading of "loss of bargain" in *Treitel's Law of Contract*, 16th ed (2025), paras 20–024 – 20–028, 20–042 – 20-049. In that wide sense,

damages for any breach of contract, repudiatory or not, may be regarded as being damages for loss of bargain. For example, if goods are delivered that are not of the required standard or goods are delivered late, the buyer is entitled to expectation damages or, one could equally well say, loss of bargain damages aiming to put the claimant into as good a position as if the goods had been of the contracted-for quality or had been delivered on time. A comparison of the market values (as between the goods as they should have been and as they are or as between the value at the time they should have been delivered and at the time actually delivered) will be used to assess the damages and this is commonly regarded as the award of damages for loss of bargain. It is important therefore to make clear that when one is referring to loss of bargain damages in the context with which we are here dealing, one is referring to a loss of bargain *consequent on the termination of a contract*. Statements such as "one can only recover loss of bargain damages for a repudiatory breach" have to be understood in that light otherwise they are likely to mislead.

21. The second point concerns the meaning of a "repudiatory breach". At common law, the right to terminate a contract for breach is triggered in one of three ways: the defendant commits a breach of a term that is a condition; or the defendant's breach is of an innominate term (ie a term that is neither a condition nor a warranty) that has sufficiently serious consequences (in the sense that, as explained in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, at p 70, it deprives the innocent party of substantially the whole benefit of the contract (or, at pp 63–64, goes to the root of the contract)); or the defendant repudiates the contract (sometimes referred to as a "renunciation"). All three are commonly referred to as a "repudiatory breach" and that is a usage that, for convenience, we will generally adopt (unless otherwise made obvious) in this judgment.

6. The approach to contractual interpretation

22. As stated by Lord Burrows (with whom Lords Reed, Briggs, Stephens and Richards agreed) in *Providence Building Services v Hexagon Housing Association* [2026] UKSC 1: [2026] 1 WLR 538 ("*Providence v Hexagon*"):

> "21. The modern approach in English law to contractual interpretation is to ascertain the meaning of the words used by applying an objective and contextual approach. As was said by Lord Hoffmann in his seminal speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 ("ICS"), the aim of contractual interpretation is to ascertain "the meaning which [the contract] would convey to a reasonable person having all the [relevant] background knowledge which would reasonably have been

> available to the parties in the situation in which they were at the time of the contract."

23. In the same case the court addressed the proper approach to interpretation of an industry-wide standard form contract, such as, in this case, the NSF 2012. While recognising that the general position is that an examination of what has been termed the "archaeology of the forms" is to be discouraged, Lord Burrows said the following about the admissible background context to such contracts (at para 26):

> "…the admissible background context may include past decisions of the courts on, and practice in relation to, clauses in an earlier version of the standard form. For example, it may be clear that the standard form has been amended so as to depart from a decision of a court. In *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*, a case dealing with a JCT standard form, Lord Hoffmann said the following, at p 274:
>
>> 'It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between the draftsmen and the courts and the efforts of the draftsman cannot be properly understood without reference to the meaning which the judges have given to the language used by his predecessors.'"

7. The interpretation of clause 14

(1) The language of clause 14

24. Like Nugee LJ, we start by focussing on the language of clause 14. A number of points may be made.

(1) We agree with Dias J and Nugee LJ that "due compensation" means appropriate compensation using the common law principles of causation, remoteness and mitigation.

(2) The word "loss" is general and unqualified.

(3) Loss of bargain is a type of loss.

(4) There is to be recovery of the Buyers' "loss" and "all expenses" (i) if the Buyers cancel and (ii) if the Buyers decide not to cancel—"whether or not the Buyers cancel".

(5) One would expect the "loss" and "expenses" recoverable to be different in those two situations. For example, wasted expenses as a result of delayed delivery (eg crew or other stand-by costs) are likely to be less than in a case of non-delivery (eg crew or other stand-down costs).

(6) To give content to "loss" and "expenses" there should be loss and expenses recoverable in both those two situations.

(7) In the event of cancellation, given that the "loss" recoverable is general and unqualified, it is wide enough to cover loss in fact suffered by the Buyers as a result of that cancellation. On the facts of this case, a loss of bargain has been factually suffered by the Buyers consequent on the cancellation. Leaving aside the normal restrictions of causation, remoteness and mitigation (see point (1) above), there is no good reason or justification for reading in some further limitation to the loss recoverable.

(8) As Nugee LJ observed, loss of bargain is the most obvious form of loss which will be suffered by the Buyers if there is cancellation.

(9) As both the arbitrators and Nugee LJ observed, unless "loss" covers loss of bargain, it is unclear what loss would be covered in the event of cancellation. The Sellers were unable to identify any example before the arbitrators and are still unable to do so. The only example put forward by John Russell KC for the Sellers was loss caused by delay in delivery. That, however, fails to provide any differing content to "loss" in the event of cancellation. Moreover, as Mr Russell acknowledged, given that cancellation is likely to occur promptly following the Cancellation Date, in many, if not most, cases there will be no such delay loss.

25. For all these reasons, we agree with the arbitrators and Nugee LJ that the natural and ordinary meaning of "loss" in the context of clause 14 is that it includes loss of bargain suffered by the Buyers consequent on the cancellation of the contract.

(2) Some wider contextual matters

26. That conclusion is supported by a number of wider contextual matters.

27. First, under clause 13, which addresses "Buyers' default", in the event of cancellation by Sellers they are entitled to claim compensation "for their losses and for all expenses" – materially the same wording as clause 14B ("for their loss and for all expenses"). As Nugee LJ explained at paras 98–100, para 10 of Tomlinson LJ's judgment in *Griffon Shipping LLC v Firodi Shipping Ltd ("The Griffon")* [2013] EWCA Civ 1567; [2014] 1 Lloyd's Rep 471 supports the view that sellers are entitled to claim the same losses under clause 13 as they would have been able to do if they had terminated for repudiatory breach—ie loss of bargain damages. If "losses" in clause 13 includes loss of bargain it would be very surprising if "loss" in clause 14 did not also do so.

28. It would also be surprising, as a matter of contractual symmetry, if loss of bargain damages were recoverable for "Buyers' default" under clause 13, but not for "Sellers' default" under clause 14. As Nugee LJ explained at para 101:

> "…the structure of Saleform 2012 leads one to expect that Clauses 13 and 14 will operate in a similar fashion. Clauses 13 and 14 are closely parallel. Delivery and payment are of course the basic duties of a seller and a buyer respectively under a contract for the sale of goods (see ss. 27 and 28 of the Sale of Goods Act 1979), and Clauses 13 and 14 deal with the consequences of non-payment and non-delivery accordingly. And I think one can assume that Saleform 2012 is not intended to be a one-sided form of contract favouring one party over the other, but to operate even-handedly as between Sellers and Buyers; it would not have commended itself to the industry otherwise. In the case of non-payment Clause 13, headed 'Buyers' default', confers on Sellers, where it applies, both a right to cancel and a right to claim compensation for their losses and all expenses incurred; in the case of non-delivery Clause 14, headed 'Sellers' default', similarly confers on Buyers, where it applies, a right to cancel and (provided Sellers are in breach of their due diligence obligations) a right to claim compensation for their loss and all expenses."

29. Secondly, in the event that buyers cancel and claim compensation under clause 14 the situation is, or is akin to, one of non-delivery under a sale of goods contract, as Nugee LJ held. In such circumstances, the normal measure of damages is loss of bargain damages—see section 51(3) of the Sale of Goods Act 1979:

> "(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered…"

That is relevant legal context for what "loss" in clause 14 means. Loss of bargain is the normal loss which would be suffered in the event of cancellation and consequent non-delivery.

30. Thirdly, for reasons developed in the next section, past decisions of the courts on, practice in relation to, and the established meaning of, clause 14 of the NSF standard form strongly support the conclusion that loss of bargain damages are recoverable.

(3) Past decisions, practice and established meaning

31. In the 1981 decision of Staughton J in *Sotiros Shipping Inc v Samieiet ("The Solholt")* [1981] 2 Lloyd's Rep 574, it was held that loss of bargain damages were recoverable under clause 14 of the NSF following cancellation by buyers. That case concerned the 1966 form of the NSF. Under clause 14 of the NSF 1966, in the event of cancellation due to default by sellers in delivery of the vessel, buyers were entitled to the return of their deposit plus interest and:

> "The Sellers shall in addition make due compensation for any loss caused to the Buyers by nonfulfilment of this contract."

32. The sellers argued that this only allowed for compensation in circumstances where the sellers' default amounted to a repudiatory breach. Staughton J rejected that argument, stating (at p 579):

> "I must construe the contract as a whole. Clause 13, dealing with breach of contract by the buyers, is a severe clause. It provides for forfeiture of the deposit plus any additional loss plus 5 per cent. interest. It is not then surprising if cl. 14 is equally stringent in the case of default by the seller. On its plain wording it does give a right to cancel and to claim interest and compensation if the vessel is not delivered within the time specified. I cannot disregard the plain wording of the contract just because I thought, which I do not, that it leads to an unduly harsh result."

33. The sellers also argued that the clause only allowed for loss arising from the default (ie delay) rather than loss of bargain. Staughton J rejected that argument, stating (at p 579):

> "I must consider compensation for loss caused by non-fulfilment. I do not accept Mr Pollock's argument that this must be confined to compensation for three days' delay. The clause itself contemplates that the buyers may cancel and therefore that the contract will be wholly unperformed, so far as its main object is concerned, that is to say; transfer of the property in the vessel. It is that loss which is, in my judgment, plainly provided for in the words, 'loss caused to the Buyers by nonfulfilment of this contract'."

34. Staughton J held that the recoverable loss was the difference between contract and market prices (US$500,000), but that the buyers had failed to mitigate their loss as the sellers would have accepted an offer by the buyers to purchase the vessel at the original price, subject to any claim they might have had for the delay.

35. The case went to the Court of Appeal on the mitigation issue and Staughton J's decision was upheld—[1983] 1 Lloyd's Rep 605. The court did not therefore address the measure of damages but the premise of the mitigation argument was avoidance of the US$500,000 loss. Further, the Court of Appeal stated (at p 608):

> "As we have already accepted as being trite law, the buyers had an unfettered right in the circumstances of this case to affirm the original contract of sale or to cancel it. No question of mitigation arose at that stage. They decided to cancel and in consequence they suffered a loss of US$500,000. As a matter of causation, this loss, unless avoidable by some reasonable *further* action, was directly attributable to the sellers' breach of contract."

36. In *Linnett Bay Shipping Co Ltd v Patraicos Gulf Shipping Co SA ("The Al Tawfiq")* [1984] 2 Lloyd's Rep 598, Lloyd J upheld an arbitrators' award of damages for late delivery even though the sellers were not to blame for the delay. In reaching that conclusion the arbitrators contrasted the wording of clauses 4 and 14:

> "Clause 4 gives the Buyers an option to cancel which option is exercisable whatever the reason for late delivery. If such option is exercised the Buyers could not claim damages for the loss of

> the bargain unless the delay was frustrating. Such is the ordinary common law rule. However, *Clause 14 provides that if the delivery date is missed for reasons [for] which the Sellers are responsible then if the Buyers cancel they can obtain damages for the loss of their bargain as a matter of contractual entitlement* even if the prospective delay was of minimal duration." (Emphasis added.)

This reasoning was essentially endorsed by Lloyd J.

37. Following the decisions in *The Solholt* and *The Al Tawfiq*, no attempt was made to amend the standard form to remove the right to claim loss of bargain damages. Various amendments have been made to clause 14 since those decisions, but those amendments have not changed the recoverable measure of loss following cancellation. If anything, the measure of recoverable loss has been extended by including both "loss" and "all expenses" and by allowing recovery where there is no cancellation. In summary, (i) in all subsequent versions of the NSF the buyers are entitled to "due compensation"; (ii) in the 1983 and the 1987 NSF compensation was "for the losses caused" rather than "any loss caused"; (iii) in the 1993 NSF compensation was "for their loss and for all expenses" which was recoverable "whether or not the Buyers cancel this agreement"—the same wording as NSF 2012.

38. That it is generally recognised that loss of bargain damages are recoverable under clause 14 of the NSF is borne out by the leading textbooks on the sale of ships. For example, *Strong & Herring on Sale of Ships: The Norwegian Saleform* 3rd ed. (2016) discusses "Buyers' right to claim 'compensation'" under clause 14 at paras 17–19 – 17–20. It states that where buyers have cancelled the contract they can claim damages for non-delivery in accordance with section 51 of the Sale of Goods Act 1979. *Goldrein on Ship Sale and Purchase* 7th ed. (2024), at para 19.11, is to similar effect. As the arbitrators pointed out (at para 164), these textbooks "suggest without hesitation that the ordinary measure of damages for non-delivery, namely the difference between contract and market [prices]," is recoverable. This is further borne out by Paul Herring's note on Dias J's decision (UK Defence Club, 28 August 2024), entitled "*The Lila Lisbon*, Commercial Court reverses industry understood practice on damages", in which he said:

> "The industry has long considered that a buyer could recover damages at large in such a situation."

See similarly the case-note by Paul MacMahon, "Compensation after cancellation for sellers' negligent delay" [2025] LMCLQ 29 in which, referring to *The Solholt* and *The Al Tawfiq,* he states (at p 32): "'Due compensation' was established by judicial decisions in the mid-1980s to involve damages for loss of bargain".

39. In summary, since at least the decision in *The Solholt* it has been recognised that loss of bargain damages are recoverable by buyers under clause 14 of the NSF and it has never been suggested that this has been altered by changes made to the clause since that decision. This is, therefore, an established meaning of the clause.

40. As is stated in *Lewison, The Interpretation of Contracts,* 8th ed (2024), at para 4.65:

> "In a case where the contract is based upon a standard form of commercial agreement, the court recognises the desirability of certainty, and is reluctant to disturb an established construction."

41. There are a number of authorities which stress the importance of certainty, predictability and consistency in the interpretation of industry-wide standard form contracts.

42. For example, in *Pioneer Shipping Ltd v TP Tioxide Ltd ("The Nema")* [1982] AC 724 Lord Diplock stated (at p 737):

> "… when contracts are entered into which incorporate standard terms it is the interests alike of justice and of the conduct of commercial transactions that those standard terms should be construed and treated…as giving rise to similar legal rights and obligations in all [cases] in which the events which have given rise to the dispute do not differ from one another in some relevant respect. It is only if parties to commercial contracts can rely on a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion."

See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 1 QB 529 at p 540 (Robert Goff J); *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch); [2011] 2 BCLC 120, at para 53 (Briggs J).

43. There are also a number of authorities which emphasise the importance of not disturbing an established interpretation.

44. As stated by Hobhouse J in *Chiswell Shipping Ltd v National Iranian Tanker Co ("The World Symphony")* [1991] 2 Lloyd's Rep 251 (at p 257):

> "It is axiomatic in English commercial law that where certain contractual provisions have achieved an established and recognised meaning the Courts should not decline to follow earlier authorities in which that meaning is recognised unless those previous authorities are clearly wrong. Without such a principle the certainty and continuity of commercial law is lost and there is a risk of frustrating rather than giving effect to the intentions of the parties. Parties must be able to contract on the basis of established decisions about the words they are choosing to use to express their contractual intention."

See also *Dunlop & Sons v Balfour, Williamson & Co* [1892] 1 QB 507 at p 518 (Lord Esher MR); In *Re An Arbitration between Hooley Hill Rubber and Chemical Company* [1920] 1 KB 257 at p 269 (Bankes LJ); *Owners of the Annefield v Owners of Cargo Lately Laden on Board the Annefield ("The Annefield")* [1971] P 168 at p 183 (Lord Denning MR); *Marc Rich & Co Ltd v Tourloti Compania Naviera SA ("The Kalliopi A")* [1988] 2 Lloyd's Rep 101 at p 105 (Staughton LJ).

45. In *Providence v Hexagon*, at paras 30–31, it was made clear that an industry-wide standard form contract should usually be interpreted consistently for all contracting parties using that form but that the established approach, based on the objective intentions of the contracting parties in the relevant context, should still be applied to the interpretation of such a contract. The point being made by, for example, Hobhouse J in *The World Symphony* falls within that established objective contextual approach because, when parties decide to use an industry-wide standard form, they are taken to know that the standard terms may have an established meaning and to be content to contract on that basis, unless that meaning is clearly wrong. Unless clearly wrong, where a standard term has an established meaning, that is the meaning which would be conveyed to a reasonable person in the position of the parties at the time of contracting.

46. In the present case the established meaning of clause 14B is that a loss of bargain is a "loss" recoverable thereunder. The onus is therefore on the Sellers to establish a good reason why that meaning is inapplicable (for example, because it is clearly wrong).

(4) The commercial consequences

47. That loss of bargain damages are recoverable under clause 14B is further supported when regard is had to the commercial consequences of the rival interpretations. It is well-established that such consequences may be an aid to interpretation. For example, in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, at para 12, Lord Hodge, with whom the other Supreme Court Justices agreed, said that contractual interpretation "involves an iterative process by which each suggested interpretation is

checked against the provisions of the contract and its commercial consequences are investigated…".

48. In many cases where the market has risen since the date of the contract buyers will choose not to cancel in order to take advantage of the increase in the ship's value. As this case illustrates, however, there will be cases in which the right to cancel is exercised, particularly perhaps where, as in this case, there has been repeated delay and default by sellers. In those circumstances, the question arises as to which of the parties is to benefit from the rise in value. For sellers to be allowed to reap the benefit of their negligence and default by keeping the vessel with its increased value is an uncommercial outcome. It would be far more commercial for innocent buyers to be compensated for the increase in value from which they would have benefited had there been compliance with the readiness obligation.

49. This can be illustrated by reference to the facts of this case. Based on the Award, the Sellers are liable to the Buyers for US$1.85 million and the Buyers are in the position they would have been in "but for" the Sellers' negligent failure to deliver. They have a total of US$16.85 million (being US$15 million of their own money and the US$1.85 million in damages) to buy an equivalent ship.

50. By contrast, on the Sellers' case, upon the Buyers' cancellation, the Sellers retain the Vessel valued at US$16.85 million, notwithstanding that their failure to deliver it to the Buyers arose from their negligence. The Buyers would be "out of pocket" by US$1.85 million when buying an equivalent ship, as it is assumed they would reasonably do in an available market, but would have no recourse for that loss. In other words, on the Sellers' case, they gain from the cancellation whilst the Buyers lose from it, the reverse of what would be expected commercially.

51. Further, as the Buyers point out and Nugee LJ accepted (at para 153), on the Sellers' case sellers have a perverse incentive to delay completing in a rising market in the hope that buyers may lose patience and cancel, leaving sellers with a more valuable ship. On the other hand, buyers may have a corresponding incentive to hold off cancelling in the hope that sellers would end up in repudiatory breach, which raises the risk of losing the right to cancel through waiver or termination. That is not a sensible commercial outcome.

52. For all these reasons, our strong prima facie conclusion is that clause 14 provides for the recovery of loss of bargain damages. How then do the Sellers put their case that that is not the correct conclusion? It is to the principal arguments advanced by the Sellers that we now turn.

8. The main submissions of the Sellers

53. Mr Russell made two central submissions. For shorthand, he referred to these in the oral hearing as being concerned with "the causation principle" and the "clear words principle".

(1) The causation principle

54. According to Mr Russell, this is a principle that underpins a number of relevant cases. The principal one he relied on is the Court of Appeal's decision in *Financings Ltd v Baldock* [1963] 2 QB 104 ("*Financings*").

55. Before looking at *Financings* it is important to make clear that David Lewis KC, counsel for the Buyers, did not seek to cast doubt on that decision (albeit that, by a respondent's notice, the Buyers argued that, if they were to fail on their primary submissions as to the correct interpretation of section 14B, *Financings* should be confined to long-term contracts and should not be applied to a one-off contract, such as the contract for the sale of goods in this case). We are therefore not being asked to overrule *Financings*. It follows that, although *Financings* has been subject to criticism by commentators (see, for example, the article by John Randall, "Express Termination Clauses in Contracts" [2014] CLJ 113 at pp 129–138) and was not followed by the Supreme Court of Canada in *Keneric Tractor Sales Ltd v Langille* [1987] 2 SCR 440 and was, arguably, a reason for the dissatisfaction with the state of the law expressed by the Court of Appeal in *Lombard North Central plc v Butterworth* [1987] QB 527, this is not an appropriate case to reconsider that decision. In particular, we have had no submissions as to what the implications would be of departing from *Financings* including which other cases would be regarded as falling with it. We are therefore assuming that *Financings* is good law and leave open for another more suitable case whether *Financings* should be reconsidered. Our task here, in relation to that decision, is to examine whether there is any force in the submissions of Mr Russell to the effect that there is a causation explanation of *Financings.*

56. In *Financings* the defendant debtor, under an agreement for the hire-purchase of a truck with the total amount payable over two years being £772 16s, paid the agreed initial payment of £100 and took possession of the truck. It then failed to pay the first two monthly instalments of £28 0s 8d that were owed to the claimant creditor. The creditor thereupon terminated the agreement, as it was entitled to do, under an express termination clause (clause 8) and took back possession of the truck and sold it. There was a minimum payment clause (clause 11(a)) but, applying the decision of the House of Lords in *Bridge v Campbell Discount Co Ltd* [1962] AC 600, that clause was unenforceable as a penalty. The creditor therefore sought damages at common law. The Court of Appeal considered

that the failure to pay the two instalments did not, on the facts, amount to a repudiatory breach by the debtor.

57. The central question at issue, therefore, was the quantum of the creditor's damages where the creditor had terminated the contract under the express termination clause and where there was no repudiatory breach. The creditor was seeking damages for its loss of bargain (although that terminology was not used) ie for the instalments that it would have been paid in the future had the contract still been on foot minus what it had already been paid and the value of the truck. The Court of Appeal held, and this was the ratio of the case, that the creditor was not entitled to such damages and was confined to damages (or, perhaps more accurately expressed on these facts, to recovery of the debts owed plus interest) for the past breaches ie for the failure to pay the instalments prior to the date of termination.

58. Lord Denning MR said at p 110:

> "It seems to me that when an agreement of hiring is terminated by virtue of a power contained in it, and the owner retakes the vehicle, he can recover damages for any breach up to the date of termination but not for any breach thereafter…."

Then at p 113 he said this:

> "if there is no repudiation, and simply, as here, a failure to pay one or two instalments (the failure not going to the root of the contract and only giving a right to terminate by virtue of an express stipulation in the contract), the owners can only recover the instalments in arrear, with interest, and nothing else: for there was no other breach in existence at the termination of the hiring."

Upjohn and Diplock LJJ made similar statements.

59. While the ratio of *Financings* is clear, the explanation for it is not. Lord Denning MR said, at p 110, that "the simple reason" why no damages could be awarded for the loss of future instalments, after the termination under the express termination clause, was that "there are no breaches thereafter." But that could also be said in respect of termination for a repudiatory breach, which does trigger damages for the future, so that this in itself does not appear to be a convincing explanation (although for an interesting argument, building on this reasoning of Lord Denning MR, see Edwin Peel, "The Termination Paradox" [2013] LCMLQ 519, 523–524).

60. Given Mr Russell's submissions, what is more significant is that Lord Denning MR, at pp 111–112, expressly approved, and Upjohn LJ at pp 115–116 appeared to approve (and see also Diplock LJ at p 122), the analysis of Salter J in *Elsey & Co Ltd v Hyde* (unreported) 9 June1926 to the effect that there should be no damages for the future, where the creditor had terminated under an express termination clause, because the loss was the result not of breach but of the creditor's own election to terminate. In other words, the future loss (ie the loss of bargain) was not caused by the breach but rather by the creditor's own conduct in choosing to terminate the contract.

61. Mr Russell submitted that such a causation explanation of *Financings* was correct. This was fully articulated as follows at paras 31–36 of his and Jakob Reckhenrich's written submissions:

> "[A] repudiatory breach is treated as being the effective cause of the loss of bargain. In contrast, where there is no repudiatory breach, but there is a contractual right to terminate, it is the terminating party's election to terminate that is treated as being the effective cause of the loss of bargain. This is unsurprising … for a breach to be repudiatory it must be sufficiently serious as to deprive the innocent party of substantially the whole benefit of the contract. Put another way, it goes to the root of the contract. The breach itself, by its nature, destroys the original bargain…. However, if a contractual right to terminate arises either where there is no breach at all, or there is only a non-repudiatory breach (which, of itself, does not, ex hypothesi, destroy the bargain), it is right that the election to terminate should be seen as being the effective cause. In a case where the contractual right to terminate arises where there is a (non-repudiatory) breach, the breach may be a but-for cause of the loss of bargain (without it, the right to terminate would not arise), but the effective cause is the terminating party's election to terminate…. Again, this is because a non-repudiatory breach, by its nature, does NOT destroy the bargain; it does not deprive the innocent party of substantially the whole benefit of the contract. The innocent party deprives himself of substantially the whole benefit of the contract by exercising his contractual right to terminate. The causation analysis underlies the decision in *Financings*."

62. Mr Russell drew further support for the causation explanation of the damages for "loss of bargain" distinction drawn in *Financings* (as between termination for repudiatory breach under the common law and termination under an express termination clause) from obiter dicta in, for example, *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobras ("The Kos")* [2012] UKSC 17; [2012] 2 AC 164, at para 52; *Phones 4U Ltd v EE Ltd* [2018]

EWHC 49 (Comm); [2018] 2 All ER (Comm) 315 ("*Phones 4U*") at para 75; and in the High Court of Australia case of *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, at pp 175 and 186. So, for example, in *Phones 4U* Andrew Baker J said, at para 75:

> "… only if an actual breach has deprived the innocent party of substantially the whole of its bargain, or is set to do so, does it seem appropriate in principle to treat the innocent party's decision to walk away as caused by the breach; and then if the decision to walk away is appropriately treated as caused by the breach, damages for that breach should rightly include damages for the loss of the bargain."

63. Mr Russell also relied on a very clear passage in *McGregor on Damages*, 22nd ed (2024), at para 9–152 (although that passage has subsequently been removed, and the discussion moved from causation to "scope of duty", in the first two supplements to that work at paras 9–160A and B, apparently in response to the decisions of the lower courts in this case). The passage read as follows:

> "One particular issue of causation that arises in relation to damages for breach of contract concerns whether damages can be claimed for the loss of a bargain following termination for a breach that is not repudiatory. Damages for lost profits following termination can only be recovered where the termination arises due to a repudiatory breach. [There is a footnote reference here to *Financings*.] The reason for this is that the general law's recognition that a breach is sufficient for termination means that when termination occurs the breach has caused the loss of the bargain. But if the right to terminate arises only by some contractual provision, the trigger of which might be described as a breach or might not, then it is the innocent party's reliance upon the contractual provision, not the breach, that causes the loss of the bargain."

64. One immediate difficulty with the causation explanation, at least as articulated by Mr Russell, is that it is clear law that a repudiatory breach has no effect on the contract unless and until it is accepted by the innocent party as terminating the contract. Contrary to a step in Mr Russell's analysis, the repudiatory breach does not itself destroy the bargain. In the famous words of Asquith LJ in *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421:

> "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind."

65. Moreover, if one were then to say merely that the bargain is lost if and when the innocent party chooses to accept a repudiatory breach as terminating the contract, there appears to be no distinction, as a matter of causation, between that situation and one where the innocent party chooses to terminate the contract under an express termination clause. If the effective cause of the loss of bargain is the innocent party's choice to terminate (under an express termination clause), it would appear that that choice should equally operate as the effective cause, thereby ruling out damages for loss of bargain, where the innocent party is terminating for a repudiatory breach.

66. A further difficulty is that, where the event triggering the express right to terminate is, on the facts, a breach by the other party (whether repudiatory or not), that breach is very likely to be an effective cause (ie a legal cause) of any resultant loss. Indeed, in the present case the arbitrators found that "the cause of the Buyers' loss of profits was Sellers' failure to deliver, and this caused Buyers to bring the MOA to an end" (para 165). That would appear to be a finding that the breach comprising the failure to deliver was not only a factual cause of the loss of bargain (applying a "but for" test) but was also an effective (ie a legal) cause of the loss of bargain. This is in line with the application of ordinary principles of legal causation: the exercise of the right to terminate did not break the chain of causation (ie was not a *novus actus interveniens*) between the breach and the loss of bargain. In particular, the Buyers' conduct in terminating under the express termination clause was not unreasonable, let alone so unreasonable as to break the chain of causation from the breach to the loss of bargain: see, for example, *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm); [2011] 1 Lloyd's Rep 482, at paras 44–45, 47.

67. Nevertheless, let us assume, in the Sellers' favour, that some form of causation analysis does provide an explanation of *Financings*. For example, it might baldly be said that *Financings* is a decision that establishes what counts as the essential or legal cause of a loss of bargain in the context of termination under an express termination clause. If the innocent party is terminating the contract under an express termination clause, the essential (ie legal) cause of the loss of bargain is the exercise of the right conferred by the express termination clause; and that it is irrelevant to the exercise of that right whether or not the event permitting termination is classified by the law as a breach so that damages for loss of bargain are not recoverable.

68. Even on that assumption, Mr Russell's submissions fall short. That is because, in this case the Sellers must go beyond a causation explanation for why damages for loss of bargain are unavailable where the innocent party has terminated the contract under a "bare" express termination clause (as was effectively the position in *Financings* because the minimum payment clause was unenforceable as a penalty). Rather they need to explain the relevance of, what we can for shorthand refer to as, the "*Financings* causation principle" to the interpretation of clause 14B. That is, we are not here concerned with a bare express termination clause (as clause 14A would be if it stood alone). Rather we have an express termination clause (clause 14A) plus an express compensation clause (clause 14B) and the focus is on the correct interpretation of clause 14B.

69. It was for this reason that, as made particularly clear in his oral submissions, Mr Russell developed his causation argument so as to be directly relevant to the interpretation of clause 14B. He pointed out that it is (now) common ground that "due compensation" in clause 14B means appropriate compensation taking into account the common law principles, applicable to damages, of causation, remoteness and mitigation. As we have mentioned at para 16(1) above, Dias J expressly said at para 45(i) of her judgment, and this was approved by Nugee LJ at para 71:

> "'*due compensation*' means compensation which is appropriate applying the usual common law principles of causation, remoteness and mitigation."

Mr Russell then submitted that because the decision in *Financings* is explicable as a matter of causation, clause 14B must be interpreted as embracing the *Financings* causation principle just as it embraces, for example, remoteness, mitigation, and the normal principles limiting damages by reason of legal causation (ie intervening cause).

70. Although at first sight having some force, we reject this submission. The assumption being made is that the *Financings* causation principle provides an explanation for why termination under an express termination clause does not trigger damages for loss of bargain. But where the parties have gone on, beyond a bare express termination clause, to provide an express compensation clause (as they have done here with clause 14B), it would defeat the purpose of that express compensation clause if one were to interpret it in line with the *Financings* causation principle. In other words, the role of the *Financings* causation principle will have been exhausted in so far as one is interpreting an express compensation clause rather than a bare express termination clause. Put another way still, subject to there being words to the contrary, there is no good reason to interpret an express compensation clause as incorporating the *Financings* causation principle. Of course, it would be possible for the parties to agree an express compensation clause that rules out loss of bargain damages. But there are no such words in clause 14B excluding damages for loss of bargain.

71. There also appears to be an inconsistency in Mr Russell's submission. As indicated by Mr Lewis, if the *Financings* causation principle were to be applied in interpreting clause 14B, it would logically mean not merely that there could be no compensation for loss of bargain but also that there could be no compensation for wasted expenses. That is because, if Mr Russell's argument were correct, the wasting of the expenses would also be legally caused not by breach but by the exercise of the right to terminate conferred by the express termination clause. Yet Mr Russell accepted (as he inevitably had to because of the clear wording referring to "expenses") that compensation for wasted expenses could be recovered under clause 14B.

72. We therefore reject Mr Russell's submissions concerning the causation principle.

(2) The clear words principle

73. Mr Russell further submitted that, because the Buyers' argument on clause 14B is that that clause confers a right to loss of bargain damages that would not arise at common law (given that there has been no repudiatory breach), clear words are required; and the words "due compensation to the Buyers for their loss…" are not sufficiently clear to cover loss of bargain damages. In the Sellers' written submissions (at para 53), this (alleged) principle, that "clear words are required to create a right to damages where no such right would arise at law" was labelled the "*Novasen* presumption" in the light of Popplewell J's judgment at para 17 in *Novasen SA v Alimenta SA* [2013] EWHC 345 (Comm); [2013] 2 All ER (Comm) 162 ("*Novasen*").

74. In considering this submission, it is helpful to start by considering the uncontroversial and well-established principle that clear words are required if a clause is to be interpreted as taking away or excluding a party's rights or remedies. Numerous cases can be referred to as exemplifying this principle.

75. A seminal case is *Gilbert-Ash (Nothern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689. The question was whether, on the correct interpretation of a clause in a building contract, the head-contractor had given up its common law right to a set-off (ie an abatement of price) in respect of a breach of contract by the sub-contractor whose work was late or defective. It was held that that right had not been given up. Lord Diplock said at p 717:

> "It is, of course, open to parties to a contract … to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."

At p 718, he continued:

> "So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or

> work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract."

76. Similarly, in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, the House of Lords held that, while there is no "fundamental breach" rule of law, clear words will be needed if a clause is to be interpreted as excluding liability for a party's own negligence or deliberate acts. As Lord Wilberforce, giving the leading speech, said, at p 846:

> "in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary…. Whether, in addition to negligence, [the exclusion clause] covers other, e.g., deliberate, acts, remains a matter of construction requiring, of course, clear words."

77. Another, and more recent, relevant leading case, which was heavily relied on by Mr Russell, is *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29; [2021] AC 1148. One of the questions at issue was the meaning of "negligence" in a clause in a contract for the supply of a software system. The Supreme Court held that it bore its ordinary legal meaning so that damages flowing from that negligence had not been capped (and, in that sense, the claimant's normal rights and remedies had not been restricted). Lord Leggatt, with whom Lord Burrows agreed, said the following at para 106:

> "*Clear words needed to restrict valuable rights*
>
> … [A] further reason for giving the word 'negligence' its straightforward and ordinary legal meaning is that clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would have had at common law (or pursuant to statute)."

78. Lord Leggatt cited from the above two House of Lords decisions and referred to many other authoritative statements to similar effect quoted in *Lewison, The Interpretation of Contracts*, 7th ed (2020) paras 12.144–12.161 (see now 8th ed (2024) paras 12–24 – 12–41). He also cited from Moore-Bick LJ's helpful additional comment in *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27, para 23, that "The more valuable the right, the clearer the language will need to be."

79. The most recent invocation of this principle by the Supreme Court was in *MUR Shipping BV v RTI Ltd* [2024] UKSC 18; [2025] AC 675 where, at para 44, Lord Hamblen and Lord Burrows said:

> “one may regard it as a general principle of contractual interpretation that parties do not forego valuable rights without it being made clear that that was their intention.”

80. What is the reason for this insistence on clear words? As Moore-Bick LJ explained in *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691; [2011] 1 All ER (Comm) 1077, at para 29, the simple answer is that it is not normally the case, or, as one might otherwise put it, it is inherently unlikely, that parties give up valuable rights without making it clear that they intend to do so.

81. In some situations, the common law may also have been seeking to protect a weaker party against an unfair term (although, in modern times, this policy has been more precisely achieved by legislation such as the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015).

82. The difficulty for Mr Russell, in invoking the clear words principle, is that we are not here dealing with the taking away of rights or remedies that the sellers would otherwise have had. Rather we are dealing with the different and converse situation where the Buyers are alleging that, by clause 14B, they have been given additional rights to those they would have enjoyed at common law.

83. Mr Russell accepts that this is a converse situation to the normal application of the clear words principle but precisely submits that the clear words principle applies equally to that converse situation. His written submission, at para 53, reads as follows: “There is a converse presumption (“the *Novasen* presumption”), that clear words are required to confer a right to damages where no such right would arise at law.”

84. We reject Mr Russell’s submission. Taking away rights or remedies is significantly different from conferring additional rights or remedies. It is not inherently unlikely that a party may intend to confer on the other party additional rights to those available at common law; nor would such a clause indicate potential unfairness. Indeed, taken to its absurd logical conclusion, Mr Russell’s submission would mean that almost every contractual clause would be subject to a clear words principle given that almost every contract is conferring on the parties rights and remedies that they would not otherwise have had.

85. More specifically, there is no justification for requiring clear words in order for clause 14B to be interpreted as conferring compensation for a loss of bargain. It is not inherently unlikely that the parties would intend compensation for loss of bargain to be recovered where there has been termination under an express termination clause. Nor is there any unfairness in conferring such a remedy.

86. Mr Russell relied primarily on what was said by Popplewell J in *Novasen*, at para 17. The sellers under a cif contract for the sale of crude groundnut oil, with shipment from Senegal, repudiated the contract which was accepted by the buyers on the same day (2 April). The sellers contended that the buyers had suffered no loss and were therefore entitled only to nominal damages because, had the contract continued in force, the contract would in any event have come to an end on 2 May without liability on the part of the sellers. That would have been so because of an order prohibiting exports from Senegal. There was a clause in the contract which laid down, inter alia, that in the event of breach by the sellers, the buyers could recover damages in so far as they had gone into the market to buy replacement goods (which, on the facts, the buyers had not done).

87. Popplewell J held that the buyers could recover only nominal damages because, applying the compensatory principle applicable to damages at common law and, in particular, the decision in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha ("The Golden Victory")* [2007] UKHL 12; [2007] 2 AC 353, the buyers had suffered no recoverable loss at common law. The clause in the contract as to damages did not give them any recovery either.

88. Having cited the passage from Lord Diplock's judgment in *Gilbert-Ash* at p 717 set out above, Popplewell J said this at para 17:

> "The issue before me is the converse of that which was there being considered, which was whether a right to damages or other remedy conferred by law was excluded by contract; whereas in this case the question is whether the contract confers a right to damages where no such right would arise at law. Nevertheless in my view similar principles should apply. The parties should be taken to have contracted against the background that their remedies will, in the absence of specific contrary agreement, be regulated by the system of law chosen to govern their contractual relations. If no remedy, in the form of an entitlement to damages, is conferred by law, clear words will be required to confer a contractual entitlement to such remedy. That is especially so where (a) the contractual term is a standard clause drafted and adopted by a trade body and (b) the contractual term is to confer a right of recovery in circumstances where no loss has in fact been suffered. Such a

> remedy is contrary to the compensatory principle governing the quantum of damages for breach of contract. The majority of the House of Lords in *The Golden Victory* [2007] 2 All ER (Comm) 97 decided that this compensatory principle should take precedence over considerations of certainty and finality in that case. If, as is not contested, those principles would apply equally to the contract and breach in this case, so that considerations of certainty and finality would not be sufficient to confer on the buyers an entitlement at law to recover where with hindsight it can be seen that no loss has occurred, it would require, in my judgment, clear words if the parties wished to achieve the opposite result. Considerations of certainty and finality are undoubtedly matters which might lead parties to wish to do so. But the starting point, in commercial dealings as in the law, is that a party claiming damages for breach of contract should be entitled to recover no more that the loss occasioned by the breach."

89. For the reasons we have given in paras 84 and 85 above, we do not agree that, in general, similar principles apply as between taking away rights and remedies and conferring rights and remedies. There was no need for Popplewell J to rely on a "clear words" principle to reach the decision he did: the same result would have been reached applying ordinary principles of interpretation to the default clause. But in any event, the facts of that case are distinguishable from this case. In *Novasen*, no recoverable loss had been suffered, applying the common law compensatory principle, and we would accept that clear words would have been needed to override that fundamental compensatory principle. That is because it is inherently unlikely that parties would agree to a clause conferring a right to compensation where the party has not suffered any loss. But in our case, applying the compensatory principle, a loss of bargain has been suffered by the buyers so there is no question of the express compensation clause overriding the compensatory principle by conferring a right to damages where no loss has been suffered.

90. Mr Russell relied on two other cases: *Spar Shipping AS v Grand China Logistics Holding (Group) Ltd, ("The Spar Capella"),* at first instance [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep 407, and Lord Sumption's judgment (which was one of two leading judgments) in *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 2 Lloyd's Rep 469.

91. In *The Spar Capella*, a principal question at issue was whether prompt payment of hire in time charters generally, and specifically, on the facts, in the New York Produce Exchange 1993 form, was a condition or an innominate term. Popplewell J held that it was the latter and his decision to that effect was upheld by the Court of Appeal: [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447. In the course of a wide-ranging review, he suggested at paras 98 and 190 (albeit without mentioning *Novasen*) that, in line with *Financings*, "clear language" would be needed to confer a right to damages where there

has been termination under an express option to cancel rather than termination for repudiatory breach.

92. For the reasons already given, we disagree with this emphasis on a requirement of clear language and that suggestion was unnecessary to Popplewell J's decision. But, in any event, his comments were addressed to a bare express option to cancel whereas in this case we are concerned with the interpretation of an express compensation clause (clause 14B).

93. There was no mention in the judgments in the Court of Appeal in *The Spar Capella* of Popplewell J's "clear language" suggestion.

94. In *Bunge v Nidera* the Supreme Court confirmed that, first, *The Golden Victory* had been correctly decided and that the compensatory principle identified in that case was not limited to instalment contracts but extended to a single sale; and, secondly, that the default clause (clause 20) in GAFTA form 49 (the standard form of fob sale contract of the Grain and Feed Trade Association) did not override that compensatory principle. In respect of the second point, it was argued by counsel for the sellers that there was a presumption that an express damages clause was not intended to depart from the compensatory principle applied in *The Golden Victory*, ie that unless the contract provided otherwise in clear terms, damages would not be awarded where no loss had been sustained. While rejecting any wider presumption, Lord Sumption accepted, at para 26, that

> "A damages clause may be assumed, in the absence of clear words, not to have been intended to operate arbitrarily, for example by producing a result unrelated to anything which the parties can reasonably have expected to approximate to the true loss."

Later at para 35, he approved Popplewell J's decision in *Novasen* as being "consistent with principle" because:

> "The alternative is to allow the clause to operate arbitrarily as a means of recovering what may be very substantial damages in circumstances where there has been no loss at all."

95. Lord Sumption's reasoning is consistent with our analysis of *Novasen* at para 89 above. We accept that clear words would be needed if an express damages clause were to override the compensatory principle by giving compensation where no loss has been suffered. But there is no wider presumption, as argued for by Mr Russell in this case. In

any event, the facts of this case are distinguishable from *Bunge v Nidera* for the same reason as they are distinguishable from *Novasen:* ie a loss of bargain has been suffered by the Buyers so there is no question of the express compensation clause overriding the compensatory principle by conferring a right to damages where no loss has been suffered. In the language of Lord Sumption, there is nothing "arbitrary" about the express compensation clause in this case (clause 14B) conferring compensation for loss of bargain.

96. Finally, we note, albeit to reject, a further submission of Mr Russell put forward at the hearing, to the effect that in interpreting clause 14B there is an analogy to be drawn with the requirement for a clear common intention if a term in a contract is to be classified as a condition rather than an innominate term. In that area of the law, it can be said that the modern starting point is a presumption that all terms are innominate and one therefore needs a clear contrary intention if a term is to be classified as a condition. But there is no equivalent starting presumption in respect of the conferral of additional rights on a party.

97. We therefore reject Mr Russell's submissions concerning the clear words principle.

9. Conclusion

98. Our strong prima facie conclusion on the proper interpretation of clause 14 has not been displaced by the main submissions of the Sellers. For all the reasons we have given, we reject the Sellers' case and uphold the Court of Appeal's interpretation of clause 14 of NSF 2012. The answer to the question of law upon which permission to appeal to the Commercial Court was granted (see para 15 above) is:

> If a Memorandum of Agreement on the SALEFORM 2012 form is lawfully cancelled by a buyer under clause 14 because the vessel is not delivered by the cancelling date as a result of the seller's "proven negligence", the buyer is entitled to recover loss of bargain damages even though there has been no accepted repudiatory breach of contract.

99. The appeal is accordingly dismissed.