Neutral Citation Number: [2022] EWHC 3196 (Comm)

Case No: CL-2020-000246
and CL-2020-000559

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

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

Date: 16/12/2022

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

B E T W E E N: -

HAVILA KYSTRUTEN A.S.

Claimant

- and -

ABARCA COMPANHIA DE SEGUROS, S.A.

Defendant

AND B E T W E E N:-

HIJOS DE J BARRERAS S.A

Claimant

- and -

HAVILA KYSTRUTEN A.S.

Defendant

- -
- -

Sean O'Sullivan KC and Rani Noakes (instructed by **Watson Farley & Williams LLP**) for **Havila Kystruten A.S.**

Gemma Morgan and Joseph Gourgey (instructed by **Preston Turnbull LLP**) for **Abarca Companhia de Seguros SA**
Paul Henton (instructed by **Preston Turnbull LLP**) for **Hijos de J. Barreras SA**

Hearing dates: 11-15 and 18-22 July 2022
Draft circulated to parties: 2 December 2022

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.

.....

Mr Justice Henshaw:

(A) INTRODUCTION

1. These claims concern the termination of two shipbuilding contracts dated 10 April 2018 between Havila Kystruten AS ("***Havila***") and Hijos de J. Barreras SA ("***the Yard***") (together, "***the SBCs***") for the design and build of two coastal passenger vessels for a price of EUR 108 million per vessel ("***the Vessels***").

2. The Yard purported to terminate the SBCs on 24 November 2019 on grounds including that Havila had failed to comply with an obligation arising under addenda to the SBCs to provide a written committed statement of its financing for the Vessels, and that (pursuant to the contractual mechanism) the parties had concluded that there was no other financial arrangement to be provided by Havila in order to avoid termination and/or cancellation of the SBCs. The Yard seeks, among other relief, payment of two instalments which it claims fell due from Havila prior to termination, and damages.

3. Havila claims that the Yard was not entitled to terminate pursuant to those provisions. Havila itself in due course gave notice to terminate the SBCs, on various grounds, on 11 February 2020. On that basis, Havila claims (a) the recovery from the Yard of three instalments which it had already paid to the Yard at the time of termination, in the aggregate sum of €18,400,000 per Vessel, and (b) the same sums from Abarca Companhia de Seguros SA ("***Abarca***") under a series of six insurance bonds dated 1 March, 30 April and 27 May 2019 (collectively "***the Bonds***"). The Bonds provided security to Havila (the exact nature of which I consider later) in the event of termination of the SBCs and a claim by Havila to recover instalments it had paid to the Yard.

4. This judgment follows a trial of these issues in July 2022. For the reasons set out below, I have concluded that the Yard was not entitled to terminate the SBCs; that Havila was entitled to and did validly terminate the SBCs; and that Havila is entitled to recover the instalments from the Yard and, under the Bonds, from Abarca.

5. On the first and second days of trial, the Yard advanced an application, issued on 28 June 2022, for permission to amend to add an additional claim against Havila for approximately €32.8 million, representing further instalments said to be due from Havila to the Yard under the SBCs. I gave a brief ruling, to the effect that I would not permit the proposed amended case to be advanced at the present trial; and I would decide as part of, or concurrently with, my judgment following trial whether to allow the amendment to be advanced in the context of the second phase of the case (if any). The potential for a second phase existed following an agreement that if the Yard succeeded in principle in its damages claims against Havila, then those would be determined later. I indicated that I would give my reasons for the ruling at the same time as handing down judgment on the substantive issues, in order to minimise disruption to the trial. My reasons are set out in the Annex to this judgment.

(B) PRINCIPAL ISSUES

6. The main issues can be summarised as follows:

   i) whether the Yard was entitled to terminate the SBCs for breach of Havila's obligations under Addendum 7 to the SBCs (as construed by reference to Addendum 8);

   ii) if so, whether the Yard waived any such right;

   iii) whether the Yard was entitled to terminate the SBCs for breach of Havila's obligations under Addendum 9 of the SBCs;

   iv) if the Yard did not validly terminate the SBCs, whether Havila was entitled to terminate them:

      a) on the basis of the Yard's purported termination having been a repudiatory act which Havila accepted;

      b) under Article IV.1(d) of the SBCs (vessel delivery); and/or

      c) under Article XII.3 of the SBCs (insolvency proceedings).

   v) whether the insurance bonds issued by Abarca are in the nature of 'on demand' bonds, and whether they respond to a damages claim following termination by Havila of the SBCs at common law; and

   vi) if the Yard was entitled to terminate the SBCs, whether it is entitled to claim damages from Havila for wasted expenditure.

(C) WITNESSES

7. Havila called Per Saevik, Stein Pettersen, Arild Myrvoll and Alfredo Cabellos Ballenilla as witnesses of fact.

8. Mr Saevik is the founder of the Havila group, whose holding company is Havila Holding AS. He is Chief Executive Officer of Havila Holding AS and chairman of Havila Kystruten AS's board of directors. Although I felt that a few of his answers were unfocussed, I am satisfied that once he clearly understood the questions being asked, he answered them to the best of his ability, and that overall he was a good witness.

9. Mr Pettersen is counsel at the Bergen office of Wikborg Rein Advokatfirma AS, a law firm which acts for Havila and other companies in its group. His main role was to advise and assist on the contractual documentation for the project. I am satisfied that he gave his evidence fairly and to the best of his recollection. He could occasionally be slightly argumentative in his oral evidence, but overall I found his evidence reliable.

10. Mr Myrvoll is the former Chief Executive Officer of Havila, a position which he held from 1 August 2018 to July 2021. He was a good witness.

11. Sr Cabellos is a partner at Watson Farley & Williams Spain SL, and acted for Havila in relation to these transactions, particularly on integrating Havila's financing with a Spanish tax lease structure. He was a good witness.

12. Abarca presented significant parts of the case on behalf of both itself and the Yard, including calling witnesses from *inter alia* the Yard. Abarca/the Yard called Juan Gonzalez-Crespan ("***Sr Gonzalez***"), Carlos Perez-Bouzada, Fernando Morales ("***Sr Morales***"), Luiz Fernandez Santos ("***Sr Santos***") and Luis Fernandez ("***Sr Fernandez***") as witnesses of fact. For ease of exposition, I have referred from time to time in this judgment to submissions made by "*Abarca*", even where (as was frequently the case) the Yard also joined in them.

13. Sr Gonzalez was Chief Financial Officer of the Yard at all material times. He resigned on 26 September 2019. On the whole he gave his oral evidence in a straightforward way, though he sometimes sought to answer before the question had been asked, or to argue the case. He made clear that he did not generally take notes of meetings, so that when saying what had occurred at them was reliant on either his memory and/or ensuing emails or agreements.

14. Sr Perez-Bouzada is a lawyer with Berbes Abogados, who acted for the Yard in relation to these transactions at all material times. Although I have not accepted all of his evidence, in general he gave his evidence fairly and was willing to make appropriate concessions, as recorded later in this judgment.

15. Sr Morales is Chief Executive Officer of Abarca. He gave his evidence in a generally straightforward manner, though once or twice I felt he had not really grasped or focussed on the question being asked.

16. Sr Santos is a lawyer at KPMG, who acted for Abarca and for the syndicate of guarantors backing the Yard. I felt somewhat limited in the degree to which I could rely on his evidence, since (as noted later) he indicated that although he probably did take notes of the relevant meetings, he did not feel it necessary to consult them before giving evidence.

17. Sr Fernandez is Head of Bonds and General Manager at Barents Re, Spain, the reinsurer of the refund bonds. He was an unsatisfactory witness, who appeared unwilling to provide direct answers to a number of questions (see §§ 77 and 189 below).

18. The parties also called expert evidence on certain issues of Spanish law. Sr Pablo Urena was called by Havila, and Dr Manuel Penades by Abarca/the Yard. I am satisfied that both experts were of sufficient competence and experience, and set out their opinions genuinely and fairly.

(D) FACTS

(1) The parties

19. Havila is a Norwegian shipowner. The Havila group manages a number of ships involved in offshore and sub-sea operations in South America, Asia, and Norway.

20. The Yard is a Spanish shipyard specialising in, *inter alia*, the construction of passenger transport vessels. It went into administration in January 2022.

21. Abarca is the insurance company which granted the refund security for the instalments paid by Havila under the SBCs.

(2) Background to the SBCs

22. Havila entered into the SBCs in order to provide vessels for the purposes of a Service Agreement which it concluded with the Norwegian Ministry of Transport and Communication on 10 April 2018. That agreement required services to be provided by four coastal passenger vessels for a duration of 10 years commencing on 1 January 2021. Havila planned to have two of the four vessels constructed by the Yard, and two at an unrelated shipyard in Turkey, Tersan. Havila provided a basic design for the Vessels through its associated company, Havyard Design, and parts of the instalments due from Havila were needed in order to pay Havyard Design for their services.

23. The intended financing structure for the project, viewed as a whole, included the following elements:

    i) The Yard's lenders would provide it with a credit facility to ensure cash flow for the project was available, bearing in mind that the larger part of the purchase price for the Vessels was payable only on delivery.

    ii) Refund guarantees would be put in place to secure any repayments of instalments from the Yard to Havila.

    iii) A Spanish tax lease would be deployed for each Vessel, pursuant to the Tax Lease and Royal Decree no. 874/2017. A Spanish tax lease is a means by which tax investors can obtain capital asset depreciation allowances to offset against other tax liabilities, through funding and ownership of an asset, thereby reducing the potential cost of the purchase to the buyer but maintaining the level of receipt by the seller. Typically, the tax investors will own a stake in a special purpose company ("*AIE*") that will enter into a finance lease with an arranging bank. The AIE will, in turn, bareboat charter the ship to the intended buyer for the tax lease period, at the end of which the buyer will either acquire the ship or the shares in

the AIE. In return, the tax lease investors share some of their tax benefits with the shipyard. It is apparently common for Spanish shipyards to offer to arrange tax leases with a view to these benefits being used to make their prices more competitive.

24. The refund guarantees referred to in (ii) above were, in the scheme as it eventuated, to be provided by Abarca in the form of insurance bonds, i.e. the Bonds, in respect of 100% of the instalments to be paid. Abarca would in turn be indemnified as to 50% of any loss suffered by CESCE, the Spanish expert credit agency, under a counter-guarantee. The financial stakeholders on the Yard's side would all communicate through Abanca, a Spanish bank, acting as representative.

25. At the forefront of Abarca's/the Yard's arguments are the points that:

    i) the contract under which Abarca was to provide the Bonds, namely the Policy for Issuance of Repayment Guarantees and Surety Bonds dated 6 March 2019 ("***the Policy***"), would become effective only if (a) Havila's pre- and post-delivery financing became effective and (b) the CESCE Policy and the Counter Guarantee had been signed; and

    ii) CESCE would issue the counter-guarantee only if Havila had *"financing of the purchase of the vessel… signed in terms satisfactory to CESCE*" and its insured parties (Abarca and its syndicate) had confirmed *"[t]he existence of sufficient financing for the execution of the entire project… as well as the availability of the funds subject to said financing"* (those quotations being taken from a policy wording provided by CESCE under cover of a letter dated 21 May 2019, albeit, as appears below, there are some indications that versions or drafts of the CESCE policy were in existence well before that date).

    The extent to which these matters were known to both parties at relevant times, in particular when certain Addenda to the SBCs were entered into, and their relevance to the correct construction of those Addenda, are central issues in this case.

(3) The SBCs

26. The SBCs were entered into on 10 April 2018, restated on 24 April 2018. They are expressed to be governed by English law. Under the SBCs, the Yard contracted to design, build, launch, equip, complete, sell and deliver the Vessels. The Vessels were given hull numbers 1710 and 1711. The purchase price of €108 million per vessel was to be paid in seven instalments (Article III), with delivery on 10 October 2020 (Article II.6). The key terms of the SBCs included the following:

    i) Article III set out the original price and payment terms. The Contract Price was payable by way of pre-delivery, delivery, and post-delivery instalments. The instalments were triggered by specified events, including, for example, steel cutting for the second instalment.

    ii) Havila's obligation to pay the pre-delivery instalments was subject to the Yard providing refund guarantees from *"major first class Spanish financial institutions or first class insurance company, in both cases acceptable to the Buyer, securing the*

repayment obligation of the Builder if the contract is lawfully cancelled…" (Article III.3).

iii) Article III.3 required Havila *"within 15 June 2018 [to] provide to the Builder [i.e. the Yard] written confirmation from the bank(s) and/or financial institution(s) providing the long-term financing arrangement of the Vessel for the purpose of enabling the Builder to reasonably satisfy himself that the Buyer has financial arrangements or resources to pay the instalments when due"*.

iv) The original delivery dates in Article VII were 10 October 2020 for Hull 1710 and 20 November 2020 for Hull 1711.

v) Article IV(1)(a) and (d) permitted Havila to cancel the SBC if it was established beyond reasonable doubt that the Vessel's delivery would be delayed by more than 180 days.

vi) The cancellation provisions in Article XII provided as follows:

a) Havila was entitled to cancel for delay as indicated above (Article XII.1 and Article IV(1)(a) and (d)). Upon cancellation, Havila was entitled to a refund of all the sums it had paid under Article III, plus interest at 5% per annum from the date of payment to the date of return (Article XII.1).

b) Either party was entitled to cancel where proceedings were commenced by or against the other party "*for winding up, dissolution or reorganisation*" (Article XII.3, "*Insolvency"*). Upon such cancellation by Havila, Havila was again entitled to a refund of instalments paid with interest.

vii) Article XXI provided that although the SBCs were effective on signing, they were subject to various conditions subsequent, including those listed below. These, if not met by 30 June 2018 or extended by agreement prior to that date, rendered the SBCs null and void and precluded either party from claiming compensation from or having liabilities to the other. There needed to be:

a) an implemented Spanish tax lease scheme and subsidy structure under Spanish Royal Decree no. 874/2017 acceptable to both parties;

b) "*[c]onfirmation from the Builder that the Builder has obtained satisfactory pre-delivery financing of the Vessel*";

c) "*[c]onfirmation from the Buyer that the Buyer has obtained construction and long-term financing of the Vessel*" (mirroring the obligation in Article. III.3); and

d) refund guarantees issued to secure the 1st instalment, in accordance with Article III (3)(a).

27. There were nine Addenda to the SBCs, to which I refer in their approximate chronological places.

28. Abarca originally relied on evidence of dealings between the parties leading up to the conclusion of various Addenda to the SBCs for the purposes of, *inter alia*, contentions

based on rectification (specifically of Addendum 7) and/or an estoppel by convention. Those arguments were no longer pursued by trial. However, Abarca/the Yard maintained their submission that the dealings were, at least in large part, relevant to the factual matrix in which the Addenda were concluded, including in particular the parties' knowledge of CESCE's requirements regarding Havila's financing. For this reason it is necessary to set out this part of the factual narrative in some detail, before turning later to assess the conclusions that can be drawn from it.

(4) Events leading up to Addendum 7 (signed 28 February 2019)

29. Havila originally intended to obtain pre- and post-delivery financing from a Chinese lender, BoComm Financial Leasing Co. Ltd ("***BoComm***"). On 3 July 2018 Mr Pettersen sent a message to the Yard stating that *"[Havila] has agreed a term sheet for a financial lease arrangement … to be provide by BoComm".*

30. Representatives of Havila and the Yard met in Madrid on 18 July 2018. Sr Perez-Bouzada's written evidence was that, to the best of his recollection, Mr Pettersen said at this meeting that Havila *"expected to sign their financing documentation with BoComm by the end of October 2018"*, adding that Mr Pettersen was not thereby referring to the BoComm term sheet, which Mr Pettersen had said was already agreed. In oral evidence he accepted that it was possible that Mr Pettersen was in fact referring to a revised term sheet. That would be consistent with an email from Mr Pettersen a few days after the meeting, dated 29 July 2018, in which he proposed extending to 31 October 2018 the time for *"the buyer's obligation to document long time financing"*, adding:

> ".. the reason for extending the time limit for documenting buyers long term financing is that Havila Kystruten AS has to re-open the discussions with Bocomm, since the present term sheet is based on a different payment structure and not the "progress payment" as set out above.
>
> As of today we do not know the time required to have a revised term sheet approved by Bocomm, but Havila Kystruten AS is optimistic and really hope that it should be possible to have a reconfirmed term sheet based on a "progress payment" as set out above, much earlier than by the end of October 2018."

I consider it more likely than not that Mr Pettersen at the 18 July 2018 meeting was referring to the objective of having a revised term sheet by the end of October, rather than full loan documentation.

31. Mr Pettersen sent an email to Havila's finance broker on 2 August 2018 attaching a copy of the existing version of the BoComm term sheet. This bore the typed date 9 July 2018 and had been signed by Mr Saevik on 2 August 2018, though it was as yet unsigned by BoComm. It was expressed to be a memorandum of understanding, non-binding save for the provisions on confidentiality and exclusiveness, and subject (among other things) to credit committee approval and final documentation. Mr Pettersen agreed in cross-examination that Havila could not have relied on this term sheet alone as a basis for requiring BoComm to advance funds, referring to it as *"one of several steps which you had to pass in order to have the financing in place"*. Abarca

in its closing relies on this answer as showing that Havila understood that a term sheet was just one step in satisfying the requirements of CESCE. However, that contention begs the question of what Havila understood CESCE's requirements to be. Insofar as Abarca may be making the linguistic point that the answer showed that Mr Pettersen took the words "*financing in place*", in whatever context they may be used, to mean signed loan documentation, I reject it. This particular exchange was specifically to do with whether a term sheet alone is sufficient to require a lender to advance funds. In other contexts, the expression may have other meanings, or indeed no clear meaning: see e.g. § 68 below.

32. On 18 September 2018, the parties entered into Addendum 1. Recital E to the Addendum recorded that *"it will be challenging to finance the construction, building, outfitting, launching and delivery of the Vessel based upon the originally agreed payment structure".* The Addendum increased the number of instalments payable; and extended the date for completion of the conditions subsequent to 20 September 2018 (clause 2.1).

33. Addendum 1 recorded at clause 1.3 that:

> "According to Article III, clause 3 the Buyer has an obligation to provide written confirmation from bank (s) and/or financial institution (s) to provide long-term financing of the Vessel for the purpose of enabling the Builder to reasonably satisfy himself that the Buyer has financial arrangements or resources to pay the instalments when due.
>
> The Buyer has in meetings informed the Builder that a term sheet has been signed with the lender providing the pre and long term financing arrangement for the Vessel ("Buyer's Financing").
>
> The Builder hereby accepts that the statement of the Buyer concerning the Buyer's finance satisfies the financing requirements of the Buyer as set out in Article III, clause 3 of the Contract."

Thus although Abarca in its closing cites the date given in SBC Article III clause 3 (30 June 2018) for the written confirmation as an example of Havila having "*consistently misled*" the Yard about the timing of its financing, the parties in the above provisions accepted that Havila's statements over the preceding weeks had in fact been sufficient to fulfil the need for a written confirmation in order to satisfy the Yard for these purposes.

34. Clause 1.3 continued:

> The execution of the loan documentation for the financing to be provided to the Buyer according to the Buyer's Financing is scheduled to be finalized within 31 October 2018, and the Parties have agreed that if any further or additional confirmation of the Buyer's Financing will be required, such documentation shall be provided by a written confirmation from the lender within 15 November 2018 (or within such extended date to be agreed by

> the Parties if the documentation for the Buyer's Financing of the Vessel is being delayed due to tax-lease arrangement or the revised payment structure as set out in this Addendum No 1."

Addendum 1 did not specify what *"further or additional confirmation of [Havila's] Financing"* might be required.

35. Addendum 1 clause 1.4(iii) required the Yard to provide a bank guarantee for the first instalment at the same time that Havila paid the instalment. Clause 1.7 amended Article III.3(iii) of the SBCs so that Havila's obligation to pay the instalments was subject to the Yard providing a refund guarantee by a well-reputed Western European insurance company or bank acceptable to Havila. By clause 2.2 the Yard agreed to provide Havila, by a "*Short Stop Date*" of 30 September 2018, with a written confirmation from a well-reputed Western European insurance company that the said company would act as refund guarantor under the SBCs. Clause 2.2 also provided that such confirmation should be subject to CESCE executing a counter-guarantee in favour of the insurance company of 50% of the total guaranteed amount. By clause 2.3 the Yard promised to provide Havila with written confirmation from CESCE that CESCE undertook to execute a counter-guarantee in the insurance company's favour. Further, by clause 2.5, if that confirmation from CESCE were not provided by a "*Revised Long Stop Date*" of 15 November 2018, Havila would have the right to cancel the SBCs.

36. Abarca suggests that the deadline in clause 2.5 for CESCE's written confirmation that it would provide a counter-guarantee, 15 November 2018, *"was the same as that for the Buyer to provide its executed loan documentation, for the obvious reason that the former depended upon the latter"*. I do not accept that submission. Clause 1.3 recorded that the execution of the loan documentation was *"scheduled"* to take place by 31 October 2018, and provided for *"any further or additional confirmation"* of Havila's Financing to be provided by 15 November 2018, subject however for an extension to be agreed in the event of certain types of delay in the documentation. Addendum 1 did not thereby make it obvious that the CESCE confirmation depended on Havila' loan documentation having been executed. Further, had that been the intention, one would have expected there to be an explicit deadline for the loan documentation some time in advance of the long-stop date of 15 November 2018 for CESCE's confirmation, rather than simultaneously with it. Sr Perez-Bouzada accepted in cross-examination that it was not clear at this stage what sort of evidence CESCE or the banks were going to require, otherwise Addendum 1 would have provided for it.

37. Abarca submits that Mr Pettersen accepted in cross-examination that the structure of Addendum 1 and the continuation of the contracts hinged upon the requirements of CESCE being met by the execution of loan documentation. However, Mr Pettersen's evidence was in substance to the contrary:

> "Q. And it's right, isn't it, that it was recognised by the structure of addendum number 1 that the execution of the loan documentation, scheduled to be finalised within 31 October, was the hinge upon which everything else rested because, until that happened, there couldn't be the CESCE counter guarantee and then there could be no refund guarantees. That's right, isn't it?

> A. No, that is not right, the way we understood it. At that time we were not aware of that CESCE -- ... We were not aware of that, that there was a requirement that the loan agreement should be executed in order to have this counter guarantee issue from CESCE.
>
> Q. Well, we looked at the scheme, Mr Pettersen, and the starting point is that the execution of the loan documentation is scheduled to be finalised within 31 October and that is the date which you have given the Yard as the likely date, and you then agree that, if anything more is required, then you will provide it by 15 November, and it is obvious --
>
> A. That is correct.
>
> Q. May I finish my question. It is obvious from what you see in clause 2.3 that the potential requirement of further confirmation of the execution of the loan documentation is the potential requirement of CESCE. That's right, isn't it?
>
> A. Yes, it is right, but I will repeat and underline that, at that time, we did not know what was the requirement of CESCE, and I also underline and repeat that the 31 October was what I would say scheduled for having this loan documentation signed up and completed."

Notwithstanding the first four words of the final answer quoted above, the substance of this evidence, which I accept, is that, at least to Mr Pettersen's knowledge, Havila did not know that executed loan documentation would be required before CESCE would issue a counter-guarantee.

38. Following the execution of Addendum 1 the Yard obtained, and forwarded to Havila, Abarca's confirmation dated 28 September 2018 that it had approved the issue of refund guarantees (reinsured by Barents Re), to be submitted to Havila under the contractual terms, subject to CESCE executing in favour of Barents a counter guarantee or insurance covering 50% of the total refund guarantee amounts.

39. There was an exchange of emails between Sr Perez-Bouzada and Mr Pettersen on 1 October 2018, during the course of which Mr Pettersen asked a question about whether CESCE was happy for 100% of Abarca's cover to be reinsured, to which Sr Perez-Bouzada replied:

> "… please note that we are not aware of any issue with Cesce related to the execution of counter guarantees or insurance in favour of the Refund Guarantors. In any case please kindly note that the Builder takes that it is not for the Buyer to deal or make any action regarding Cesce and would therefore kindly request the Buyer and/or its advisors to avoid any dealing or contacts with Cesce."

40. Abanca indicated in an email of 11 October 2018 to the Yard that CESCE had requested *"details of the financing granted to Havila by BoCom (term, amounts, conditions ...)*. Sr Gonzalez passed this on to Havila the same day:

> "Dear Stein, the Spanish ECA, CESCE, inside the process of fulfilling their insurance, is asking our financers and guarantors some information about you as shipowner under the contract.
>
> They need to know any things about your finance from BoComm like:
>
> Term, amounts, conditions...
>
> Could you provide us with it?
>
> If you prefer, directly to them?"

Mr Pettersen replied on 16 October indicating that:

> "… as of today we are not allowed to forward you a copy of the term sheet. We can provide you with a letter from Bocomm confirming the pre- and post delivery financing. Will that be to any help to you?"

Sr Gonzalez replied *"Yes, it will help".* This exchange suggests that Havila still did not understand CESCE to be asking for proof of executed loan documentation; and that the Yard said nothing to Havila in this exchange that would lead it to expect that that was being put forward as a requirement.

41. There was a meeting between Havila and the Yard in Oslo, or possibly by telephone, on 17 October 2018. There was disputed evidence about whether Sr Perez-Bouzada told Mr Pettersen at this meeting that a letter from BoComm confirming Havila's financing would be sufficient for the purpose of providing confirmation of the financing to CESCE. Abarca contended that Sr Perez-Bouzada gave unchallenged evidence to that effect in his second witness statement. Mr Pettersen in his witness statement had said that, following the email exchange quoted above, his side showed the Yard an unsigned copy of the BoComm letter across the table at the meeting, and that although the Yard did not ask to take it, it confirmed that that was all CESCE required. He had been unable to print the signed version at the meeting, but later provided the letter on 19 October 2018 (as mentioned below). In his oral evidence, Mr Pettersen said it was his "*impression*" from the meeting that it was sufficient, that he could not recall 100 per cent what had been said in a meeting 3½ years previously, but his note from the meeting would reflect the vital issues discussed. Abarca in its written closing took this as an opportunity to criticise Mr Pettersen for a *"failure to recall matters which he had so confidently asserted in his witness statement … a running theme of Mr Pettersen's evidence"*. However, Abarca in its cross-examination of Mr Pettersen refrained from taking Mr Pettersen to his note of the meeting, which indeed contained an entry stating:

> "Documentation for HK's financing
>
> - Letter from BoComm will be satisfactory."

In these circumstances I conclude that Abarca's criticism of Mr Pettersen was unfair. On the contrary, it is to his credit that Mr Pettersen fairly acknowledged in his oral evidence that it was difficult to recollect events accurately after such a long term. In the event, the evidence in his statement was supported by his contemporaneous note. The most that could be said is that Mr Pettersen should have made clear in his witness statement that his recollection about the meeting was based to a significant degree on his notes, rather than being pure unrefreshed recollection; but I nonetheless accept the substance of his evidence.

42. Responding to Mr Pettersen's witness statement, Sr Perez-Bouzada in his second witness statement said:

> HJB did not say a term sheet or the BoComm letter was enough for CESCE. HJB had to check with them if it was enough. We could not have told Havila the BoComm letter was enough immediately at the meeting — HJB did not act on CESCE's behalf and CESCE and Abanca did not attend that meeting. I asked Mr Pettersen for a copy of the letter on 19 October 2018 so HJB could ask Abanca / CESCE if it was enough. As I said in my first statement, it was not.

Contrary to Abarca's submission, that is plainly not evidence that Sr Perez-Bouzada told anyone at the 17 October 2018 meeting that a term sheet or the BoComm letter would be insufficient to satisfy CESCE. Insofar as Sr Perez-Bouzada's evidence contradicts Mr Pettersen's evidence that Havila were positively told that a BoComm letter would be enough, I prefer Mr Pettersen's evidence, which is consistent both with his contemporaneous note and with the request set out in the 19 October 2019 email from Sr Perez-Bouzada which I mention below: subject only to the caveat that (as reflected in that email) the Yard may, at the 17 October meeting, also have been seeking information about the main terms of Havila's financing.

43. After some chasers from Sr Gonzalez, Sr Perez too chased for the information on 19 October 2018, asking for *"the Bocomm's letter and main terms of [Havila] financing as CESCE … is insisting on this asap"*. Mr Pettersen replied the same day, attaching what he described as *"a letter from Bocomm confirming the financing o[f] the vessels contracted, and a memo explaining the financing in more detail"*. The BoComm letter said:

> "At the request of the Buyer, we are hereby providing you with these confirmations
>
> 'We - Bocomm Financial Leasing Co, ltd, having the registered address 28'h Floor, 333 Lujiazui Ring Road, Shanghai, PRC and with business registration address 28ù Floor, 333 Lujiazui Ring Road, Shanghai, PRC ("Bocomm") hereby confirm that the Buyer and Bocomm have agreed upon a term sheet for the financing of the Vessels which has been signed on the 2 August 2018 ("Term Sheet").
>
> The Term Sheet includes pre - delivery and long-term financing of the Vessels ("Pre and Post Delivery Financing"), and

> Bocomm intends to provide the Buyer with a financing for each Vessels to the lower of EUR 82,8 million and 90% of the agreed original contract price of each of the Vessels.
>
> The Pre and Post Delivery Financing is subject to final documentation, and the approval of the board of directors of Bocomm. The documentation will include standard provisions for a loan transaction of this nature, and completion of the loan documentation is scheduled within 3l October 2018.
>
> We expect that this letter of intent meets your requirements and are looking forward to the cooperation with the Builder and the Buyer in this transaction."

44. The attached memo was from Mr Pettersen's firm, dated 3 July 2018, and had (as Mr Pettersen explained in his covering communication) previously been sent to the Yard on that date. It explained that Havila had agreed a term sheet for a financial lease arrangement to be provided by BoComm (China's fifth largest bank), and summarised the main terms of the transactions as a whole.

45. The Yard forwarded these documents to Abanca the same day, asking *"will it be enough?"* There is no evidence of any response.

46. Sr Santos said in re-examination that he thought that "*we*" received the offer from CESCE in October or November 2018, and said it contained the condition that the buyer's financing be evidenced to CESCE. The document itself was not in evidence, nor is there any evidence that it was forwarded to Havila. As I mention below, there were certain references to CESCE's offer/policy and some of their terms in correspondence on 17-18 January 2019 and 13 February 2019.

47. Shortly afterwards, on 5 November 2018 Abanca sent to CESCE an information memorandum dated August 2018 from the Yard, seeking 50% CESCE cover for all refund guarantees. On the subject of Havila's financing, the memorandum said "*The Shipowner has closed its financing with a long-term lease with a Chinese bank, it does not need financing in the form of buyer credit*".

48. In the meantime, Havila and the Yard on 19 October 2018 agreed to Addendum 2, which addressed certain technical issues with the Vessels and put back their delivery date to 25 October 2020.

49. Havila paid the first instalments under the SBCs on 24 October 2018, the Yard having obtained temporary guarantees for those instalments from Banco de Sabadell (issued on 8 October 2018). It was intended that those guarantees be replaced once the intended financial structure for the project was in place. Mr Saevik's evidence was that Havila paid these instalments (about € 36.8 million in total) from its own equity, before the BoComm financing was available to draw down, because it was confident that the financing would be put in place – until the BoComm financing ultimately 'crashed' because of the Spanish tax lease problem referred to below.

50. It became apparent by early to mid -November that there were difficulties fitting BoComm's intended lending structure together with the Spanish tax leasing structure.

Difficulties also appear to have arisen from new rules applicable to BoComm, including a prohibition on joint ventures, and other regulatory issues which emerged over the ensuing months. (As Mr Saevik and Mr Pettersen pointed out, the Yard itself wished to use the Spanish tax lease arrangement, in order to help it to be competitive in an international market.) Sr Cabellos recalled a 'brainstorming' meeting on 13 November 2018, between his firm, Havila and the Yard, trying to find solutions. He recollected that the attendees left the meeting realising that the likelihood of the dual Spanish tax lease/BoComm finance lease working was remote.

51. The parties entered into Addendum 3 on 15 November 2018. It recorded in clause 1.1.3 that "*The Parties acknowledge that it will not be possible to meet the requirements as set out in clause 2.3, 2.4 and 2.5, respectively, of the Addendum No 1 and have therefore agreed upon a new long stop date being the 30th November 2018 …*". Addendum 4 was dated 30 November 2019 and Addendum 5 was dated 20 December 2018. These Addenda extended the long stop date for the Yard to provide written confirmation from CESCE for its counter-guarantee, to 30 November 2018, 21 December 2018 and 31 January 2019 respectively.

52. Sr Perez-Bouzada in his witness statement stated that the above extensions were needed because CESCE was unwilling to issue counter-guarantees without having confirmation that Havila's financing documentation was signed; that when each Addendum was signed the Yard believed Havila would be signing financing documents soon; that the extended dates in these Addenda were based on Havila's indications of when they would have their financing documentation signed; and that the Yard told Havila about the situation with CESCE at the meetings mentioned in his witness statement, and in in emails. However, as he accepted in cross-examination, the contemporary documents indicate that the extensions were linked at least in part to dates for CESCE committee meetings. Thus, on 9 November 2019 Sr Gonzalez told Mr Pettersen in an email that the Yard had been informed that CESCE's first committee meeting would be on 20 November, and the second and final meeting on 12 December. Mr Pettersen in his response proposed that a new Addendum 3 extend the long stop date to 30 November 2018 as "*[t]hat will allow us to see the outcome of the meeting which Cesce is going to have on the 20 November 2018*". In his response, Sr Gonzalez suggested that Havila had delayed some information about its finance facility required by CESCE (which Mr Pettersen, in his reply, did not accept) and proposed an extension to 15 December in light of the date for the second CESCE committee meeting. Following a meeting in Madrid on 13 November 2018, the parties agreed in Addendum 3 to the extension to 30 November. Sr Perez-Bouzada accepted that the Addendum 3 extension was probably to do with the timing of CESCE's committees, and that he could not really remember anything specifically linking the Addenda 4 and 5 deadlines to the signing of Havila's finance documentation.

53. Sr Gonzalez in an email of 17 November 2018 envisaged asking CESCE to start drafting their policies once they had given their first approval. An email of 21 November 2018 from Sr Gonzalez indicated that CESCE's first committee approval was given the previous day, and did not mention any suggestion from CESCE that the information provided about Havila's financing was insufficient.

54. BoComm wrote to the Yard on 27 November 2018 confirming that its board had approved a term sheet, and indicating that drawdown would be available once the documentation had been completed and all conditions were fulfilled. Abarca suggests

that this letter must have been sent at the request of either Havila or its financial broker, though Mr Pettersen in cross-examination was unable to say how it came about. Abarca in its closing cites this as a further example of Havila having misled the Yard about the situation, citing Sr Cabellos's recollection of the 13 November meeting (see above). That is a wholly misconceived submission: as Sr Cabellos's evidence written and oral evidence both made clear, the meeting included representatives of the Yard: Sr Gonzalez, Sr Lopez and Sr Perez-Bouzada. The evidence accordingly demonstrates the opposite of the proposition Abarca seeks to advance.

55. By about December 2018, Havila was looking for alternative finance. Although there were various lenders interested in financing Havila's purchase of the Vessels, Havila ultimately selected GTLK as I indicate later.

56. Steel cutting took place on 3-4 December 2018, triggering Havila's obligation to pay the second instalments, of €16.4 million, to the Yard. The Yard's evidence is that it needed money to pay for steel, Havyard Design and other suppliers.

57. Sr Morales said in his second witness statement that he recalled a meeting in KPMG's offices in which all parties were present, including Havila, during which it was made clear that "*we*" needed evidence that they had a signed finance agreement and no such evidence was provided to us. In cross-examination he indicated that he was unsure which meeting it was, though it may have been one that took place on 19 December 2018 at KPMG's offices in Madrid. However, he said he did not recall the content of that meeting. He did not take notes at meetings. I do not consider this evidence a reliable basis on which to conclude that Havila was told, at the 19 December 2018 meeting or any other meeting, that a signed finance agreement was required.

58. Telephone calls took place between Havila and the Yard between 13 and 16 January 2019 during which Havila mentioned that it would be focussing on raising finance from European banks (against the backdrop of its concerns that the BoComm financing was incompatible with the Yard's Spanish tax lease).

59. On 17 January 2019, Sr Perez-Bouzada sent Mr Pettersen an email, headed "*HJB/Havila Insurance Bond*", which included the following passages:

> "A) As agreed yesterday on the phone, please find here below some comments (received from
>
> our banks/insurers) with regard to the bond insurance draft received from Alfredo Cabellos on the 15th January. Kindly please note that we take that the draft is a step backwards as you open new issues. There are also comments in your draft which make reference to matters that we had already agreed (at least on principles).
>
> These are the main issues:
>
> …

> - 10.- You wish to have the right to assign to any other party providing finance which is a new issue (and CESCE forbids). This had already been discussed and agreed; If you have any other party in mind this needs to be specifically stated (CESCE would need to approve it);
>
> - 11.- You request 60 calender days previous notice to be entitled to terminate in case of the inaccurate, false .. information which is a new issue and goes against CESCE policy (it leads to automatic termination)
>
> …
>
> C) Lastly, we would like to stress that we are very concerned about your feedback on the lack of progress of your financing talks with Bocomm. We see that this no progress with Bocomm leads to a dangerous delay with the issuance of the refund guarantees and, therefore, to the payment of the second instalment. You will no doubt agree that this is becoming a burden for the entire project (delivery dates included).
>
> We are glad to hear that you are working on European alternatives to Bocomm which could facilitate some aspects of the projects."

60. The Yard's pleaded case is that this email indicated to Havila that CESCE and/or the refund guarantors did not regard BoComm's statement that a term sheet had been agreed as sufficient for the issue of the counter-guarantee and/or refund guarantees, and that Havila should have known that something more was required by CESCE. In somewhat similar vein, Mr Pettersen was asked in cross-examination why he did not respond suggesting that CESCE should have issued its counter-guarantee already, based on the BoComm term sheet, which would in turn allow the refund guarantees to be issued and the price instalment due to the Yard to be paid. I do not accept the Yard's contentions on this matter. Sr Perez-Bouzada's email did not make any suggestion that the term sheet BoComm had provided was inadequate, nor that no counter-guarantee would be provided until Havila had signed loan documentation in place. Insofar as the email made reference to CESCE's requirements, in the comment numbered 10 quoted above, it suggested only that any change in the identity of the person providing finance to Havila would need to be notified and approved before the CESCE counter-guarantee could be issued. More generally, it was obvious that the refund guarantees could not be issued until their wording had been finalised, including any issue about a right to change the identity of Havila's lender. As to the final paragraph of Sr Perez-Bouzada's email, it was also obvious that if it turned out that the BoComm financing could not proceed at all, then that would be liable to delay the issue of the counter-guarantee and refund guarantees. That did not demonstrate that only signed loan documentation would be sufficient to allow CESCE to proceed: at most, Sr Perez-Bouzada's final paragraph (which did not refer to CESCE in terms at all) may have indicated that CESCE might be unwilling to proceed if unanticipated developments since the issue of BoComm's term sheet had the result that BoComm would no longer be proceeding after all.

61. Mr Pettersen in fact responded by proposing that the matter be discussed at a meeting scheduled for 24 January 2019 in London, if not resolved in a telephone conversation planned to occur in the meantime.

62. On 18 January 2019, Abanca sent an email to the Yard saying:

> "In line with the telephone conversation, we have had this morning, I would like to tell you that we have already consulted with CESCE about the possibility of including as beneficiary a bank other than BoCom, and its response has been positive, provided that it is perfectly identified.
>
> As you all know, the CESCE offers are valid until next 28 January (its extension already requested) and taking advantage of the fact that the extension will pass through their committees, they will include our request that the beneficiary of the guarantees may be a bank other than BoCom.
>
> Although they have stressed once again, and as it appears in the coverage conditions in point 6.6, that confirmation of the firm existence of sufficient financing is necessary for the execution of the entire project, so in order to materialise the CESCE coverage, closing a financing for the Shipowner is essential. Actual financing cannot be formalised without prior formalisation of the shipowner's financing."

It is unclear what document the last paragraph quoted above referred to. Sr Santos in re-examination referred to a CESCE offer received by the Yard in October or November 2018, but it is not before the court: and there is no evidence that Havila saw any such document.

63. The planned meeting in London did proceed on 24 January 2019. During the course of the meeting, Sr Gonzalez sent an email to Abanca asking *"[W]hat is needed as proof that Havila has long term financing?"*. Abanca replied:

> "Sorry for the delay in answering but I was checking with CESCE; Cesce insurance would not enter into force until the condition that the shipowner has the funds to undertake the project is met, likewise we would not be able to issue a guarantee. Therefore, the way to justify it is either with a certificate from the financing bank of the Shipowner where they confirm the existence of said financing already formalised with amount and terms or provide us with a copy of the financing.
>
> For the signing of the financing, Astillero [the Yard] could do with the commitment of the financing bank of the Shipowner, but for the issuance it would already be necessary for said financing to be formalised."

64. Some time was spent at trial attempting to construe this somewhat cryptic response. The first paragraph seems to indicate that in order for CESCE to issue its policy, and

for Abarca to issue a "*guarantee*", there needed to be a certificate from Havila's financing bank confirming "*the existence of said financing already formalised with amount and terms*", or a copy of the financing. However, the second paragraph uses different terminology, indicating that the "*signing of the financing*" (perhaps meaning the issue of the CESCE policy) would require the "*commitment*" of Havila's lender but that the "*issuance*" (possibly meaning the issue of the refund bonds themselves) required the financing to be "*formalised*". The expressions used in the response, individually and taken together, do not provide a particularly clear picture of CESCE's requirements.

65. In any event, the important question, insofar as the Yard/Abarca seek to demonstrate a common understanding of the parties as to what CESCE's requirements were, is what Sr Gonzalez told those present at the meeting in London after receiving this response from Abanca. There is no evidence that he forwarded it to anyone on the Havila side, nor that he read it out verbatim at the meeting. The only notes in evidence were those made by Mr Saevik and Mr Myrvoll of Havila and Mr Pettersen.

66. Mr Saevik's notes read (in translation):

> "24.01.2019 kl. 09:00
>
> Meeting with Watson Fairley in London, Alfredo Lois. Barreras. Stein, Arild, Per. Spanish Tax Lease, Havila Kystruten. Stein [Mr Pettersen] informs about the status of Bocom and the problem with Spanish Tax Lease. Ownership during the lease period. Payment guarantee from Abanca with guaran- tee from these and other smaller guarantors. Abanca 60.6 - Barreras 3.0 = 57.6. Cesse 50%. Will get an overview of how the guarantees should be designed. 360 days per year for interest calculation. Discussion on the appointment card, many details that have been commented on. Summary. The meeting ends at 17:30."

67. Mr Myrvoll's notes of this meeting stated (in translation):

> "Møte London.
>
> HK have received at new term sheet from Bocomm. There are some problem with implementing the tax-lease with the financing from Bocomm. HK is in discussion with 3 banks. We will sort this out within the next weeks.
>
> Discussion around the insurance bond and who is behind.
>
> - Documentation to Barreras that financing is in place
>
> - Clarify the company structure
>
> - Barreras to delivery an overview over the guarantee structure
>
> - Clarify if the interest is covered under the guarantees
>
> - Barreras to send ratings of the guarantors."

68. Mr Myrvoll was, unsurprisingly, unable to add to these notes from his recollection. Nothing in those notes provides any clear basis on which to conclude that Havila were told that signed loan documentation was required in order for the CESCE policy and refund bonds to proceed. The reference to "*financing in place*", even assuming those to have been words used at the meeting, is vague. Abarca in closing sought to rely on the following exchanges:

> "Q. … in circumstances where they were building the vessels and you weren't paying them for the work that they had done in accordance with the contract schedule, that was imposing a burden upon the Yard?
>
> A. I agree that the Yard need funding to complete the vessels.
>
> Q. And we heard Mr Pettersen, in his evidence yesterday, accept that the situation in January 2019 was not sustainable for the Yard. You would agree with that, wouldn't you?
>
> A. I agree that we -- all parties need to have necessary financing in place to be able to fulfil the projects.
>
> Q. If they don't have any cash, they can't build, can they?
>
> A. No, not over a long period."
>
> …
>
> "Q. … And that [22 July 2019] was two months after the date that you recorded in addendum number 8 that you expected to have drawdown, isn't it?
>
> A. Yes, we expected to have financing in place."

as showing that Mr Myrvoll equated "*financing in place*" with the ability to draw down funds. Abarca's thesis is thus that when Mr Myrvoll wrote "*Documentation to Barreras that financing is in place*" in his note at the 24 January 2019 meeting, he was recording that the Yard had asked for proof of signed loan documents. However, it does not follow, from the fact that Mr Myrvoll on those occasions used the phrase in that particular sense, that Havila must in fact have been told at the 24 January meeting that something as specific as signed loan documentation was being sought.

69. Mr Pettersen said in his oral evidence about this meeting that he was not aware "*what they meant by financing in place*", and in his witness statement that he was sure that Havila was not told that its loan documentation would need to be in place in order for CESCE to issue its counter-guarantees. Similarly Mr Sr Perez-Bouzada agreed that it depends to whom you are talking, adding that in order to refer to "*executed available funds, you need to further explain …You need to say 'binding documentation signed' etc*". He agreed that "*in place*" can mean different things in different contexts, albeit his position (as indicated below) was that his side had regularly made clear to Havila that a term sheet was not enough.

70. Mr Pettersen was not taken to his notes in cross-examination, but made clear that he would need to refer to them in order to try to recollect the course of events. He explained in re-examination that, throughout his career, he has made manuscript notes in a notebook. A typed transcription of his notes at this meeting (and a translation into English) were in evidence. The typed transcription runs to 2½ pages and includes the following entries:

> [1] "1. Financing
>
> Informed of financing
>
> - Bocomm
>
> - Sparebanken Midt Norge
>
> - DNB Bank ASA
>
> - Hanabank"
>
> [2] "1 - 7 - Insurance Bond
>
> - EUR 60,6 mill Abarca
>
> - Reinsurance EUR 57,6
>
> Abarca (EUR 1.150)
>
> Coperative (EUR 2,5)
>
> Abanca (EUR 2,5) EUR 5 mil"
>
> together with a side note saying "NB 50% counter gar from Cesce"
>
> [3] "Documentation (representing risk for guarantee to collapse)
>
> - The shipbuilding contract
>
> - KPMG investigate what is possible
>
> - try to take out recital C - KPMG to clarify"

Mr Pettersen explained that the first set of entries above reflected his having informed the parties to the meeting about the financing, including the four then alternatives. The second set of entries related to something said about the CESCE counter-guarantee, but Mr Pettersen could not recall the detail. He could not remember what the third set of entries related to. The notes also included some deleted wording relating to the insurance bond, including the phrase "*Cesce – contra guarantees both insurance and*

bank guarantee". Mr Pettersen could not recall precisely why these words had been deleted.

71. In cross-examination, Mr Pettersen accepted that it was clear to Havila that the Yard could not continue to build without being provided with cash, so it was in both parties' interests to keep the project going and they were looking at alternatives for how the second payment could be made. However, he said he could not recall that CESCE's requirements were under discussion at the meeting. He could not really remember whether Sr Gonzalez relayed the contents of Abanca's 18 January 2019 email, and could not confirm that he did. He could not confirm that Sr Gonzalez had passed on the contents of the response which Sr Gonzalez had received from Abanca during the course of the meeting itself.

72. In re-examination, Mr Pettersen said that if he had been told in the meeting about a specific CESCE requirement, he was quite sure he would have made a note in his notebook about it. Abarca makes the point that Mr Pettersen's notes were not a comprehensive account of what happened at the meetings, and did not for example contain a note directly corresponding to Mr Myrvoll's note "*documentation to Barreras that financing is in place*". That is no doubt true, but it does not detract from the force of Mr Pettersen's point. Had Havila been told at this meeting that CESCE could not proceed until Havila's loan documentation had been executed, that would have been a highly significant (and, on my findings above, new) point which Mr Pettersen would have been almost certain to note down as part of the reasonably detailed notes (almost three page in their typed transcription) he took at the meeting. Abarca also seeks in closing to criticise Mr Pettersen for going further in his witness statement than in his cross-examination. This criticism was not put to Mr Pettersen, and I take the same view on it as I do in relation to the similar criticism discussed in § 41 above.

73. Sr Gonzalez said in his witness statement that he remembered receiving from Abanca, during the 24 January meeting, a response indicating that CESCE needed (in translation)*"either a certificate of the finance, or a letter confirming that the finance was already formalized, with the amount and terms of finance, or a copy of the finance agreement itself"*, and that he immediately passed this information on to Havila in the meeting *"to make clear that what was needed was a formal executed finance agreement and with the financing available"*.

74. In cross-examination, Sr Gonzalez said he did not take notes. He said he was "*sure*", or "*pretty sure*", that he passed the contents of the Abanca email of 24 January on to Havila at the meeting, "*because that's what I had to do*". On the other hand, when asked whether he was saying he discussed with Havila the need for a commitment from the financing bank, Sr Gonzalez replied "*I didn't say that, but I feel that would have been logic in the fulcrum of the negotiation*"; that he did not know whether he referred in the meeting to providing details about the amount and terms of the financing; and that he did not recall the whole of the conversation, though he did recall that he had to relay this information to Havila.

75. Sr Perez-Bouzada was also present. He said in his oral evidence that, although he was a lawyer, his general practice was not to take notes, except more recently when his memory started to fail with age. He did take notes on occasions, but not every day in meetings. He might make notes in a notebook, which he would retain, or on pieces of paper. He had not found any notes of any of the meetings he had attended in relation

to this transaction. In his witness statement, Sr Perez-Bouzada said he had refreshed his memory of the discussions at the 24 January 2019 meeting by reviewing the emails from the time. To the best of his recollection, Sr Gonzalez had said that, based on discussions with Abanca, CESCE and Abanca were asking for more about Havila's financing than the BoComm letter, and that Havila having financing in place with financing documentation signed was a condition to effective refund guarantees being issued under the credit facility and CESCE issuing effective counter-guarantees. Sr Gonzalez said CESCE had confirmed in emails that they needed evidence of that from Havila's financier or a copy of the financing documentation. Sr Perez-Bouzada added that "*These points were discussed at most meetings from October 2019 to January 2020*" (presumably having intended to refer to October 2018, since this was said in the context of the 24 January 2019 meeting). In oral evidence, he said that "*it was an ongoing discussion with Havila from the very beginning that we need something more than just a term sheet*".

76. With respect to Sr Perez-Bouzada, that last point somewhat detracts from the reliability of his recollection. The contemporary documents make it very unlikely that anyone had been telling Havila from the outset that signed financing documentation was needed before any refund guarantees could be issued. There is no record of Havila being told that, even after the Yard in mid- October 2018 specifically asked Abanca whether the documents Havila had so far provided from BoComm were sufficient. Indeed, the fact that even at the 24 January meeting itself Sr Gonzalez apparently felt the need to check what CESCE's requirements were makes it unlikely that there had been any prior discussion of the kind Sr Perez-Bouzada says he recollects. In cross-examination, Sr Perez-Bouzada replied in similar vein. It was suggested to him that, at least without notes, it would be impossible for him to pretend to remember whether Sr Gonzalez said anything specific about CESCE's requirements, let alone exactly what he said. Sr Perez-Bouzada replied "*Yes, but it was always the same issue repeatedly being reminded to Havila*." He said he thought that CESCE had said around Christmas (2018) that the documents provided to them from BoComm were not enough, but was unable to explain the lack of any contemporaneous record of that. As to the meeting on 24 January 2019, Sr Perez-Bouzada ultimately said that he had "*got clear the situation; the details it is difficult for me to remember exactly*". It is also notable that Sr Perez-Bouzada accepted, as a general proposition, that CESCE might have different requirements in relation to different transactions.

77. Sr Fernandez of Barents said in his second witness statement that *"it was made very clear in meetings from at least January 2019 that a signed finance agreement was necessary as proof of financing"*. It was not entirely clear from his witness statement which meetings he had in mind. In cross-examination he said he personally attended only one meeting, and received a report from a team member at Barents about another meeting. However, he was unable to say, even approximately, when those meetings occurred. Sr Fernandez was asked in cross-examination about his practices as regards taking notes, leading to the following exchanges:

> "Q. Do you take any notes when you attend meetings?
>
> A. Yes. Sometimes I do; sometimes I use my own memory.
>
> Q. And do you keep those notes when you take them?

A. I don't have to keep them.

Q. That wasn't my question.

A. I'm not a lawyer so, you know, my method of working is different, you know.

Q. I'm not asking about what you're obliged to do. I'm just -- I don't know you, Mr Fernández. I'm asking what you do—

A. I'm a reinsurer. I'm a reinsurer. I underwrite risks upon the basics of the documentation I'm giving. That's ...

Q. I'm just asking: do you take notes? Not do you have to or should you or is it wrong for you not to, but just do you?

A. Yes, I take notes. Sometimes I take them.

Q. And do you keep them?

A. Yes, normally I keep them.

Q. Right. And have you gone back to see if you took notes of any of the meetings that you attended in this case?

A. My only notes in those meetings was that there was no finance. That was my note.

Q. No, come on. Try and answer the question. Have you gone back to see whether you took any notes of those meetings that you attended -- the two meetings you say you attended, for which we're not sure about the dates?

A. I find that irrelevant, to be honest.

Q. Don't worry about what's irrelevant. The learned judge will tell us what's irrelevant and tell us what's irrelevant in due course. Have you gone back to look to see whether you took any notes of the two meetings you attended?

A. No.

Q. Were you asked to do that?

A. By whom?

Q. By lawyers. Anybody. Did anybody ask you to do that?

A. You know, I remember things perfectly well, so I don't need notes for that."

Those exchanges indicate an entirely cavalier approach to the process of giving evidence, including when in court under oath, and cast significant doubt on the extent to which any reliance can be placed on Sr Fernandez's evidence.

78. Sr Fernandez went on to say that the meeting he attended took place by phone (including at Barents' offices) and the other meeting (on which he received a report) was at the office of Watson Farley in Madrid. He confirmed that he did not attend the meeting in London on 24 January 2019, and was unable to provide any clear information about the date of the meeting in which he personally participated.

79. Sr Santos in his witness statement said that he and Sr Gonzalez at the 24 January 2019 meeting passed on to Havila the information in Abanca's emails of 18 and 24 January. Sr Santos was also asked about notes, and gave the following evidence:

> "Q. … There was a meeting on 24 January 2019 in London, which I think you attended?
>
> A. Yes, I did.
>
> Q. And I think you were there because one of the topics on the agenda was the wording of the insurance bonds.
>
> A. Yes.
>
> Q. And you would be Abarca's lawyer on that issue.
>
> A. Exactly. That is right.
>
> Q. And did you take any notes?
>
> A. I probably did.
>
> Q. And have you gone back to find those notes?
>
> A. Not really because -- because, for preparation of the -- of the statement, I check the correspondence that I have. And also I checked the summaries that we did after the -- I think not this meeting but probably the other one. So, no, I don't think I came back to my notes.
>
> Q. But you take notes and you -- presumably, as a lawyer, you keep your notes?
>
> A. Yes, probably I have those notes.
>
> Q. But you say you didn't go back to check what they said? Isn't that a slightly strange thing to do? If someone asks you what happens in a meeting and you're going to come to court to talk about it you didn't go back to check your notes of the meeting?
>
> A. No. And I don't think that it is strange because I think that the themes that we were discussing at the meeting were very

> clear. As you said it was about the wording of the bonds, about the bonds providers. So I don't -- I don't think I need to check my notes to be honest.
>
> Q. That's a very strange thing to say to me Mr Fernández Santos. You're talking about a meeting now that happened three years ago.
>
> A. Yes.
>
> Q. More than three years ago. If I had attended a meeting three years ago and I wanted to know what had happened at that meeting or wanted to refresh my memory about that meeting, I would look at my notes. You really -- it didn't cross your mind to do that?
>
> A. Not really. I mean, I don't know what you will do. I can tell you what I did. And, to me, I have a clear recollection of the note -- sorry, of the meeting. And -- and -- to be honest, I don't come so often to London so as to forget the meetings that I have here. So, no, I didn't check my notes. I'm sorry. I have some recollection of the meeting and I didn't need to -- to check.
>
> Q. Do you think, sitting there now, that it would have been a better idea before you started expressing views about what you think you might have remembered from a meeting three years ago to have a look at your notes of that meeting?
>
> A. We can double-check what I said about the meeting and then we can see if I need the notes or not.
>
> Q. Well, do you -- you do understand it's quite an important -- quite a serious exercise, giving evidence to the English court. You know that, don't you?
>
> A. I am not joking. What I'm saying if you want to know, if I need to check my notes, what I am saying is that probably I need to review what I have said about that meeting. And then I can see if I need the notes or not. I mean, I didn't -- I didn't feel, at the time, that I need to double-check my notes."

That is a surprising approach for any lawyer to take when asked to give evidence, particularly about events that occurred several years ago.

80. Sr Santos went on to say that his side mentioned their need to receive "*some evidence of the financing of Havila*", that he was "*pretty sure*" that the term sheet was not equivalent to having financing in place, so his "*assumption*" was that it was not enough for CESCE; and it was not sufficient for Abanca; and "*that's why we double-check with Abanca and Abanca said, to the extent I remember, that was not sufficient*". Evidence of this kind, imprecise and given after a conscious decision *not* to check the witness's own notes of the meeting, cannot be regarded as a reliable basis for drawing conclusions

about what was said at the meeting, particularly in circumstances where important distinctions might have to be made about what precise form of evidence of financing was stated to have been necessary.

81. The day after the meeting, on 27 January 2019, Mr Pettersen sent an email setting out a list of follow-up matters in the form of a short summary/action list, and then a "*short term*" working schedule agreed in the meeting. Mr Pettersen then said at the end of his email:

> "The "goal" is to have the complete documentation (guarantees / tax lease documentation / buyers loan documentation) agreed and executed in due time before 15 March 2019. We suggest that we discuss a further working schedule in the meeting in Madrid on the 7 and 8 February 2019, securing a good progress on outstanding matters so that we meet this time limit."

Abarca notes that 15 March 2019 was, at that time, about to become the revised long stop date for CESCEs counter-guarantee, set out in Addendum 6 signed on 29 January. Abarca submits that Mr Pettersen "*acknowledged that complete loan documentation would be required for CESCE to issue the counter-guarantee, because he obviously had been told that by the Yard*". I do not accept that contention. By referring to a "*goal*" of having all the documentation signed by 15 March 2019, Mr Pettersen was not in his email acknowledging that CESCE had imposed any such requirement, nor that any such requirement had been communicated in the meeting of 24 January. Insofar as Abarca may be suggesting that Mr Pettersen acknowledged this in his oral evidence, that is entirely incorrect. On the contrary, Mr Pettersen's oral evidence was that CESCE's actual requirements were never made clear to Havila, and in the context of his 29 January email did not accept that he had been told that CESCE required a loan agreement to be produced. I accept that evidence.

82. Viewing this evidence in the round, I conclude that the Yard did not make clear to Havila at the 24 January meeting that nothing less than signed finance documentation would suffice in order for matters to proceed (including the CESCE counter-guarantee and the Abarca refund bonds). The contemporary notes of the meeting itself lend no support to the suggestion that that occurred, and the evidence (including further contemporary records) about the ensuing events which I discuss below also make it unlikely. I find persuasive Mr Pettersen's evidence that his relatively detailed notes of the meeting would have included this point, had it arisen: not least because it would have been a highly important consideration for Havila, and the first time any such clear statement had been made. Equally, I do not find the recollections of the witnesses tendered by the Yard/Abarca to be reliable on this point.

83. Addendum 6 was agreed on 29 January 2019, further extending the long stop date for CESCE's counter-guarantee to 15 March 2019. On the same date, Sr Gonzalez said in an email to Mr Pettersen: "*As I have told to you at Madrid, it is no possible for HJB to take more risk on this projects until first security shall be issued. Havila has to take own risk to finance next month of the project*."

84. The parties met again, in Madrid, on 7-8 February 2019, where there were some discussions around Havila's alternative financing. Mr Myrvoll's notes of these meetings stated:

> "07.02.2019 (day 1)
>
> Madrid
>
> Banca Marc is not in position to offer refund guarantees. Discussions around Insurance bond and Master agreement.
>
> Juan can inform that steel cutting is in progress. Keel laying in March.
>
> The Insurance bond is not an "on demand guarantee". Juan wants to split the risk until everything is in place. Discussion around HKs financing. Juan wants to see that our financing is in place. Discussion around risk, payments and guarantees.
>
> We asked question about the financial position of the yard, and the Ritz Carlton project. The yard can not provide information about the R.C project. The yard informed that it will be at least two more vessels to R.C. We will get some financial information about the yard.
>
> 08.02.2019 (day 2)
>
> Madrid
>
> We received a new proposal related to payment of the second instalment. Barreras is in dialogue with Havyard to postpone some payments.
>
> Discussion around next payment, documentation, refund, tonnage tax, etc."

The Ritz Carlton project was an unrelated vessel construction task that the Yard was undertaking in parallel with the construction of the vessels for Havila, which subsequently created very significant problems for the Yard and contributed to its going into administration.

85. Mr Saevik's and Mr Pettersen's notes of the meeting do not include any entries specifically relating to Havila's financing or what evidence CESCE might require in connection with it.

86. Sr Santos sent an email on the evening of 7 February 2019, i.e. during the course of the two days of meetings, which *inter alia* said:

> "As commented this afternoon we have proposed the following scheme in order to continue building the vessels 1710 & 1711 without delays on the construction plan:
>
> (a) Financial Guarantees on the first instalment already put in place are maintained but the amounts

> guaranteed will be reduced in the cash actually available in the project accounts, i.e. Euro [1,4M] for 1710 and Euro [2,1M] for 1711;
>
> (b) On payment of the second instalment from Havila Insurance Bonds in the terms discussed and to be closed tomorrow will be put in place for the second instalment plus the amount deducted on the financial guarantees. These bonds will not enter into force until Havila produces evidence that they have funds available for financing all the payments to be made in respect of the Vessels, which evidence can be produced by attaching a financing agreement for the relevant amount or other evidence reasonably acceptable to the Parties;"

87. It was suggested to Mr Pettersen in cross-examination that this email showed that nothing less than a (signed) finance agreement would be sufficient. Mr Pettersen did not accept this. Self-evidently, the words "*or other evidence …*" made clear that provision of a financing agreement was not a pre-requisite. Nor did the use of the expression "*funds available*" make clear that CESCE required a signed loan agreement to be in place. Abarca submits that one might have expected Mr Pettersen to respond pointing out that there was already a term sheet from BoComm. Such a response would, however, have been unrealistic in circumstances where, by this stage, there was significant doubt about whether the BoComm financing could proceed, and Havila was instead exploring alternatives.

88. Sr Santos said in his witness statement that, having checked the accuracy of his recollection against the documents, he recalled discussion at the 7-8 February 2019 meeting to the effect that refund bonds could not be issued while Havila did not have signed loan documentation, and that a term sheet was not enough. He said he told Havila in the meeting, or a few days later, that the insurers and banks needed to see the signed loan documents, or confirmation they had been signed, "*or that the funds were available*"; and that whilst they might accept something less than that, a signed term sheet would definitely not be enough because it was not a binding commitment and would always be subject to conditions. Sr Gonzalez's evidence was to similar effect.

89. It was not put to Mr Pettersen that the discussion at the meetings had, in these various ways, been much more specific than the contents of Sr Santos's email of 7 February sent during the meetings.

90. Sr Gonzalez's evidence in cross-examination on this matter was somewhat diffuse, and he said at one point that he could not "*confirm or deny and with detail with regards to what happened in that meeting*", though he rejected the suggestion that nothing was said about the adequacy of a term sheet.

91. Sr Santos maintained in cross-examination that he could recollect these details of the meeting, without having checked his notes of the meeting. He regarded his email of 7 February as a summary of what he had said at the meeting, but considered it clear that financing could not be said to be in place if there were only a term sheet. He noted that, as his witness statement indicated, the discussion might have taken place shortly after, rather than at, the meeting of 7-8 February, perhaps 4-6 days later, though his recollection was that it took place at the meeting. He was unable to say whether or not

he actually made any note of this discussion. I am unable to place any real reliance on this evidence, particularly in circumstances where Sr Santos refrained from checking (still less producing) whatever notes he made of the meeting.

92. Sr Perez-Bouzada said in his statement that, having refreshed his memory from the emails, he could not remember the exact words used at the meeting, but to the best of his recollection:

i) Havila said they were exploring the possibility of getting financing from local Norwegian banks to be counter guaranteed by GIEK (the Norwegian export credit agency), instead of from BoComm (who, Mr Pettersen said either at this meeting or during telephone calls around the time, had been slow dealing with the file because the Spanish tax lease system was not easy to relate with the Chinese financing regulations);

ii) Havila said they expected to sign financing documentation by 30 April;

iii) the Yard said it could not continue spending money and incurring liabilities building the vessels much beyond 30 April without getting paid the second and third instalments;

iv) the Yard needed to have by 30 April 2019 the evidence of Havila's financing that Abanca and CESCE wanted, so that the Yard could provide the security for those instalments;

v) he could not remember if they specifically said at this meeting that Abanca and CESCE wanted confirmation that Havila had "*financing in place (financing documentation signed)*", but this was an ongoing issue that had been explained to Havila at meetings around this time, including the 24 January 2019 meeting, and in emails (for example, an email on 13 February 2019, where Mr Gonzalez told Mr Pettersen that "*the CESCE policy is issued subject to the existence of financing*", and an email on 17 February 2019 where he requested "*evidence of [Havila's] financing in place*");

vi) Havila said they would provide the evidence; and

vii) he did not remember Havila saying that it would be hard to get their financing in place by 30 April 2019.

93. Thus Sr Perez-Bouzada did not claim to have any positive recollection of Havila having been told, at the meetings on 7-8 February 2019, that CESCE required Havila to have signed loan documents, or that a term sheet would be insufficient.

94. Overall, I find the evidence relied on by the Yard/Abarca as a clearly inadequate basis from which to conclude that the parties, including Havila, specifically understood by the end of the 7-8 February 2019 meetings that refund bonds could not be produced until Havila had executed loan documentation in place, and that a term sheet would not suffice. The contemporaneous documents – notes and emails – do not support that proposition, and instead indicate that something less specific and more open-ended was said on this topic; and the Yard/Abarca's witness evidence is not reliable, for the reasons I have indicated.

95. Very shortly after the 7-8 February 2019 meetings, the parties were discussing and circulating drafts of Addendum 7. Sr Gonzalez on 13 February 2019 proposed a long list of matters to be considered in that connection, including that "*[w]hen the existence of financing is proven, the first guarantee will be issued and shall replace the final one*" and "*[t]he CESCE policy is issued subject to the existence of financing*." The email does not assist in establishing any particular knowledge on the part of the parties about what the "*existence of financing*" specifically entailed. I reject the suggestion that it obviously meant the existence of signed loan documentation such that Havila already had a legal entitlement to draw down funds.

96. In an email of 17 February 2019, the Yard suggested that it had been agreed at the 7-8 February meetings that if Havila did not by 30 April "*provide evidence of its finance in place*", then the Yard could cancel the SBCs. Mr Pettersen replied: *"I do not think that there is a big disagreement between the parties about what was agreed in Madrid".* This sheds no light on the parties' knowledge as to what 'finance in place' actually meant.

97. On 19 February 2019 Sr Santos sent an email to Sr Gonzalez and Sr Perez-Bouzada about the draft Addendum 7, including the comment:

> "In general, we are not clear on what it means to have financing. They seem to want to lead us to a mere confirmation from their bank (the old discussion of whether it is worth a TS). Honestly, I am not concerned much, I think it will force us to argue, but better to argue with part of the insured milestone with insurance than otherwise;"

Sr Santos in cross-examination said the reference to the "*old discussion of whether it is worth a term sheet*" reflected his side having already told Havila that a term sheet was not enough. He went on to provide this explanation:

> "Q. Well -- and then you say:
>
> > "Honestly, I am not concerned much, I think it will force us to argue, but better to argue with part of the insured milestone with insurance than otherwise".
>
> So do I understand that to mean you're saying: we may have to argue about this later, but let's get the money in first?
>
> A. Yes. What I'm trying to say is: okay, it is clear that we cannot close that discussion now. I was not intending to say that we were prepared to accept the term sheet, because we were clear on that. But it is clear that we don't know yet what they can provide. And because they have not told us. So I understood from Juan [Sr Gonzalez] that they need the money in order to -- sorry, to continue the building.
>
> So I say: okay, if that is the important thing, because this is what Juan says, then let's postpone this discussion. That we cannot close now and let's reconvene later.

> Q. Let's sign the addendum, get the money in, and argue about this later?
>
> A. Well, let me be clear on this. I mean, this is the decision of the yard to continue proceeding. It's not my decision, so ...
>
> …
>
> Q. I'm not saying you're making the decision. I'm saying that you're effectively saying to him: if that's your priority then sign the addendum, get the money in –
>
> A. He didn't want to postpone these discussion. Although the discussion is there, but he didn't want to postpone the discussion. If you are prepared to take that risk that they can propose something, which is not sufficient -- I didn't think at the time, I believe, that they would, again, raise the issue with the term sheet because we were clear on that, but they could propose something different. So that is what I am saying. If we are not able, at this time, to say: okay, what you need to provide is certainly this, then let's continue the building process because otherwise the project will collapse."

Sr Santos's email thus in substance seems to reflect an internal discussion about choosing to live with contractual terms in Addendum 7 that would be unclear, in order to move things forward: a situation reminiscent of Lord Wilberforce's observations in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384 that:

> "The words used [in a contract] may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get "agreement" and in the hope that disputes will not arise. The only course then can be to try to ascertain the "natural" meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective — even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised."

The email seems unlikely to have been sent if the Yard had believed that Havila knew perfectly well that signed loan documents were required and would be willing to agree to that.

98. On 24 February 2019 Sr Gonzalez and Mr Pettersen had an exchange of emails, in one of which Mr Pettersen commented that:

> "First of all – the buyer is not trying at all to delay the process. Havila Kystruten AS is preparing for making the payment of the

> 2nd instalment tomorrow and to proceed accordingly with the remaining payments.
>
> We have the full understanding of the importance of the tax lease to you and value of the tax lease benefits to be paid to the yard. Our concern is that we do not reach to conclude the documentation in time if a complete documentation shall be a condition for issuing the insurance bond for 3rd instalment. Provided the insurance bond can be issued even though the tax lease documentation is not in place as of payment of the 3rd instalment the buyer can "live with that" and have the documentation completed on a later stage."

and Sr Gonzalez's reply:

> "About the 3rd instalment. The both things have to be related. If I have understood, you are going to pay third instalment with finance, but if you would pay with own resources the CESCE policy should not be in force if you don't confirm the existence of required finance to pay the project. I have proposed to you to solve this with: a declaration of Havila or the shareholders that they will finance the project or they have funds enough to do and to apply to it. But if both things are related on the contract, finance evidence and 3rd instalment, we can go on."

The exchange is of no real help in establishing what Havila and the Yard understood CESCE would regard as amounting to "*the existence of required finance to pay the project*".

99. On 27 February 2019, the day before Addendum 7 was signed, Sr Gonzalez sent Mr Pettersen an email which began:

> "This is to confirm what we have discussed and agreed by phone earlier today with regard to your main concern
>
> on the projects C1710 and C1711: The need of Havila's finance in place and duly signed.
>
> We can accept not to claim for the payment on keel lying on both projects (installment 3rd "c" of each contract) until you confirm that Havila's finance is in place or until next April, 30th, whichever occurs first.
>
> However this would be subject to your confirmation that we can delay the payments to Havyard until the collection of said installment (3rd "c") and with no effect on Havyard's obligations under the Supply contract between Havyard and Barreras.

> The following installments (4th "d" and 5th "e", with a maturity date set 60 days after installment 3rd "c"), shall be paid as if the installment 3rd "c" would have been paid in the contractual date. So they will not be affected by the arrangement we are discussing here, considering Havila's finance in place."

Mr Pettersen replied:

> "After further considerations I have made a small amendment to you email. Is that ok to you?
>
> It is almost midnight and I suggest that we proceed tomorrow morning, and try to complete the appendixes to the agreement."

with the slightly altered text for Sr Gonzalez's second paragraph now reading:

> "We confirm not to claim for the payment on keel lying on both projects (installment 3rd "c" of each contract) until you confirm that Havila's finance is in place or until next April, 30th, whichever occurs first. The reason for this is that such extension is already covered by the agreed Addendum No 7."

100. Abarca submits that this exchange proves that, to Havila's knowledge, CESCE required Havila's financing documentation to be signed before it would provide its counter-guarantee. However, it demonstrates no such thing. The subject of discussion in these paragraphs is not any requirement emanating from CESCE, but "*your*" i.e. Havila's own, "*main concern*" to have the finance in place and signed. That leads naturally into the ensuing discussion about deferring, temporarily, part of Havila's payment obligations in circumstances where it would be unable to draw down on funds from its lenders. The discussion thus forms part of the negotiations about delaying payment of the third instalment. Evidence of this kind, about Havila's own concerns, is of no relevance to the correct construction of Addendum 7, and indeed inadmissible for that purpose.

(5) Addendum 7

101. Addendum 7 was signed on 28 February 2019. I set out its terms, so far as material to the present case, fully below in view of its central importance to the present dispute.

> "1.4 The Parties hereby irrevocably and expressly confirm that the Current Contract is Legal valid, blinding and enforceable upon the Parties according to the terms and provisions of the Current Contract (including the amendments agreed upon by this Addendum No 7.)
>
> Without prejudice to clause 4.5 of the Addendum No 7, consequently the Parties hereby irrevocably confirm that all subsequent conditions as set out in Article XX of the Contract have been fulfilled or waived, and that no subsequent condition(s) as set out in the Contract is outstanding.

…

2.2 Refund obligations

…

2.2.2 Bond Insurance

[i] The Parties have agreed that the Builder shall provide the Buyer with bond insurance as set out in the **Appendix 2** hereto, to be issued by Abarca Companhia de Seguros, S.A. **("Abarca")** (the **"Insurance Bond"**) and reinsured by Barents Re. **("Barents")** and counter guaranteed by Compañia Española de Sergos de Crédito a la Exportación, S.A., Compania de Sergos y Reaseguros, S.M.E. **("CESCE")** as security for the Builder's obligations to refund to the Buyer the 1st Instalment and any subsequent instalment to and including the 7th Instalment as set out in the Contract, if the Contract is being terminated by the Buyer according to the terms and provisions of the Contract.

[ii] For 8th Instalment as set out in the Contract a combination of the Insurance Bond and bank guarantees shall be provided and issued by Abarca (reinsured by Barents) (as insures and reinsurer) and Banco de Créditio Social Cooperative. S.A **("Cajamar")** and ABANCA Coorporatión Bancaria, S.A. **("Abanca")** (as bank guarantors), the Insurance Bond to be according to Appendix 2 and the bank guarantee(s) to be in the terms and form as set out in **Appendix 3** hereto (the **"Banks Guarantee")**

[iii] The Insurances Bond and the Bank Guarantees to be issued for the respective instalments under the Contract to be secured, shall have a face value or maximum amount as set out in **Appendix 4** to this Addendum No 7, such Insurance Bonds and / or Bank Guarantees (as relevant) to be delivered to the Buyer at least three (3) Banking Days prior to the payment of the respective instalments under the Contract.

[iv] For each of the Insurances Bond the Builder shall cause Abarca and Barents to set out in Appendix 5 hereto (the **"Cut-Through Agreement"**) at least three (3) Banking Days prior to the payment of the respective instalments under the Contract.

[v] Pursuant to clause 2.2.1 and this clause 2.2.2 and without prejudice to clause 2.2.4 of the Addendum No 7 one (1) separate Insurance Bond and likewise one (1) separate Cut-Through Agreement shall be issued and delivered to the Buyer, as security for the Buyer's payment of each of the 1st and any subsequent instalment under the Contract, except for instalment **"(i)"** (instalment 9), **"(j)"** (instalment 10) and **"(k)"** (instalment 11) as set out in clause 1.7 of the Addendum No 1, **provided however**,

that the reinsurance to be issued and confirmed by Barents for the Insurance Bond securing the 2nd Instalment, shall not be issued, or, if issued, shall not come into force and effect before the Buyer has documented and confirmed the pre and post-delivery financing of the Vessel as set out in clause 2.4 of the Addendum No 7. By documentation of the pre and post-delivery financing of the Vessel as set out in clause 2.4 of the Addendum No 7, the reinsurance for the 2nd Instalment under the Contract shall be issued or if already issued, shall automatically come into full force and effect, without no further notice to Abarca and / or Barents.

[vi] The Parties have further agreed that the Insurance Bond to be provided by Abarca and reinsured by Barents and likewise the Bank Guarantees to be provide by and issued by Cajamar and Abanca as set out in the clause 2.2.2, shall be insured by CESCE for a total amount equivalent to fifty (50) percent of the total liabilities under the respective Insurance Bond and Bank Guarantees issued (the **"Cesce Counter Guarantee").** The Cesce Counter Guarantee shall come into full force and effect from the time / date when the Buyer has confirmed the pre and post-delivery financing of the Vessel as set out in the clause 2.4 of the Addendum No 7.

[vii] The Builder undertakes to provide the Buyer with Confirmation of the reinsurance to be provided by Barents and the Cesce Counter Guarantee being in force, such documentation to be provided to the Buyer simultaneously with the Buyer's payment of the 3rd Instalment subject to the Buyer has confirmed financing as set out in clause 2.4 of this Addendum No 7.

[viii] If the Buyer has not provided confirmation of financing as set out in clause 2.4 of this Addendum No 7, the Buyer's payment of 3rd Instalment to the Builder shall be extended till such confirmation has been provided to the Builder.

Any extension of payment of the 3rd Instalment as set out in this clause 2.2.2 of this Addendum No 7, shall not have any impact on the due date for the 4th and 5th Instalment as set out in Article III, clause 3 of the Contract (as amended by this Addendum No 7)

2.4 Buyer's financing

2.4.1 Documentation of Buyer's financing

[i] The Buyer has provided the Builder with information about the Buyer's present pre and post-delivery financing of the Vessel

to be arranged by BoComm Financial Leasing Co. Ltd ("BoComm Financing").

[ii] The Parties acknowledge that the implementation of the BoComm Financing into the Tax Lease (such Tax Lease to be provided by the Builder) is complicated and shall take time to implement it due to circumstances not attributable to any of the Parties. Consequently, the Buyer has informed the Builder that the Buyer will obtain alternative financing for the pre and post-delivery financing of the Vessel, and that has been accepted by the Builder.

[iii] Pursuant hereto the Parties have agreed that the Buyer's alternative pre and post-delivery financing of the Vessel shall be confirmed to the Builder no later than on the 30 April 2019. The confirmation shall be provided by a written, committed statement from the bank/financing institution financing the Buyer (pre and post-delivery financing), to be submitted to the Builder.

2.5 Builder's right to cancel the Contract

2.5.1 Builder's right to terminate the Contract

[i] Without prejudice to Article XII, Clause 2 and 3 of the Contract, if the Buyer cannot confirm and provide evidence that the pre and post-delivery financing of the Vessel is in place at 30 April 2019 (at the latest) by a written statement from a bank or financial institution as set out in clause 2.4.1 of the Addendum No 7, the Builder shall be entitled to terminate and/or cancel the Contract according to the terms and provisions of the Contract, provided (i) the Buyer is being informed in writing about the Builder´s intention to terminate and/or cancel the Contract for such reasons with fourteen (14) days written notice, (ii) the Buyer and the Builder have been meeting physically subsequent to the Buyer's receipt of such notice in order to consider and negotiate in good faith alternative arrangement in order to avoid termination and/or cancellation of the Contract and (iii) the Parties after fourteen (14) days negotiation have concluded that there is no other alternative financial arrangement to be provided by the Buyer in order to avoid termination and/or cancellation of the Contract.

[ii] Pursuant hereto the Buyer acknowledge that the Builder needs evidence of the Buyer's pre and post-delivery financing in order to be able to provide the Insurance Bond, the Cut-Through Agreement, the Bank Guarantees and the CESCE Counter Guarantee, except for the Amended 1st Instalment Bank Guarantee and likewise the 2nd Insurance, Bond which is going to be issued and delivered to the Buyer on the Closing Day (as latest).

> 2.5.2 Reimbursement of instalment by Builder's termination of the Contract
>
> If the Contract is being terminated and/or cancelled by the Builder according to the terms and provisions of as set out in this clause 2.5 of this Addendum No 7, the Buyer shall be informed about the Builder's termination and/or cancellation of the Contract according to the terms and provisions of Article XII of the Contract.
>
> Provided that a legal valid termination has been declared by the Builder to the Buyer according to the terms and provisions of clause 2.5 of this Addendum No 7 and Article XII of the Contract, the Builder shall be entitled to retain the instalments directly paid by the Buyer to the Builder under the Contract and consequently the Buyer cannot under such circumstances claim repayment and/or refund any such instalment.
>
> 2.5.3 Additional claims / consequential damages/ losses
>
> It is expressly stated that no further direct claim nor any claim for compensation of any consequential losses and / or damages suffered by the Builder and or any third party can be addressed or submitted to the Buyer if termination and / or cancellation of the Contract is being exercised by the Builder according to clause 2.5 of the addendum No 7"
>
> (roman numbering interpolated for ease of reference)

102. I consider how Addendum 7 should be construed in section (E) below. It is convenient though at this point to refer to one piece of evidence about Havila's understanding of the position which Abarca relies on in its closings. Mr Pettersen agreed in cross-examination that the thinking behind the arrangements in Addendum 7 was that if Havila provided confirmation of its financing, then it could obtain the security it needed from Abarca, Barents and CESCE in order to pay the instalments under the SBCs. What he specifically did not agree, however, was any understanding of what Havila was expected to produce by way of such confirmation:

> "Q. … So what you record there [Addendum 7 § 2.5.1] in terms, don't you, is that you knew, you, the Buyer, knew, that the Yard needed evidence of financing in order to issue the documents listed there?
>
> A. Yes, that's stated in that clause.
>
> Q. Yes, and it ties in with what we saw in clause 2.2.2, which is only once you evidence your finance will the Insurer, Barents and CESCE, respond with the various security documents?
>
> A. Yes.

> Q. So you know, don't you, what the evidence -- what the purpose of you providing evidence of your financing is?
>
> A. Well, in a way you can say that. What I knew at that time was that we needed to provide evidence for the financing. I was not aware of what kind of evidence it should be or if there is a particularevidence which is not covered by a committed statement. So we used the word "committed statement" in the agreement and –
>
> Q. I'm not going to debate with you what the words "committed statement" mean –
>
> A. No, I don't expect that either."

(6) Events leading up to, and terms of, Addendum 8

103. Following the signing of Addendum 7 on 28 February 2019, the Abarca 'umbrella policy' under which it appears the security bonds were intended to be issued (the Policy of Issue of Guarantees and Insurance Bonds) was issued on 6 March 2019. The umbrella policy provided that it would not come into force until, among other things, the CESCE policy had been signed and CESCE had approved *"a guarantee coverage for an amount not less than 50% of this Contract, under terms that are acceptable to the Guarantors"* (clause "*Preliminary Bis*" and Annex 1). In addition, it made the Yard's ability to request the issue of any guarantees conditional on numerous matters including *"that financing has been granted to the Shipowner to comply with its obligations in relation to the Construction Contract"* (clause 1.6.2(p)). Also on 6 March 2019, the first refund bonds were issued by Abarca in favour of Havila, covering the second instalment and part of the first instalment plus interest under the SBCs. Sr Morales explained that Abarca was content to issue these bonds at this stage because its exposure under them was minimal. It appears that the bonds were in fact issued under a policy other than the umbrella policy, though nothing turns on that particular point. (Overall, the three sets of insurance bonds issued were in a total aggregate sum of €37,820,252, covering the principal amount of each of the 1st and 2nd instalments under the SBCs (substituting amounts originally guaranteed by Banco de Sabadell), and the First Additional Payment under Addendum 8, as well as interest in the case of refund at a rate of 5%.)

104. On 11 March 2019 Havila paid the second instalment to the Yard for Hull 1710, and on 29 March 2019 Havila paid the second instalment to the Yard for Hull 1711. In each case, the sum paid was EUR 8,200,000.

105. In the meantime, the keel of Hull 1710 was laid on 1 March 2019 and of Hull 1711 on 22 March 2019, which would have triggered payment of the third instalments on 15 March and 5 April 2019, subject to the refund bonds being in place.

106. By the time of Addendum 7 Havila was looking into the possibility of financing from Norwegian banks, to be backed by GIEK. Havila also began discussions, in or about January 2019, with GTLK, an Irish-headquartered finance house ultimately owned or controlled by the Russian Ministry of Transport.

107. The position was unresolved by late April 2019, and the parties entered into Addendum 8. On 29 April 2019, the day before Addendum 8 was concluded, one of the Norwegian banks, SpareBank SMN, wrote to the Yard confirming that it had been approached by Havila about financing, and was in positive dialogue with GIEK and Sparebanken Vest "*in order to arrange a syndicate for the Financing with the intention to have the Financing approved no later than Thursday 23rd May*". The letter continued:

> "Provided the Financing is approved by the relevant decision making bodies as set out above, it is our intention to conclude and close the documentation before mid June 2019. However, this will be dependent on that all Parties involved contribute to a smooth process and that we agree on satisfactory documentation. Consequently, drawing under the Financing should be possible within June 2019."

108. Addendum 8 was signed on 30 April 2019. Clauses 2.1 and 3.1 provided as follows:

> 2.1 In a meeting between the Parties in Vigo on the 29 April 2019, the Buyer has advised the Builder about the present situation of the pre- and post-delivery financing of the Vessel ("Financing"), and the Parties have agreed to extend the period for confirming the Financing as set out in clause 2.4 last paragraph of Addendum No 7 from 30 April 2019 till 31 May 2019. Under such circumstances the Builder's right to terminate and/or cancel the Current Contract according to the terms and provisions of clause 2 .5 of the Addendum No 7, shall apply from 1 June 2019
>
> In order to provide the Builder with the relevant information about the progress of the Buyer's Financing, the following shall apply:
>
> (i) On the 10 May 2019 the Buyer shall report to the Builder in writing the conditional conclusion of the banks to be providing the Financing.
>
> (ii) On the 24 May 2019 the Buyer shall report to the Builder in writing the final approval of the Financing, which shall include the approval of GIEK to the extent required.
>
> If the Financing of the Vessel is not being conditional confirmed on the 10 May 2019, the number of calendar days from 11 May 2019 and up to the earliest of (i) 24 May 2019 or (ii) the day such confirmation is being provided, shall be considered as Permissible Delay.
>
> Further and if the final confirmation of the Financing is not being confirmed on the 24 May 2019, the number of calendar days from 25 May 2019 till the confirmation is being provided shall be considered as Permissible Delay, provided that under such

> circumstances the first day for calculating the Permissible Delay shall be 11 May 2019.
>
> …
>
> 3.1 With reference to clause 2.1 of the Addendum No 8, the Buyer expect to be able to draw under the Financing and make the due payment under the Current Contract by the end of May 2019.
>
> If the Buyer is not able to draw under the financing as set out in clause 3.1, first paragraph of the Addendum No 8, the Buyer shall pay to the Builder EUR 2,000,000 as partly payment of the Contract Price. Payment of the amount shall be made on the 31 May 2019 and against issue of Insurance Bond as set out in Addendum No 7 to the Amended and Restated Contract. For such Insurance Bond the Cut-Through Agreement provisions as set put in clause 2.2,third paragraph, of Addendum No 8 shall apply."

109. On the same day, the second set of bonds was issued and signed, relating to the remainder of the first instalment plus interest.

110. Asked in cross-examination about the end of May date referred to in § 3.1, Mr Pettersen said it was based on the position with the Norwegian banks, which were at that stage further ahead than GTLK, adding *"[m]aybe that was somewhat optimistic but I can explain further if that is required*". Mr Myrvoll said in cross-examination that although it was a tight schedule, he believed Havila's expectation of drawdown by the end of May was based on feedback from the bank (either direct or via the brokers, Fearnley). That recollection was consistent with an email from Fearnley dated 25 April 2019 which under the heading "*Timing*" referred to "*Barreras drawdown aimed by latest 21st of May*". Mr Myrvoll said there was good reason to believe Fearnley's view to be reliable as they had a close dialogue with GTLK on a daily basis, and Havila believed it when Fearnley indicated this timetable was possible to achieve. I accept that evidence.

(7) Events after Addendum 8 up to 21 June 2019

111. Mr Pettersen on 10 May 2019 (the deadline referred to in Addendum 8 § 2.1(i)) told the Yard, with reference to Addendum 8 § 2.1(i), that both Norwegian savings banks' credit committees had approved the financing, subject however to the participation of GIEK as guarantor. His message did not make any corresponding statement in relation to GTLK, though it said Havila was working on an alternative solution and expected to have a term sheet soon.

112. On 20 May 2019, Sr Gonzalez emailed Mr Pettersen about the following query from CESCE:

> "… regarding the CESCE policy, CESCE is asking us the following:

> Which is going to be real date for the owner to have its finance signed and fully effective?
>
> This it is important to have the policy on time for the yard with its effects on the bonds well issued So, the possible scenarios are:
>
> 1.- GIEK approval next Friday [24 May 2019]. Which will be the date?
>
> 2.- GIEK approval not next Friday. Alternative decisions we have to take." (date interpolated)

Mr Pettersen replied on 21 May 2019:

> "There are several options – and let me explain as follows:
>
> 1. Provided GIEK confirms the credit on Friday 24 May 2019, we will nevertheless not be able to complete and execute the documentation on Friday this week [24 May 2019]. That will have to be a subsequent event.
>
> If the date is going to be the date when the credit is approved by GIEK we can use this date, but if the approval unfortunately is not being granted on Friday 24 May 2019, we will have to use the date when the credit actually is being approved – for example a date in the following week.
>
> 2. Alternatively - if you prefer to use the date when the documentation for the financing is signed up, it is somewhat hard to say for sure when that will take place. Realistically I think that we will need 2 – 3 weeks in order to complete the documentation – so under such circumstances 14 or 17 June 2019 can be an alternative date.
>
> 3. As advised to you during our meetings in Vigo on 29 and 30 April 2019, Havila Kystruten AS is working in parallel on an alternative financing – which does not include the Norwegian bank and GIEK. This is the same lender as we are using on the Tersan vessels. We may have a firm term sheet from them this week – at least that is what is being indicated to me yesterday evening. If so Havila Kystruten AS will most likely prefer to change to this alternative – due to better terms.
>
> The good thing about this alternative is that we have been through the documentation after having discussed the financing of the Tersan vessels, and most likely we can work more efficiently on the documentation by using this alternative. However, we will not be able to complete the documentation within close of business on Friday this week.

> In other words – it can be hard to specify a particular date also for this alternative, so our best estimate should therefore be early June 2019.
>
> 4. Finally – if we should stick to the date when the documentation is completed / signed up we are of the opinion that the date should be 14 or 17 June 2019, but it can be earlier – and of course also somewhat later.
>
> Anyhow, and since we obviously is moving close to the time limit - it seems that Havila Kystruten AS will have to meet the payment obligations as set out in Addendum No 8 – meaning that EUR 2,000,000 has to be paid up under each of the two contracts by 31 May 2019 against insurance bond as agreed. The reason for this is that Havila Kystruten AS will not be allowed to draw under the facilities to be provided before the documentation is completed and signed up, and that will most likely be the case for both of the two lenders / finance providers. Consequently, the issue / execution of the insurance bond should be prepared so that this is ready as of 31 May 2019, and payment can be done according to Addendum No 8.
>
> Please call me when you have had the chance to review this email so that we can discuss practical matters further on phone." (date interpolated)

113. Abarca submits that his exchange indicates that Mr Pettersen knew that the reference in Addendum 8 § 2.1(ii) to "*final approval of the Financing*" referred to the existence of signed loan documentation. I reject that submission. Mr Pettersen was responding to the specific question from CESCE posed in Sr Gonzalez's email, namely when the financing would be "*signed and fully effective*", and Sr Gonzalez's reference in that email to the alternative possibilities of GIEK approval being obtained or not obtained by 24 May 2019, which was the date referred to in § 2.1(ii). Mr Pettersen's response made no assumption as to what had to be done pursuant to Addendum 8 (or 7). On the contrary, his email explicitly set out alternative answers depending on the question being asked: see his § 1 ("*If the date is going to be …*", § 2 ("*Alternatively, if you prefer to use …*") and § 4 ("*if we should stick to the date …*"). Mr Pettersen explicitly denied in cross-examination that he understood Addendum 8 § 2.1(ii) to bear the meaning Abarca put forward. His subsequent subjective understanding of the position would in any event be irrelevant to the correct construction of Addendum 8 or, for that matter, Addendum 7.

114. The documents include Policy Number FB/280.737/19 issued by CESCE on 21 May 2019, referring to Havila as the debtor and Abanca, another bank, Abarca and Barents as insured parties. Clause 5 stated:

> "This Insurance Policy will not take effect until the financing of the purchase of the vessel by the importer is signed in terms satisfactory to CESCE. The Policy is conditioned on compliance with the aforementioned Condition Precedent, so that coverage

> will not be initiated, nor will there be any right to any possible compensation until it is fulfilled. …"

Clause 7.6 made cover conditional on "*The existence of sufficient financing for the execution of the entire project [being] confirmed by the Insured Parties, as well as the availability of the funds subject to said financing*". The issue of this Policy post-dated Addenda 7 and 8 though, as will be clear, it is Abarca/the Yard's case that CESCE's requirements were known to Havila well before that date and in advance of the execution of those Addenda.

115. On 24 May 2019 (the date referred to in Addendum 8 § 2.1(ii)), Mr Pettersen gave Sr Gonzalez an update, including an unexpected delay in the financing proposal being put to GIEK, and the fact that Havila was continuing to work with GTLK.

116. The following day, 25 May 2019, Sr Lopez Loureiro in an internal email indicated that the Yard should wait for Havila to pay the €4 million of additional payments referred to below, and then bring up the cancellation of the contracts again (he was assuming the contracts would "*go into cancellation on 31 May*"). He added "*First receive the payment and then present the conditions under which we continue with the project*".

117. On 27 May 2019, the third set of refund bonds was issued and signed, in respect of what was termed "*First Additional Payments*" pursuant to Addendum 8 § 3.1 (i.e. €2 million per Vessel) plus interest.

118. On 31 May 2019, the deadline passed under Addendum 7 § 2.4.1, as amended by Addendum 8 § 2.1, for Havila's confirmation of the pre- and post-delivery financing for the Vessels. Sr Gonzalez agreed by telephone on that date not to apply the default provisions until after a meeting then due to be held in Vigo on 13 and 14 June 2019. Sr Gonzalez said in his witness statement:

> "The Yard is always very flexible with its customers, and we would never want to cancel a project, so this was something to be discussed rather than something we would look to use against a customer. It would also be bad for the yard's reputation in the market. However, as I have said before, where a Buyer does not pay on time that becomes a problem in having funds available to pay for the work that needs to be done."

119. On 4 June 2019, Havila made the First Additional Payments to the Yard from its own funds.

120. On 6 June 2019 Havila received a draft term sheet from GTLK's lawyers, Clifford Chance, which was provided subject to GTLK's further review and comment. Mr Pettersen updated the Yard about this on 8 June, indicating that GTLK was the same lender who were financing the Tersan vessels, and that this was an alternative to the Norwegian financing which had been approved by the banks but was pending GIEK's approval.

121. Havila and the Yard met in Vigo between 17 and 20 June 2019. The discussions at the meeting included Havila's financing, a potential timeline for the completion of documentation and drawdown under it, and technical matters relating to the Vessels.

As to the latter, Mr Saevik's evidence, which I accept, was that the Yard informed Havila "*out of the blue*" that the Vessels' design gave rise to serious stability issues, and that to achieve their specified deadweight and draught, the Yard would need to lengthen each Vessel by 12 metres: a major construction task. Sr Perez acknowledged that this came as a shock to Havila. Both Mr Saevik and Mr Pettersen said this issue then became the major preoccupation of the meetings: which in the circumstances appears inherently likely and which I accept.

122. During the course of these meetings, Mr Pettersen on the morning of 18 June 2019 circulated by email a proposed payment structure designed to avoid interruption in the construction of the Vessels. This envisaged *inter alia*: (i) further cash advances within 2 banking days after signing Addendum No. 9 (€2m per vessel): contemplating that Addendum 9 would be signed "*this week*"; (ii) 3rd instalment thereafter following execution of loan documentation with GTLK - not later than 31 July 2019; and (iii) further cash advances of €1m per vessel if drawing under the facility was not possible within 20 July 2019. Mr Pettersen accepted in cross-examination that, at this stage, the proposals under discussion envisaged certain further cash payments being made by Havila in advance of the loan documentation being finalised (or, as the question was put, "*in advance of the lifting of any impediments*" to the finance). Mr Pettersen said this was being discussed with the aim of keeping construction going, and occurred before construction was halted and before Havila had received detailed information about the technical problems.

123. Abarca in its written closing cites Havila having anticipated loan documentation by the end of July 2019 as an example of Havila having "*consistently misled the Yard as to when financing would be due, whether out of naivety or, more likely, by the time they got to June 2019, in an attempt to 'dangle the carrot' of imminent cash to stop the Yard from exercising its right to terminate*". Abarca submits that the reference to the end of July on this occasion was made "*without any regard for when it would actually materialise*". However, the cross-examination of Mr Pettersen on this aspect of the 17-19 June 2019 meeting was limited to the following exchanges:

> "Q. And you told them at this point that you expected to be able to have cash from GTLK within July?
>
> A. I think we indicated by the end of July. I can't recall exactly but I think I have it in the notes from the meeting.
>
> Q. Is it right that by this point the Norwegian banks had fallen out of favour, as it were?
>
> A. No, I don't think so, but I think it much better that Arild Myrvoll gives details about that.
>
> …
>
> Q. … All I meant by that was your preference at this point was GTLK?

> A. Our preference was GTLK because it was higher leverage, meaning you could lend more money, and I think also the terms were rather good.
>
> Q. Yes. So you told them that you expected to be able to have cash from GTLK within July at this meeting, but the Yard wasn't persuaded by your promises because they wrote to you on 21 June, just after this meeting, informing you of their intention to terminate under clause 2.5.1, because you hadn't confirmed their financing, didn't they?
>
> A. That is correct."

The serious allegation that Havila, and Mr Pettersen in particular, deliberately misled the Yard at this meeting was not fairly put to him, and (having regard also to Mr Pettersen's answers to questions about the meetings on 27-28 June 2019 considered below) I do not accept it.

(8) The Yard's 21 June 2019 notice and subsequent events

124. The day after the end of the Vigo meetings, on 21 June 2019, the Yard served on Havila written notice of its intention to terminate by reason of Havila's failure to confirm its financing by 31 May 2019, pursuant to Addendum 7 § 2.5.1(ii). That led, contractually, to a 14-day period (from 22 June to 5 July 2019) for the parties to hold the discussions provided for in § 2.5.1. In the notice, the Yard proposed a meeting with Havila in Vigo between 25 and 28 June 2019.

125. On 26 June 2019 GTLK and Havila signed a term sheet for the financing of the Vessels. The term sheet set out indicative terms, subject to *"inter alia, the approval of GTLK Europe DAC's board of directors, the approval of the STLC Lease Committee, acceptable regulatory compliance advice and opinions, and acceptable documentation"*. The indicative terms included details of the finance amount, availability period, final maturity date, conditions precedent, repayment schedule, interest rate, security arrangements and commitment fees, financial covenants, vessel covenants, security coverage ratio, events of default, and numerous other key commercial terms (albeit some were redacted for confidentiality reasons in the copy in the trial bundle). The term sheet stated that it was not legally binding, save for specified provisions including exclusivity, confidentiality, and a provision on "*Financing*" making clear that GTLK's commitment was conditional on it obtaining its own financing. Havila on 27 June told the Yard (in the context of discussions of a proposed Addendum 9) that GTLK had informed it that it may be possible to draw €24.6 on each of the two Vessels by the end of July 2019.

126. The parties then met in Amsterdam on 27 and 28 June 2019. There are different accounts of what discussions occurred. Sr Gonzalez's witness evidence indicated that the purpose of the meeting, and indeed the main discussion, was about the intended termination letter sent on 21 June 2019, and that the Yard informed Havila that they could no longer work on the project while Havila failed to pay instalments because the Yard had consumed all the funds available. According to Mr Pettersen, the main purpose of the meeting was in fact to progress the resolution of the issues relating to

Vessels' specifications. On the subject of Havila's finance, Mr Pettersen said in his witness statement:

> "Mr Myrvoll informed the Yard's representatives, Mr González, Mr López and Mr Pérez, the Yard's Spanish lawyer, that HKAS had now obtained a committed term sheet from GTLK. This fact was later recorded in Clause 2.1 to Addendum no. 9 to each SBC. In fact, I recall that I offered to show Mr González of the Yard a copy of the GTLK term sheet with the commercially sensitive terms redacted out. Indeed, Mr Myrvoll showed the redacted copy in his hand to Mr González across the table, but Mr González refused to look at it in detail and declined to keep a copy."

127. Mr Saevik's and Mr Myrvoll's evidence was to essentially the same effect. Their evidence that they produced the GTLK term sheet at the meeting, but the Yard declined to take or look at it, was not challenged. The point that the term sheet was explicitly referred to at the meeting was not denied by Sr Perez-Bouzada or Sr Gonzalez, and is consistent with (a) a note Mr Myrvoll made at the meeting stating "*GTLK in place. Draw 20 July*", and (b) Mr Pettersen's subsequent email of 1 July 2019 to the Yard which included the statement:

> "Since the buyers pre and post-delivery financing now has been confirmed – as advised to you in the meeting in Amsterdam – we hope that we should be able to conclude the outstanding matters and sign up an Addendum No 9 while we are in Amsterdam next week."

I accept the evidence of Mr Saevik, Mr Pettersen and Mr Myrvoll on these matters.

128. The contemporary emails indicate that during the course of the meetings, on 27 June 2019, Mr Myrvoll emailed Havila's brokers to ask whether it was possible to get "*a confirmation of financing from GTLK that we can submit to the shipyard. Great if it is without reservations, with the exception of* "*subject to documentation*"." The broker responded asking whether Havila had a format in mind, noting that the response from GTLK would necessarily depend on how binding it must be. There is no evidence of a response from Mr Myrvoll, and he could not recall these emails when asked about them in cross-examination. It is nonetheless notable that, at these meetings, (a) the Yard was shown but declined to look at GTLK's term sheet, and (b) Mr Myrvoll evidently formed the impression that it would be helpful to have a confirmation from GTLK which remained subject to documentation: which would seem hard to square with any suggestion that the Yard's position at the meeting was that nothing less than signed loan documentation would do.

129. In another email sent during the meetings, dated 28 June 2018, Sr Gonzalez told Abanca that *"It looks like [Havila] could have their GTLK financing signed on the 17th"*. Mr Pettersen in cross-examination explained that Havila already had GTLK's signed term sheet, and they were already starting to draw down from GTLK in relation to the two Tersan vessels; and he believed Havila had had indications that it would be possible to complete the documentation for the Yard's vessels and draw down during July. Mr Pettersen accepted that there were no drafts of the loan documentation in circulation

yet, but did not accept the suggestion that the end of July was "*wildly unrealistic*". Certainly if one applies hindsight it appears to have been optimistic, but it is necessary to recall that the documentation ultimately could not be finalised until the (at this stage still new) technical issues about the Vessels had been resolved, and the Yard itself had provided input into some documents forming part of the package, both of which I mention below. I certainly do not consider there to be any adequate basis on which to accept Abarca's apparent contention that Havila was deliberately misleading the Yard about the likely timescale.

130. On 4 July 2019, Havila asked the Yard to send certain documents, in preparation for the loan to be provided by GTLK, and the Yard sent the first batch of these on 8 July.

131. Also on 8 July 2019, Havila made clear to the Yard that the parties needed to finalise the negotiations about Addendum 9, and finalise the revised payment schedule for the SBCs, so that the drawdown under the GTLK facility could take place during July:

> "In order to meet the timeline which we are working under in respect of the documentation for the buyers financing, we need to complete the Addendum No 9 tomorrow so that we can submit the revised payment schedule as discussed in the meeting on the 27 and 28 June 2019 to GTLK in order to prepare for the payment of EUR 24,6 million [i.e. the 3rd instalment] within 31 July 2019 on each of the contracts for NB 1710 and NB 1711, respectively."

132. The parties then met again on 9 and 10 July 2019 in Amsterdam. In the 24 hours leading up to the meetings Mr Pettersen was in touch by email with Clifford Chance about how soon the GTLK loan documentation could be ready so that drawdown could occur. Mr Pettersen was keen to reach drawdown by 20 July 2019. Mr Capel of Clifford Chance, having initially suggested that early to mid August was more likely, indicated that targeting 26 July (the last Friday in July) might be slightly more realistic than 20 July, albeit still challenging. Mr Pettersen responded to Mr Capel that *"Targeting 26 July can be acceptable but then we really need to try to reach this target. In our meeting with [the Yard] today we will indicate this as the goal for drawing under the financing for both vessels."* Mr Capel replied *"We would suggest trying to buy yourself as much time as possible. This is still a big transaction to document in under three weeks, but rest assured that we work as quickly as possible."* Abarca criticise Mr Pettersen's approach as having ignored Mr Capel's advice and chosen instead to 'dangle the carrot' again, telling the Yard what it wanted to hear irrespective of its accuracy. Abarca again significantly overstates the point. Whilst 26 July may have been at the outer limit of what Mr Capel considered feasible, it is clearly wrong to suggest that Mr Pettersen was simply ignoring the advice and giving the Yard a date which we knew to be unfeasible. On the contrary, his last remark to Mr Capel quoted above suggests that he genuinely expected Clifford Chance to work towards that date.

133. Messrs Saevik, Myrvoll and Petersen made notes at the 9-10 July 2019 meetings. Those indicate that there was a great deal of discussion about the problems about the Vessels' weight and stability, including the Yard's proposal to lengthen them, and how this would be paid for. That was a very major issue, not least because (as Mr Saevik pointed out in cross-examination) the Yard's lengthening proposals were going to cost approximately an extra € 16 million per Vessel, € 32 million in total. There was

discussion of points which became terms of Addendum 9, including rights of cancellation. As to Havila's financing, Mr Saevik's notes include the entry "*Insurance Bond, financing must be shown before one is ready with it*". The recollection of Mr Myrvoll and Mr Pettersen was that Havila's financing was discussed only briefly, and the notes tend to bear that out.

134. Sr Gonzalez, though he said the financing was his priority at the meeting, and that Havila had still not confirmed their financing and were nervous, did not suggest that any conclusion or agreement was reached at the meeting about whether or not financing was available to Havila.

135. According to Sr Perez-Bouzada, the Yard said at the meeting that it would have to terminate the SBCs if an alternative financial arrangement could not be agreed very soon; and he commented in his second witness statement that "*Because Havila told us they still did not know who their financier would be and they were still considering different options there was a limit to what could be discussed*". That evidence is hard to square with Sr Gonzalez's evidence that he believed Havila to be in discussion only with GTLK by this stage. In any event, Sr Perez-Bouzada too did not suggest that any conclusion or agreement was reached at the meeting about whether or not financing was available to Havila; and he accepted in cross-examination that he expected Havila's financing to fall into place.

136. Another topic which appears to have been discussed at and around the meetings on 9 and 10 July 2019 was the parties' (alleged) rights of cancellation. Various competing wordings were proposed in email correspondence on 9 and 10 July 2019 for possible inclusion in Addendum 9 or perhaps a side-agreement, but none were agreed.

137. On 10 July 2019 Sr Cabellos, for Havila, sent a document to the Yard which stated that it recorded the parties' agreement negotiated at the meetings on 9-10 July. Paragraph 1 of this document stated:

> "The Parties agree that by entering into this agreement, the Parties have complied with the obligations to negotiate in good faith according to the terms and conditions of clause 2.5.1 of the Addendum No 7 (as amended by Addendum No 8), and no further negotiations as set out in clause 2.5.1 of the Addendum No 7 are required for the Builder to be entitled to cancel the Current Contract according to clause 2.5.1 of the Addendum No 7 (as amended by Addendum No 8). The Parties agree that fourteen (14) days negotiation period referred in Clause 2.5.1 of Addendum No. 7 (as amended by Addendum No 8) have elapsed without satisfactory arrangement for the Parties in order to find a satisfactory solution today for both Parties."

This document was, however, never signed. Sr Cabellos said in cross-examination that he was trying to "*[s]eek peace*" and had been asked to include the Yard's position as reflected in the paragraph quoted above. He recalled having copied and pasted it from an email from the Yard, and did not agree that it reflected the position of both parties. He said that at the meeting itself, the Yard wanted Havila to confirm that Addendum 7 § 2.5.1 was exhausted, and they feared Havila's right to cancel the SBCs. I accept Sr Cabellos's evidence that the document did not reflect anything the parties had agreed

at the meeting. It is inherently unlikely that they would have done, given the expectation on both sides that Havila's financing would fall into place; and the fact that the document was never signed is also consistent with Sr Cabellos's evidence.

138. The Yard nonetheless on 11 July 2019 sent Havila letters stating that the *"fourteen (14) days negotiation period referred to in Clause 2.5.1 of Addendum no. 7 (as amended by Addendum no. 8) have elapsed without satisfactory arrangement for the Parties in order to finds a satisfactory solution for both Parties"* and hence that the Yard was entitled to cancel the SBCs. The Yard did not purport actually to cancel the SBCs, but only to reserve its right to do so in the future, adding that *"no actions taken by us to the contrary shall in any way be construed as a waiver in any form by [the Yard] under the Contract"*. Sr Perez-Bouzada agreed in cross-examination that the Yard did not want to terminate the SBCs at this point but wanted to keep the pressure on Havila. He confirmed that the Yard wanted to keep exploring all possible alternative arrangements.

139. The following day, 12 July 2019, Havila's on-site representative in Vigo reported by email referring to *"the current situation at [the Yard] with the suspension of production on both vessels, … and also the overweight problem"*.

140. Mr Pettersen on 14 July 2019 said in an email to GTLK that:

> "We really hope that the postponement of the board approval of STLC does not cause a delay in the documentation of the loan. We ned to have the documentation ready and signed /executed so that we can draw on the loan in the week commencing with 29 July 2019."

Abarca suggested that Havila was pressing for signed documentation because it knew that was what it was contractually required to produce. Mr Pettersen did not accept that suggestion, and (for reasons I explain later) it does not accord with Havila's actual contractual obligations. Mr Pettersen's understanding of the effect of the contract would not be admissible in any event, but as a matter of fact it is entirely unsurprising that Havila wanted to be able to draw down under the loan in order to fund instalments under the SBCs.

141. On 16 July 2019, Havila was sent a letter from the CEO of GTLK stating:

> "By and between Havila Kystruten AS (as borrower) and GTLK Europe DAC (as lender) a term sheet dated 26 June 2019 has been entered into for the financing of the vessels NB 1710 and NB 1711 to be delivered from Barreras to Havila Kystruten AS according to the terms and conditions as set out in two separate shipbuilding contracts dated 24 April 2018 (as from time to time amended by addenda thereto), said term sheet hereinafter referred to as the "Term Sheet" and the transaction as described therein as the "Transaction".
>
> According to my legal capacity as the company CEO of GTLK Europe DAC, I (the undersigned) hereby confirm that the Term Sheet has been approved by the Board of Directors at GTLK

> Europe DAC and that the Term Sheet is binding upon the lender according to terms and provisions as set out therein.
>
> The approval of the Term Sheet is only subject to satisfactory documentation of the Transaction."

142. The issue of this letter followed approval of the transaction by GTLK's board of directors on 9 July 2019 and, it appears, approval by the leasing committee of its parent, STLC, on 16 July 2019 (both of those approvals having been required under the provisions of the term sheet itself: see § 125 above). The fact that approval had been given by the leasing committee on that date is stated in Mr Myrvoll's evidence and can reasonably be inferred from the facts that (a) email correspondence on 14 July 2019 referred to the leasing committee's consideration of the matter being scheduled for 16 July 2019 – which was the date of the letter itself – and (b) the letter stated that its approval was now subject only to satisfactory documentation.

143. Havila forwarded this letter to the Yard by email on 22 July 2019, referring to it as "*a confirmation from GTLK which we have requested to be issued in respect of the pre and post-delivery financing of the vessels contracted at [the Yard]*". Havila on the same day wrote formally to the Yard, denying the Yard's claim (in its letters of 21 June and 11 July 2019) to be entitled to cancel the SBCs, and saying:

> "Your claim to be entitled to cancel the Contract seeks to rely on Clause 2.5.1 of Addendum no. 7 to the Contract. Clause 2.5.1 does indeed contain a right of cancellation of the Builder where the Buyer cannot confirm the pre- and past-delivery financing of the Vessel by 30 April 2019 (a date thereafter extended to 31 May 2019 by Addendum no. 8). However, and among others, the Builder's right is subject to a number of conditions precedent including that the Buyer and the Builder must meet physically "in order to consider and to negotiate in good faith alternative arrangement[s] in order to avoid termination and/or cancellation of the Contract" and, further, that they must have concluded after a 14 day negotiation that "there is no alternative financial arrangement" available.
>
> Meetings took place in Vigo on 17 to 19 June 2019, and in Amsterdam on the 27 and 28 June 2019 and on 9 and 10 July 2019. Your 11 July 2019 letter, in which you refer to the parties' meetings in Amsterdam, does not mention that, at these meetings, we confirmed that we now had obtained a committed term sheet for financing that we expected to be drawn down by 31 July 2019 — or within 7 August 2019 as agreed in the meeting on 11 July 2019 as payment of the next instalment. We attach, for your ease of reference, a confirmation from GTLK Europe DAC (Ireland) which we have obtained in order to confirm the financing. If required we can also provide you with a redacted copy of the term sheet dated 26 June 2019.
>
> Accordingly, the position is that we have now confirmed that the required financing is in place, even if we did not do so before 31

> May 2019. The documentation will only deviate from a previous financing with the same financier concerning the 2 vessels which are under construction in Turkey, in terms of including the Spanish tax lease entered into for your benefit on 21 March 2019.
>
> For our part, we therefore fully intend to perform the Contract, and we have a committed offer of finance in place.
>
> Consequently it is clear that the conditions precedent to any right to cancel under Clause 2.5.1 have not been satisfied …"

144. It will be noted that Havila in this letter offered, for the second time, to provide a copy of the term sheet itself, in redacted form, if the Yard wished to see it. There is no evidence of the Yard having requested a copy of the term sheet, or having forwarded GTLK's letter to Abarca or Abanca (or, indirectly, to CESCE). There is no evidence of any of those entities being asked to give any consideration to whether anything further was required from GTLK at this stage.

145. Abarca suggested to Mr Pettersen in cross-examination that it was unreasonable for Havila, in this letter, to repeat its prior statement about expecting drawdown by 7 August, since it had only received a first draft of the facility agreement on 22 July. Mr Pettersen did not accept this, saying *"I think it was based on my expectations at that time, but what we really were struggling with was the technical issues."* As Havila's 22 July letter pointed out, the loan documentation was expected to be substantially the same as it had just used, with the same lender, for the Tersan vessels, subject only to changes to address the Spanish tax lease aspect. According to Mr Myrvoll's recollection, the term sheet for the Tersan vessels had been signed with GTLK in April 2019 and Havila was drawing down under the GTLK loans by the end of May. Even if Havila's prediction was optimistic, I see no basis for concluding that it was seeking deliberately to mislead the Yard.

146. Further meetings took place between the parties, including on 24-25 July 2019 in Vigo. For once, formal minutes were prepared and signed. The 'Background' section of the minutes recorded that:

> "Following various meetings in Vigo on 17 to 19 June, and in Amsterdam on 27 and 28 June 2019 and on 9 and 10 July 2019, and various subsequent exchanges, the Parties decided to meet again in good faith to address design issues faced by the project of the Vessels. The technical discussion entails the need to also discuss the financial and timing consequences of the potential solutions. The overall solution is to be documented in an Addendum No 9 to the Contracts ("Addendum no 9"). Barreras and Havyard present several solutions to Havila."

It is evident from the minutes that the meetings focussed very largely on the technical and commercial aspects of the Yard's proposal to lengthen the Vessels (including, importantly, a significant increase of the cost of building the Vessels and delayed delivery dates). The minutes record discussion about how the additional costs would be shared, which is bound to have been a major issue given their size. At the end of the minutes, a paragraph headed 'Financing' read:

> "[The Yard] states that nowadays no financial arrangement has been agreed by [the Yard] and [Havila] and that only by signing the expected finance communicated by [Havila] concerning GTLK's financing is not enough to be considered a valid alternative financial arrangement. [Havila] disagrees with and rejects such statement."

147. Immediately after the meetings, Sr Gonzalez reported to Abanca that:

> "We just finished the meeting with the Norwegians.
>
> We have reached a basic agreement.
>
> [The Yard] will not assume more than one-third of the cost of modifying the project caused by its technical office (estimated impact on [the Yard] due to loss of profitability about 3.5-4.5 million).
>
> The remaining two-thirds will be assumed between the shipowner and its technical office.
>
> Havila will have its financing ready on 8 August. GTLK Europe DAC Bank.
>
> From that day on, they will be able to pay us the 45.2 million that they owe.
>
> On Friday, next week, we have arranged to meet in Oslo to close the rest of the complementary matters in addendum 9 that leads us to the full perfection of the contract, collection of outstanding amounts and normalised construction.
>
> Therefore, I confirm that we would need the extension of the CESCE policy valid for one month before we go on holidays.
>
> I have informed CESCE of all this. CESCE has told me that there are many things I didn't know because it hadn't been informed, for example, the name of the shipowner's new bank (GTLK). I had told them in June! …"

148. It evidently remained the case that the Yard had, still by this stage, not reached any conclusion to the effect that Havila did not have financing available in principle from GTLK. Abanca's response the same day (25 July) indicates that CESCE, on the other hand, were beginning (at least) to have concerns about the Yard position in general:

> "On the one hand, I would like to inform you that CESCE, as I had told you over the phone, asked us to make a global assessment of the risk increase, this is the total situation of the Shipyard, not only of the Havila projects in particular and our assessment in this regard as a Bank, which response they require to be before tomorrow at 10 a.m. so that the extension can be processed.

> On the other hand, I confirm that CESCE HAD been informed of the new bank, I don't know who you're talking to about it, but I assure you that we had informed it and attached you will find a screenshot of the email from 2 July where you can check that it is like that."

149. In an email of 31 July 2019, Mr Pettersen expressed concern about when the CESCE policy and refund bonds would be in place, Havila being unwilling to pay the third and later instalments without them. Havila wanted construction to restart as soon as possible, but was concerned about "*the time which will run before the required approvals for a new technical solution (including increase of cost / risk and new delivery dates) are in place by all parties involved*". In order to find an intermediate solution, Mr Pettersen said, Havila was prepared to provide the two instalments of € 2.5 million as discussed in the last meeting, subject to satisfactory security; and Mr Pettersen asked when the insurance bond could be issued for the two payments. (Mr Pettersen agreed, in cross-examination, that this would involve Havila funding the payments itself, before the GTLK loan documentation was finalised and in force.) Sr Gonzalez responded the same day that he was expecting the CESCE policy "*[t]oday*" to be extended to 20 August, upon which "*we would be able to issue bonds and cut through, under the contractual limits*". That response is hard to square with any suggestion that Havila knew, even by this stage, that the CESCE counter-guarantee and refund bonds could not be put in place until Havila had proven that it had signed loan documentation.

150. Further meetings took place on 5-6 August 2019 in Oslo. Mr Pettersen's evidence was that those meetings were mainly to discuss the draught issues and the Yard's and Havyard Design's proposed alternatives, and those topics were the main subject of his email of 6 August 2019 referring to the discussions. He also attached an "*updated plan for payment*" envisaging a second additional payment from cash of €3.5 million per vessel by 14 August in connection with the proposed Addendum 9. His email ended:

> "Finally – and with reference to the discussions yesterday concerning the confirmation of GTLK of the pre- and post-delivery financing of the vessels as contacted by Havila Kystruten AS at Barreras, we attach for sake of good order a new copy of the confirmation of GTLK as of 16 July 2019."

151. Sr Perez-Bouzada in his witness statement said he could not remember the exact words used at the meeting, and again there were no minutes, and referred to Mr Pettersen's email. Having refreshed his memory from the emails, Sr Perez-Bouzada said that to the best of his recollection, there had been a discussion of Havila's financing, as part of which the Yard had said the GTLK letter was not sufficient; and that Sr Gonzalez had discussed it with Abanca and CESCE but it was not enough for them. Sr Gonzalez said he did not remember the discussion well but did not disagree with Sr Perez-Bouzada's account.

152. In cross-examination, Sr Perez-Bouzada agreed that at the meeting, Havila had been asked for a signed version of GTLK's letter because the signature had not been visible on the version previously provided. He also said that, at this stage, *"…we thought that the financing was going to be available at some time. But, I mean, after one year waiting*

for the financing, I mean, some doubts it's logical would arise. … We hoped that the financing was going to be available".

153. On 8 August 2019, Sr Cabellos sent the Yard's team draft wording for notices of assignments and acknowledgements (relating to the assignment of Havila's rights under the SBCs and insurance bonds), and notice of pledge of the tax lease documents, indicating that Havila would need them in place to draw under the financing, and asking for any comments at the recipients' earliest convenience.

154. On 12 August 2019, Havila told Clifford Chance (acting for GTLK) that the parties were still discussing Addendum 9 and expecting a conclusion to be reached within 1-2 weeks (subject to the holiday period). Clifford Chance on 12 August and 6 September chased for updates in relation to parts of the suite of financing documents that would require input from the Yard or the Yard's own financial backers, such as the pre-delivery mortgage and Intercreditor Agreement and various notices and acknowledgements of assignments in relation to security.

155. On 21 August 2019, Clifford Chance set out a summary of the status of the whole suite of financing documentation. On 22 August 2019, Mr Pettersen responded in relation to the various clarifications required: "*As far as concerns the clarifications – please be advised that technical clarification meetings are going today and tomorrow and that a conference call is scheduled for Monday 26 August 2019. I will assume that we will know more after the call on Monday when we can expect to finalize the technical evaluation and have the discussions with Barreras completed and be ready for drawing under the Facility Agreement*". Clifford Chance responded that: "*To the extent possible, it would be great to try to finalise the documentation in parallel with the discussions you are having with Barreras. We appreciate that some mechanical aspects of the Facility Agreement cannot be finalised until Addendum No. 9 has been finalised*".

156. It is evident from these communications that it would – unsurprisingly – not be possible for Havila's financing documents to be finalised and executed until the parties had agreed the changes to the commercial deal intended to be set out in Addendum 9. It was also clear from the evidence of Messrs Pettersen and Myrvoll that, as one would naturally expect, the financing documents could not be finalised until the key revised commercial terms to be set out in Addendum 9 had been finally agreed. Similarly, Sr Perez-Bouzada said that, in mid September 2019, the first and most important issue was to close Addendum 9, and which would give a clear view of payments and a schedule of payments. He said the Yard knew the addendum would need to be submitted to the banks and other parties in order to get their approvals.

157. On 26 August 2019, Havila asked the Yard about "*the date for when we can have the insurance bond and the cut-through agreement securing the 3rd instalment (EUR 24,600,000 on each of the two contracts) issued. The reason for this is that all parties involved need to do planning of the drawing and the disbursement of funds to be paid to the Yard, and that the execution of the insurance bond and the cut-through agreement is one of the condition precedent for drawing under the facility*".

158. On 27 August 2019 Mr Pettersen circulated comments on the latest draft of Addendum 9 and a detailed proposed timeline in connection with it. In relation to the draft, Mr Pettersen said *inter alia*:

> "Please note that the payment of the Second Additional Payment as per the draft Addendum No 9 (1 x EUR 5,000,000 per vessel) is subject to that the construction of the vessels is being restarted immediately. Please therefore prepare for such restart of the construction of the vessels."

Mr Pettersen's proposed timeline envisaged Addendum 9 being signed on 30 August 2019 (along with the Addendum to the Supply Agreement between the Yard and Havyard Design), followed by these steps:

> "4. **2 September 2019**: Relevant information outstanding (if any) to be provided by Havyard Design & Solutions AS and forwarded to Barreras for review of the Havyard Alternative.
>
> 5. **4 September 2019**: Lifting of the board approvals in the Addendum No 9 and the Addendum to the Supply Agreement.
>
> 6. **5 September 2019**: Delivery of the insurance bond to be issued for Second Additional Payment to Watson Farley & Williams in Madrid.
>
> 7. **6 September 2019**: Payment of the Second Additional Payment to Barreras.
>
> 8. **9 September 2019**: Required confirmation for insurers, reassures, refund guarantors and CESCE to be provided to Havila Kystruten AS. (Approval of Addendum No 9, extension of the expiry date of the insurance bond / refund guarantees).
>
> 9. **9 September 2019**: Satisfactory insurance bond including cut-through agreement to be provided for 3rd Instalment (EUR 24,600,000) in respect of both vessels (NB 1710 and NB 1711).
>
> 10. **12 September 2019**: Payment of the 3rd instalment for both vessels (NB 1710 and NB 1711). (Please note that we have maintained this date in the attached draft Addendum No 9, but due to providing the confirmation from the insurers / CESCE as set out in item 9 above, we maybe have to amend the payment date till 15 September 2019. Let us discuss that tomorrow).
>
> 11. **14 September 2019**: Conclusion in respect of technical solutions to be applied (Barreras Alternative or Havyard Alternative).
>
> 12. **21 September 2019**: Final date for agreeing / concluding the Havyard Alternative (if finally chosen by Havila Kystruten AS).
>
> 13. **21 September 2019**: Suggested date for all conditions / approvals to be fulfilled (Target Date or Long Stop Date)."

Mr Pettersen agreed in cross-examination that this timeline envisaged payment of the second additional payments (step 7) before the various confirmations and other matters

referred to in steps 8 and 9. It was suggested that the latter steps were "*always*" going to come after the second additional payment, because the idea was to provide cash now whilst those matters were being ironed out. Mr Pettersen responded that one could express it in that way, but he stressed – three times – that payment would be made only after board approval (step 5). I understand Mr Pettersen, in placing that emphasis on board approval, to have been making not merely the obvious chronological point that step 5 (board approval) preceded step 7 (payment), but also the fundamental point that the whole arrangement remained subject to board approval.

159. On 3 September 2019, the Yard informed Abarca that it expected to sign Addendum 9 that day and requested a further insurance bond for the €5m payments. Sr Morales replied that "*as a way of supplementing the file we would need to have confirmation from the Norwegians on the financing of the project*". Notably, the request was not for signed loan documentation. This request appears to have been discussed in a telephone call, following which Mr Pettersen emailed the Yard that evening stating:

> "We refer to our discussions this morning and your request to provide a confirmation from GTLK stating that we have agreed upon the loan documentation and that we are ready to draw subject to fulfilment of conditions precedent.
>
> We have discussed the matter with GTLK in a conference call today, and although they find the request somewhat strange based on the confirmation provided as of 16 July 2019, they can be willing to issue the requested confirmation if that can speed up the required approval of the Addendum No 9 by the insures [sic] / CESCE.
>
> Based on this we suggest the following wording which we kindly request you to consider and respond to…"

Mr Pettersen's draft wording stated:

> "By and between Havila Kystruten AS (as borrower) and GTLK Europe DAC (as lender) a term sheet dated 26 June 2019 has been entered into for the financing of the vessels NB 1710 and NB 1771 to be delivered from Barreras to Havila Kystruten AS according to the terms and conditions as se out in two separate shipbuilding contracts dated 24 April 2018 (as from time to time amended by addenda thereto) ("Shipbuilding Contracts"), said term sheet hereinafter referred to as the "Term Sheet" and the transaction as described therein as the "Transaction".
>
> By our letter dated 16 July 2019, we confirmed that the Term Sheet has been approved by the relevant committees of GTLK Europe DAC and State Transport Leasing Corporation and that the Term Sheet is binding upon the lender according to terms and provisions as set out therein. The only remaining subject was satisfactory documentation of the Transaction.
>
> With reference thereto we further confirm that the Havila Kystruten AS / Havila Holding AS (as obligors) and GTLK

> Europe DAC (as lender) have agreed upon the facility agreement and the security documents appurtenant thereto, and that we have the require funding available for the drawing of the next payment (3rd instalment) being EUR 24,6 million to be paid under each of the Shipbuilding Contracts.
>
> The only outstanding matters as for now is completion of the conditions precedent as set out in the facility agreement, which includes (i) the notice of assignments to be made to the insurers / reinsurers and refund guarantors providing the refund arrangement, (ii) insurance companies providing the insurance of the vessels under construction and (iii) Barreras in respect of the assignment of the Havila Kystruten AS` rights and benefits under the Shipbuilding Contracts."

The last part of this draft wording lists a number of matters where input was still needed from the Yard's side before drawdown could occur.

160. Sr Cabellos on 4 September 2019 wrote to the Yard's team, referring to comments received from the Yard on some of the transaction documentation, and stating:

> "We have conveyed the comments to GTLK, and here is the revised draft of the notices/acknowledgement. In terms of the first comment, as mentioned, this notice will be delivered on closing – that is the earliest we can deliver it - and it needs to be effective on the date delivered because otherwise the agreements to pay to the Assignee would not be effective.
>
> In parallel, we also need comments, if any, to the attached notices: one relates to the assignment of rights under the SBC (comments should come from Barreras) and the other under the tax lease (comments should come from Luis Mingo/BM)."

Sr Perez-Bouzada accepted that, in the light of this, he had been incorrect in his witness statement to say that the last mention by Havila of the notice of assignment had been certain comments that Sr Gonzalez had provided on 2 September 2019. Sr Santos at one point said in cross-examination that he thought the Yard had sent their comments on the documents to Watson Farley. However, I find it clear from the correspondence that input from the Yard's side remained outstanding.

161. In parallel with this, however, disagreements arose about the contents of the proposed Addendum 9. Mr Pettersen emailed Sr Gonzalez and Sr Perez-Bouzada on 3 September 2019 with various comments on *"the execution copies of the Addendum No 9 which have been forwarded to us by email today".* Sr Perez-Bouzada responded to those comments on 4 September, adding:

> "Also note that unless the outstanding matters be solved within 15,00 CEST of today the 4th September and Addendums 9 be executed within said timing, we shall consider that the Parties have not been able to reach an acceptable Agreement as stated in the Current Contract.

> As per our phone call earlier today, an unambiguous Owner's and GTLK 's confirmation of the availability of the pre and post delivery financing is paramount to further proceed with the projects as contractually agreed. Insurers have just requested this evidence as a condition to approve the issuance of the insurance bonds. In this regard, please also note that this confirmation is also needed within today."

162. Further correspondence ensued about the differences between the parties about proposed changes to the Vessels and their cost. Sr Perez-Bouzada on 4 September 2019 stated that aspects of Havila's proposals for changes and improvements in relation to the vessels were unacceptable last-minute requests. Mr Pettersen responded later the same day indicating that Havila's board had not approved the version of Addendum 9 that the Yard had executed, stating that *"it is the technical challenges the yard and the designer now are facing which really cause a problem for the project",* but underlining that Havila wanted to find a solution and complete the project with the Yard.

163. However, Sr Perez-Bouzada, on behalf of the Yard, then emailed on 5 September 2019 stating:

> "First of all we would like to pass to you all Havila that we are extremely disappointed and frustrated by the Havila Kystruten AS' response to several weeks of intense discussions and negotiations aimed to solve the current situation. It was our understanding that the Buyer and the Builder had agreed in the Addendum n. 9 how to further proceed with the vessels construction with an acceptable solution for all the parties.
>
> We would also like to state that the only reason why the parties are facing the current situation is due to the fact that Havila Kystruten AA has not been able to honor its payment obligations under the Current Contract and confirming the pre and post delivery financing of the Vessels as per the agreement between the parties. This failure by Havila Kystruten AS to fulfill its payment obligations has caused the projects coming to a halt and serious damages to Hijos de J. Barreras SA.
>
> With regard to the Design responsibility, please note that Hijos de J. Barreras SA has always undertaken the control of the Buyer's parent company Havyard Design & Solutions AS design and also made repeatedly Havila Kistruten AS (and the Designer) aware of the deficiencies, errors and increased risk relating to such design which HJB discovered.
>
> Furthermore the Builder has clearly shown its willingness to find and contribute to solve the technical challenges derived from such designs issues.
>
> But it seems -unfortunately- that Havila Kystruten AS disregards the above mentioned facts.

> We do to see that the matters set out in your email can be neither accepted nor timely implemented within the end of the week (bearing in mind all the financial and technical issues to be considered and related to Havila's last minute requests) and, therefore, kindly please note that Hijos de J. Barreras SA' s position is that the parties have concluded that there is no alternative financial arrangement to be provided by Havila Kystruten AS to the Builder in order to avoid the cancellation of the Current Contract.
>
> All Builder's rights are expressly reserved."

164. The penultimate sentence of this message, despite the use of the word "*therefore*", did not follow from the first. The message at one point asserted that the "*only*" reason for the current situation was Havila's failure to honour its payment obligations and to confirm the financing of the Vessels as agreed. That was obviously incorrect in circumstances where (leaving aside the question I consider later about Havila's obligations under Addendum 7) Havila had procured a commitment from GTLK, and the primary focus of the parties' discussions and disagreements related to other matters. Those other matters were, indeed, the main focus of Sr Perez-Bouzada's message. There was no basis on which Sr Perez-Bouzada could cogently have asserted that the parties had in fact concluded, nor (objectively) that parties acting in good faith (or, for that matter, reasonably) would have concluded, that there was *"no alternative financial arrangement to be provided by [Havila] to [the Yard] in order to avoid the cancellation of the contract."* Sr Perez-Bouzada was unclear in cross-examination about precisely when he said any such conclusion had been reached, referring to *"the fact that we didn't arrive to any alternative … financial arrangements at this date in September 19"* but also saying that *"we were working on addendum no. 9 in order to avoid a cancellation of the contract".* Further, he accepted that in order to conclude its financing arrangements Havila would need to know, for insertion into the documents, how much was going to be paid and when: which were two of the things being discussed in relation to Addendum 9. In these circumstances, I accept Havila's submission that the assertion in Sr Perez-Bouzada's message did not reflect any conclusion that the parties, or even the Yard, had in fact reached; rather, it was an attempt to maintain pressure on Havila in the context of the negotiations leading to Addendum 9.

165. On 9 September 2019 Havila told GTLK, following discussions with the Yard, that the Yard no longer required a letter from GTLK, but only a letter from Havila confirming that the financing was in place. A draft wording for this letter was then provided to the Yard on 10 September and forwarded the same day to Sr Morales of Abarca. I infer that Abarca had requested such confirmation. The Yard meanwhile maintained the position with Havila that Havila had still not provided the confirmation required by Addendum 7 § 2.4.1.

166. Sr Morales of Abarca responded to the draft confirmation letter the same day, 10 September 2019, as follows:

> "I am confident that we are in a phase of resolving the last few challenges. I am forwarding you the text with a modification. Please print it on corporate paper and send it signed to us to complete the file."

The form of the letter, with Sr Morales's proposed modification underlined, was:

> "HIJOS DE. J. BARRERAS S.A.
>
> Dear Sirs,
>
> We refer to the shipbuilding contracts dated 24 April 2018 (as from time to time amended by addenda thereto) entered into by and between Hijos De J. Barreras S.A. ("Builder") and Havila Kystruten AS ("Buyer") for the vessels NB 1710 and NB 1711 (the "Vessels" and the "Shipbuilding Contracts", respectively).
>
> According to an Addendum No 9 which is under negotiation between the Builder and the Buyer, a total amount of EUR 130,360,000 is going to be paid to the Builder for each of the Vessels, in the terms and conditions of the Shipbuilding Contracts (including said Addendum No 9, when it enters into force). We as Buyer have as of today paid up the 1st and the 2nd Instalment under each of the two Shipbuilding Contracts for a total amount of EUR 16,400,000 <u>for each of the Vessels</u>. A total amount of EUR 26, 420,000 is going to be settled for each of the Vessels through Spanish financial structures. As a result, a total of EUR 87,540,000 payable by the Buyer ("Remaining Outstanding Amount") will be outstanding under each of the Shipbuilding Contracts.
>
> In addition to GTLK `s confirmation of 16 July 2019, we hereby confirm that we have the sufficient funding and are able to settle the Remaining Outstanding Amount according to the payment plan as being incorporated in the Addendum No 9 by the aggregate of (i) the pre- and post-delivery financing to be drawn in due course from GTLK and (ii) our own available funds (equity).
>
> We hope you find this confirmation satisfactory.
>
> Fosnavåg 10 September 2019
>
> Havila Kystruten AS
>
> Per Sævik
>
> (Chairman of the board of directors)"

167. The Yard then told Havila that Abarca had said they would accept the letter "only to issue next bond", requesting the signed letter, and adding:

> "But consider that this shall be not enough to confirm the finance to Reinsurers, Financers and CESCE, in the correspondent moment.

> We refuse your previous comments about the sufficiency of the said letter from GTLK of 16 July 2019 as an evidence of a committed statement from the bank.
>
> And we aware you that to issue the Cutthrough, to have CESCE policy in place and issue RG's, shall be not enough, as per the contract, only the two letters.
>
> For that, we kindly ask you, also, to send to us the refered Term Sheet as stated in the attached letter and the confirmation from the bank that all the subsequent conditions of the letter (satisfactory documentation …) have been lifted."

168. A letter in the revised form Abarca had requested was signed and provided on 11 September 2019.

169. Addendum 9 was then signed on 15 September 2019 in its final form and approved by the Yard's Board on 16 September 2019.

(9) Addendum 9 and subsequent events

170. Addendum 9 provided:

i) for design changes, including lengthening the Vessels, subject to an option for Havila to choose an alternative design improvement (clauses 4.2 & 4.8);

ii) for a price increase to €130,360,000, i.e., a €16,800,000 increase per Vessel (clause 4.6);

iii) for new milestones for payment of the revised Contract Price (clause 5.1); and

iv) for new delivery dates of 30 April 2021 (Hull 1710) and 22 May 2021 (Hull 1711) (clause 8.1), which extensions included all Permissible Delays up to the date of Addendum 9.

171. Addendum 9 also provided that Havila was to pay a further sum of €5m per Vessel (referred to as the "*Second Additional Payment*") one Banking Day after the assignable insurance bond for the payment was delivered to Havila's solicitors, subject to board approvals being granted:

> "3.2 The Buyer shall pay to the Builder, an additional cash amount of EUR 5,000,000 (Euros five million 00/100) one (1) Banking Day after the Insurance Bond for this payment has issued and delivered to Watson Farley & Williams in Madrid ("Second Additional Payment" and "Second Additional Payment Date", respectively), see clause 3.3 of the Addendum No. 9.
>
> Upon the Buyer's payment of the Second Additional Payment, the Builder undertakes to "re-start" the construction and building of the Vessel immediately subsequent to two (2) Business Days after the Buyer's payment to the Builder of the Second

> Additional Payment. In this respect "re-start" of the construction and building of the Vessel shall be regular and as considered to be normal for the shipbuilding industry for such a vessel under construction as NB 1710, in the current circumstances.
>
> 3.3 [i] Provided that the board approvals are being granted, the Second Additional Payment shall be made against Insurance Bonds as issued for the First Additional Payment (see Appendix 1 hereto) (with logical amendments), however, without the obligation to provide a Cut-Through Agreement if the final financing cannot be drawn by the Buyer as of the Second Additional Payment Date. The Insurance Bond shall be assignable to the Lender and / or security trustee under the Buyer's pre and post- delivery financing of the Vessel.
>
> [ii] The original copy of the Insurance Bond for the Second Additional Payment shall be delivered to Watson Farley & Williams in Madrid not later than on 18th September 2019.
>
> [iii] If the Builder cannot provide and hand over the Insurance Bond as security for the Second Additional Payment on the Second Additional Payment Date, the payment of the Second Additional Payment shall be postponed correspondingly.
>
> If the payment of the Second Additional Payment is not being made on the Second Additional Payment Date (as extended according to this clause 3.3 of the Addendum No 9) the provisions of clause 9.3 [sic. 9.4] of the Addendum No 9 concerning the cancellation of the Current Contract, shall apply"

172. Clause 9.4 provided, that:-

> "By entering into this Addendum No 9 the Builder and the Buyer expressly confirm that the Current Contract is in full force and effect between the Builder and the Buyer according to the terms and provisions of the Current Contract (as amended by this Addendum No 9).
>
> Pursuant hereto - and during the period commencing by signing of this Addendum No 9 and up till and including 30th September 2019 (the "Target Date") the Builder shall not exercise any right of cancelation according to the Current Contract, except if (i) the Buyer fails to make the Second Additional Payment, or (ii) the Buyer fails to make the payment of the 3rd Instalment pursuant to Addendum No 9 other than for a cause attributable to the Builder, Banca March or the insurance bond issuers or refund guarantors, and by default in any of these two cases the Builder shall have the right to cancel the Current Contract by written notice to the Buyer as set out in the Current Contract.

> Notwithstanding the above, if this Addendum is not effective on 30th September 2019 as per clause 12 below, the Builder shall from that date be entitled to exercise any right of cancellation to which it would be entitled before signing this Addendum No. 9, as if this Addendum has never been entered into."

173. Clause 12, headed "*Subjects*", provided that Addendum 9 was "*subject*" to all the conditions set out in clause 12, and "*shall only become effective*" when they had been fulfilled or lifted. It set out a series of deadlines, ranging from 16-20 September 2019, for satisfaction of each condition and provided that Addendum 9 would be "*deemed to be as non-written*" unless each condition was satisfied by its deadline unless the parties had prior thereto agreed in writing to extend the time limit. The text of clause 12 was as follows:

> "**12. Subjects**
>
> 12.1 This Addendum No 9 is subject to all of the conditions as set out in this clause 12, and shall only become effective between the Parties when all of the conditions as set out in clause 12 of the Addendum No 9 have been fulfilled or lifted (as relevant).
>
> If any of the conditions as set out in this clause 12.2, 12.3, 12.4, 12.5 and 12.6 of the Addendum No 9 have not been fulfilled or lifted (as relevant) by 12:00pm. CET on the dates as specified in each of the said clauses, this Addendum No 9 shall deemed to be as non-written, unless the Parties prior thereto have agreed in writing to extend the time limit.
>
> 12.2 The effectiveness of the amendment of the Current Contract pursuant to this Addendum no 9 is subject to that the insurers which have issued the Bond Insurance (including the Cut Through Agreement to be issued by the reinsurers) for the 1st Instalment, the 2nd Instalment and the First Additional Payment, approves the amendment of the Current Contract, and that the Insurance Bonds issued as of today for the instalments / payments which have been made under the Current Contract, remain valid and enforceable in all and any respect, and that the insurers obligations under the Insurance Bonds are not being cancelled, terminated and or rescinded (partly or totally) as a consequence of the amendment of the Current Contract as set out in this Addendum No 9. In addition the Insurer and Reinsurers and likewise the Refund Guarantors shall confirm in writing to the Buyer the assignability of all the Insurance Bonds and the Refund Guarantees (issued or to be issued) to the Lender and/or the security trustee under the Buyer's financing.
>
> Further the Builder shall provide the Buyer with written confirmation that the Insurance Bonds (Including the Cut Through – Agreement as per this Addendum No 9) to be issued for the remaining instalments to be paid by the Buyer to the Builder as per the Current Contract (as amended by this

Addendum No 9), will be issued by the Insurers, and likewise that the Refund Guarantees will be issued by Abanca and Cajamar, respectively.

The confirmation of the **(i)** validity and enforceability of the Insurance Bonds, **(ii)** the issue of the Insurance Bond (including the Cut Through - Agreement as per this Addendum No 9) – see **Appendix 9** hereto) to be issued and the likewise the Refund Guarantees to be provided, and **(iii)** the assignability of the Insurance Bond, all as set out in the Current Contract (as amended by the Addendum No 9) shall be confirmed in writing by the insurers and refund guarantors to the Builder and the Buyer no later than two (2) Banking Days prior to September 2019, and the Builder and the Buyer have agreed to submit a joint letter to the insures and the refund guarantors in order to clarify this matter, said letter to be substantially in the terms and form as set out in **Appendix 8** hereto.

If the insurers and Refund Guarantors do not confirm that the Insurance Bonds and the Refund Guarantees as set out above are and will be in full force and effect, as a consequence of this Addendum No 9 entering into force, then the Current Contract shall remain in full force and effect as it is as of today, but not including the Addendum No 9.

12.3 The Builder shall provide written confirmation from the Insurers that the expiry date of the Insurance Bonds issued and to be issued according to the Current Contract and likewise the Refund Guarantees to be issued, has been extended until the Revised Expiry Date, such written confirmation to be provided and submitted to the Buyer no later than at 12:00pm CEST two (2) Banking Days prior to the 20 September 2019.

12.4 The revised payment plan as set out in clause 7.1 of the Addendum No 9 and the delivery plan of the equipment under the Supply Agreement as set out in Appendix 7 of the Addendum No 9, are subject to the approval of the Designer and that such approval is being confirmed in writing to the Builder and the Buyer no later than 12:00pm CEST on the 16 September 2019, or alternatively according an another valid agreement between the Builder and the Designer, signed before that time.

12.5 The inter creditors agreement has been duly agreed by the Parties and the first mortgagees in the Vessel as per clause 9.1 of this Addendum No 9, no later than 12:00pm CEST on the 20th September 2019.

12.6 This Addendum No 9 shall be approved by the board of directors of each of the Builder and the Buyer, and such board approval shall be lifted or confirmed in writing no later than 12:00pm CEST on the 16th September 2019.

> The approval shall only be subject to the fulfilment of all and each of the conditions as set out in clause 12.2, 12.3, 12.4 and 12.5 of the Addendum No 9.
>
> If one or more of the conditions are set out in clause 12.2 to and including 12.6 of this Addendum 9 is not being fulfilled within the time limit as set out therein, then this Addendum no 9 becomes null and void and shall be deemed to be as non-written".

174. Addendum 9 did not contain any further obligation on Havila to provide evidence or confirmation of its financing, or record that any such evidence or confirmation remained outstanding.

175. Addendum 9 required further bonds to be put up for the Second Additional Payments, which was done on 16 September 2019. Sr Morales said the bonds were issued at the request of the Yard, although the Yard maintained that Havila's letter of 11 September 2019 (which Sr Morales had seen in draft on 10 September) and GTLK's 16 July 2019 letter (which Sr Morales had not seen) were insufficient. Sr Fernandez of Barents said:

> "I also want to explain briefly the reasons for agreeing with ABARCA to issue the insurance bonds without the confirmation of financing by Havila. First, it was our understanding throughout that Havila would obtain pre and post-delivery finance, which would then activate the CESCE Policy and the Policy of Issue of Guarantees and Insurance Bonds. It was never envisaged that Havila would be unable to do so. The message that was relayed to us by the Yard (which I think, was their reasonable expectation) is that Havila would obtain finance. However, at no point did the Yard inform us that Havila actually did have financing in place."

Sr Fernandez confirmed in his oral evidence that the Yard was telling Barents that they were expecting Havila to obtain finance.

176. Havila informed GTLK about the signing of Addendum 9, indicating to their broker (Fearnleys) that the timing for drawdown was now "*at the mercy of the insurance bond and reassurance*" (i.e. the security to be put in place by the Yard). On 17 September 2019, Clifford Chance was still waiting for input from the Yard's side on documentation, particularly the notices and acknowledgements. That remained the case on 1 October and 4 October 2019, Mr Pettersen on the latter occasion telling Clifford Chance:

> "Except for the matters outstanding in respect of the notice of assignment we should be more or less ready to execute the documentation for the loans to be provided. We therefore have to put pressure on finalizing outstanding matters.
>
> As far as concerns the matters outstanding in respect of the notices etc. we prefer to deal with this by ourselves together with

> Alfredo Cabellos of Watson Farley & Williams, and will therefore follow up this matter together with him."

177. On 18 September 2019 Mr Pettersen told the Yard that Havila's board had approved Addendum 9 subject to conditions:

> "1. The conditions as set out in clause 12 of the Addendum No 9 shall be fulfilled within the time limit as set out therein – ref. clause 12.6, second paragraph.
>
> However, we have to consider whether some of the time limits have to be slightly amended due to the fact that the board approvals are being lifted later than what was originally intended / expected when the agreement was executed.
>
> 2. The agreement to be entered into by and between Barreras and Havyard Design & Solutions AS concerning the Addendum No 2 to the Supply Agreement and the sharing of the compensation to be paid to Havila Kystruten AS in respect of NB 1710 and NB 1711, respectively, - shall be approved by Havila Kystruten AS. …"

Mr Pettersen said in cross-examination that this message reflected the outcome of a meeting of Havila's board that day, 18 September, at which concerns had been expressed about both the technical issues (including the cost of the Yard's lengthening proposal) and information which was now leaking out about the Yard's financial position. His witness statement set out his recollection that Mr Saevik and Mr Myrvoll had decided Havila could approve Addendum 9 because it remained subject to the conditions precedent, which the Yard would satisfy only if it retained the support of its financiers.

178. Mr Saevik in cross-examination said there were, at that board meeting, *"great concerns and discussions whether we could go ahead"*. He said in his witness statement that he could not recall what the conditions precedent were or whether they were satisfied, but was sure that he agreed to the two €5 million payments only on the strict understanding that this sum would shortly afterwards be reimbursed by drawdown from GTLK; and that would not happen unless the conditions precedent were satisfied so that Addendum 9 came into effect. He said there was no way he would have agreed to advance the money while depending on the Yard to enable the GTLK loan to be drawn down. Mr Myrvoll's evidence was to similar effect.

179. The Yard on 19 September 2019 asked whether the money would be paid that day, to which Mr Myrvoll replied that he was working hard to get Havyard in place and would try to push everyone *"so that we can move forward with the payment"*. The Yard asked Mr Myrvoll to confirm that under Addendum 9 the money was due that day, to which Mr Myrvoll did not directly respond. Sr Perez-Bouzada later the same day confirmed that the Yard's board had approved Addendum 9 within the timescale set out in § 12.6. He noted from Mr Pettersen's message of 18 September that Havila's board had not approved Addendum 9, or that its approval was subject to conditions relating to

outstanding issues with Havyard Design. He proposed an extension of the deadlines set out in §§ 12.2 and 12.3 to 27 September.

180. On 22 September 2019, Sr Cabellos told the Yard that:

> "Addendum No 2 to the Supply Agreement to be entered into by Barreras and Havyard Design & Solutions AS is now agreed between the parties thereto and also approved by Havila Kystruten AS. This is formally communicated, for the purposes of lifting the conditional Havila's board approval and proceed forward with Addendum No 9."

That message related to the second of the two conditions referred to in his 18 September message. As to the first set of conditions, Sr Cabellos wrote to the Yard on 23 September 2019 saying:

> "Following our conversation on Friday and the confirmation of the lifting of Havila's board approval, payment of the 5 million euros per vessel (1710 and 1711) is ready to be made this morning, with today's value date. But the issue both yard and Havila are facing is formal. A number of time limits in Addendum No 9 have been exceeded, and this should be fixed before or in parallel, for the benefit of all parties. In that respect, could you please confirm that the parties are still working within Addendum No 9 and the following revised dates?
>
> • Clause 12.2 - Approval of the Addendum No 9 by insurers / refund guarantors: Two (2) Banking Days prior to 20 September 2019 (already passed or exceeded). New / extended time limit: Two (2) Banking Days prior to 3 October 2019.
>
> • Clause 12.3 - Expiry date of insurance bond / refund guarantees: Two (2) Banking Days prior to 20 September 2019 (already passed or exceeded). New / extended time limit: Two (2) Banking Days prior to 3 October 2019.
>
> • Clause 12.4 - The approval of the revised payment plan as et out in Addendum No 2 to the Supply Agreement: Within 16 September 2019 – extended by exchange of email till 18 September 2019 (already passed or exceeded). However, this should be fine, pending the singing by Havyard Design & Solutions AS only.
>
> • Clause 12.5 – Intercreditor Agreement: Two (2) Banking Days prior to 20 September 2019 (already passed or exceeded). New / extended time limit: Two (2) Banking Days prior to 3 October 2019. Please confirm this works in your end at your earliest possible convenience."

181. Sr Perez-Bouzada replied:

> "We, on behalf of HJB, confirm that -subject to the due cash payments as per clause 3 of Addendum be made this morning with today's value date, as per your email- the Addendum No 9 shall deemed to be in force and effective and that the revised/extended dates of clauses 12.2 (two (2) Banking Days prior to 3 October 2019); 12.3 (two (2) Banking Days prior to 3 October 2019 and 12.5 (two (2) Banking Days prior to 3 October 2019) shall be applicable to the Addendum No.9 between HJB and Havila."

182. Mr Myrvoll emailed Sr Cabellos asking "*are you then ok with this and we can proceed with the payment?*" Mr Myrvoll was asked in cross-examination whether that meant he was ready to make the Second Additional Payments despite the fact that the other condition precedents had not yet been lifted and would be deferred to 3 October, but did not accept that. He said he was ready to make the payment, but could not instruct payment to be made before he received confirmation from all the advisers that the conditions precedent had been fulfilled. Mr Myrvoll was challenged on this, on the basis that he knew from the email correspondence that the conditions precedent had not in fact been fulfilled yet. That may be so, but the position remained that Mr Myrvoll had not decided to make the payment without some form of confirmation from his advisers, and the conditions precedent had not yet been fulfilled.

183. Mr Pettersen on the same day, 23 September 2019, told GTLK that Addendum 2 to the Supply Agreement between the Yard and Havyard Design had been approved by both parties, and would be executed and exchanged the following day; and that *"[s]ubsequent thereto we expect the Second Additional Payment to be transferred by [Havila] to [the Yard]".* The Yard makes the point that this message appears to have envisaged the payments being made very soon, rather than only sometime later following the satisfaction of conditions precedent. Mr Pettersen explained in cross-examination that Havila was here trying to maintain time pressure on GTLK.

184. Mr Myrvoll on 27 September 2019 wrote to the Ritz Carlton group, quoting two of the press reports that day about the Yard to which I refer below, and saying:

> "Below is the translated version of todays newspapers in Vigo. This is no good reading, and it seems that you are far away from a conclusion. Do you have any comments on this?
>
> We have agreed with Barreras around a new Addendum to the ship building contract, but we don't want to do further payments before we see a total solution for the yard."

In cross-examination, it was suggested to Mr Myrvoll that by this stage he (or Havila) had decided not to pay because of what had appeared in the press, rather than because the conditions precedent had not been complied with. Mr Myrvoll denied that, and said he would never authorise a payment of €2.5 million without the condition precedent being fulfilled. It is possible that both factors played a part, but it does not appear to me to matter. The fact remained that the conditions precedent had been neither satisfied nor waived, and there is no evidence that Mr Myrvoll had received advice internally that he could proceed to make the payments.

185. Mr Saevik said he recalled that, with Addendum 9 still not having come into effect, he learned on 27 September 2019 that the local press in Spain had reported that a shareholders' meeting of the Yard had taken place at which the Yard reported a cash deficit in the 'colossal' sum of €80 million, and that it looked as though the Yard's shareholders would not bail it out. The evidence includes press reports from that date that two luxury cruise ships which the Ritz Carlton group had contracted for the Yard to build had generated cost overruns and delays, with audits estimating the construction cost overrun for the first ship at €80 million; that banks were putting pressure on the Yard to increase its capital by at least €50 million; and that its largest shareholders were unwilling to invest more funds. Reference was also made to Havila owing the Yard about €40 million. It was reported the following day that a General Meeting of the Yard had dismissed its president.

186. On 29 September 2019, the Yard gave notices of default to Havila in respect of clauses 3.2 and 3.3 of Addendum 9, citing Havila's alleged failure to make the Second Additional Payments one banking day after the insurance bonds for these payments were delivered to WFW in Madrid. The Yard stated that if it did not receive the payments within 7 banking days from this notice, then the Yard would cancel the SBCs.

187. Further press reports, on 1 and 2 October 2019, suggested that the Yard had diverted some of the funds already provided by Havila to the Ritz Carlton projects.

188. On 2 October 2019, the Yard filed for pre-insolvency protection from its creditors under Article 5bis. of Spanish Insolvency Law 22/2003, in the Pontevedra Commercial Court in Spain. The application blamed the Yard's current financial problems on "*very large cost overruns*" on the Ritz Carlton vessel, and "*lack of payment*" by Havila, suggesting that "*although immediate payments have been negotiated for weeks with HAVILA, the reality is that these have not yet occurred*".

189. Also on 2 October 2019, there was a meeting between at Watson Farley's offices in Madrid between Havila, Banca March (the tax lease arranger for the project) and Barents, with some representatives attending by telephone. Mr Pettersen said the main purpose of the meeting was to find out whether the Yard retained the support of its financiers. Sr Fernandez in his second witness statement said his side asked Havila "*once more*" about financing and got no satisfactory reply; and that Havila asked in return whether Barents would support the projects if they did provide evidence of finance so that CESCE could commit to their position as counter-guarantors. Mr Myrvoll's notes from the meeting record Havila as having said it would fulfil the contract, was ready to pay and had the financing in place. The notes make reference to a *"[g]lobal solution*", and record Barents as having indicated they would fulfil the project, though the guarantors were "*collecting [sic.] information*". Sr Fernandez in cross-examination appeared unsure whether he had attended the meeting by phone, or necessarily at all. He was asked questions by reference to Mr Myrvoll's notes – on the basis that Sr Fernandez had not checked any notes he might have taken himself (as I mention earlier) – but gave answers which were bordering on evasive:

> "Q. …What was said at this meeting that certainly involved Barents, and I think involved you. The buyer said:
>
> > "We will fulfil the contract. We are ready to pay and have the financing in place."

> But what they were looking for, this is right, isn't it, was a global solution to the shipyard's problems?
>
> Do you remember that?
>
> A. No. How can I remember something about somebody else's notes, which is not Barents' notes?
>
> Q. Well, I'm asking you whether you remember that from the meeting. Don't -- I don't have anything better to offer you. You didn't look to check if you had got any notes; so I can't offer you your own notes. What I'm asking you is: do you have any recollection of these things from the meeting?
>
> And I'm asking you to cast your mind back and see if you remember a discussion where the buyer said that they were going to fulfil the contract, they were ready to pay and had the financing in place, but they wanted a global solution?
>
> A. I said before, these are -- these were recurrent issues so this is not adding any value to. You know, we –
>
> Q. Do you have any recollection of that or not?
>
> A. Any recollection of somebody else's notes? I cannot say –
>
> Q. Do you have any recollection of those things being said at the meeting or not?
>
> A. No. No, because these are not my notes.
>
> MR JUSTICE HENSHAW: You're being asked about your recollection, just to be clear.
>
> A. My recollection speaks about the questions we made and the answers we received. That was all, my Lord. And this is what I'm saying in my statement. It's nothing else."

190. Sr Fernandez denied that Barents were collecting information about the Yard and said they were collecting information about Havila. I consider that unlikely in the circumstances: there is no reason why Barents would have needed to collect information about Havila at this stage, and every reason why they may have become concerned about the position of the Yard. Sr Fernandez was also asked why the confirmation from Barents required under § 12.2 of Addendum 9 was still outstanding in October, but was unable to assist.

191. On 14 October 2019 Havila wrote to the Yard referring to its application for pre-insolvency protection, and requesting information about its finances.

192. Havila on 7 and 16 October 2019 responded to the Yard's notice dated 29 September 2019, rejecting the assertion that the Second Additional Payments had fallen due and,

in the second letter, stating that the conditions precedent set out in clause 12 had not been fulfilled.

193. On 17 October 2019, Mr Pettersen reported to GTLK that:

> "Payment of the Second Additional Payment (EUR 5,0 million on each of the Vessels) was scheduled to take place on 23 September 2019.
>
> Due to the fact that the Buyer during the weekend up until 23 September 2019 and 23 September 2019, gradually received information about the challenges the Builder was facing, the Buyer decided to halt the payment of the Second Additional Payment, pending more clarification of the situation involving the yard and the order book of Barreras.
>
> Consequently, payment of the Second Additional Payment has not been made as of today. However, the Buyer is ready to transfer the payment to the Builder as soon as a satisfactory solution is reached and signed by all relevant parties."

194. In cross-examination, Mr Pettersen said the reason payment was not made was due to *"lifting of the board approval"*, presumably meaning satisfaction of the conditions precedent. It was suggested to him that, as the above message indicated, Havila had in fact chosen not to pay because of concerns about the Yard's finances, to which Mr Pettersen responded *"I don't think that I need to answer that conclusion"*. Though on its face that was a regrettable refusal to answer the question, viewing Mr Pettersen's two answers together I think it tolerably clear that Mr Pettersen was saying he did not accept the proposition put. When Mr Saevik was asked about this, he said he relied on Mr Pettersen's advice, which was that as the conditions precedent had not been fulfilled yet, the payments could not be made.

195. The Yard submits that the Second Additional Payments were always intended to be made from cash ahead of the lifting of the remaining conditions, the payments were authorised and due to be made on 23 September 2019, but Havila decided it did not want to pay because of concerns about the Yard's finances. The Yard suggests that the argument about the Second Additional Payments not being due, by reason of unsatisfied conditions, was introduced after the event as the excuse or pretext to justify the decision not to pay. I do not accept that contention. Addendum 9 was expressly subject to board approval. The information provided by Mr Pettersen in his 18 September email was to the effect that Havila's board had approved Addendum 9 subject, however, to two conditions. The first of these – reflecting and expressly cross-referencing the second paragraph of Addendum 9 § 12.6 – concerned compliance with the conditions set out in § 12. That was an understandable position to take because unless those conditions were satisfied Havila could not be properly secured for further payments it made to the Yard.

196. Mr Myrvoll's notes include reference to a telephone discussion on 7 November 2019, including financing and technical issues, including a note that *"[Sr Perez-Bouzada] is saying they need evidence of financing*".

197. On 9 November 2019 Sr Perez-Bouzada sent Mr Pettersen a "*revised conditions*" document in connection with an attempt by the Yard to reach a global restructuring agreement involving all stakeholders to ensure the Yard's long-term viability. In that context, the email said, agreeing and finalising documents relating to the Vessels was an important milestone, and whilst the Yard was willing to explore an alternative solution to the lengthening of the Vessels, in its current situation it could not incur the necessary efforts and costs until it had "*independent confirmation from your lender that financing is in place*". Such confirmation was requested by 11 November. An attachment to the email indicated that what the Yard wanted was confirmation that a facility agreement had been agreed, signed and executed. Mr Pettersen replied on 10 November 2019:

> "Havila Kystruten AS is of the opinion that, at this stage and in the current yard circumstances, the confirmation already provided is satisfactory evidence for the financing of the Havila Project, and that was also accepted by the parties in the Addendum No 9 to the shipbuilding contracts for NB 1710 and 1711, respectively ("Contracts"). For various reasons Havila Kystruten AS is not willing to once more approach GTLK in this matter until there is more visibility on the projects, in the terms we are now discussing. However, rest assured that we will be working in parallel to our negotiations with the bank to make the necessary adjustments to the finance documentation – as we assume you will be doing the same with your financiers and insurance/refund issuers – so that drawdown is made on closing.
>
> As you will know, the restart of the project as being discussed between the parties for the time being, will require a number of conditions precedent to be fulfilled. With reference thereto Havila Kystruten AS is fully aware of that effective contracts will require a new addendum to the Contracts, and that agreed conditions have to be fulfilled – including but not limited to payments to be provided by Havila Kystruten AS. Consequently Havila Kystruten AS is prepared to provide and updated reconfirmation of the financing - including the pre-and post-delivery financing (as already provided) as a condition precedent to be fulfilled.
>
> Further - as far as concerns fulfilment of conditions precedent under the facility agreement with GTLK, we expect the full cooperation from Barreras to the extent required, so that drawing under the facility agreement is not being delayed due to conditions precedent to be fulfilled by Barreras or its financiers (for example, acknowledgement of notices of assignment).
>
> Finally - whilst we appreciate your concern, we are strong on that the confirmation already is in place and only need an updated reconfirmation."

198. Sr Perez-Bouzada wrote back on 11 November 2019:

> "It is very hard for us to understand Havila's continuous reluctancy to provide supporting evidence of its financing. We would recall that the Buyer's delay with its financing and the failure to make agreed payments has already caused serious constraints to the projects.
>
> You have also had the opportunity to hear that all counterparties relevant to the financing structure of Havila's NB vessels state the need to have appropriate confirmation as soon as possible. As you know, it is a fairly standard procedure for banks to issue commitment letters and confirmation of availability of funds letters. So, we do not understand that your insistence that a termsheet (or a simple letter from the Buyer) is equivalent to a formal commitment or to a confirmation of availability of funds letter when it is obviously not equivalent. Precisely because of the yard´s situation we, and as clearly stated in the 7th of November call, all other parties involved in the financing of Havila's vessels (tax lease and insurance bonds/refund guarantee providers), need confirmation of financing. As previously stated this can include condition precedents such as the assignment to GTLK that you mention in your email. …"

199. On 17 November 2019, Havila told the Yard that it was prepared to approach GTLK to get fresh re-confirmation from GTLK, notwithstanding the issues about the Yard's financial position, and to start drafting an Addendum 10 to document a potential agreement for the recommencement of construction of the Vessels. On 18 November 2019, Sr Perez-Bouzada noted this, adding:

> "We hope that this be a clear signal of Havila's willingness and determination to arrive to an agreement for the re-starting of the [Vessels]. The fact is that there has been very little progress with you over the last few weeks and this gives particular cause for concern as to your commitment and intentions. We hope fervently that we are wrong and we look forward to further discuss and meeting asap."

200. On 24 November 2019, the Yard purported to terminate the SBCs on the following grounds:

> "1. By this letter we give you notice that the SBCs are terminated pursuant to Addendum No. 7 Clause 2.5.1 on the basis that:
>
> a) You could not and did not provide confirmation of the pre and post delivery financing of the Vessel by 30 April 2019 or thereafter by a written statement from a bank or financial institution set out in Addendum No. 7 Clause 2.4.1
>
> b) We informed you in writing on 21 June 2019 of our intention to terminate and/or cancel the SBCs on that basis within 14 days written notice.

> c) We physically met following our 21 June 2019 notice and negotiated in good faith alternative arrangements to avoid termination.
>
> d) We have concluded that there is no other alternative financial arrangement to be provided by you to avoid termination and/or cancellation of the SBCs.
>
> 2. You said in your letter dated 18 October 2019 your position is that Addendum No. 9 did not enter into force or effect. If, however, Addendum No. 9 has entered into force or effect, we have an additional (or alternative) right to terminate the SBCs as a result of your failure to pay the Second Additional Payment as defined in Addendum No. 9. Further or alternatively, and without prejudice to the above, and only if the SBCs have not been terminated as above, we give you notice that the SBCs are terminated pursuant to Addendum No. 9 Clauses 3.3 and 9.4 on the basis of your failure to pay the Second Additional Payment by the agreed due date or at all.
>
> 3. Further or alternatively, and without prejudice to the above, and only if the SBCs have not been terminated as above, we give you notice that the SBCs are terminated pursuant to the agreement between us that the sum of EUR 5,000,000 would be paid within one banking day of 18 September 2019 or thereafter and you have failed to pay that sum by the agreed date or at all.
>
> 4. Further or alternatively, and without prejudice to the above, and only if the SBCs have not been terminated as above, we give you notice that we accept the repudiatory and/or renunciatory breach of the SBCs arising as result of the totality of your conduct as terminating the SBCs.
>
> All our rights under the SBCs and at law are fully reserved."

201. Havila rejected this notice on 25 November, stating that it was invalid, of no legal effect and repudiatory, and reserving all its rights.

202. A day later, on 26 November 2019, the Yard's board applied for judicial dissolution of the company. The decisions to send the termination notice and to apply for judicial dissolution were taken at the same Board meeting on 22 November 2019.

203. On 29 November 2019, Abarca notified Havila that the insurance bonds had expired. On 1 December 2019, Havila rejected that notice of expiry.

204. Banca March gave notice of termination of the tax lease structures, relying on the Yard's purported termination of the SBCs, on 20 December 2019. Havila's solicitors then wrote to the Yard on 23 December 2019 to find out whether the Yard was in a position to continue construction and deliver the Vessels without receiving benefits under the lease and subsidy structure. In response the Yard maintained its position (via its solicitors) on 31 December 2019 that it had been entitled to terminate the SBCs.

205. Havila signed contracts with Tersan in Turkey for the construction of substitute vessels on 31 December 2019 (although they did not become became effective until 2020). The financing was in due course provided by GTLK.

206. The Yard entered into a Deed of Restructuring Framework Agreement (the "***RFA***") with its financial creditors and the Ritz-Carlton SPV on 2 February 2020, at the conclusion of the protection offered by Art 5bis pre-insolvency procedure. The RFA received judicial approval on 17 February 2020 and on 4 March 2020 the Spanish court granted the Yard's request that its application for judicial dissolution be determined inadmissible upon approval of the RFA.

207. On 11 February 2020, Havila served notice to terminate the SBCs, demanding a refund of the instalments paid along with interest, stating:

> "We therefore hereby (i) accept your continuing repudiatory and/or renunciatory breaches of the Contracts as discharging us from any responsibility to perform the Contracts; and/or (ii) cancel the Contracts in reliance on the above and in particular on your application for your judicial dissolution (under Article XII.3 of the Contracts) and the fact that it is obvious that the Vessels, construction of which you have now abandoned for well over 7 months, will never be completed within 180 days of their Delivery Dates (under Article IV.1(d))."

208. Havila wrote to Abarca on 13 February 2020 attaching a copy of its termination letter to the Yard and notifying Abarca that it had claimed from the Yard the refund of the instalments plus accrued interest.

209. In early 2022 the Yard voluntarily declared bankruptcy.

(E) WHETHER THE YARD BECAME ENTITLED TO TERMINATE PURSUANT TO ADDENDUM 7

(1) Principles

210. The general principles of contractual interpretation were summarised in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619:

> "When interpreting a written contract, 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", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that

> the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions." (§ 15)

211. The court has to ascertain the objective meaning of the language used, within the context of the contract as a whole and, depending on the nature, formality, and quality of the contract, give more or less weight to the wider context in reaching a view on objective meaning (*Wood v Capita Insurance Services* [2017] UKSC 24 § 10).

212. The court will not construe the contract in a vacuum but will have regard to the factual background (*Reardon-Smith v Hansen-Tangen* [1976] 1 WLR 989). It is entitled to have regard to evidence of what was said or done during the course of negotiating the agreement in order to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel (*Chartbrook v Persimmon Homes* [2009] AC 1101 § 42).

213. Evidence of the factual background is relevant only if it concerns facts or circumstances which were known or reasonably available to both parties at the time the contract was made (*Arnold v Britton* § 21).

214. The aim, object, or commercial purpose of a transaction or provision may be relevant factual background, and must be objectively ascertained by reference to what reasonable people would have had in mind in the situation of the parties at the time, whether or not they had the matters in question at the forefront of their minds (*Reardon-Smith* at pp. 996 and 997.)

215. The unitary exercise of construction is an iterative process by which rival constructions are checked against the provision of the contract, business common sense, and their commercial consequences. It does not matter whether the court's analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each. However, the extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement. Sophisticated and complex agreements or those negotiated and prepared with the assistance of skilled professionals should be interpreted principally by textual analysis (*Wood v Capita* §§ 11-13).

216. Pre-contractual negotiations not admissible for the purpose of drawing inferences about what the contract means, except in a claim for rectification (*Prenn v Simmonds* [1971] 1 WLR 1381; *Chartbrook Homes Ltd v Persimmon Homes Ltd* [2009] AC 1101 at §§32-40; *Wood v Capita* §10.) As Lord Wilberforce said in *Prenn v Simmonds*:

> "By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter are changing and until the final agreement, though converging, still different. It is only the final document which records a consensus. If the previous documents use different expressions how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words?" (p.1384)

Similarly, Waller LJ noted in The *Rio Assu (No2)* [1999] 1 Lloyd's Rep 115, 124 that:

> "The negotiations of a contract can often be a compromise. it is dangerous to make the assumption that one party intended to have something supplied or provided for by the contract, or that the other party intended to have something else supplied or provided by the contract. Contracts are negotiated and ultimately each may think that he has what he wishes, but it is for the Court to interpret the language of the contract."

217. Subsequent conduct and contracts are generally inadmissible as an aid to construction: see Lewison, *"The Interpretation of Contracts"* §§ 3.183-3.187, and *Hyundai Merchant Marine Co Ltd v Daelim Corp* [2012] 1 Lloyd's Rep 211: *"reliance on a subsequent contract to construe a written contract is, to say the least, a heretical approach to construction …The inadmissibility of a subsequent contract as an aid to construction of a written contract is merely one aspect of the general principle of English contract law that… the subsequent conduct of the parties cannot be looked at to interpret a written contract…It seems to me that the principle that the subsequent contract is inadmissible is equally applicable whether it is made the following day or long after."* (§ 13)

218. Effect will be given to an 'entire agreement' clause, such as Article XVIII of the SBCs in the present case, providing that each SBC constitutes the "*entire contract and understanding between the Parties*" and "*supersedes all prior negotiations, representations, undertaking and agreements*" as to the matters set out in it. Such a clause *"constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere"* (*Inntrepreneur Pub Co v East Crown* [2000] 2 Lloyd's Rep 611, 614, per Lightman J, as affirmed by the Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24). In *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2007] EWHC 3130 (Ch) it was held that the reference in an entire agreement clause to "*any other agreement preceding the date of this agreement*" did not exclude agreements that were part of a package of agreements entered into as a composite transaction (§§ 101-104).

(2) Application

(a) The relevant factual background

219. Abarca submits that the provisions relating to documentation of Havila's financing and the Yard's right to terminate, set out in Addendum 7 (particularly §§ 2.4 and 2.5) and in due course in Addendum 8 § 2.1, are to be construed in the context of a factual background including the following features:

i) The SBCs had been concluded nearly a year previously, and Havila had not, by either 28 February 2019 (Addendum 7) or 30 April 2019 (Addendum 8), secured funds for its purchase of the Vessels. No lender was yet under an obligation to lend it any money.

ii) As at 28 February 2019, Havila had not paid the 2nd instalments due on 17 December 2018. The due date for the 3rd instalments (keel laying) was imminent. By 30 April 2019, keel laying had happened.

iii) Havila had had the BoComm Term Sheet since 3 July 2018 but that had not resulted in BoComm providing Havila with finance for the Vessel. Havila

acknowledged that this was a cause for concern for the Yard. It was clear that what was needed for drawdown was a loan or facility agreement.

iv) Havila had informed the Yard of several potential lenders, including Norwegian banks backed by GIEK, but none had offered a facility or other loan agreement to Havila.

v) The Yard could not afford to continue with building the Vessels without Havila paying the instalments. The Yard owed significant sums of money to suppliers and sub-contractors for the build. It was clear to Havila that the Yard could not continue to build without being provided with cash.

vi) The partially constructed hulls of the Vessels would block the progress of later builds if they were not progressed.

vii) Havila was entitled to and wanted the bonds for protection in the event that it was entitled to reclaim instalments paid (see Article III.3 of the SBCs and Addendum 7 § 2.2.2).

viii) In order to provide the Bonds, Abarca required the counter-guarantee from CESCE (see Addendum 1 § clause 2.2).

ix) In order to provide the reinsurance, Barents required the counter-guarantee from CESCE (see Addendum 7 § clause 2.2.2(v)).

x) In order to provide the counter-guarantee, CESCE required a signed finance agreement in satisfactory terms. It needed to be satisfied that Havila had the funds available to be able to pay the instalments through to purchase: a non-binding term sheet was insufficient (see the CESCE Policy §§ 5 and 7.6). Havila knew of CESCE's requirements and that a non-binding term sheet was insufficient.

xi) Addendum 7 § 2.2.2(viii) provided that if Havila had not provided confirmation of financing, its payment of the 3rd instalment would be extended until such confirmation was provided to the Yard. Havila only intended to pay the 3rd instalment when it had financing from which to draw down. The scheme envisaged therefore that the 3rd instalment was only payable once Havila's finance was in place, so the required confirmation of finance necessarily involved having funds to draw down from.

xii) Havila understood the cascade of obligations. There needed to be confirmation of Havila's financing; that would make the counter-guarantee from CESCE effective; that in turn would make the insurance bond and the reinsurance effective; the Yard would then confirm the effectiveness of those documents to Havila, and Havila would pay the 3rd instalment. As part of these obligations, Havila understood that the reinsurance would not be given by Barents until the financing was "*documented and confirmed*".

xiii) Havila therefore understood that the purpose of providing evidence of financing was for the purposes of enabling CESCE to issue the counter-guarantee which triggered the cascade of obligations set out above, as recorded in Addendum 7

§ 2.5.1 (which bound Havila by way of contractual estoppel). Havila understood that a lot hinged on providing confirmation of finance.

xiv) CESCE had been provided with the BoComm letter confirming a term sheet but had not yet issued a counter-guarantee.

220. A central tenet of this analysis is Abarca's contention that Havila knew what CESCE's requirements were, and that a term sheet was not enough. Abarca submits that that conclusion can be drawn from a combination of factors.

221. First, Abarca points out that Addendum 7 § 2.5.1[ii] expressly records that:

> " …the Buyer acknowledge that the Builder needs evidence of the Buyer's pre and post-delivery financing in order to be able to provide the Insurance Bond, the Cut-Through Agreement, the Bank Guarantees and the CESCE Counter Guarantee, except for the Amended 1st Instalment Bank Guarantee and likewise the 2nd Insurance, Bond which is going to be issued and delivered to the Buyer on the Closing Day …"

Abarca says "*evidence*" must necessarily mean evidence to satisfy the parties who were to issue these documents, including CESCE. That may be the case, but it does not assist in establishing what knowledge the parties, including Havila, actually had about CESCE's (or the insurers') requirements.

222. Secondly, Abarca submits that CESCE would not provide its counter-guarantee against the BoComm term sheet, which had been in existence since 3 July 2018, thereby demonstrating that a non-binding term sheet was insufficient to satisfy CESCE's requirements of signed financing or proof of available funds. By February 2019, CESCE had had the BoComm letter confirming the existence of the term sheet since 2 August 2018, i.e. for six months, and the further letter confirming the same on 27 November 2018 for almost three months. Yet CESCE had not issued the counter-guarantee, nor had Havila called upon CESCE to issue a counter-guarantee. The only logical conclusion is that Havila knew or became aware by February 2019 (and very likely earlier) that a term sheet was not sufficient for CESCE. What other explanation, Abarca asks, would Havila think of for CESCE failing to issue the guarantee?

223. Abarca's reasoning is fallacious. CESCE was known to be considering the matter at committee meetings scheduled for 20 November and 12 December 2018 (§ 52 above). Following those meetings, nothing was said to Havila to indicate that CESCE had found the information and documentation already provided to them to be insufficient (§ 53 above). However, problems had emerged by this stage (November/December 2018) about BoComm's intended lending structure which cast doubt on whether it could finance the project at all, which is why Havila was now looking for alternative lenders (§§ 50 and 54 above). These problems were known to the Yard by mid November 2018 (see §§ 50, 54, 58 and 59 above), and the potential need to assign to a different financing party had been specifically discussed with CESCE, who had said that party would need to be specifically identified (§§ 58, 59 and 62 above). In these circumstances there was a perfectly obvious reason why CESCE had not issued its counter-guarantee on the basis of what BoComm had so far provided, namely that it was doubtful whether BoComm would be lending at all. There is no coherent basis on which to conclude that

Havila must have known that the reason why CESCE had not issued the counter-guarantee was, instead, because CESCE first required executed loan documents between Havila and its lender.

224. Thirdly, Abarca contends that Havila was told, expressly and/or by implication (for example by the setting of various deadlines), that CESCE required executed loan documentation, during the course of the parties' dealings over the period from the 18 July 2018 meeting to Sr Gonzalez's email of 27 February 2019 to Mr Pettersen.

225. However, I have rejected that contention as part of my findings in section (D)(4) above (see, in particular, my findings in §§ 30, 31, 34, 36, 37, 40, 41-43, 52, 57, 60, 82, 94, 95, 96, 97, 98 and 100 above). For the reasons given there, I conclude that Havila did not know, by the time it entered into Addendum 7 (or indeed Addendum 8), that CESCE required Havila to have executed loan documentation before CESCE could issue its counter-guarantee. On the contrary, such indications as had been given to Havila tended to indicate that that was not necessary (see §§ 40, 41-43 and 94 above). Further, as noted in § 39 above, Havila had been told that it should not attempt to contact CESCE itself.

226. Insofar as Abarca's arguments on factual background derive from the terms of Addendum 7 itself, I address them under heading (b) below.

(b) Meaning of financing "confirmed" by a "written, committed statement"

227. Addendum 7 § 2.4.1[iii] provided:

> "Pursuant hereto the Parties have agreed that the Buyer's alternative pre and post-delivery financing of the Vessel shall be confirmed to the Builder no later than on the 30 April 2019. The confirmation shall be provided by a written, committed statement from the bank/financing institution financing the Buyer (pre and post-delivery financing), to be submitted to the Builder."

228. The immediate context of this, as appears from § 2.4.1 itself, was the problem that had been encountered with the BoComm financing:

> "[i] The Buyer has provided the Builder with information about the Buyer's present pre and post-delivery financing of the Vessel to be arranged by BoComm Financial Leasing Co. Ltd ("BoComm Financing").
>
> [ii] The Parties acknowledge that the implementation of the BoComm Financing into the Tax Lease (such Tax Lease to be provided by the Builder) is complicated and shall take time to implement it due to circumstances not attributable to any of the Parties. Consequently, the Buyer has informed the Builder that the Buyer will obtain alternative financing for the pre and post-delivery financing of the Vessel, and that has been accepted by the Builder."

229. Abarca submits, first, that the plain meaning of § 2.4.1[iii] is that executed loan documentation had to be provided. It contained two requirements:

    i) stage one: the existence of financing, and

    ii) stage two: the existence of that financing being confirmed to the Yard in a written, committed statement from the lender providing the financing.

230. As to stage one, Abarca reasons that in order for financing to be "*confirmed*", it must first in fact exist. Financing can only exist if there is a legal entitlement on the part of the borrower to receive funds, which can itself only exist if there is a binding contract to lend, set out in a facility agreement or other similar loan document. Clause 2.4.1[iii] cannot merely have envisaged Havila producing a mere document, not backed by an actual facility agreement: such a document would have been of no use to either the Yard or Havila, and no funds might ever flow from it. It would be extraordinary for such a weak requirement to be imposed in the context of a project ten months old, in which Havila still could not fund two partially built vessels, with debts mounting for the Yard. Hence stage one was in fact the key requirement, with stage two serving the function of providing independent verification to the Yard, Abarca, Barents and CESCE that the financing existed.

231. As to stage two, Abarca says the required confirmation had to take the form of a written, committed statement from the lender. The language of 'commitment' again indicates an unequivocal promise to provide finance. Such a promise accordingly could only be made by a lender if it had signed a binding contract to lend. Neither a potential promise to lend, nor an agreement to negotiate over lending terms, nor a statement of an intention to lend subject to negotiation of terms, could amount to a "*confirmation*" of financing. The form that the lender's assurance took at stage two was not prescribed because it did not really matter, provided that it evidenced the existence of financing from the lender. A letter stating that a facility agreement had been signed for the necessary sum due under the SBCs would no doubt have been sufficient.

232. I do not accept Abarca's submission that § 2.4.1[iii] can be partitioned in this way. Its two sentences, together, give rise to a single obligation, namely to confirm Havila's financing to the Yard by submitting to the Yard a written, committed statement from the financing entity. It is incorrect to treat the clause as containing a freestanding requirement (Abarca's stage one) that there should exist "*financing*", and to seek to determine the content of that requirement without regard to the provision as a whole. The words "*written, committed statement*" are integral to determining the content of the obligation.

233. The ordinary meaning of a "*written, committed statement*" is, simply, a statement in writing of the bank's commitment to lend. It would be a strange choice of words, especially in a legal document, if what was meant was a binding legal obligation to lend, deriving from executed facility documentation. Had that been the intention, it could readily have been expressed in simple language in any of a number of ways (for example, a written confirmation that facility documents were in place, signed or executed; or that Havila was entitled to draw down funds, or that the lender had made a binding agreement to advance monies). The words actually used in § 2.4.1[iii] are in my view more apt to refer to a commercial commitment to lend, whereby the bank has

given an 'in principle' indication that it will lend on specified terms, but without any binding legal agreement yet having been entered into.

234. Insofar as Abarca suggests that that form of commitment would be meaningless, I do not agree. Terms sheets, agreed heads of terms and comfort letters are frequently used as a stage in the formulation of a deal, providing a degree of commercial assurance that proposed terms which have been negotiated (often at length) are agreed in principle, but with no binding legal commitment having yet been entered into. A legally binding agreement may be reached only after further stages which may include internal approvals, legal opinions or agreement on full documentation. Mr Myrvoll in the present case gave evidence that "*when you are at the stage where you receive a term sheet from a bank, they have an intention to finance the company, so they will never issue and sign a term sheet if the intention is not to finance the company…."*; and made clear that he viewed the BoComm term sheet as a "*strong commitment*" even though he accepted that it could not be relied on legally to oblige BoComm to lend. In similar vein, Mr Myrvoll said *"…when a financial institution negotiated and signed a term sheet, they will stick to it. I have never, ever been in a case where I have obtained a signed term sheet form a bank and they are walking away from it"*; and that *"it will break their reputation"*. In the case of BoComm, Mr Myrvoll said it was Havila who had chosen to borrow from GTLK instead, rather than BoComm having walked away. It is clear from the evidence as a whole that the reason why the proposed borrowing from BoComm did not proceed was a very specific technical problem arising in relation to the Spanish tax lease structure that was incompatible with the terms BoComm had put forward. Mr Myrvoll's point, which I accept, was that the issue by a bank of a term sheet in general represents an important degree of commercial commitment to the proposed transaction.

235. Abarca prays in aid the reference in § 2.4.1[i] to the "*financing of the Vessel <u>to be arranged</u> by BoComm*" (emphasis added), as indicating that the parties did not view the issue of BoComm's term sheet as meaning that "*financing*" had yet been "*arranged*". I do not consider that point to assist. The immediately ensuing provision, § 2.4.1[ii], made clear that the BoComm financing had proven problematic, hence Havila was turning to alternative financing. Clause 2.4[i] did not in my view attribute any special meaning to the terms 'financing' or 'arranged': its purpose was simply to identify the problem with the BoComm financing, as a prelude to the provisions of § 2.4.1[ii] and [iii].

236. I would also add in any event that the word "*financing*", in its ordinary meaning, is not synonymous with 'financing documents' or a legal commitment to provide financing. Its meaning has to be taken from the context.

237. Abarca further submits that, in the context of the status of the project and the Yard's need for funding, the "*commitment*" referred to in § 2.4[iii] must surely have been one that provided certainty of funding, which only executed loan documentation would provide. Havila had failed to pay instalments and needed to provide cash to the Yard to fund the build. Abarca suggest that, in the circumstances then existing, it was obvious that only a binding contract to lend, with the prospect of actual funds in very short order, would be enough to keep the project alive. Further, both parties were aware of the 'cascade' of obligations under Addendum 7 which all hinged on Havila providing evidence of its financing, and cash:

i) Havila obtains its financing;

ii) CESCE issue a counter-guarantee and the reinsurer provides reinsurance;

iii) Abarca would then issue the insurance bond for the 3rd instalments and onwards;

iv) Havila would get the envisaged cut-through agreement;

v) Havila would be obliged to pay the 3rd instalments;

vi) the Yard would have the cash it needs to build; and

vii) Havila could avoid the Yard terminating the SBCs.

238. Abarca highlights in this context the parties' express agreement in § 2.5.1[ii] that the Yard "*needs evidence of the Buyer's pre and post-delivery financing in order to be able to provide the Insurance Bond, the Cut-Through Agreement, the Bank Guarantees and the CESCE Counter Guarantee*".

239. Further, Abarca submits, in order for Havila to have its own protection for paying the instalments, it needed the bonds to be issued: but they could only be issued if CESCE, Abarca and Barents were satisfied that there was financing in place. Without that protection, Havila did not want to pay any more instalments and the project would come to an end. Clauses 2.4.1 and 2.5.1, and in due course Addendum 8 § 2.1, therefore were intended to provide a clear regime for the parties to continue with the project if Havila could obtain finance and bring its performance back up to speed quickly and, if it could not, for the Yard to terminate the SBCs and bring the project to an end.

240. I do not accept those submissions.

241. First of all, the delay in Havila obtaining its financing was linked to the need to make the Spanish tax lease structure work. That was inherent in the project from the outset. Article XXI of the SBCs made "*[a]pplication and implementation of a financial Spanish Tax Lease scheme acceptable to the Builder and Havila*" a condition subsequent to the SBCs; and Addendum 7 § 2.7 made it a condition precedent to the payment of the 3rd instalment. It is that feature which had given rise to the problems with BoComm. Moreover, the parties in Addendum 7 expressly agreed in § 2.4.1[ii] that the "*the implementation of the BoComm Financing into the Tax Lease … is complicated and shall take time to implement it due to circumstances not attributable to any of the Parties*". It cannot therefore be said to be part of the factual background to Addendum 7 that Havila was at fault for having failed to arrange its financing and provide funds.

242. Secondly, the argument that the need for funding meant that the "*written, committed statement*" required by § 2.4.1[iii] must refer to executed loan documentation begs the question of what CESCE and Abarca required in order to issue, respectively, their counter-guarantee and insurance bonds. I have concluded that, contrary to Abarca's submissions, it was not part of the mutually known factual background that those parties first required signed loan documentation to be in place. Abarca's contention based on the 'cascade of obligations' therefore does not assist it.

243. Thirdly, as to Abarca's point that Havila itself needed to have funds to draw down before it could actually perform its payment obligations, that is not mentioned in § 2.5.1[ii] as being part of the reason why the confirmation of Havila's financing was necessary. There is no evidence, and no reason to believe, that it was part of the factual background, known to both parties, that Havila could and would not perform its obligations under the SBCs until it was able to draw funds down from its lender; and as noted earlier, Havila had made the First Additional Payments from its own funds.

244. Abarca submits that § 2.4 must be read in the context and in the light of other provisions of Addendum 7. In particular, Abarca makes the following points:

i) Clause 2.5.1[ii] referred to the Yard's need for "*evidence*" of Havila's financing in order to be able to obtain the security documents from CESCE / the Insurer / Barents. In order for there to be "*evidence*" of financing, financing had to exist.

ii) The same clause indicated that the "*evidence*" necessarily had to be such that would satisfy CESCE, Abarca and Barents, and Havila agreed that it was aware of that fact. CESCE, Abarca and Barents needed there to be a signed loan document, as set out in §§ 5 and 7.6 of the CESCE policy and in the Policy.

iii) Addendum 7 § 2.2.2[v] recorded that the cut-through agreement would become effective, and re-insurance by Barents would come into effect, only when "*the Buyer has documented and confirmed the pre and post-delivery financing as set out in clause 2.4 …*". Once again, financing must exist in order for it to be documented and confirmed: the language is not of 'prospective or potential financing'. Further, the use of the definite article indicates that specific financing was being envisaged, not a general category. The specific reference to clause 2.4 shows that what was intended in clause 2.2.2 was the same as what is meant in clause 2.4.

iv) Clause 2.2.2[vi] similarly provided that the CESCE counter-guarantee would come into force when Havila had "*confirmed the pre and post-delivery financing of the Vessel as set out in clause 2.4."*

v) Clause 2.2.2[vii] stated that the Yard would provide Havila with confirmation of the CESCE counter-guarantee and the Barents reinsurance, against payment of the 3rd instalment, subject to Havila having "*confirmed financing as set out in clause 2.4*". The emphasis was not on a mere statement by the lender but on the actual existence of Havila's financing.

vi) Clause 2.2.2[viii] provided that if Havila had not provided "*confirmation of financing as set out in clause 2.4*", then its payment of the 3rd instalment would be extended until such confirmation had been provided.

245. I do not accept Abarca's submissions. First, the references (whether in § 2.2.2 or in § 2.5.1[ii]) to the confirmation of Havila's financing being needed in order for the CESCE counter-guarantee and Abarca bonds to be provided cannot convert Havila's obligation in § 2.4.1[iii] into an obligation to provide what CESCE and Abarca might require, pursuant to policy documents that had never been provided to Havila. The parties chose to specify in § 2.4.1[ii] the nature of the confirmation Havila was required to provide, namely a "*written, committed statement from the bank / financial institution financing*

[Havila]". Secondly, each of the provisions of § 2.2.2 on which Abarca relies referred to confirmation of financing "*as set out in clause 2.4*". They accordingly point towards § 2.4.1[iii] as being the place where Havila's obligation is defined. Thirdly, Abarca's point that in order to be documented and confirmed, "*financing*" must exist, simply begs the question of what "*financing*" means in the context of Addendum 7. The word "*financing*" does not by itself answer that question. It is § 2.4[iii] which defines the status or degree of commitment from the lending entity that Havila is required to demonstrate. I repeat, if the parties meant by the word "*financing*" that there had to be executed loan documents with funds ready to draw down, it would have been easy to say so.

246. Finally on this topic, Abarca relies on parts of Addendum 8 to shed light on the meaning of Addendum 7 § 2.4.1. Addendum 8 was entered into on 30 April 2019, the date of the deadline under Addendum 7 § 2.4.1[iii], and it extended that deadline to 31 May 2019. Abarca submits that Addendum 8 §§ 2 and 3 set out a four stage process which made clear that a term sheet or conditional offer of commercial terms was insufficient under Addendum 7 § 2.4.1[iii]:

    i) First, in order to provide the Yard with information about the progress of Havila's financing, Addendum 8 § 2.1(i) required Havila to report to the Yard on 10 May 2019 "*the conditional conclusion of the banks to be providing the Financing*".

    ii) Secondly, on 24 May 2019 Addendum 8 § 2.1(ii) required Havila to report to the Yard in writing "*the final approval of the Financing, which shall include the approval of GIEK to the extent required*".

    iii) Thirdly, the body of Addendum 8 § 2.1 made 31 May 2019 the extended deadline for Havila to comply with Addendum 7 § 2.4.1[iii], by means of the lender confirming to the Yard itself the approval of financing which had occurred at stage (ii) above.

    iv) Fourthly, Addendum 8 § 3.1 then provided that *"[w]ith reference to clause 2.1…the Buyer expect[s] to be able to draw under the Financing and make the due payment under the Current Contract by the end of May 2019*."

247. Abarca notes that Havila was at the time in discussion with two Norwegian banks and GTLK. It submits that the "*conditional conclusion*" at stage (i) above would be represented by a signed term sheet: a conditional offer to proceed with negotiations about financing around agreed main heads of terms, with finance subject to agreement. It is to be contrasted with 'confirmed financing' as required by Addendum 7 § 2.4.1. Then, stage (ii) above, requiring "*final approval of financing*", meant there had to be a final agreement by the lender to provide financing, with nothing further needed for the finance to be effective. Once again, a non-binding term sheet could not amount to "*final approval of financing*".

248. Moreover, Abarca says, in order for Havila to be able to draw down on financing by 31 May 2019 as envisaged by Addendum 8 § 3.1, a binding contract to lend clearly had to exist. The parties thus intended such a binding contract to be in place by 31 May 2019, so that Havila could actually start paying. The contingency provided for in the remainder of Addendum 8 § 3.1:

> "If the Buyer is not able to draw under the financing as set out in clause 3.1, first paragraph of the Addendum No 8, the Buyer shall pay to the Builder EUR 2,000,000 as partly payment of the Contract Price. Payment of the amount shall be made on the 31 May 2019 and against issue of Insurance Bond as set out in Addendum No 7 to the Amended and Restated Contract. For such Insurance Bond the Cut-Through Agreement provisions as set put in clause 2.2,third paragraph, of Addendum No B shall apply."

was included in case actual drawdown were for some reason delayed beyond that date.

249. Thus, Abarca submits, Addendum 8 shows that the parties expected and intended the following sequence of events: (i) lender makes a conditional offer to lend; (ii) loan agreement is concluded; (iii) lender confirms the existence of the loan agreement to Havila; and (iv) drawdown of the loan. The provision of a non-binding term sheet would fulfil stage (i), but obviously not (ii) or (iii), nor would it allow (iv).

250. I am again unable to accept Abarca's submissions.

251. As a preliminary matter, Addendum 8, as a subsequent contract, can *prima facie* not be used as an aid to the construction of Addendum 7: see § 217 above. It might be legitimate to have regard to Addendum 8 if it modified the obligations in Addendum 7 in a material respect (other than, as is obvious, by changing the deadline under Addendum 7 § 2.4[iii]). Further, on the footing that (a) Addendum 7 and Addendum 8 were both addenda to each SBC, such that all three at least arguably should be construed as parts of a single contract, and (b) the relevant obligations under Addendum 7 remained to be performed by the time Addendum 8 was signed, it is arguable that Addendum 7 § 2.4.1[iii] should henceforth be construed in the light of the contents of the contract as a whole (including the provisions inserted by Addendum 8). However, I do not need to reach a final view on those matters, because I do not consider Addendum 8 to assist Abarca in any event: essentially for three reasons.

252. First, the language of Addendum 8 § 2.1 does not in my view indicate a requirement for signed loan documentation. The references to the lending banks' "conditional conclusion" and "*final approval*", and to the "*final approval of GIEK*", used the language of commercial decisions about whether or not to proceed in principle with a lending proposition. At the very least, they do not point clearly towards a need for binding legal documentation to have been concluded.

253. Secondly, the factual background includes the letter from SpareBank SMN referred to in § 107, sent to the Yard the day before Addendum 8 was signed. That letter indicated an aim to have approval by GIEK and Sparebanken Vest by 23 May 2019, i.e. the day before the date in Addendum 8 § 2.1(ii) for Havila to report "*final approval*" of the financing including approval by GIEK (if required). The SpareBank SMN letter also expressed a hope to have loan documentation closed and drawdown available by 15 June 2019, which was after the final approval date in Addendum 8 § 2.1(i). In these circumstances it is more likely, as well as being consonant with the language the parties used, that the "*final approval*" in § 2.1(ii) meant commercial approval by the lender and regulatory approval by GIEK (if required), rather than signed loan documentation. That view is also consistent with the oral evidence of Mr Pettersen (at least as regards

Havila's understanding of the position), and of Sr Perez-Bouzada (who accepted that anyone reading the letter alongside Addendum 8 would understand that the 24 May 2019 deadline was for final approval preceding any signed loan documentation).

254. Thirdly, it is not obvious why the parties should have envisaged any material delay between loan documents being signed and drawdown being available. Accordingly, the fact that Addendum 8 § 3.1 expressly provided for circumstances in which drawdown would not be available by the end of May, providing for Havila nonetheless to pay € 2 million, and for an insurance bond and cut-through agreement nonetheless to be issued to Havila against that payment, tends to undermine Abarca's contention that Addendum 8 § 2.1(ii) (or Addendum 7 § 2.4.1[iii]) required signed loan documentation to be in place by 31 May 2019.

(c) Was GTLK's 16 July 2019 letter a "written, committed statement"?

255. GTLK's letter of 16 July 2019 letter was provided to the Yard on 22 July 2019. It was therefore sent neither to Havila nor to the Yard itself before the expiry on 31 May 2019 of the deadline under Addendum 7 § 2.4.1[iii] (as amended by Addendum 8). Nonetheless, as appears later, it is relevant to consider whether it was a "*written, committed statement …*" of the kind required by § 2.4.1[iii].

256. I have quoted the letter in § 141 above. The letter referred to GTLK's term sheet dated 26 June 2019, which I have summarised in § 125 above.

257. In my judgment, the GTLK letter did constitute a written, committed statement of the kind required by Addendum 7 § 2.4.1[iii]. The term sheet had been signed on behalf of GTLK and Havila, but indicated that it was largely not legally binding and was subject to *"inter alia, the approval of GTLK Europe DAC's board of directors, the approval of the STLC Lease Committee, acceptable regulatory compliance advice and opinions, and acceptable documentation"*. The 16 July 2019 letter followed approval by both GTLK's board and the STLC Leasing Committee, and made clear that approval of the term sheet was, now, subject only to satisfactory documentation of the transaction. The statement that the term sheet was binding on GTLK according to its terms and conditions perhaps had an element of circularity, since the term sheet itself made clear that it was not legally binding (aside from a few discrete provisions). However, the gist of the GTLK letter was that the lender had gone through all the necessary approval procedures, and regarded the financing as, at the very least, a serious commercial commitment which was subject only to conclusion of satisfactory documentation. It was sufficient to satisfy the criterion set out in Addendum 7 § 2.4.1[iii].

(d) The meaning of Addendum 7 § 2.5.1[i]

258. To recap, Addendum 7 § 2.5.1[i] provided that:

> "… if the Buyer cannot confirm and provide evidence that the pre and post-delivery financing of the Vessel is in place at 30 April 2019 (at the latest) by a written statement from a bank or financial institution as set out in clause 2.4.1 of the Addendum No 7, the Builder shall be entitled to terminate and/or cancel the Contract according to the terms and provisions of the Contract,

> provided (i) the Buyer is being informed in writing about the Builder´s intention to terminate and/or cancel the Contract for such reasons with fourteen (14) days written notice, (ii) the Buyer and the Builder have been meeting physically subsequent to the Buyer's receipt of such notice in order to consider and negotiate in good faith alternative arrangement in order to avoid termination and/or cancellation of the Contract and (iii) the Parties after fourteen (14) days negotiation have concluded that there is no other alternative financial arrangement to be provided by the Buyer in order to avoid termination and/or cancellation of the Contract"

259. Abarca submits that this clause required the parties, in order to avoid termination, to have agreed an alternative to Havila having committed financing available; alternatively, at the very least, for Havila by then to have provided the type of written, committed statement required by § 2.4.1[iii] (being, on Abarca's case, executed loan documents). Abarca contends as follows:

i) Any meeting pursuant to § 2.5.1[i] would take place in circumstances where Havila had received no commitment to lend from a lender.

ii) The meeting stage was not merely a 14-day grace period to enable Havila to have another attempt to source a lender and secure committed finance. The meeting is between the parties, not between Havila and potential lenders; Havila had already spent 12 months failing to obtain committed finance, and time was up.

iii) The aim of the meeting was therefore to find an "*alternative arrangement*" to avoid termination, meaning an alternative to Havila having committed financing available, that would nevertheless enable Havila to provide the cash instalments that the Yard required in order to build, and also satisfy CESCE / the Insurer / Barents. That would be something such as evidence of Havila being able to self-fund, by way of certification from Havila's bank, perhaps coupled with a change in the payment structure.

iv) Alternatively, even if the meeting stage was, effectively, a 14 day grace period to enable Havila to cure its breach of clause 2.4.1, Havila must have been required, in order to avoid termination, to provide at least the same type of confirmation of financing as § 2.4.1[iii] required. It would be nonsensical for the parties to have agreed a firm deadline for the provision of a committed statement of financing, breach of which triggered the right to terminate, and then allow another 14 day period at the end of which something far less than what triggered the right to breach could be produced by Havila to avoid termination. There would then have been no need for the strict requirements of clause 2.4.1, or the tight time scale in clause 2.5.1. All of the carefully drafted, interdependent obligations relying upon Havila having financing would go unfulfilled, and the project would remain in limbo.

v) That view is supported by the fact that § 2.5.1[i] makes clear that the Yard still needs "*evidence of the Buyer's pre and post-delivery financing in order to be able to provide the Insurance Bond, the Cut-Through Agreement, the Bank*

Guarantees and the CESCE Counter-Guarantees". Clause 2.5.1[i] cannot be intended as a watered-down version of § 2.4.1[iii], because that would fail to address the need for the confirmation of financing needed in order for these things to occur and hence for the project to proceed.

vi) Havila's case on § 2.5.1[i] would make it sufficient for Havila to have told the Yard at the meeting stage that, for example, as a well-reputed Norwegian company, with an underlying contract with the Norwegian government, it was bound to obtain financing from someone. On that approach, it is hard to think of any circumstances in which the Yard would have the right to terminate. Presumably Havila would have to be rejected by every single lender first. The time limits set out in § 2.4[iii] and 2.5.1[i] were there precisely in order to avoid that outcome, and were very necessary as the project was in limbo and the Yard needed money in order to proceed.

260. As to the argument summarised in (i)-(iii) above, I do not agree that an "*alternative arrangement*" or "*other alternative financial arrangement*" within § 2.5.1[i] must exclude the alternative financing which Havila had been seeking in accordance with § 2.4.1[iii]. Clause 2.4.1[ii] and [iii] referred to "*alternative*" financing, naturally meaning in the alternative to the BoComm financing referred to in § 2.4.1[i]. The expressions "*alternative arrangement*" and "*other alternative financial arrangement*" in § 2.5.1[i] are potentially broader than "*alternative financing*", and could perhaps include entirely different solutions such as Havila self-financing, if necessary following a further infusion of equity capital. However, there is no indication in the language of § 2.5.1[i] that those two expressions necessarily excluded borrowing. In both cases, they are expressed to be alternatives *"in order to avoid termination and/or cancellation of the Contract"*. That language is an indicator of the real purpose of § 2.5[i]. Both parties were heavily invested, in different ways, in the SBCs. It cannot have been thought to be in either of their interests for the contracts to come to an end unless absolutely necessary (and the repetition in § 2.5.1[i] of the phrase *"in order to avoid termination and/or cancellation of the Contract"* may lend support to that view). The natural meaning of "*alternative arrangement in order to avoid termination and/or cancellation of the Contract*" and "*alternative financial arrangement to be provided by Havila in order to avoid termination and/or cancellation of the Contract*" is any arrangement that the parties, acting in good faith, find to be an acceptable means of continuing with the contract (which might, of course, have to include a means of addressing the need to evidence the alternative financing arrangement so that the insurance bond and other matters referred to in § 2.5.1[ii] could be addressed).

261. Abarca's proposed construction would mean that if, for example, during the course of the meeting provided for in § 2.5.1[i], Havila provided (late) the written, committed statement envisaged by § 2.4.1[iii], or even evidence of signed loan documents, the parties would have to ignore that fact, potentially resulting in the termination of the SBCs, carrying with it among other things the loss by Havila of the instalments it had already paid. That strikes me as a very unnatural construction, and at odds with the evident objective of § 2.5.1[i], namely to permit termination only if, after good faith negotiations, the parties could find no solution to the problem of Havila's financing. Abarca would argue that any other approach would in substance give a grace period for compliance with § 2.4.1[iii], which would be at odds with the scheme of the contract. However, that objection in my view takes too narrow a view of § 2.5.1[i] and its evident

objective. The type of alternative arrangement envisaged by § 2.5.1[i] is broadly expressed, and is not limited to confirmation of financing of the kind provided for in § 2.4.1[iii]; but nor, in my view, is there any reason to believe that it excludes it. Indeed, artificially to exclude it would be commercially absurd, as it would entitle the Yard to terminate in circumstances where the problem of Havila's financing had entirely disappeared, even if any intervening delay posed no real threat to the successful continuation of the project. In addition, the reference in § 2.5.1[ii] to Havila's "*pre and post delivery financing*" would be hard to understand if bank lending were excluded at the § 2.5.1[i] stage.

262. I do not consider it to make any difference that the meeting provided for in § 2.5.1[i] is between the parties, not between Havila and potential lenders. The subject-matter of the meeting is what, if any, financial arrangements Havila may be able to provide in order to keep the contract alive. Nor does Abarca's point that Havila had already spent 12 months failing to obtain committed finance assist. As I have already noted, in Addendum 7 § 2.4.1[ii] the parties contracted on the agreed basis that the delays arising from the BoComm problem were neither party's fault.

263. Turning to the submissions made in § 259(iv)-(vi) above, Abarca's contentions in my view misstate the nature of § 2.5.1[i]. Its language, and evident purpose as noted above, does not involve setting a further deadline for an alternative arrangement for Havila's financing to be put in place or evidenced. Rather, it envisages a discussion by the parties, "*in good faith*", as to whether there is an alternative financing arrangement "*to be provided by Havila*", i.e. in the near future (and not necessarily during the 14-day negotiation period itself), sufficient to continue with the contract. That does not mean that the Yard is obliged to accept any kind of open-ended promise by Havila that it can obtain financing somehow or at some unspecified point in the future (as Abarca put it in its written closing). A good faith discussion would not lead to that conclusion, and in that sense there was a real constraint on what might otherwise be regarded as the subjective requirement for a conclusion reached by "*the Parties*". (For completeness, I do not consider it necessary to gloss § 2.5.1[i] by implying that the parties had to act reasonably as well as in good faith, though it would not in my view affect the outcome of the present case anyway). However, § 2.5.1[i] equally did not mean that the Yard would necessarily be entitled to terminate simply on the basis that Havila had not actually put in place by the end of the 14-day period something which would, but for that fact, amount to an alternative financial arrangement acceptable to both parties. I note in passing that § 2.5.1[i] is very differently structured from the precisely worded termination provision in Article XX.3 of the SBCs, which provided for a right of termination following default in payment, service of a notice and non-payment during a prescribed period.

264. Ultimately, the language of § 2.5.1[i] can be left to speak for itself, without the need for any gloss or reinterpretation of the kind Abarca proposes. It required a conclusion actually to be reached by the parties – or at least a conclusion which the Yard had actually reached and which Havila would have reached had it been considering the situation and negotiating in good faith (bearing in mind among other things the current status of the project and the need for funding) – that there was no alternative financial arrangement to be provided by Havila sufficient to avoid termination of the SBCs. Unless and until such a conclusion was arrived at, the right to terminate did not arise.

265. Clause 2.5.1[iii] required any such conclusion to be reached "*after fourteen (14) days negotiation*". It did not stipulate that the conclusion could be reached, if at all, only within that 14 day period. It is arguable, therefore, that the parties might reach the requisite conclusion only on a later date, though it is unclear how much later that could be. If so, however, the parties would then have to have regard to the circumstances in existence at that later date. It would follow, for example, that any conclusion reached by the parties only after the date (22 July 2019) on which Havila provided to the Yard GTLK's letter of 16 July 2019 would need to have taken account, in good faith, of that letter's potential impact on the question of whether there was an alternative financial arrangement sufficient to avoid termination of the SBCs. That would of course include taking account of the fact that the letter post-dated the § 2.4.1 deadline, the significance of which would be a matter for the parties (acting in good faith) to assess in the light of the current position and outlook as regards performance of the SBCs.

(e) Whether a right to terminate arose under Addendum 7 § 2.5.1[i]

266. Abarca's case on this issue in part reflects its case about the meaning of § 2.5.1[i], discussed in section (d) above.

267. Abarca's first contention is that the parties held meetings on 27-28 June and 9-10 July 2019 in Amsterdam, following the Yard's 21 June 2019 notice of intention to terminate; that there were some discussions of Havila's financing at those meetings; that Havila did not put forward any alternative financing arrangement other than borrowing from GTLK; that borrowing from GTLK was not capable of being an "*alternative arrangement*" or "*other financial arrangement*" within § 2.5.1[i]; and that the Yard was therefore entitled to terminate.

268. I reject that contention, first, because I reject the premise. As indicated in §§ 260-262 of section (d) above, I do not accept the submission that borrowing from GTLK was incapable of being an "*alternative arrangement*" or "*other financial arrangement*" within § 2.5.1[i]. Secondly, even were the premise correct, the absence of discussion of any alternative to GTLK, on which Abarca relies, would not have been sufficient to fulfil § 2.5.1[i]. As indicated in §§ 263-264 of section (d) above, the clause required a conclusion actually to be reached by the parties, or at least a conclusion which the Yard had actually reached and which Havila would have reached had it been considering and negotiating in good faith, that there was no alternative financial arrangement to be provided by Havila sufficient to avoid termination of the SBCs. I consider the course of events at these two meetings in §§ 126-138 above. There is no evidence of either party having in fact reached any such conclusion.

269. Moreover, if alternative financing within § 2.5.1[i] meant something <u>other</u> than borrowing from GTLK, then there would have needed to be a good faith discussion about whether any such alternative were available. That would in my view have required the Yard, in response to Havila having referred to and proffered a copy of the GTLK term sheet, to have pointed out that there needed to be a discussion about some <u>other</u> form of financing in order to avoid termination. There is no evidence of it having done so. Abarca makes the point that Havila put forward only the GTLK financing, so there was nothing else to discuss. However, on that footing, a good faith negotiation in my view required there to have been an overt discussion between the parties about what non-GTLK financing might be acceptable in order to avoid termination.

270. Abarca also addresses the issue on the basis of its alternative case, that § 2.5.1[i] at the very least required the written, committed statement provided for in § 2.4.1[iii] to be provided by the end of the 14-day negotiating period. That period ran from 22 June 2019 (the day after the Yard's 21 June 2019 notice) to 5 July 2019. The GTLK letter did not amount to such a statement, and in any event it was not provided to the Yard by the end of the 14 day period. I reject this contention. I have already rejected Abarca's submission that the GTLK letter did not amount to a statement of the kind required by § 2.4.1[iii] – see section (c) above. Clearly that letter was not provided within the 14-day period ending 5 July 2019. However, as indicated in §§ 263-264 of section (d) above, I do not accept that § 2.5.1[i] operates in the manner for which Abarca contends. Instead it required the parties to have reached a specified conclusion, which on the evidence they did not reach. The considerations set out in § 268 above apply again.

271. Nor, for that matter, is there evidence of either party having reached the conclusion specified in § 2.5.1[i] at any later stage. Had the Yard done so, it would surely have terminated the contract, or at least purported to do so, far sooner than its letter of 24 November 2019. Instead, the Yard continued, at the 27-28 June and 9-10 July 2019 meetings and for months thereafter, to proceed on the basis that Havila's financing would probably be available and the SBCs would proceed. Whilst the Yard at various points (including in Addendum 9) reserved its position, its actions are not consistent with it having concluded that there was no alternative but to terminate the SBCs by reason of the lack of financing on Havila's side. I have set out earlier my reasons for rejecting certain particular assertions made on the Yard's behalf that it, or the parties, had reached the requisite conclusion (see, in particular, §§ 137 and 164 above). Most importantly, there is no evidence of any further discussion or negotiation between the parties at which the parties reached the conclusion required by § 2.5.1[iii], or at which the Yard reached it and Havila, if acting in good faith (or, were it relevant, reasonably), would have been bound to do the same.

272. On the contrary, shortly after the meetings on 9-10 June 2019, GTLK provided its letter of 16 July 2019, and Havila forwarded it to the Yard on 22 July. The major focus of discussions then became the technical issues about the Vessels, and how the change of specification would be paid for, leading ultimately to Addendum 9. In the meantime, work was proceeding on the GTLK financing documents, but it was clear that those could not be finalised until (a) the commercial terms had been finalised in Addendum 9 and (b) the Yard had provided certain input required from it in relation to the financing documentation: see §§ 153, 154, 155, 156, 159, 160 and 176 above. Although Addendum 9 was signed, the preconditions for it being effective were not satisfied, and events were then overtaken by the problems about the Yard's solvency. The input required from the Yard into the loan documentation appears never to have been provided. But for these supervening problems, there is no reason to believe that the GTLK term sheet and confirmation letter would not have led, in a timely fashion, to executed loan documentation and drawdown as, it appears, had happened in relation to the Tersan vessels. Whilst the Yard's witnesses said they did not see evidence of the progress of Havila's financing during this period, that does not assist them in establishing either that the Yard reached the conclusion stipulated in § 2.5.1[i], or that Havila did so, or that Havila if acting in good faith (or reasonably) would have been bound to do so.

273. In those circumstances, even if the Yard had itself reached the conclusion required by § 2.5.1[i] at some stage on or after 22 July 2019, that is not a conclusion Havila itself reached nor one which it would have been bound to reach acting in good faith (or reasonably).

274. Abarca in its closing further submits that even if § 2.5.1[iii] has a meaning other than those indicated in Abarca's primary and alternative cases, then a right to terminate arose on the facts. Abarca suggests that, unless it is correct about its primary or alternative case, § 2.5.1[i] must be taken to mean that "*it was enough to satisfy clause 2.5.1(iii) if potential financing from GTLK might be available at some unspecified point in the future and that that potential was more than enough to allow a reasonable person to conclude that finance would be forthcoming*". As indicated in §§ 263-264 above, that is not in my view the correct interpretation of § 2.5.1[iii]. However, I go on to consider below whether Abarca's submissions on the facts assist it in establishing that the Yard became entitled to terminate pursuant to § 2.5.1[i] as correctly interpreted.

275. Abarca submits, in summary, as follows:

i) For over a year (starting with the stipulation in the SBCs, of 30 June 2018 as the date for confirmation of Havila's finances) Havila had given estimates of when drawdown would occur and a loan agreement would be signed. For over a year, Havila had demonstrated that its estimates were misleading, over-confident, and just plain wrong: they were not to be taken seriously. It knew the Yard was desperate and so made regular promises that cash would be forthcoming shortly. It consistently misled the Yard as to when financing would be due, whether out of naivety or, more likely, by the time they got to June 2019, in an attempt to 'dangle the carrot' of imminent cash to stop the Yard from exercising its right to terminate.

ii) It was obvious that, by July 2019, the Yard had no confidence in what they were being told by Havila. The Yard's evidence is consistent and entirely credible in this regard.

iii) It was therefore entirely justified for reasonable people in the position of these parties to objectively conclude that the GLTK term sheet would not result in GLTK providing financing for Havila to purchase the Vessels, and certainly not in anything resembling a realistic time frame given the progress of the project, the urgent need for funds, the fact that the Yard's right to terminate had accrued and the fact that construction had to be complete and the first Vessel launched by January 2020.

iv) Havila's witnesses were wrong to claim that there was no reason for the Yard to be concerned by June/July 2019 about Havila's ability to provide finance. The Yard was extremely concerned, for good reason. Havila's witnesses were either wholly naive or misleading. Abarca highlights in this regard the points that, prior to the June/July 2019 meetings, the Yard repeatedly made pleas for cash; Havila accepted that the Yard could not continue to build without cash; the Yard had said, from as early as February 2019, that it could not continue much beyond April, and this much was clear to Havila; one of the topics in the 29-30 April 2019 meeting was when the Yard was going to get paid, and the Yard told Havila that it needed money to pay sub-contractors and suppliers whose invoices the

Yard was struggling to pay; the Yard was in considerable debt (€10-11 million) to its suppliers; the keel laying instalments were 3-4 months overdue; there were two partially built hulls sitting in the slipway, construction having been halted due to lack of payment; despite promises from Havila, no financing had materialised; the Yard had stressed the problems it was facing in a series of meetings; and the Yard had sent a notice of termination for lack of financing.

v) It had now been 17 months since the parties signed the SBCs; there was still no loan documentation signed; there had been a potential lender on the table for nearly a year which did not materialise in any cash; the Norwegian banks did not provide any cash; Havila had been telling the Yard since April 2019 that it would have signed loan documentation in place with GTLK soon, based on wholly implausible estimates; there were two partially built hulls in the Yard; work on the ships had ground to a halt; they were due to be delivered within a year's time. The Yard was in a nightmare scenario.

vi) There was no financing confirmed by the GTLK letter because no financing existed. All that was confirmed was that GTLK had signed a non-binding term sheet with Havila. The requirements of clause 2.4.1/2.5.1 were not met.

276. The short answer to all these points is that, whether taken individually or collectively, they do not have the result that "*the Parties after fourteen (14) days negotiation have concluded that there is no other alternative financial arrangement to be provided by the Buyer in order to avoid termination and/or cancellation of the Contract"*. That stage was never reached, for the reasons I have already indicated. I nonetheless deal briefly with Abarca's points below, in the same order:

i) I do not accept Abarca's submission that, for over a year leading up to June/July 2019, Havila had consistently misled the Yard as to when financing would be due, whether out of naivety or deliberately. This contention is based on the following eleven matters:

a) the date, 30 June 2018, for provision about Havila's finance, set out in the SBCs;

b) the expectation of signed loan documentation from BoComm by 31 October 2018, referred to in Addendum 1;

c) the statement in BoComm's letter of 27 November 2018 that "Pre- and Post Delivery Financing will be available for drawing as soon as the documentation has been completed";

d) Havila's statement in the 24 January 2019 meeting that it would "sort out" the financing issues "within the next weeks";

e) Mr Pettersen's communication of 27 January 2019 indicating that "the 'goal' was to have the complete documentation agreed and executed in due time before 15 March;

f) Havila's statement at the Madrid meetings on 7-8 February 2019 that it expected to have financing by 30 April;

g) the date of 31 May 2019 set out in Addendum 8;

h) Havila's statement at the meeting on 17-19 June 2019 that it expected to have cash from GTLK by the end of July;

i) Havila's statement at the meeting on 27-28 June 2019 that it was seeking to get drawdown by 17 July 2019 from GTLK;

j) a statement by Mr Pettersen at the 9-10 July 2019 meeting that drawdown was expected by the end of July or early August; and

k) Havila's reference to the same expectation in its letter of 22 July 2019 attaching the GTLK term sheet.

Several of these are clearly bad points: see §§ 33, 54, 110, 123, 129, 132 and 145 above. Others were not squarely put to the relevant witnesses (such as (e), (f) and (h) above). By and large, Havila had reason to believe the dates it put forward were feasible. I reject the suggestion that Havila was systemically misleading the Yard.

ii) Although representatives on the Yard's side at times expressed lack of confidence about Havila's financing in contemporary documents or in their oral evidence, at other times they took a different view (see e.g. §§ 129, 135, 148-149 and 165-166 above). In any event, expressions of lack of confidence are insufficient to fulfil the requirements of § 2.5.1[i].

iii) For the reasons already given, I do not accept Abarca's submission that it was, or would have been, entirely justified for reasonable people in the position of these parties to conclude, objectively, that the GLTK term sheet would not result in GLTK providing financing for Havila to purchase the Vessels at all or in a realistic time frame.

iv) By the time of the meetings on 27-28 June 2019, the Yard had been told that Havila now had a signed term sheet from GTLK but had declined to look at it. Had Havila's financing been a primary concern, that would have been a surprising course for the Yard to take. By 22 July 2019 the Yard were aware not only of a term sheet but of GTLK's letter confirming that it had been approved and was now subject only to the detailed documentation. There was no reason to believe that the SBCs would founder for lack of financing on Havila's part, and I do not accept that either the Yard or Havila were of that view.

v) It was agreed common ground that the delays with the BoComm financing were not the fault of either party. Havila now had a replacement lender who had already signed a term sheet. But for the various intervening problems that ensued, that term sheet (in itself and bolstered by GTLK's 16 July 2019 letter) could reasonably be expected to lead to executed loan documentation and drawdown within a reasonable time.

vi) As for (v) above.

277. For all these reasons, I conclude that the Yard did not become entitled to terminate pursuant to Addendum 7 § 2.4.1[i].

(F) WHETHER THE YARD WAIVED ANY RIGHT TO TERMINATE PURSUANT TO ADDENDUM 7

278. Any question of waiver would arise only if the Yard had become entitled to terminate pursuant to Addendum 7 § 2.4.1[iii]. I have concluded in section (E) above that it did not, and therefore no question of waiver arises. I accordingly consider the arguments on this issue relatively briefly.

(1) Principles

279. In *The Kachenjunga* [1990] 1 Lloyd's Rep 391, 397 Lord Goff stated:

> "where with knowledge of the relevant facts a party acts in a manner which is only consistent with his having chosen one of the two alternative and inconsistent courses of action then open to him… he is held to have made his election accordingly. It can be communicated to the other party by words or conduct…in clear and unequivocal terms…Once an election is made, however, it is final and binding…"

280. An innocent party has a reasonable period of time within which to decide whether or not to terminate: see Stocznia Gdanksa v Latvian Shipping [2002] 2 Lloyd's Rep. 436 § 87 per Rix LJ:

> ".. there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected".

281. The length of the period given to the innocent party in order to make up his mind will depend on the facts of the case (Chitty on Contracts 34th edn, § 27-055; *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm) § 22).

282. Where an innocent party does not terminate immediately but instead calls on the defaulting party to perform its obligations, the court should be slow to find that the innocent party has affirmed the contract. In *Yukong Line v Rendsburg Investments* [1996] 2 Lloyd's Rep. 604 Moore-Bick J said at p.608:

> "[T]he Court should not adopt an unduly technical approach to deciding whether the injured party has affirmed the contract and should not be willing to hold that the contract has been affirmed without very clear evidence that the injured party has indeed chosen to go on with the contract notwithstanding the other

> party's repudiation. In my view, the Court should generally be slow to accept that the injured party has committed himself irrevocably to continuing with the contract in the knowledge that if, without finally committing himself, the injured party has made an unequivocal statement of some kind on which the party in repudiation has relied, the doctrine of estoppel is likely to prevent any injustice being done.
>
> Considerations of this kind are perhaps most likely to arise when the injured party's initial response to the renunciation of the contract has been to call on the other to change his mind, accept his obligations and perform the contract. That is often the most natural response and one which, in my view, the Court should do nothing to discourage. It would be highly unsatisfactory if, by responding in that way, the injured party were to put himself at risk of being held to have irrevocably affirmed the contract whatever the other's reaction might be, and in my judgment he does not do so. The law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligations."

283. Two factors relevant to what will be 'a reasonable period of time' are (i) any urgency and (ii) whether prejudice will be suffered to the defaulting party by delaying the decision: see *Force India Formula Team v Etihad Airways PJSC* [2010] EWCA Civ 1051 § 122.

284. Once a reasonable period of time has expired, it is a question of considering the innocent party's actions and whether they are only consistent with that party having given up their right to terminate the contract: *White Rosebay* § 26.

285. A reservation of rights is ineffective where the party acts in a manner which is inconsistent with the reservation: see *Antaios v Salen Rederierna ("The Antaios")* [1983] 1 WLR 1362, 1370H-1371C per Donaldson LJ, who said a party cannot extend the time for reaching a decision beyond what is reasonable in all the circumstances by the simple device of announcing that his failure to decide is without prejudice to his rights.

286. An election can only be made once, though a continuing breach may give rise to a further right to terminate the contract. Rix LJ in *Stocznia Gdanska* at §§ 40 and 96 quoted and approved passages from the judgment below. Those in turn quoted from the decision of Mr Sumption QC (sitting as a Deputy High Court Judge) in *Safehaven v Springbok* [1996] 71 P&CR 59:

> "It does not follow from this analysis that the innocent party may in all cases change his mind after affirming the contract. If, after he had affirmed it, the repudiating party's conduct suggested that he proposed to perform after all, then the previous party's repudiation is spent. It has no further legal significance. If on the other hand, the repudiating party persists in his refusal to perform, the innocent party may later treat the contract as being

> at an end. The correct analysis in this case is not that the innocent party is terminating on account of the original repudiation and going back on his election to affirm. It is that he is treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after the affirmation. (Safeway § 66)

following which the judge below continued:

> "Once the innocent party has affirmed, he must go on performing. He must then be able to point to behaviour that amounts to a repudiation after the affirmation either by way of some fresh conduct amounting to repudiation or by way of the continuing refusal to perform amounting to repudiation."

See also *White Rosebay* §§ 43-51 (renunciation); and the statement of Proudman J in *Future Publishing Ltd v. Edge Interactive Media Inc* [2011] EWHC 1489 (Ch) § 69:

> "However this was a case in which the breaches were persisted in by the defendants. In those circumstances the fact that the claimant continued to press for performance should not preclude it from treating itself as discharged from its obligations under the contract. The claimant is not discharging on account of the original repudiation and trying to go back on an election to affirm. It is instead treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour"

(2) Application

287. Havila's case is that the Yard waived any right to terminate by failing to terminate within a reasonable time, and/or by signing Addendum 9 and procuring the issue of insurance bonds pursuant to it. I consider this contention on relevant alternative assumptions as to the parties' obligations.

288. First, if I am correct that GTLK's letter of 16 July 2019, forwarded to the Yard on 22 July, was a written, committed statement of the kind required by Addendum 7 § 2.4.1[iii], and that financing from GTLK was capable of being an "*other alternative financial arrangement*" within § 2.5.1[i], then the Yard waived any right to terminate that had accrued following the 14-day negotiation period and the parties' meetings in Amsterdam on 27-28 June and 7-9 July 2019. Once it received the GTLK letter on 22 July 2019 the Yard had the performance it might otherwise have been pressing for. It knew that the letter had been provided late, outside the 14-day period. It therefore had all the knowledge necessary to decide to exercise its termination right, but did not do so within a reasonable time. Instead, over the ensuing months, it failed to exercise its right and instead participated in all the ongoing discussions referred to earlier, directed at the continuation of the contract, over the period July to November 2019. That in turn meant that Havila continued to spend money having the GLTK financing documentation drawn up and negotiated, and refrained from finding an alternative shipyard to build the vessels it needed to fulfil its contract with the Norwegian

government. The Yard thereby elected, notwithstanding its reservations of rights, to keep the SBCs on foot.

289. Secondly, if I am correct that GTLK's letter of 16 July 2019, forwarded to the Yard on 22 July, was a written, committed statement of the kind required by Addendum 7 § 2.4.1[iii], but financing from GTLK was incapable of being an "*other alternative financial arrangement*" within § 2.5.1[i], then the Yard again waived any right to terminate that had accrued following the 14-day negotiation period and the parties' meetings in Amsterdam. The Yard knew during those meetings, and at all times thereafter, that Havila had no intention of arranging financing anywhere other than via GTLK, and was making no attempt to do so; and there is no evidence that the Yard was pressing Havila to provide evidence of non-GTLK financing. By refraining from terminating within a reasonable time, and notwithstanding its reservations of rights, the Yard thereby elected to keep the SBCs on foot.

290. Thirdly, if only signed loan documentation was sufficient to satisfy § 2.4.1[iii] and § 2.5.1[i], then the position needs to be considered in slightly more detail. Abarca submits that the right to terminate accrued on 10 July 2019. Thereafter, Abarca says, the Yard:

i) agreed with Havila to negotiate until 22 July 2019 and not exercise any rights until then;

ii) stopped work on the Vessels on 12 July 2019 and thereafter did not perform the SBCs;

iii) reserved its rights in letters/emails dated 21 June, 11 July, 5 September, 29 September and 17 October 2019, and in Addendum 9 § 9.4;

iv) pressed for performance, by reiterating to Havila that signed loan documentation was required, at the meeting on 24-25 July 2019, by the letters of 4 and 5 September 2019 quoted earlier, in telephone calls on 7-8 November 2019, and in the correspondence between 9 and 18 November 2019; and

v) terminated on 24 November 2019 because Havila had still failed to perform.

291. Even on this footing, however, I would have held that the Yard had waived its right to terminate by failing to do so within a reasonable time. It became increasingly clear, as the technical issues were discussed and Addendum 9 negotiated, that there would have to be significant changes to the terms of the SBCs, not least a large price increase. Once Addendum 9 was executed, that was a certainty. It was also clear that the loan documentation could not be finalised until (at least) Addendum 9 came into effect, so that the ultimate commercial terms were known. Thus, following the delay in the Yard exercising its right to terminate on or soon after 10 July 2019, Havila ultimately found itself in a position where it could not put final loan documentation in place until Addendum 9 became effective or, if it fell away (by reason of the conditions set out in it not being satisfied) the parties agreed replacement terms. Putting it another way, the situation after July 2019 was one of continuous flux and uncertainty about the commercial terms on which the construction of the Vessels could recommence, and final loan documentation had to await the outcome of that. Thus if the Yard did have a right to terminate in July 2019, following the end of the § 2.5.1[i] negotiations, it needed to be exercised promptly. It was not reasonable to delay, during which time there were

Addendum 9 negotiations aimed at fundamentally altering the commercial terms (upon whose outcome final loan documentation would depend), and then terminate on the basis that final loan documentation had not been provided.

292. Alternatively, Abarca submits, if the Yard did waive the right to terminate accrued in July 2019, Havila was in continuing breach, with the result that the Yard was still entitled to terminate under § 2.5.1[i] on 24 November 2019. I do not accept that submission. Any right to terminate under § 2.5.1[i] did not arise simply by virtue of a breach: it arose due to the outcome of negotiations of the kind for which that clause provides. Having lost by waiver its right to terminate in consequence of the July 2019 negotiations, the Yard would have needed to engage in a fresh round of negotiations, in the light of the circumstances then existing, before it could acquire a fresh right to terminate.

(G) WHETHER THE YARD BECAME ENTITLED TO TERMINATE PURSUANT TO ADDENDUM 9

293. The Yard submits that:

i) Addendum 9 § 3.2 provided that the Second Additional Payments (€5m per Vessel) would be payable within one banking day of the issue and delivery to Havila's solicitors of the insurance bonds for which § 3.2 made provision;

ii) if Havila failed to make payment, §§ 3.3 and 9.4 gave the Yard the right to cancel the SBCs;

iii) these provisions were conditional only upon approval of Addendum 9 by the parties' boards, and provision of the insurance bonds to Havila;

iv) the insurance bonds were provided to Havila on 18 September 2019 and the parties' boards approved Addendum 9 by 22 September 2019;

v) as a result, the obligation to pay the Second Additional Payments arose one banking day after 18 September 2019 (alternatively 22 September 2019);

vi) upon Havila's non-payment, the Yard acquired a right to cancel the SBCs; and

vii) the Yard exercised that right by its letter of 24 November 2019.

294. Havila submits that, by reason of the non-fulfilment of the conditions set out in Addendum 9 § 12, the addendum was agreed to be null and void, and deemed never to have been entered into.

295. I have quoted the relevant terms of Addendum 9 in section (D)(9) above.

(1) Principles

296. In addition to the authorities I have already mentioned on contract interpretation in general, the parties referred to the following additional cases and materials on this point.

297. Chitty on Contract (34th ed.) §§ 1-074 and 1-075 state:

> "**Void contracts**
>
> A void contract is strictly a contradiction in terms, because if a contract is truly void it is not a contract at all; but the term is a useful one and well understood by lawyers. Properly speaking, a void contract should produce no legal effects whatsoever. Neither party should be able to sue the other on the contract. If goods have been delivered, they or their value should be recoverable by an action in tort, because the property will not pass. If money has been paid, it should be recoverable by an action in restitution, because the money was not due. In one situation, i.e. where a contract is void for mistake, these consequences would appear to follow from the fact that the contract is void. But it is by no means true that all contracts termed "void" by the law necessarily produce this effect.
>
> **"Void" contract may have effects**
>
> 1-075 For example, where A and B paid money to C under an agreement under which C was empowered to pay some of the money to B, the court did not at A's request restrain C from so doing, even though the agreement was held illegal and void as an unreasonable restraint of trade. Other difficult questions arise in relation to the relative positions of the parties to a contract for the sale or other disposition of an interest in land which is a nullity as a result of not having been made in writing as is required by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989." (footnotes omitted)

298. The law recognises various types of conditional arrangements, including (i) "*pre-conditions*", which prevent the contract/obligation coming into force if the 'subject' is not lifted, and (ii) "*performance conditions*", which excuse performance if the 'subject' is not satisfied for reasons other than breach. Intermediate situations can arise where there is a limited obligation to bring about, not prevent or use best endeavours to bring about the lifting of the 'subject': see the recent synopsis in the *Leonidas* [2021] 2 Lloyd's Rep 165 §§ 48-52 per Foxton J.

299. The classic definition of a "*condition precedent*" is: *"[a provision] under which the coming into existence of (for example) an obligation, or the duty or further duty to perform an obligation, is dependent upon the fulfilment of the specified condition*": see *The Good Luck* [1992] 1 AC 233 (Lord Goff). A "*condition subsequent*" is "*a condition of the agreement's continuing; and if it is not performed the agreement comes to an end*": *Wickman Machine Tool Sales Ltd v Schuler (L) AG* [1972] 1 WLR 840 at 859 (Stephenson LJ). Lewison on "*The Interpretation of Contracts*", 7th edn § 16.03 cites the statement of Sackar J in *Yule v Smith* [2013] NSWSC 209 at §§ 25 and 26 that:

> "As mentioned, where a contract contains a condition precedent, the non-fulfilment of the condition precedent results in either there being no contract (i.e. a condition precedent to contract), or alternatively no obligation to perform (i.e. condition precedent

> to performance). Which of the two actually occurs in a given case depends on the intention of the parties …
>
> The expression 'condition subsequent' refers to an event the occurrence of which terminates either an existing contractual relationship, or the obligation of one or more parties to perform. However, as noted by various text writers, the distinction implied by the words 'precedent' and 'subsequent' is largely semantic, as most conditions precedent can be expressed as conditions subsequent (and vice versa)."

300. Whether an agreement or obligation is subject to a condition precedent or subsequent must depend on: "*the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law*": see *Bremer v Vanden Avenne Izegem* [1978] 2 Lloyd's Rep 109, 113 (Lord Wilberforce).

301. Because the classification of a term as a condition precedent or subsequent may have the effect of depriving a party of its rights/remedies, clear words are usually required before reaching that conclusion: see e.g. *Heritage Oil & Gas Ltd v Tullow Uganda Ltd* [2014] 2 CLC 61 § 33 per Beatson LJ.

302. The Court of Appeal in *Global Container Lines Ltd v State Black Sea Shipping Co* [1999] 1 Lloyd's Rep 127, 152 rhc, held that a term of a contract prescribing that the contract was to be "*null and void*" failing onward sale or charter to the US government made it a conditional agreement liable to be defeated by a condition subsequent.

303. Termination of a contract does not in general prevent recovery of sums already accrued due, in addition to damages for repudiatory breach (where relevant): see, e.g., *Stocznia Gdanska SA v Latvian Shipping Co. (No. 1)* [1998] 1 WLR 574, 585-6 (HL), and *Hyundai Heavy Industries v Papadopoulos* [1980] 2 Lloyd's Rep 1, 13.

304. The Yard submits that shipbuilding contracts are a well-known example of an area of drafting where the words "*null and void*" have been misused and are not to be taken literally, citing the commentary in Curtis *'Law of Shipbuilding Contracts'* (5th ed, 2020) about in Art. XI (3) (b) of the SAJ shipbuilding form. That clause is quoted as follows:

> "3. Effect of Default:
>
> (a) If any default by the BUYER occurs as provided hereinbefore, the Delivery Date shall be automatically postponed for a period of continuance of such default by the BUYER.
>
> (b) If any default by the BUYER continues for a period of fifteen (15) days, the BUILDER may, at its option, rescind this Contract by giving notice of such effect to the BUYER by telefax. Upon receipt by the BUYER of such notice of rescission, this Contract shall forthwith become null and void and any of the BUYER's supplies shall become the sole property of the BUILDER.

> In the event of such rescission of this Contract, the BUILDER shall be entitled to retain any Installment or Installments theretofore paid by the BUYER to the BUILDER on account of this Contract which shall be subject to Paragraph 4 of this Article."

Curtis states at p.224:

> "… the SAJ Form standard wording specifically provides that the contract shall become "null and void" upon the builder's rescission. However, as previously indicated, this language cannot be meant to have literal effect, and it seems unlikely in practice that the buyer would succeed in contending that upon rescission it is excused by reason of this language from previously accrued obligations to pay instalments of the contract price."

Havila counters that this is merely a particular example of a case where the words "*null and void*" must be read in context, the context there being a contractual cancellation mechanism regulating both parties' rights following the notice of termination.

(2) Application

305. The Yard submits that Addendum 9 must be construed in a context where:

i) there was a heavily delayed project under which construction had been suspended, with the Yard desperate for further funds as soon as possible, and Havila urgently seeking the re-commencement of construction; the Second Additional Payment provisions of §§ 3.2 and 3.3/9.4 were the clauses most keenly directed to this purpose;

ii) Addendum 9 dealt with a range of other matters besides the urgent need for funding and re-starting of the project: including design changes to be implemented for the lengthening of the hulls, against revised specifications, and an increase to the contract price. This could all potentially fall away if the parties did not satisfy the conditions set out in § 12;

iii) § 3, however, dealt with a discrete and more urgent matter: i.e. payment of a further "*advance*" as soon as practically possible; and ahead of the 3rd instalment, which was itself to fall due on 30 September 2019. Clause 9.4 provided for the concomitant right of cancellation if that did not happen.

306. The Yard notes that the only provisos or conditions expressly mentioned in Addendum 9 § 3 were board approval and provision of specific insurance bonds. To recap, §§ 3.3 and 3.4 provided:

> "3.2 The Buyer shall pay to the Builder, an additional cash amount of EUR 5,000,000 (Euros five million 00/100) one (1) Banking Day after the Insurance Bond for this payment has issued and delivered to Watson Farley & Williams in Madrid ("Second Additional Payment" and "Second Additional

> Payment Date", respectively), see clause 3.3 of the Addendum No. 9.
>
> Upon the Buyer's payment of the Second Additional Payment, the Builder undertakes to "re-start" the construction and building of the Vessel immediately subsequent to two (2) Business Days after the Buyer's payment to the Builder of the Second Additional Payment. In this respect "re-start" of the construction and building of the Vessel shall be regular and as considered to be normal for the shipbuilding industry for such a vessel under construction as NB 1710, in the current circumstances.
>
> 3.3 [i] Provided that the board approvals are being granted, the Second Additional Payment shall be made against Insurance Bonds as issued for the First Additional Payment (see Appendix 1 hereto) (with logical amendments), however, without the obligation to provide a Cut-Through Agreement if the final financing cannot be drawn by the Buyer as of the Second Additional Payment Date. The Insurance Bond shall be assignable to the Lender and / or security trustee under the Buyer's pre and post- delivery financing of the Vessel.
>
> [ii] The original copy of the Insurance Bond for the Second Additional Payment shall be delivered to Watson Farley & Williams in Madrid not later than on 18th September 2019.
>
> [iii] If the Builder cannot provide and hand over the Insurance Bond as security for the Second Additional Payment on the Second Additional Payment Date, the payment of the Second Additional Payment shall be postponed correspondingly.
>
> If the payment of the Second Additional Payment is not being made on the Second Additional Payment Date (as extended according to this clause 3.3 of the Addendum No 9) the provisions of clause 9.3 [sic. 9.4] of the Addendum No 9 concerning the cancellation of the Current Contract, shall apply."

307. Thus, the Yard says, these provisions contained their own specific conditions, paring them down to a minimum in the interests of ensuring fast flow of funds and project re-start. The specific must prevail over the generality of § 12. The clause 3 regime also imposed its own deadlines, potentially different from and earlier in time than those for the lifting of the various subjects in § 12:

    i) the insurance bond was to be issued "*not later than on 18th September 2019*"; and

    ii) payment was then due "*one (1) Banking Day after the Insurance Bond for this payment has issued and delivered*" (albeit potentially suspended until the Board Approval subject was lifted).

By contrast, § 12 set out a series of different deadlines for satisfaction of the conditions stated there:

i) § 12.2: approval of Addendum 9 by the insurers/refund guarantors (by two banking days before 20 September 2019);

ii) §12.3: extension of the expiry dates of the refund security (same deadline);

iii) §12.4: approval of the revised payment plan by Havyard (by 16 September 2019); and

iv) § 12.5 inter-creditors agreement agreed (by 20 September 2019).

in addition to board approval on behalf of both parties by 16 September 2019 (§ 12.6).

308. The Yard submits that the § 12 conditions, as a whole, were dependent on the involvement of third parties (e.g. Havyard Design and various creditors besides Abarca), and were directed at matters relevant to the broader aspects of Addendum 9 (design changes/revised instalment plan) rather than the more immediate issue of the Second Additional Payments. Nothing in the wording of § 3 suggested that the parties objectively intended the Second Additional Payment obligation to be defeated by such matters. Indeed, once the full list of § 12 conditions was satisfied and longer-term finance was in place, there would be no need for an interim 'bridging' solution of the kind provided for by § 3.

309. Moreover, § 9.4 indicates that the parties agreed a "*Target Date*" of 30 September 2019 for the Addendum as a whole to become effective, but an objective reading of clauses 3 and 9 is that the Second Additional Payment was to be paid before that.

310. Thus, the Yard submits, the objective intention was that the €5m per vessel would fall due ahead of the 3rd instalment, ahead of the "*Target Date*", subject only to its own provisos, and with a related termination right attached to it, regardless of the operation of the other provisos in § 12. Clear words are required to support a finding that Havila is to be discharged by unrelated conditions from an otherwise accrued liability to make the Second Additional Payments. Clause 3 contains none, and nothing in § 12 suggested that it would affect debts which fell due or rights of cancellation which accrued prior to the contract becoming 'null and void'.

311. Further, the Yard says, § 9.4 distinguished between the Yard's cancellation rights in two different situations:

> "… Pursuant hereto – and during the period commencing by signing of this Addendum up till and including 30th September 2019 (the "Target Date") the Builder shall not exercise any right of cancelation according to the Current Contract, except if (i) the Buyer fails to make the Second Additional Payment, or (ii) the Buyer fails to make the payment of the 3rd Instalment pursuant to Addendum No 9 other than for a cause attributable to the Builder, Banca March or the insurance bond issuers or refund guarantors, and by default in any of these two cases the Builder

> shall have the right to cancel the Current Contract by written notice to the Buyer as set out in the Current Contract.
>
> Notwithstanding the above, if this Addendum is not effective on 30thSeptember 2019 as per clause l2 below, the Builder shall from that date be entitled to exercise any right of cancellation to which it would be entitled before signing this Addendum No. 9, as if this Addendum has never been entered into."

The first paragraph quoted above indicated that prior to the 30 September 2019 "*Target Date*", the Yard would not be able to exercise any right of cancellation unless Havila failed to pay the Second Additional Payment or the 3rd instalment prior to their due dates. The second paragraph meant that after 30 September 2019, if Addendum 9 were ineffective then the Yard would be entitled to exercise any pre-existing right of cancellation as if the addendum had never been entered into. Thus, the Yard submits, the clause envisaged both an obligation to pay and a right of termination accruing before it was known whether or not the Addendum as a whole had fallen away pursuant to § 12, and before the "*target date*" for satisfaction of the § 12 conditions.

312. In my view, it is necessary to distinguish between two matters: the position as it stood, were it necessary to assess the position as at (say) 23 September 2019 (the day after the Yard says both parties' boards had approved Addendum 9), and the position as at 24 November 2019 when the Yard purported to terminate for non-payment of the Second Additional Payments.

313. Were it necessary to consider the former date, then complexities might arise which were not fully canvassed in the evidence or argument (or necessarily even in the statements of case). On 18 September 2019 Mr Pettersen told the Yard that Havila's board had approved Addendum 9 subject to two conditions, one of which (relating to the Havyard Design Supply Agreement) was fulfilled on 22 September. The other 'condition' was expressed to be fulfilment of the conditions set out in § 12 itself, Mr Pettersen referencing the statement in the penultimate paragraph of § 12 that the parties' board approvals "*shall only be subject to the fulfilment of all and each of the conditions as set out in clause 12.2, 12.3, 12.4 and 12.5*". By 22 September all the deadlines in §§ 12.2 to 12.5 had expired with several conditions remaining unfulfilled. On that basis, Addendum 9 might appear to have fallen away already. However, in the correspondence referred to in §§ 177-181 above, the parties may have agreed extensions to the deadlines, mostly to two banking days before 3 October 2019. Whether agreement was reached might depend on the effect of Sr Perez-Bouzada's response that the Yard's agreement to the extensions was "*subject to the due cash payments as per clause 3 of Addendum be made this morning*", which did not occur. In any event, however, since (a) § 3 was subject to board approval, (b) Havila's approval of Addendum 9 was subject to the fulfilment of all the § 12 conditions (as reflected in § 12.6 second paragraph) and (c) that never occurred, it would follow that even as at 23 September Havila was under no obligations pursuant to § 3.

314. However, I do not find it necessary to reach a definitive view on those matters. In my view the final paragraph of § 12 is unequivocal in any event:

> "If one or more of the conditions are set out in clause 12.2 to and including 12.6 of this Addendum 9 is not being fulfilled within

> the time limit as set out therein, then this Addendum no 9 becomes null and void and shall be deemed to be as non-written."

315. That paragraph unambiguously provides for Addendum 9 to fall away altogether and *ab initio* if the conditions in § 12 are not fulfilled on time. On any view of the facts that was the case by two banking days before 3 October 2019. The wording is sufficiently clear to relieve Havila of any previously accrued liability to pay, and to remove any right on the Yard's part to terminate. In those circumstances, as § 9.4 expressly contemplated, the Yard would instead be left with such (if any) existing termination rights as it had before Addendum 9 was signed, "*as if this Addendum has never been entered into*".

316. Contrary to the Yard's submissions, I do not find that a commercially surprising result. Satisfaction of the § 12 conditions was necessary for the project to proceed in a way that would, among other things, provide adequate protection to Havila in terms of refund security. Moreover, if Addendum 9 as a whole fell away, the parties would then be left with no effective agreement on price and scope of work. In either of these sets of circumstances, Havila would have paid a further €10 million yet the project would remain in the state of impasse that had existed prior to Addendum 9.

317. Accordingly I conclude that the Yard was not entitled to terminate the SBCs pursuant to Addendum 9.

318. The Yard accepts that if it was not entitled to terminate pursuant to Addendum 7 or Addendum 9, then it will not succeed in establishing a repudiatory breach by Havila. Had the Yard established a right to terminate, it would have been necessary to decide whether the Yard also had a common law right to bring the SBCs to an end for repudiatory breach, on which the Yard could base its claim for damages. Since that issue was argued before me, I consider it briefly in section (J) below.

(H) HAVILA'S ENTITLEMENT TO TERMINATE THE SBCS

319. Since I have concluded that the Yard was not entitled to terminate the SBCs, it is necessary to consider whether Havila:

i) was entitled to bring the SBCs to an end at common law, and to recover the instalments it had already paid, on the basis that the Yard's purported termination in November 2019 was a repudiatory act which Havila accepted;

ii) (if relevant) whether Havila was entitled to terminate pursuant to Article IV.1(d) of the SBCs, on the basis that it could be established beyond reasonable doubt that the Vessels would not be completed within 180 days of their Delivery Dates; and

iii) (if necessary) whether Havila was entitled to terminate pursuant to Article XII.3 due to the occurrence of a relevant insolvency event in respect of the Yard.

320. Sub-issues (ii) and (iii) are relevant if Havila fails on (i) above, or if the insurance bonds issued by Abarca do not respond where the SBCs were brought to an end only at common law (see section (I)(2) below).

(1) Common law termination and recovery of instalments

321. The Yard accepts that if it had no right to terminate on 24 November 2019, then its purported termination would (subject to waiver/affirmation) amount to a repudiatory breach.

322. The Yard nonetheless denies Havila's claim for recovery of the instalments it had paid (totalling €36.8 million) on the ground that they are irrecoverable absent a total of failure of consideration. Havila in its Counterclaim seeks such recovery "*at common law, alternatively damages*" (§ 72.1) in addition to further losses which were to be particularised in due course (§ 73).

323. The Yard submits that instalments paid under a shipbuilding contract are recoverable only where there has been a total failure of consideration, which depends on whether the other party has performed any part of the contractual duties in respect of which payment is due. The Yard cites *Hyundai Heavy Industries v Papadopoulos* (*supra*, pp. 4-6); *Stocznia v Latvian Shipping (No. 1)* (*supra* at p. 587D – 590); and *Stocznia Gdynia v Gearbulk Holdings* [2009] 1 Lloyd's Rep 461 § 40, in addition to passages from Curtis (pp. 223-224) and Keating on Construction Contracts (11th ed.) § 4-014).

324. Based on those authorities, the Yard submits that Havila on its own evidence cannot say there has been a total failure of consideration for the instalments it paid, because:

    i) the 1st instalment was linked to contract effectiveness;

    ii) the 2nd instalment was linked to cutting of 100 tons of steel per vessel, which was done (and more); and

    iii) the 1st Additional Payments (€2m POA per vessel) were on account of the 3rd instalment, which was linked to keel laying, which was also done. The Yard had done everything needed (and more) to earn the full instalment.

325. Havila maintains that it is entitled to rely on total failure of consideration, but submits that it is unnecessary to resolve that point because it can in any event recover the instalments as expenditure wasted in reliance on the contracts, pursuant to ordinary principles (cf *Anglia Television v Reed* [1972] 1 QB 60 and *C&P Haulage v Middleton* [1983] 1 WLR 1461, 1465-8): and Havila elects in its written closing so to claim.

326. The Yard contends that no such claim can succeed, because reliance loss refers to expenditure incurred (or wasted) in reliance on the counterparty's promise of performance, such as sums paid to third parties (cf the Yard's claim for wasted expenditure incurred towards sub-contractors). Price paid to a contractual counterparty is not reliance loss but a claim for restitution, and can be recovered only in the event of total failure of consideration.

327. Before turning to the case law as was cited on this point, I observe that the principle for which the Yard contends strikes me as illogical. It would result in an arbitrary situation where the innocent party to a contract would be liable to be under-compensated and the party in breach left with a windfall. Whenever there was no total failure of consideration, the innocent party would be able to recover, by way of reliance loss, money spent preparing to perform its side of the bargain, and any money paid to third

parties, but not money actually paid to the party in breach, such as the price. I can see no principled basis for such a distinction, or why the ordinary right to recover wasted expenditure should be limited in this way. It is no answer to say that, because no claim would lie in restitution (as there was no total failure of consideration), there should equally be no claim for reliance loss. The one does not follow from the other. The innocent party may have paid the price for goods or services, and received little or no value in return, even where there has been no total failure of consideration. It therefore has in fact suffered a reliance loss, which should be recoverable, subject to the usual defence available to the wrongdoer if it can establish that due performance of the contract would still not have led the innocent party to recover value equivalent to the claimed reliance loss (the onus in that regard being on the party in breach: see Chitty § 29-027, citing *C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16). The loss must be recoverable, on ordinary principles, absent some compelling reason to the contrary.

328. The Yard cites the discussion in Chitty § 29-022 on the difference between the "*reliance interest*" and the "*restitution interest*". Chitty goes on to suggest, in §§ 29-023 that the categories may overlap: for example, for a claimant who has paid the price but received nothing in return, recovery of the price may be viewed either as a restitution interest or as a form of wasted expenditure or expectation interest. Chitty goes on to suggest in § 29-029 that the price should be recoverable as reliance loss, whether or not there has been total failure of consideration, though the value of any partial performance would need to be taken into account.

329. The Yard submits that that view is inconsistent with the authorities referred to in § 323 above. I do not agree. The first two authorities mentioned there were cases where the buyer of a ship under construction was in breach, leading to termination by the builder, and the question was whether the buyer could nonetheless bring a restitutionary claim for instalments paid based on total failure of consideration. There was no consideration of any claim by the buyer for reliance loss, and nor of course could there have been, as the buyer was the party in breach. Those cases, and that situation, are the subject of the discussion in Curtis.

330. The third case, *Stocznia Gdynia v Gearbulk* did involve a claim by a buyer following breach by the builder, and at § 40 Moore-Bick LJ said:

> "On discharge of a contract of this kind a buyer who has paid the whole or part of the price in advance is entitled, in the absence of any agreement to the contrary, to recover what he has paid by reason of a total failure of consideration. He therefore has a right to recover in restitution any payments he has made in respect of the price, a right which is quite distinct from any right he may have (if he is the injured party) to recover damages for the loss of his bargain. In the present case the parties made specific provision for the repayment of instalments and Gearbulk could not, of course, recover both under the contract and in restitution; to do so would result in double recovery. In fact, however, Gearbulk is not seeking to recover the advance payments since it has already done so. There is no inherent inconsistency, however, in recovering instalments of the price under article 10 and recovering damages for loss of bargain at common law."

There was, however, no discussion in that case of any claim for reliance loss or wasted expenditure, and the above observations are not authority for the proposition that sums paid under a contract cannot be recovered on such a basis. (Havila also points out that the Court of Appeal made no distinction between the remedies available in respect of the two vessels on which no construction work had been done and the third vessel on which it had, and that there may have been work such as design and procurement even in relation to the first two vessels: yet the Court was willing to allow a damages claim. However, that point really goes to the total failure of consideration issue which Havila submits I need not address, given its election to recover the instalments as wasted expenditure.)

331. The Yard also cites *Khan v Malik* [2011] EWHC 1319 (Ch), which is mentioned (and doubted) as part of the discussion in Chitty. In that case, Christopher Nugee QC (sitting as a Deputy Judge of the High Court) said:-

> "[130] … Where a contract is repudiated the position of the innocent party who has paid money under the contract is said by Chitty to be as follows:
>
> "If he has paid money under the contract to the party in default, he will be entitled to recover it by an action for money had and received, but only if the consideration for the payment has totally failed." (Chitty on Contracts (30th edn) §24-050).
>
> I take this to be established law. It seems to me that it would undermine the requirement that there be total failure of consideration before the innocent party could recover his money, if the same result could be achieved in every case (save where it was shown that he had made a bad bargain) simply by claiming the money as wasted expenditure instead. I do not think this can be right.
>
> 131. As Mr Haque points out, McGregor deals with the principle of reliance loss under the rubric: "An alternative measure: recovery for expenses rendered futile by the breach". The well-known case of Anglia Television v Reed [1972] 1 QB 60 was an example of this: Anglia TV were seeking to recover expenses that they had incurred in putting together the production in question such as director's fees, designer's fees and the like. They were not seeking to recover money paid to Mr Reed for his promised performance.
>
> 132. But in a case where the innocent party has paid money under the contract and seeks to recover it, there will either have been a total failure of consideration or not. If there has, there is no difficulty and the money can be recovered; if however there has not, then ex hypothesi the defaulting party has nevertheless provided some part of the contractual performance for which the money was paid, some part of the benefit bargained for under the contract (see Paragraph 123 above). To allow the innocent party to recover the entirety of the money he has paid as wasted

> expenditure seems to me wrong in principle, as he has received some of the performance that he paid it for…"

332. This passage was recently considered by Butcher J in *Cardiorentis AG v Iqvia* [2022] EWHC 250 (Comm);

> "452. It was submitted by Cardiorentis that the obiter remarks of Christopher Nugee QC (as he then was), sitting as a High Court Judge in Khan v Malik [2011] EWHC 1319 (Ch) at [129]-[132] are to the effect that, in a case in which the defaulting party has provided some part of the contractual performance, there cannot be a claim for recovery of wasted expenditure as damages, and that this was wrong. If those paragraphs said that, I would agree that that was incorrect. A claim for wasted expenditure is not dependent on a showing of a total failure of basis. I agree with the statement in Chitty on Contracts para. 32-069, to that effect. I regard the remarks of the judge in Khan v Malik as explicable on the basis that he was rejecting the argument that the claimant could recover the entire amount paid, even though some benefit had been received, and the judge was not considering an argument to the effect that there could be recovery of a lesser amount which took into account the value of such performance as there had been."

With respect, I entirely agree. It would be wrong in principle for the innocent party to recover in full his payment to the wrongdoer, without giving credit for any value he has received, but a claim for reliance loss would require such credit to be given. It would be at least equally wrong in principle for the innocent party to be left without a remedy (absent a claim for a provable expectation loss, the onus there being on the claimant innocent party), and for the wrongdoer to be able to retain the price merely on the basis that he had provided some degree of contractual performance.

333. For completeness, though not canvassed in argument, I note that the relevant section of Chitty also footnotes another decision of the Court of Appeal, as follows:

> "In Howard-Jones v Tate [2011] EWCA Civ 1330, [2012] 1 P. & C.R. 11 it appears that a claim seeking reimbursement of the purchaser's payment and expenses, made after he had terminated the contract because of the vendor's non-performance of a post-completion obligation to install water and power, was denied on the basis that there had not been a total failure of consideration; but, with respect, it is hard to see why recovery by way of damages should be refused so long as (a) any benefits received by the purchaser before termination are taken into account; and (b) the purchaser was not put into a better position than he would have been in if the contract had been performed. The measure of damages awarded (the cost of making good the vendor's obligations to install water and power) seems appropriate only on the assumption that, despite having the right to terminate the contract, the purchaser had not done so."

In that case, however, the Court of Appeal concluded that the claimant buyer was not entitled to terminate the contract; and, as Lloyd LJ pointed out at § 42, the post-completion breach that had occurred did not justify awarding damages to put the claimant in the position he would have been in had the contract not been entered into. There was no express discussion of the principles relating to reliance loss, and the case is simply an illustration of the standard requirement for a causal link between the breach and the loss claimed. The breach there had not resulted in the claimant's expenditure being wasted.

334. Finally, the passage in Keating (§ 4-014) which the Yard cites does not support its position. Keating refers to the restitution claim available, if there has been total failure of consideration, to an employer who has paid money under a contract with the contractor fails to complete. However, the same paragraph goes on to say that if there has not been a total failure of consideration, then the employer can claim damages for breach of contract, giving credit for the value of the work actually performed.

335. I conclude that there is no authority or principle supporting the proposition that money paid to the party in breach cannot be recovered as reliance loss, subject to satisfying the requirements ordinarily applicable to such a claim; and the decision in *Cardiorentis* is persuasive authority that it can be.

336. For completeness, I note that the Yard in its written closing inserts the caveat "*subject to waiver/affirmation*" in the acceptance to which I refer in § 321 above. However, the Yard's pleaded case of affirmation (Amended Reply & Defence to Counterclaim § 105), particularly when read in context, is confined to Havila's claim to be entitled to cancel pursuant to Article XII.3 of the SBCs. The parties' agreed List of Issues refers to affirmation/waiver only in that specific context (§ 9), and so I consider it under heading (3) below. It does not therefore arise in relation to Havila's claim to have been entitled to bring the SBCs to an end at common law or to cancel them under Article IV.1(d). I would in any event have concluded that Havila was not precluded from exercising its rights, since (as Havila pleaded) its efforts to persuade the Yard to withdraw its purported termination were entirely unsuccessful: the Yard's renunciation of the SBCs continued, and it remained clear that the Vessels would not be ready for delivery within 180 days of their contractual delivery dates.

337. For these reasons, I conclude that Havila is entitled to recover, by way of a claim for reliance loss, the instalments it had paid the Yard, together with interest (at a rate which may need to be the subject of submissions). Those payments amounted to wasted expenditure resulting from the Yard's renunciation of the SBCs by its notice of 24 November 2019. I shall hear submissions on the question of whether, in the light of the statements of case and the evidence, there remains any basis for suggesting that Havila received any value pursuant to the SBCs for which it must give credit.

(2) Termination under SBC Article IV.1(d) (vessel delivery)

338. Article IV.1 (d) of each of the SBCs provided:

> "If it can be established beyond any reasonable doubt that the Vessel will be delayed for more than 180 days as per paragraph (b) above, or be delayed for more than 270 days as per paragraph

> (c) above, the Buyer shall have a right forthwith to cancel the Contract."

339. Broadly speaking, subparagraph (b) of Article IV.1 entitled Havila to cancel if the Vessel was in fact delivered more than 180 days late; and subparagraph (c) entitled Havila to cancel if non-Permissible Delay plus Force Majeure Delay (both as defined) were 270 days or more. "*Permissible Delay*" had the effect of postponing the Delivery Date for the Vessel (as per the definitions of "*Delivery Date*" and "*Permissible Delay*", and Article IX). It included *"any other delays caused by non-fulfilment by the Buyer of the Buyer's obligations hereunder"* (Article IX.3).

340. The Yard submits that, on its wording, this right of termination could only ever apply where it was proven to the criminal standard that the Vessel "*will be*" delayed for the requisite number of days beyond the Delivery Date. Thus it did not apply if there were a reasonable doubt on the evidence as to whether or not the Vessel would or would not have been (non-permissibly) delayed for 180 days or more beyond the Delivery Date. Further, the words "*will be*" show that what the clause is driving at is a certainty (rather than a likelihood based on the Yard's present position) that the Vessel will be so delayed.

341. The Yard says those thresholds were not reached. Pursuant to Addendum 8, the project was in Permissible Delay from the end of May 2019 onwards for as long as the Buyer did not have its finance in place. That remained the position when the Yard terminated on 24 November 2019, as illustrated by the Buyer's own failure to pay the long overdue 3rd instalment as of that date, in circumstances where it did not have the finance to do so. The Yard says Havila cannot rely, in that context, on the lack of an insurance bond for that instalment: Havila needed to confirm its financing before an insurance bond could be issued – see Addendum 7 § 2.5.1[ii]) – and had not done so.

342. Moreover, on the evidence, the Yard's position was that issues about confirmation of the Buyer's financing, delay in payment of the 3rd instalments and the design changes had to be resolved in order for the project to progress. Addendum 9 expressly provided for construction to recommence upon receipt of a further tranche of funds on account of the 3rd instalment. Accordingly there was no refusal by the Yard to build. Rather, the Yard's position was contingent and subject to change if and when the Buyer provided the necessary funds for the project to re-start.

343. Alternatively, even if the Yard were taken as refusing to build from the date of its termination on 24 November 2019 until the Buyer terminated on 11 February 2020, that was a period of only 79 days. The court cannot conclude with certainty or beyond reasonable doubt what would have happened thereafter, if the Buyer had put up the relevant funding to re-start the project.

344. I do not accept those submissions. I have concluded that Havila had, by 22 July 2019, confirmed its financing in the manner required by Addendum 7 § 2.4.1[iii]. The project was, at least from that date, not subject to Permissible Delay. Further, the Yard made it clear beyond doubt that it had no intention of recommencing work on the Vessels by:

i) its purported termination notice of 24 November 2019;

ii) its solicitors' letter 31 December 2019, in response to Watson Farley's letter of 15 December 2019 seeking to persuade the Yard to withdraw its termination letter and proceed with the SBC: the Yard's letter maintained that its termination was valid, and gave no hint of any willingness to resume the SBCs; and

iii) the absence of any substantive response to Watson Farley's further letter of 15 January 2020, again seeking to persuade the Yard that it was not entitled to terminate and should resume the project.

345. In these circumstances it was clear beyond any reasonable doubt that the Yard was not going to complete the Vessels at all, let alone within 180 days of their Delivery Dates. Havila was therefore entitled to terminate under Article IV.1(d).

(3) Termination under SBC Article XII.3 (insolvency proceedings)

346. SBC Article XII.3 (headed "*Insolvency*") provided that:

> "If proceedings are commenced by or against the Buyer or Builder for winding up, dissolution or reorganisation (except in case of merger or solvent internal reorganizations) or for the appointment of a receiver, trustee or similar officer, or if bankruptcy is opened, the party who is not subject to such proceedings shall have the right to cancel this Contract."

The clause went on to specify the consequences. In the event of cancellation by Havila, the Yard would be obliged to refund all sums Havila had paid it under Article III, with interest at 5%, as well as any Buyers Supplies (as defined).

347. On 26 November 2019, the Yard's board applied for judicial dissolution of the company, an event which on its face fell within Article XII.3.

348. However, Abarca submits that the position is more complicated than that. It relies on the following facts:

i) By September 2019, the Yard was having financial difficulties for two principal reasons: (i) Havila had stopped paying the instalments under the SBCs and so the Yard could not pay its sub-contractors and suppliers; and (ii) the overruns of the Ritz Carlton project, which had increased the costs and made it uneconomic at the original purchase price.

ii) The Yard's equity was less than one half of its share capital, which constituted a legal cause for dissolution under Article 363(e) of the Spanish Capital Companies Act.

iii) Following a shareholders meeting on 26 September 2019 in Vigo, the Yard applied for pre-insolvency protection from its creditors under Article 5 bis of Spanish Insolvency Law No. 22/2003. The Yard's shareholders did not agree to dissolve the Yard nor to remedy its negative equity.

iv) On 7 October 2019, the Pontevedra Court granted the Yard 2 months under Article 5 bis to carry out negotiations with creditors.

v) On 22 November 2019, the Yard's Board of Directors met. Given that the legal ground for dissolution still existed and the Yard's shareholders had not agreed to dissolve the Yard or remedy its negative equity, the directors were (according to Sr Perez-Bouzada's evidence) legally obliged as individuals to request judicial dissolution under Art 366.2 of the Capital Companies Act, failing which they could have been personally liable.

vi) On 26 November 2020, the directors therefore applied to the Commercial Court of Pontevedra No. 3 for judicial dissolution, but in that application the directors requested the application to be stayed ("***the 26 November application***").

vii) On 2 February 2020, a Restructuring Framework Agreement ("***RFA***") was reached between the Yard and its creditors. An application was then made on 3 February 2020 to the Spanish Commercial Court for approval of the RFA, and on 17 February 2020 the Spanish Commercial Court approved it.

viii) On 4 March 2020, the Spanish Commercial Court issued a decree rejecting the application for judicial dissolution for retrospective lack of cause in light of the RFA.

349. Abarca submits that:

i) The question of whether or not the 26 November application commenced judicial dissolution is a matter of Spanish insolvency law.

ii) The 26 November application did not amount to the commencement of such proceedings because (a) the Spanish court's permission was required to commence proceedings; (b) the application specifically requested the court to refrain from granting permission, pending refinancing arrangements being concluded, which the court did; and (c) the Spanish Commercial Court dismissed the application on 4 March 2020 for retrospective lack of cause.

iii) The application was made by the Board of Directors, not the Yard, to protect its own position in circumstances where the Yard did fulfil insolvency criteria and pursuant to legal obligations upon the directors personally. That is why the application contained an express request to suspend the progress until 2 February 2020, and as a consequence the court did not examine or even grant the initial permission for proceedings to proceed.

iv) The grant of permission by the Spanish court is a necessary pre-condition to the commencement of proceedings.

350. Sr Pablo Urena and Dr Manuel Penades gave expert evidence of Spanish law relating to these matters. Sr Pablo is a practising lawyer in Madrid, and founded the law firm Urena Abogados in 2012. He was a judge and senior judge from 1987 to 2005, and taught procedural law at the Complutense University of Madrid from 1996-2006 and 2012-2017. He has published and lectured on topics including procedural law. Dr Penades is Senior Lecturer at King's College London, and a Guest Professor at the Universitat Pompeu Fabra. After studying law in Spain he clerked at the Commercial Court of Valencia, and trained at a shipping law firm in Valencia and an arbitration firm in London, also qualifying as a Spanish advocate, before completing a doctorate. His

areas of expertise are intentional commercial litigation, insolvency law and international arbitration, and in addition to his academic work he sits as an arbitrator and provides expert evidence for courts and for EU Commission projects.

351. Both Sr Urena and Dr Penades gave evidence in writing and orally. Both did so fairly and properly. Although Sr Urena was on occasion prone to giving lengthy answers, I do not accept Abarca's criticism that he was argumentative or chose to ignore reality (for example in his statement that the court clerk lacked competence to issue the 4 March 2020 decree).

352. The Spanish Voluntary Jurisdiction Law ("***VJL***") applies to what might broadly be termed 'non-contentious' cases, and includes provisions relevant to the commencement and assessment of an application such as the 26 November application:

> "Article 8 Supplementary nature of the Civil Procedure Law
>
> The provisions of the Law of Civil Procedure shall apply additionally to the voluntary jurisdiction files in everything not regulated by this Law."
>
> "Article 14 Initiation of proceedings
>
> 1. The proceedings shall be initiated ex officio, at the request of the Director of Public Prosecutions or on application made by an authorised person, which shall include the details and circumstances identifying the applicant, with the indication of an address for the purpose of notifications.
>
> It shall then set out clearly and precisely what is requested, together with a statement of the facts and legal grounds on which it is based. It shall also be accompanied, where appropriate, by the documents and opinions that the applicant considers to be of interest to the proceedings, and as many copies as there are interested parties.
>
> 2. The application shall include the identification details and circumstances of the persons who may be interested in the proceedings, as well as the address(es) at which they may be summoned or any other information that may enable them to be identified.
>
> 3. If the intervention of a Solicitor and Court Agent is not required by law, the Judicial Office will provide the interested party with a standard form to make the application, in which case it is not necessary to specify the legal grounds for the application.
>
> The application may be submitted by any means, including those provided for in the regulations on citizens' electronic access to the Administration of Justice."

"Article 16 Ex officio assessment of lack of jurisdiction and other defects or omissions

1. Once the application to initiate proceedings has been lodged, the clerk of the court shall examine of his own motion whether the rules of objective and territorial jurisdiction have been complied with.

…

4. The Court Clerk shall also examine the existence of possible defects or omissions in the applications submitted and shall, if necessary, give a period of five days in which to remedy them. If this is not carried out within the period indicated, it shall consider the application as not having been submitted and shall archive the proceedings in those files that fall within its competence. Otherwise, it shall be reported to the judge, who shall decide as appropriate.

Article 17 Admissibility of the application and summoning of interested parties

1. The clerk of the court shall decide on the application and, if he considers that it is not admissible, he shall issue a decree closing the file or shall inform the judge, when he is the competent judge, so that he may decide what is appropriate."

"Article 125 Scope of application

The procedure laid down in this Chapter shall apply to the judicial dissolution of a company in cases where it is required by law.

Article 126 Competition, legitimacy and application

1. Jurisdiction to proceed with the judicial dissolution of a company shall lie with the Commercial Court of the company's registered office.

2. Directors, members and any interested party are entitled to initiate the judicial dissolution of the company.

3. The intervention of a lawyer and a solicitor shall be mandatory in the processing of these files.

Article 127 Processing

1. The proceedings shall be initiated by means of a document stating that the legal requirements for the judicial dissolution of the company have been met, accompanied by the documents on which the application is based.

> When the petition is submitted by a legal entity other than the directors, it must be proven that the request for dissolution has been notified to the company.
>
> 2. The Court Secretary will serve notice of the brief to the directors, if they have not initiated the file, and will call an appearance summoning them and the other interested parties who, according to the law, must intervene in the file.
>
> Article 128 Resolution
>
> 1. The judge shall decide the case by way of an order within five days of the end of the hearing.
>
> 2. In the event that the judge declares the company dissolved, the order shall include the appointment of the persons who are to act as liquidators, and a copy of the order shall be sent to the relevant Commercial Register for registration."
>
> "Article 143 Effects of admission
>
> The presentation with subsequent admission of the request for conciliation shall interrupt the prescription, both acquisitive and extinctive, in the terms and with the effects established by law, from the moment of its presentation.
>
> The limitation period shall start to run again from the date of the decree of the Court Clerk or the order of the Justice of the Peace terminating the case."

353. Article 8, quoted above, indicates that the Law of Civil Procedure ("***CPL***") also applies to the extent that matters are not regulated by the VJL. The Law of Civil Procedure includes the following provisions:

> "Article 19 Litigants' right of disposal. Transaction and Suspension
>
> …
>
> 4. Likewise, the parties may request the suspension of the proceedings, which shall be agreed by the Legal Adviser of the Administration of Justice by means of a decree, provided that it does not harm the general interest or third parties and that the period of suspension does not exceed sixty days."
>
> "Article 179 Procedural momentum and adjournment of proceedings by agreement of the parties
>
> …
>
> 2. The course of the proceedings may be suspended in accordance with the provisions of Article 19(4) of this Act and

> shall be resumed at the request of either party. If, on expiry of the period for which the stay was ordered, no one requests, within the following five days, that the proceedings be resumed, the Legal Secretary for the Administration of Justice shall order the case files to be provisionally filed and they shall remain in that situation until such time as the continuation of the proceedings is requested or the instance lapses."
>
> "Article 410 Start of lis pendens
>
> The lis pendens, with all its procedural effects, arises from the filing of the action, if it is subsequently admitted."

354. Two main issues of Spanish law arise:

    i) whether the filing of the 26 November application meant (subject to issue (ii) below) that judicial dissolution proceedings had been "*commenced*" for the purposes of Article XII.3; and

    ii) whether the 4 March 2020 decree rejecting the application, which post-dated Havila's termination notice, had the retrospective effect that judicial dissolution proceedings had not in fact been commenced.

It is then necessary to consider the effect under Article XII.3 of the SBCs.

(a) Commencement of proceedings

355. VJL Article 14 indicates that the proceedings shall be "*initiated*" by (so far as relevant) an "*application made by an authorised person*" setting out specified details. Similarly, Article 127 indicates that the proceedings shall be "*initiated*" by means of "*a document stating that the legal requirements for the judicial dissolution of the company have been met*", accompanied by the necessary documents.

356. VJL Article 16 refers to the "*application to initiate proceedings*". It goes on to set out a process whereby, if the court clerk or judge (whichever has competence) decides that there are unremedied defects or omissions, then either the clerk shall "*consider the application as not having been submitted*" or the judge can make a decision. Article 17 provides that if the clerk or (as appropriate) judge considers the application inadmissible, then the file can be closed or other appropriate order made. Neither of Articles 16 and 17 makes express provision for any positive action by the court required in order for the proceedings to regarded as having been initiated or commenced.

357. VJL Article 143 includes reference to the "*subsequent admission*" of the "*request for conciliation*", and CPL Article 410 draws a distinction between the filing of an action and its subsequent "*admission*". It is not entirely clear on the face of those provisions whether they envisage positive action by the court, as distinct from the mere absence of a negative decision following consideration pursuant to (in the case of voluntary jurisdiction cases) VJA Articles 16 and 17.

358. Sr Urena in his report referred to the absence in the present case of any decision "*admitting*" the 26 November application, indicating that the court clerk was "*the*

relevant entity to hand over such resolution, provided that he considered that there was no reason to refuse admitting it". In his oral evidence, he stated that the proceedings were nonetheless "*initiated*" by the submission of the application, referring to VJA Article 14 and also to CPL Article 399.1:

> "The trial will begin with a claim, in which, having recorded in accordance with the provisions of Article 155 the data and identification details of the claimant and the defendant and the domicile or residence at which they can be summoned, the facts and the grounds of law will be set out numbered and separated, and what is requested will be clearly and precisely set forth."

359. Sr Urena said the initiation of the proceedings, by submission of the application, did not require the court's permission. The next stage was for the court to admit, or refuse to admit, the claim. If a claim is admitted, the other party is then summoned to respond to it. Thus in the present case, as at 11 February 2020 (when Havila served its notice), the proceedings had been initiated, and existed, even though the court had not yet responded to them by making any decision whether or not to admit them. The fact that the 26 November application also contained an application to suspend the proceedings did not alter that fact.

360. Sr Urena agreed that CPL Article 410 provides that "*[t]he lis pendens, with all its procedural effects, arises from the filing of the action, <u>if it is subsequently admitted</u>*" (emphasis added), and was shown an extract from a work by Professor Gutierrez Berlinches stating:

> "The distinction between the two decisions is of some interest from the point of view of the effects of lis pendens (such as, for example, the interruption of the statute of limitations), since, as a general rule, all the effects of lis pendens are produced as soon as the action is brought, provided that it is subsequently admitted[FN]. Thus, the order of inadmissibility of the claim excludes in any case any of the effects of lis pendens, because the proceedings never started. The dismissal order, on the other hand, assumes that there was a pending proceeding, since the claim was admitted and, therefore, the effects of lis pendens will have been produced. The abstention decision may be issued before the admission of the claim or once the proceedings are pending, hence, depending on the case, the effects of lis pendens will or will not be produced. Finally, the decision to reject the application does not raise any question of lis pendens, because it is not final: either an order of inadmissibility follows, or the defect is cured and the proceedings continue.
>
> [FN] This is the case for all the procedural effects of lis pendens, as provided for in Article 410 LEC. However, some of the material effects of lis pendens do not occur until after the claim has been filed and then admitted (this is the case, for example, of the claim of a claim and its litigious status, since Article 1535 CC postpones this effect of lis pendens until the time of the answer to the claim)."

361. Sr Urena noted that the first part of the main text quoted above applied (as explained in the footnote) to the procedural effects of lis pendens. Sr Urena explained that "*lis pendens in the procedural effects deals with the preference of two different procedures in order to establish which of them is the preferred by the law over the other and because both of them has the same object or because they have different objects but they are related*". Clearly, if one of the sets of the proceedings were subsequently not admitted, then there would be no competing proceedings. Sr Urena said the above passage did not address the different types of material effects that could arise from filing proceedings, for example under the Civil Code or contracts (as distinct from procedural law). In his view, it therefore did not follow that, prior to being admitted, or after being declared inadmissible, proceedings (respectively) had not come into existence or were deemed never to have been started.

362. Dr Penades in his report stated that until the court grants permission to proceed, proceedings have not been commenced and do not exist. Otherwise, the unilateral act of an application could trigger procedural consequences without any court approval. Until the court has given permission to proceed, there are no court proceedings but merely an outstanding application. That view was based on his interpretation of VJA Articles 17 and 127.

363. In his oral evidence, Dr Penades very fairly accepted that he had not been involved in handling court cases in Spain since 2007, though he had been involved in cases concerning Spanish law, and that Sr Urena had more experience of procedural law than Dr Penades did. However, there was no suggestion in their discussions that Dr Penades was not qualified to opine on the matters at hand.

364. Dr Penades was asked about the statement in VJL Article 14 that *"[t]he proceedings shall be initiated … on application made by an authorised person"*, and in VLJ Article 1227 (the provision relating more specifically to judicial dissolution proceedings) that *"[t]he proceedings shall be initiated by means of a document stating that the legal requirements for the judicial dissolution of the company have been met, accompanied by the documents on which the application is based"*. Dr Penades said he could see no relevant distinction in Spanish between the word "*initiated*" and "*commenced*". He accordingly agreed that proceedings under the VJA can be commenced by an application by an interested person, adding that that was "*the first step in the proceedings*".

365. Dr Penades also agreed that the 26 November application, so far as he could see, complied with the requirements of VJL Article 127: from a formal point of view he could see no invalidity in it, albeit the court subsequently refused to admit it for supervening lack of object.

366. The upshot of this evidence, in my judgment, is that as a matter of Spanish procedure, the judicial dissolution proceedings were initiated – a word which neither expert viewed as meaning anything different from 'commenced' – by the filing of the 26 November application. The procedural code then provided for a subsequent stage, where the court (through a clerk or judge) would decide whether or not to admit the claim, thereby allowing it to proceed. Prior to that stage, the proceedings had nonetheless been commenced, and were in existence, albeit they would not move forward until the court decided whether they were admissible. Further, the 26 November application was on

its face a valid one, in the sense that it was made by an authorised person and contained the information required by Article 127.

(b) Effect of subsequent non-admission

367. There is no evidence of any response from the court to the 26 November application until 4 March 2020. On that date, the clerk (attorney of the administration of justice) issued a decree stating (in translation):

> "FACTUAL BACKGROUND
>
> … ON 26.11.2019, HIJOS DE BARRERAS SA, requested, under the Voluntary Jurisdiction Law in force, the judicial dissolution thereof.
>
> On 03.02.2020, the request for approval of the restructuring agreement that gave rise to the order of 17.02.2020, published in the BOE and bankruptcy public registry, was sent to this court.
>
> In the aforementioned request, it is requested, by means of Addendum 1, that once the restructuring agreement has been approved, the request for judicial dissolution of HIJOS DE BARRERAS S.A. be rejected.
>
> LEGAL GROUNDS
>
> … Once the restructuring agreement has been homologated, the judicial dissolution proceeding has become devoid of subject matter and is therefore inadmissible.
>
> PROVISIONS AGREEMENT: The inadmissibility of the voluntary jurisdiction proceeding requested by the members of the board of directors of HIJOS DE BARRERAS S.A. regarding the judicial dissolution of this entity due to lack of purpose.
>
> The applicant's attorney in voluntary jurisdiction shall be notified of the document herein, against which an appeal for review may be filed, subject to a deposit of 25 Euros.
>
> I agree and sign it. I attest."

368. The decree thus approved and gave effect to an agreement that, following a restructuring agreement reflected in an order dated 17 February 2020, the 26 November application had become devoid of subject matter and thus inadmissible due to lack of purpose.

369. Dr Penades in his report said that meant that, under Spanish law, the 26 November application was deemed never to have been submitted at all. Dr Penades referred, by way of analogy, to:

i) a Spanish Supreme Court decision that withdrawal of a claim form before it is granted leave to proceed and notified to the parties does not in law give rise to any court proceedings (Judgment of 30 September 2009, RC 2209/2004);

ii) the provision in VLJ Article 143 that presentation of a request for conciliation interrupts prescription (the limitation period) only if it is subsequently admitted;

iii) the fact that CPL Article 410, providing that lis pendens or parallel proceedings arises only if a claim is admitted; and

iv) an application for homologation of a refinancing agreement, in the context of pre-insolvency protection under Article 5 bis of Spanish Insolvency Law 22/2003, is insufficient to lift the protective effects until the court grants leave to proceed with the application.

370. Sr Urena did not address this point in his report, presumably because the experts had specifically been asked to opine on the status of any proceedings "*as at 11 February 2020*", although he did make brief reference to the 4 March 2020 decree in his report. In his oral evidence, Sr Urena made essentially two points:

i) First, that although a claim subsequently refused permission would no longer be relevant for lis pendens purposes, and would not interrupt the limitation period, it did not follow that the refusal of permission meant that the proceedings were for all purposes retrospectively deemed never to have been commenced. As at 11 February 2020, no non-admissibility decision yet having been made, the proceedings remained in existence. Sr Urena was shown an extract from a textbook by Professors Ortiz and Escalona ("*Comments to Voluntary Jurisdiction Law, Law 15/2015, of 2 July*") mentioning the provision in VLJ Article 16.4 that, where identified defects are not remedied within 5 days, *"it shall consider the application as not having been submitted."* He agreed that the proceedings would then be regarded as closed for lis pendens purposes but they might nonetheless have had other material effects under the Civil Code or contractual provisions (Abarca's contention in closing that Sr Urena accepted that prior to admission by the court the application has no procedural or material effects is incorrect).

ii) Secondly, that the clerk did not in fact have the power to issue the 4 March 2020 decree: 'competence' for the purposes of VJL Articles 16 and 17 flowed from competence to deal with the substantive claim, which for this type of case would be the judge rather than the clerk.

371. Dr Penades in his oral evidence said he had used analogies because he could not find anything in Spanish law that directly answered the question of the status of an application that has been submitted but is later refused permission to be processed. He agreed that in a different field, Spanish law had made express provision for an application to be deemed never to have been made: Article 46 of Royal Decree 520/205 provides *inter alia* that if an application to a Tax Appeal Board to suspend a proceeding is rejected as inadmissible, then the application "*shall be deemed not to have been lodged to all intents and purposes*". Dr Penades agreed that the VJL and CPL do not use comparable language, hence his use of analogy. He also accepted that if the court had ultimately made the order the Yard had originally requested, namely to admit the

application and suspend the proceedings, then proceedings would have been deemed commenced on 24 November 2019.

372. As to Sr Urena's second point, Dr Penades agreed that the judge was competent to rule on the substance of a dissolution application, but considered that the clerk nonetheless had the power to make a decision under Articles 16 and 17, though it was not a point he had to consider before giving evidence.

373. In my view the evidence does not establish that in circumstances such as those of the present case, the proceedings initiated by the 26 November application are to be regarded for all purposes as never having been commenced. The only VJL or CPL provision in evidence that might on its face have that effect is Article 16.4, which applies where the clerk (having due competence) has determined that there are possible defects or omissions in the application, and the five-day remedy period has passed without there having been remedied. Those are not, however, the circumstances of the present case. The 26 November application was declared inadmissible not on grounds of any invalidity but by reason of supervening events which meant it no longer had any purpose or cause. The provisions to the effect that a claim will have lis pendens effects or stop the limitation period only once the claim is admitted do not mean that a claim is deemed non-existent for all purposes if the claim is later refused admission.

(c) Whether dissolution proceedings commenced for SBC Article XII.3 purposes

374. In the light of the conclusions I have reached as to Spanish law, I consider now whether dissolution proceedings had been "*commenced by or against … the [the Yard]*" within Article XII.3 of the SBCs when Havila served its notice on 11 February 2020.

375. I have concluded above that, as a matter of Spanish procedure, the judicial dissolution proceedings were initiated on 26 November 2019, with the result that they had been commenced and were in existence, albeit they would not move forward unless and until the court decided whether they were admissible. Whether that was sufficient to mean the proceedings had been commenced within the meaning of Article XII.3 is a question of English law, to which the usual rules of contractual interpretation apply.

376. The ordinary meaning of "*commenced*" refers to the initiation of a proceeding, rather than necessarily connotating any particular stage of further progress. Further, Article XII.3 contains a right to terminate the contract, and to do so in circumstances where delay might operate to the prejudice of the non-affected party, for example because it might be liable to make payments or do work during any period of delay. As Havila points out, the parties must have intended to be able to act quickly if the other party become involved in insolvency proceedings. In all these circumstances, I consider that (subject to the point about the effect of the 4 March 2020 decree) the 26 November application meant that dissolution proceedings had been commenced.

377. The position might be different if the 26 November application had not been filed by an authorised person, or was in some other way obviously defective: for example, an error-strewn document filed by a vexatious third party. It might be arguable that in those circumstances Article XII.3 would not be satisfied, though the limits of any such exception would need to respect the need for the parties to have certainty as to their contractual position, particularly in the context of a termination clause. However, it is unnecessary to decide any such issue, because there was no dispute on the evidence that

the 26 November application was on its face a valid one, made by an authorised person and containing the information required by Article 127.

378. It is also a question of construction of Article XII.3 (governed by English law) whether a notice served under it is necessarily invalidated by a subsequent decree whose effect under Spanish law is that dissolution proceedings are retrospectively deemed not to have been commenced. In my judgment the answer to that question is no. The validity of a notice under Article XII.3 must be assessed in the light of the circumstances actually in existence when it is served. Any other approach would give rise to unacceptable uncertainty about the position, and scope for serious prejudice to the party who has served the notice. The parties cannot have intended that an otherwise valid termination would be unravelled in such circumstances. In any event, for the reasons given in section (b) above, I do not consider that the 4 March 2020 decree in the present case did have the effect of deeming the 26 November application never to have been made as a matter of Spanish law.

(d) Affirmation

379. Abarca contends that Havila lost any right to cancel the SBCs under Article XII.3 because it affirmed them by Watson Farley's letters of 15 December 2019 and 15 January 2020.

380. On 15 December 2019 Watson Farley wrote to the Yard, setting out Havila's reasons for rejecting the Yard's 24 November 2019 termination notice. The letter ended by saying:

> "The Buyer expresses the sincere hope that the Builder will come to its senses and will revoke its cancellation so that both parties can proceed with the SBCs. If and to the extent the Builder does so, the Buyer, for its part, will not seek to rely on the Builder's application for its dissolution to the Spanish courts in order to cancel the SBCs itself, provided of course, that such application is withdrawn or otherwise that no such dissolution proceeds. The Buyer therefore invites the Builder to reflect thoroughly and carefully upon its purported cancellation of the SBCs, which is entirely without merit and repudiatory and to confirm to the Buyer or to us within a period of 7 calendar days that the cancellation is revoked. For this purpose, and pending the Builder's response. The Buyer affirms the SBCs.
>
> All the Buyer's remaining rights under the SBCs, and generally, are strictly reserved."

381. The Yard's solicitors replied in detail on 31 December 2019, maintaining the Yard's purported termination, though without reference to the dissolution proceedings (as opposed to the Article 5 bis filing).

382. Watson Farley replied on 15 January 2020, taking issue with the Yard's response as to its purported termination of the SBCs. The letter made brief mention of the judicial dissolution petition, filed two days after the Yard's termination notice, as indicating the precarious nature of the Yard's financial position. The letter concluded:

> "To conclude, we reject all of the allegations and false assertions made in your letter. The Buyer continues to affirm the SBCs and again calls on the Builder to revoke its purported cancellations. We understand that representatives of the parties will be meeting in Amsterdam tomorrow and we express the since hope that good sense will finally prevail and that the project will get back on track."

383. Abarca submits that Havila thereby affirmed the SBCs, in full knowledge of the dissolution proceedings, and thereby lost any right to terminate on that ground. I do not agree. On a fair reading of Watson Farley's two letters, they were (among other things) calling upon the Yard to rectify matters by withdrawing the dissolution application or otherwise ensuring that it did not proceed, in addition to revoking the Yard's purported termination notice and resuming work on the SBCs. Neither of those things happened, and the dissolution proceedings remained extant. The considerations set out in the passage quoted earlier from *Yukong Line v Rendsburg Investments* apply. There was no affirmation, and even if there had been, the Yard's continuing failure to bring the dissolution proceedings to an end was a continuing event justifying termination on 11 February 2020 pursuant to Article XII.3.

(I) HAVILA'S CLAIMS UNDER THE INSURANCE BONDS

384. The only issues which arise in relation to Havila's claim on the bonds are:

i) whether they operate as "*on demand bonds*", or whether in order to claim on the bonds Havila must establish that its termination was valid and the Yard was obliged to refund the instalments Havila had paid; and

ii) if the latter, whether the bonds respond to a termination at common law or only upon termination pursuant to express provisions of the SBCs.

385. These questions may be hypothetical, as I have decided that:

i) Havila's termination was valid and the Yard was and is obliged to return the instalments, and

ii) the Yard is obliged to do so not merely by reason of Havila having accepted its renunciation at common law, but also by reason of Havila having exercised contractual termination rights under SBC Articles IV.1(d) and XII.3.

I nonetheless consider them briefly below.

(1) Payment on demand

(a) Principles

386. Both parties cited the statement of principles by the Court of Appeal in *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd* [2021] EWCA Civ 1147. The principles can be summarised thus:

i) Surety guarantees: a traditional guarantee by way of suretyship is an undertaking by the guarantor to be answerable for the debt or obligation of another if that

other defaults, or "*to see to it that the debtor performed its own obligation to the creditor*". Its essential feature is that the liability of the guarantor depends upon there being a liability of the obligor/debtor. Such guarantees sometimes describe the guarantor's obligations as those of a "*primary obligor*", to make clear that the default of the obligor gives rise to an independent and primary liability of the guarantor, who is liable and in breach of his obligation by the very fact of default by the obligor without more. A surety guarantee may require a demand, in addition to the condition of obligor liability. (§§ 22 and 23)

ii) Demand guarantees: Security may alternatively be provided by an undertaking to pay a sum on or following demand, irrespective of whether the obligor/debtor is under a liability to make the payment. Such undertakings are also commonly termed 'guarantees', but they are payable on or by reference to an event, namely the demand, and without the beneficiary having to establish the obligor's liability. The demand may have to be in prescribed form, and/or may have to be accompanied by prescribed documents, but it is the demand that triggers the liability to pay (§ 23). Payment against demand is the hallmark of a demand guarantee (§ 37(3)).

iii) A demand guarantee may be called on only if the guarantor can assert in good faith that the secured obligation has arisen. The demand must say in what respect the obligor is in breach of its obligations under the underlying relationship, so demand guarantees still have to make reference to the obligations for which they provide security. A bare promise to pay on demand without any reference to the principal's obligation would leave the principal unacceptably exposed in the event of a fraudulent demand (§ 24). Such reference may also be necessary because the obligee may (albeit the Court of Appeal did not decide the point) be obliged to account to the obligor if it is later determined that the debt or obligation was not in fact owed (*Cargill International SA v Bangladesh Sugar and Food industries Corporation* [1998] 1 WLR 461 at 469B, 471G). (§ 25)

iv) Conditional bonds: Guarantees other than surety guarantees may require payment upon or by reference to an event other than a demand, or be conditional upon such an event, such as an arbitration award, in which case they may be described as a conditional bond. Analytically, demand guarantees form a subset of conditional bonds in this sense, the demand being merely one type of event upon which liability may be conditional (§ 26).

v) It is incorrect to treat the starting point for determining the categorisation of the instrument as being the nature of the institution providing the instrument, e.g. whether it is a bank or equivalent financing institution (§ 29). For example, in the shipbuilding context payment guarantees given by individuals and non-bank companies have in previous cases been held to be demand guarantees (§ 31). What matters is the wording by which the parties have chosen to express their bargain, interpreted in accordance with the well-established rules of construction (§ 32).

vi) Reliance on previous cases on what are said to be similarly worded instruments is of assistance only in very limited circumstances, namely where the words

> used in the document taken as a whole are materially identical and the contractual context in which they are used is materially identical (§§ 33 and 34).

As an example of (iv) above, the instrument at issue in *Shanghai Shipyard* included a provision whereby in the event of a dispute between the parties to the underlying contract, the defendant guarantor would pay against a document, namely an arbitration award. That did not make the guarantor's liability contingent on an underlying liability on the part of the obligor and established vis a vis the guarantor: the guarantor would not be party to any such arbitration, the arbitration might go by default, and the award might later be challenged, yet payment by the guarantor would still be due upon presentation of the award. (§ 37(6))

(b) Application

387. The key provisions of the insurance bonds in the present case were these:

> "1. The Insurer hereunder irrevocably undertakes in the event that (a) one of the following events occurs: (i) termination of the SBC due to the default of the Policyholder under Article XII (1) of the SBC or termination of the SBC under its applicable law (as long as the termination of the SBC under its applicable law raises the obligation of the Policyholder to return the Relevant Instalments plus interest accrued thereon at the rate set out in the SBC); and/or (ii) termination of the SBC resolved by the court decision in accordance with the provisions of Articles 61 and 62 of the Spanish Bankruptcy Law *(Ley Concursal)* following the declaration of insolvency proceedings of the Policyholder; and (b) provided that in both cases (i) and (ii) the Policyholder fails, within the period of 15 days, to reimburse the Insured an amount equal to the Relevant Instalments plus interest accrued thereon at the rate set out in the SBC (the occurrence of the events mentioned in paragraphs (a) and (b) of this paragraph, hereinafter a or the **"Loss"**), to pay the Insured, as monetary compensation for the damage suffered as a result of the occurrence of the Loss, an amount equal to the amount that the Policyholder has not reimbursed in respect of the Relevant Instalments and other amounts in respect thereof which the Policyholder was obliged to reimburse pursuant to Article XII (1) paragraph 3 of the SBC up to Euro eleven million, three hundred and eighty three thousand, three hundred and forty two (€11,383,342) (the total amount of Relevant Instalments and the rest of the amounts which the Policyholder is obliged to pay pursuant to Article XII (1) paragraph 3 of the SBC in respect of the Relevant Instalments, up to the referred amount, the "Total Insured Amount"), provided always that the Insurer has not been able to comply with the obligations of the Policyholder to deliver the Vessel in time and form in the event that the Insurer has been allowed by the Insured in writing to do that instead of paying the amount due in respect of the Loss in the terms of Clause 3 below.

For clarification purposes, in the event that the dispute refers only to a part of the corresponding Relevant Instalments owed by the Policyholder, the uncontroversial or non-disputed part shall be paid by the Insurer in accordance with this Insurance Bond.

For further clarification purposes, any amount received by the Insured from Banco de Sabadell, S.A ("Sabadell") pursuant to a financial guarantee issued by Sabadell in respect of the Instalment paid under Article III. 3(a) (the "Financial Guarantee") shall be considered, for the purposes of this Clause, as paid by the Policyholder and, as such, shall reduce the obligations of the Insurer accordingly.

2. The amounts guaranteed by this Insurance Bond shall be paid in EUROS within twenty (20) Business Days from the date on which the Insured has supplied the necessary documents in accordance with the provisions of Clause 4 below for making a claim and such payment shall be made to the Insured's account at DNB Bank ASA number NO0712506214376 or such other account which is notified in writing by the Insured to the Insurer at least 15 days in advance of such payment being payable.

In this Insurance Bond, Business Day means any day on which banks of Madrid (Spain), Vigo (Spain) and Oslo (Norway) operate, except for Saturdays, Sundays and statutory holidays in Madrid (Spain), Vigo (Spain) or Oslo (Norway).

…

4. Following a Loss, in order to be paid pursuant to the cover established in this Insurance Bond, the Insured must submit to the Insurer a claim stating that the Loss has occurred (including the express declaration that it has not received the amount that it is entitled to receive as a consequence of the occurrence of any of the events described in section (a) of Clause 1 of this Insurance Bond) and accompanied by any of the following documents:

(i) a written confirmation by the Policyholder (it being understood that in the case of cancellation pursuant to Clause 1(a)(ii), the Policyholder might act through an insolvency administrator or insolvency judge) that the Policyholder will not be able to complete the construction of the Vessel in accordance with the SBC within the agreed term in breach of its obligations under the SBC and certifying that the SBC has been terminated as a result of the occurrence of any of the events described in subsection (a) of Clause 1 of this Insurance Bond without the Policyholder having paid the amounts due to the Insured as a result of such termination; or

> (ii) the Insured's confirmation that, within 20 Business Days from the notification of the cancellation of the SBC as a consequence of the occurrence of any of the events described in paragraph (a) of Clause 1 of this Insurance Bond, the Policyholder has not made the notification provided for in Clause 4 paragraph (i) above, nor has it raised any objection to such cancellation commencing legal proceedings in accordance with Article XIX of the SBC (and the Insured has not been notified in writing by the Insurer, the Policyholder or any other third party that a dispute on such cancellation has been submitted to the Policyholder's bankruptcy court); or
>
> (iii) notification from the Insured that (a) the cancellation of the SBC as a consequence of the occurrence of any of the cases described in section (a) of Clause 1 of this Insurance Bond has been rejected and submitted to the jurisdiction of the courts according to Article XIX of the SBC (or, if applicable, has been submitted to the Policyholder's bankruptcy court, if the dispute were to be settled before it), and that in the corresponding final and non-appealable decision duly certified by a court certifying officer, or judicial decision of the bankruptcy court, a copy of which must be attached to said notification, it is stated that the Insured has validity terminated the SBC as a consequence of the occurrence of any of the cases described in section (a) of Clause 1 of this Insurance Bond and it is, therefore, entitled to obtain the return of the Instalments (including, inter alia, the Relevant Instalments) paid (together with the other amounts payable pursuant to Article XII(1) paragraph 3 of the SBC, if applicable) and (b) that such amount has not been reimbursed by the Policyholder."

388. In construing these provisions, both parties to a degree made submissions at odds with the principles set out above. Havila submitted *inter alia* that where a bond is issued by an insurance company in the ordinary course of its business (as in this case), that fact makes it more likely to be a demand bond, citing *Caterpillar Mortoren GmbH & Co KG v Mutual Benefits Assurance Co* [2015] EWHC 2304 (Comm) § 20 and *Mertiz Fire and Martine Insurance Co Ltd v Jan de Nul NV* [2010] EWHC 3362 (Comm) § 66. Conversely, Abarca made the point that the bonds were in the nature of insurance, as one might expect given who provided them. However, *Shanghai Shipping* indicates that the nature of the issuing entity is unlikely to assist.

389. Similarly, Abarca also submitted that the absence here of certain language found in the (wholly-different constructed and framed) instrument considered in Shanghai Shipping – the words "*absolutely and unconditionally*", "*primary obligor*", "*first written demand*" and "*immediate payment*" – pointed against the bonds here being in the nature of on demand bonds. However, what is important is to construe the bonds as a whole and identify their essential nature.

390. As to that, Abarca submits as follows:

i) Under clause 1, there has to be an event of "*Loss*", defined to mean a situation in which the Yard is be obliged to reimburse to Havila the instalments paid. That is as clear an indication as possible that the liability of the Insurer to pay under the Bonds is only triggered if the Yard is itself liable to repay Havila. This is the defining feature of a simple, or surety, guarantee.

ii) The language used in the Bonds is inconsistent with the Insurer having a primary obligation to pay independent of the Yard's liability. There is no language requiring Abarca to pay 'upon the Buyer's written demand', so the hallmark of an on-demand bond is missing. Clause 1 states that the Insurer shall pay "*monetary compensation*" to Havila. The language of compensation is inconsistent with the notion of a primary obligation to pay and reflective of a liability only if Havila suffers a loss. Both Clauses 2 and 4 refer to Havila "*making a claim*" under the policy. If this were an on-demand guarantee, the language used would be that of making a 'demand', rather than a 'claim'.

iii) Where Havila wishes to make a claim and the Yard disputes that it is liable to repay the pre-paid sums to Havila, Havila's only option (in practice) is to obtain a final and non-appealable decision from the Court:

a) Clause 4 provides that if Havila wishes to make a claim, it must be accompanied by: (1) written confirmation by the Yard that the SBCs were terminated in accordance with any of the events described in Clause 1(a); (2) Havila's confirmation that Yard has not objected within 20 business days to Havila's claim that there has been an occurrence of an event described in Clause 1(a); or (3) a final and non-appealable judgment stating that the SBCs have been terminated in accordance with an event described in Clause 1(a).

b) In other words, there must be an undisputed or judicially-determined right of Havila to the instalments under the SBCs before the insurance cover responds.

c) That pre-condition to recovery by Havila could not be further from the core feature of an on-demand bond, namely that the sums are payable simply upon a demand by Havila.

iv) The bonds do not provide that the obligations of the guarantor are to be unaffected by any dispute under the SBCs.

v) If this were an on-demand guarantee, that fact would not give Havila the ultimate right to retain any sums paid (or that should have been paid) if it transpires in the course of this hearing that it was not entitled to these sums – see *Shanghai Shipyard* § 25 (as summarised above).

391. I am unable to accept those submissions. The nature of the bonds can be found be understanding how clauses 1, 2 and 4 work together. It is true that clause 1 defines Loss in terms of an unsatisfied liability of the Yard to refund instalments to Havila, and describes the resulting payment undertaking on Abarca's part as "monetary compensation for the damage suffered". However, clause 4 (the date of compliance with which defines, under clause 2, when Abarca must pay) makes clear, when read as

a whole, that Abarca's obligation to pay is not dependent on Havila establishing vis a vis Abarca, or necessarily at all, an underlying liability on the part of the Yard to Havila.

392. Under clause 4(i), a payment obligation arises on a specified written confirmation from the Yard, which at least in practice will require it to have acknowledged liability. But it would make little sense for § 4(i) to specify the requisite written confirmation in this way if Havila would nonetheless have to prove to Abarca the underlying liability on the part of the Yard.

393. Under clause 4(ii), it is sufficient for Havila to confirm that the SBC has been cancelled by an event falling within clause 1(a), and for the Yard to have failed, within 20 days of notification of cancellation, either (a) to provide the confirmation provided for in clause 4(i) or (b) to have "*raised any objection to such cancellation commencing legal proceedings in accordance with Article XIX [the governing law and jurisdiction clause] of the SBC …*". Thus, clause 4(ii) will apply if the Yard fails to start proceedings within the 20-day period, regardless of whether or not the Yard is in fact liable to Havila as alleged. That provision too would be pointless if Havila nonetheless had to prove the liability to Abarca (which no doubt in practice would require Havila to commence legal proceedings itself).

394. Under clause 4(iii), Havila is to provide to Abarca a copy of a final and non-appealable judgment against the Yard with specified contents, with no requirement for Abarca itself to have been made a party. This provision would also make little sense if Havila nonetheless had to establish the Yard's liability vis a vis Abarca.

395. Thus, in my judgment, these key provisions of the bonds make sense only if the bonds are construed as demand or conditional bonds under which payment by Abarca is due against production of the documents stipulated in § 4, those being the means by which the "*Loss*" or "*monetary compensation*" referred to in § 1 are to be established, without the need for Havila separately to prove to Abarca an underlying unsatisfied liability on the part of the Yard.

396. It makes no difference, in my view, that the bonds do not use the words "*on demand*" or "*demand*", but instead use the (functionally similar) word "*claim*" in §§ 2 and 4. The words "*demand*" or "*claim*" are not in themselves informative about whether a document is a surety guarantee or an on demand instrument: that is to be discerned by working out the substance of the obligation in the light of the instrument as a whole. The bonds here in substance entitled Havila to payment conditional upon production of the required documents, rather than only upon establishment vis a vis Abarca of the underlying liability.

397. Finally, if it turned out that Havila were not entitled to refund of the instalments, and not entitled to any sums paid, in the manner contemplated in Shanghai Shipping § 25, that would be a matter between Havila and the Yard (the Yard having been obliged to recompense Abarca for having had to pay out under the bonds). It would not and does not affect Abarca's liability to make payment up front to Havila under the bonds.

(2) Whether the bonds respond to termination at common law

398. Abarca argues that if Havila was entitled to terminate the SBCs on 11 February 2020, but only on the ground of repudiatory breach by the Yard, then Havila is not entitled to recover under the Bonds.

399. The relevant portion of § 1 of the bonds reads:

> "The Insurer hereunder irrevocably undertakes in the event that … one of the following events occurs: (i) termination of the SBC due to the default of the Policyholder under Article XII(1) of the SBC or termination of the SBC under its applicable law (as long as the termination of the SBC under its applicable law raises the obligation of the Policyholder to return the Relevant Instalments plus interest accrued thereon at the rate set out in the SBC) …"

400. Abarca submits that this covers only an obligation on the Yard to return the instalments, not a general damages claim such as arises following termination at common law for repudiatory breach. The words in parenthesis make clear that this is a specific requirement, over and above the need for a termination. They would be satisfied, for example, by a termination pursuant to Article IV.1(d) or Article XII.3, both of which would give rise to a right to the return of instalments under Article XII.1. That provision applied where *"the Buyer shall exercise its right of cancelling the Contract under and pursuant to any of the provisions of the Contract specifically permitting the Buyer to do so"*, and provided that Havila shall in that event be entitled to the refund of all sums paid under Article III, including interest at 5% per annum.

401. Further, Abarca points out, § 4(iii) of the bonds, which applies where Havila's right to terminate is disputed by the Yard, requires Havila to present to Abarca a court decision stating that, having validly terminated the SBC, Havila *"is, therefore, entitled to obtain the return of the Instalments (including, inter alia, the Relevant Instalments [i.e. those covered by the particular insurance bond]) paid …"*. In the event that Havila is entitled to damages for repudiatory breach, the court will make an order in those terms and not an order requiring Havila to return the instalments.

402. I do not accept those submissions. Clause 1 of the bonds, in the passage quoted above, provides for two alternatives. The first applies to termination under Article XII.1. The provision applies to any case of cancellation by Havila pursuant to an express contractual provision. The second alternative, termination under applicable law, must therefore be wider. It must at least apply to cases where a restitution claim permits recovery of the instalments. In my view, it also covers cases where Havila is entitled to recover an amount equal to those instalments by way of damages. The language "*obligation … to return the Instalments*" is broad enough to cover an obligation to pay damages in the amount of the instalments, and it is hard to think of any commercial reason (and none was suggested) why a distinction should be made between the two situations. On the contrary, it would be a strange lacuna if the bonds were ineffective if the Yard were, for example, simply to renounce its obligations under the SBCs.

403. I therefore conclude that the bonds do cover a liability on the Yard, arising at common law following repudiation or renunciation by the Yard, to refund the instalments to

Havila including by way of a liability for damages (e.g. Havila's reliance loss claim in the present case) based on the value of the instalments.

(J) THE YARD'S CLAIMS FOR DAMAGES

404. The Yard claims damages for repudiatory breach, the alleged repudiations arising from:

i) the events giving rise to the right to terminate under Addendum 7 (read with Addendum 8); and/or

ii) Havila's failure to pay the Second Additional Payments pursuant to Addendum 9.

405. In the alternative to its case that it was not in breach in either of those respects, Havila resists these claims on the basis that:

i) the Yard elected to terminate pursuant to one, or the other, of its contractual rights, and there is no space for a competing termination at common law;

ii) neither Addendum 7 § 2.4.1 nor Addendum 9 § 3.2 was expressed as a condition of the SBCs, and nor could Havila's alleged breaches of them sensibly be said to have deprived the Yard of substantially the whole benefit of the SBCs; and

iii) even if there was a termination for breach of Addendum 7 § 2.4.1, the exclusion in § 2.5.3 prevents any claim for wasted expenditure being advanced.

406. As I have concluded that Havila was not in breach, these points are hypothetical, but for completeness I consider them fairly briefly below.

(1) Principles

(a) Election

407. I have discussed the general principles concerning waiver by election in section (F)(1) above. In this particular context, the parties highlighted the following authorities.

408. In *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599 Christopher Clarke J stated:

> "143. The same conduct may be such as to give rise to a contractual right to terminate and a common law entitlement to accept a repudiatory breach. This will typically be so if (i) the guilty party has failed to make the payments stipulated by the contract, (ii) that failure either amounts to a repudiation or is, by the terms of the contract, to be treated as such, and (iii) there is a contractual right to terminate which is applicable to the circumstances giving rise to the breach. In such a case the innocent party can exercise either his contractual or his common law right of termination. Prima facie he can rely on both. He is not disentitled to rely on the latter on the ground that recourse to the former constitutes an affirmation of the contract since in both cases he is electing to terminate the contract for the future (ie to

> bring to an end the primary obligations of the parties remaining unperformed) in accordance with rights that are either given to him expressly by contract or arise in his favour by implication of law. If he can rely on both there is no reason in principle why, if he terminates the con- tract without stating the basis on which he does so, he cannot be treated as doing so under any clause which entitles him to do so and in accordance with his rights at common law. ‘‘Termination’’ is capable of meaning both a termination pursuant to a contractual clause and the acceptance of a repudiation: *Aktieselskabet Dampskibsselskabet Svendborg v Mobil North Sea Ltd* [2001] 2 Lloyd’s Rep 127. Even if he refers to a particular clause upon which he relies, that would not inevitably mean that he was only relying on that clause. If that were so an innocent party who, in the face of a repudiatory breach, terminated the contract by reference to a clause which was in fact inapplicable, might, on that account, find himself disentitled to terminate at all.
>
> 144. The fact that service of a contractual notice of termination is not inconsistent with the acceptance of a repudiation does not, however, mean that in all cases such a notice amounts to such an acceptance. If the notice makes explicit reference to a particular contractual clause, and nothing else, that may, in context, show that the giver of the notice was not intending to accept the repudiation and was only relying on the contractual clause; for instance if the claim made under the notice of termination is inconsistent with, and not simply less than, that which arises on acceptance of a repudiation: United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 QB 54, 65, 68. In the present case markedly different consequences would arise according to whether or not there was a termination under clause 14.4 or an acceptance of a repudiation. … In those circumstances it should take effect in, and only in accordance with its express terms, namely as a determination under clause 14.4.”

409. The point was also considered, *obiter*, in Stocznia *Gdynia v Gearbulk Holdings*, where a buyer served notice purporting to terminate a shipbuilding contract on the grounds of the shipyard’s delay. The Court of Appeal said:

> “44. It must be borne in mind that all that is required for acceptance of a repudiation at common law is for the injured party to communicate clearly and unequivocally his intention to treat the contract as discharged: see Vitol SA v Norelf Ltd [1996] 2 Lloyd’s Rep 225; [1996] AC 800, pages 810G to 811B per Lord Steyn. If the contract and the general law provide the injured party with alternative rights which have different consequences, as was held to be the case in Dalkia Utilities v Celtech, he will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant, but where the contract provides a right to

> terminate which corresponds to a right under the general law (because the breach goes to the root of the contract or the parties have agreed that it should be treated as doing so) no election is necessary. In such cases it is sufficient for the injured party simply to make it clear that he is treating the contract as discharged: see Dalkia Utilities v Celtech, para 143 per Christopher Clarke J. If he gives a bad reason for doing so, his action is nonetheless effective if the circumstances support it. ...
>
> 45. In the present case the parties accept, and indeed the arbitrator has found, that the breaches on the part of the yard which entitled Gearbulk to terminate the contracts were in each case sufficient to amount to a repudiation. … in its letters of 7 November 2003 and 4 August 2004 Gearbulk purported to terminate the contract pursuant to article 10.1(b) and (c) and not under the general law, but each of the letters made it clear that it was treating the contract as discharged and in those circumstances each was sufficient to amount to an acceptance of the yard's repudiation. In its letter of 30 November 2004 Gearbulk sought to rely on both. Mr Dunning said that letter was equivocal as between reliance on the terms of the contract and reliance on the general law. Perhaps it was, but it was quite unequivocal as to Gearbulk's intention to treat the contract as discharged and that was all that was necessary."

410. Under the principle in *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, a party who terminates a contract for a bad reason can defend itself against a claim for wrongful termination by reference to a good reason that existed at the time of termination, even if the party was unaware of it. However, it does not necessarily follow that such a party can rely on the good reason as a basis on which to claim damages for repudiatory breach by the other party. In *Loefelis v Lonsdale Sports* [2012] EWHC 485 (Ch) and [2012] EWCA Civ 985, Roth J held that damages for repudiatory breach could not be claimed where a contract had been purportedly terminated in ignorance of, and thus irrespective of, the breach in question. On appeal from Roth J, the Court of Appeal rejected an argument that damages could be claimed merely on the basis that a ground for repudiation existed and the claimant had purported to terminate for breach, albeit not the breach in question.

411. In *Phones 4U Ltd (in Administration) v EE Ltd* [2018] EWHC 49 (Comm), Andrew Baker J, in the light of *inter alia* the cases mentioned above, concluded that a loss of bargain damages claim requires the claimant to show that the termination of the contract resulted from the relevant repudiatory or renunciatory breach; and that that in turn requires the claimant to show that it terminated the contract by exercising its common law right to terminate for that breach or renunciation: see §§ 117 and 122. If a termination letter communicates clearly a decision to terminate only under an express contractual right that has arisen irrespective of any breach, then it cannot be said that the contract was terminated for breach, so a claim for damages for loss of bargain at common law cannot run (§ 121).

412. This area of the law of contract may still be developing, and a number of points may yet remain unresolved (such as the precise circumstances in which a party can validly

rely simultaneously on both the common law right and an express contractual right, bearing in mind the degree of difference between the consequences; and the position where a termination notice is unspecific as to the reasons for terminating). The court should be astute to avoid taking an unduly restrictive approach when considering the meaning and effect of a termination notice served in the not uncommon situation where common law and express contractual rights co-exist and where (adapting Christopher Clarke J's words in *Dalkia*) the consequences of exercising the express contractual right are not inconsistent with, albeit they may be less than, those of exercising the common law right. However, one point that in my view does emerge clearly from the case law summarised above is that damages cannot be claimed at common law to the extent that a termination notice makes clear that the claimant is not relying on the common law right.

(b) Repudiatory breach

413. *Stocznia Gdynia v Gearbulk Holdings* is an example of repudiatory breach arising from a shipyard's delay. The Court of Appeal considered the contractual right of termination for delay there to be a contractual expression of the point at which the breaches were agreed to be treated as repudiatory:

> "…[the parties] have also agreed that there comes a point at which the delay or deficiency is so serious that it should entitle Gearbulk to terminate the contract. In my view they must be taken to have agreed that at that point the breach is to be treated as going to the root of the contract.
>
> … In my view it is wrong to treat the right to terminate in accordance with the terms of the contract as different in substance from the right to treat the contract as discharged by reason of repudiation at common law. In those cases where the contract gives a right of termination they are in effect one and the same." (§ 20 per Moore-Bick LJ)

414. However, it is does not follow that a contractual term giving a right to cancel for failure to make a payment necessarily indicates that such failure will also amount to a breach of condition or repudiatory breach. In *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm), for example, it was held that a term providing an option to cancel for non-payment did not, without more, evince an intention to make the time for payment of the essence of the contract giving rise to a right to terminate at common law:

> "There is no reason to infer from the inclusion in the contract of a provision giving a right to cancel if the buyer fails to pay for the goods within a specified period that a failure to pay within that period is to be treated as a repudiatory breach of the contract. Rather, the natural inference is that a contractual right of cancellation is being provided because failure to pay within that period would not (or would not clearly or necessarily) give rise to a right to terminate the contract under the general law." (§ 56)

415. In *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] 2 Lloyd's Rep 447 the Court of Appeal stated:

> "The simple and important point to keep in mind is that all conditions entitle the innocent party to terminate the contract – but not all contractual termination clauses are conferred for breaches of condition alone." (§ 47)

and:

> "[W]hether an express termination clause amounts to no more than a contractual option to terminate, or is triggered by a breach of condition, depends on the contract and context in question." (§ 48

416. Chitty on Contracts, 34th edn., § 27-046 states that "*the modern approach is that a term is innominate unless a contrary intention is made clear*."

417. The general test of repudiatory breach was, of course, set out by the Court of Appeal in *Hongkong Fir v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. Diplock LJ said:

> "The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?" (p.66)

and went on to add:

> "No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity ("It goes without saying") to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. and such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a "condition." …
>
> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties," …. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the

> breach gives rise and do not follow automatically from a prior classification of the undertaking as a "condition" or a "warranty."" (pp.69-70)

418. Applying this test involves evaluating all the relevant circumstances (see Chitty§ 27-043 and the cases cited there).

(c) Exclusion clauses

419. As to the general approach, in *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] 2 Lloyd's Rep 216, Moore-Bick LJ stated:

> "One can find in the authorities many statements to the effect that exclusion clauses must be clear and unambiguous if they are to operate effectively, many of which date from a period when courts took a more literal approach to the construction of commercial documents in general than is now generally the case. The modern approach to construction, which applies as much to exclusion and limitation clauses as to other contractual terms, is to ascertain the objective intention of the parties from the words used and the context in which they are found, including the document as a whole and the background to it: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, and *Investors Compensation Scheme v West Bromwich Building Society*. However, in cases where there is uncertainty about the parties' intention, and therefore about the meaning of the clause, such uncertainty will be resolved against the person relying on the clause and the more significant the departure is said to be from what are accepted to be the obligations ordinarily assumed under a contract of the kind in question, the more difficult it will be to persuade the court that the parties intended that result." (§ 223)

420. The Privy Council in *Bahamas Oil Refining Company v Owners of the Cape Bari Tankschiffahrts (The "Cape Bari")* [2016] 2 Lloyd's Rep 469, a case about whether a shipowner had contracted out of its statutory right to limit liability, confirmed that the question is essentially one of construction of the contractual provision, applying ordinary principles (§ 30). At the same time, the Board made clear that for a party to be held to have abandoned or contracted out of valuable rights arising by operation of law, the provision must make it clear that that is what was intended: see §§ 31-33 citing statements to similar effect in previous cases including *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL), *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, 585C (shipyard's rights to recover purchase price instalments) and *Stocznia Gdynia v Gearbulk Holdings*.

421. As regards cases of statutory rights in particular, the Board in *The Cape Bari* cited statements in *Ingram & Royle Ltd v Services Maritimes du Trèport Ltd* [1913] 1 KB 541, 553, 557 (CA) and *Tempus Shipping v Louis Dreyfus & Co* [1931] AC 726, 733, 741 to the effect that where the right in question is a statutory one, then the contractual terms are to be construed as if the statutory provision were written out in the contract (§§ 34-35). The Board accepted that it might be possible to exclude the right to limit

without express reference to the statute, but concluded that the right must be clearly excluded, whether expressly or by necessary implication (§ 36).

422. There is no justification for adopting a strained construction: see, e.g., *Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372 § 20, and Jackson LJ's statement in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 that:

> "In major construction or other commercial contracts the parties commonly agree how they will allocate the risks between themselves and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down." (§ 57)

(2) Application

(a) Election

423. After briefly reciting the history, the Yard's 24 November 2019 termination letter stated:

> "1. By this letter we give you notice that the SBCs are terminated pursuant to Addendum No. 7 Clause 2.5.1 on the basis that:
>
> a) You could not and did not provide confirmation of the pre and post delivery financing of the Vessel by 30 April 2019 or thereafter by a written statement from a bank or financial institution set out in Addendum No. 7 Clause 2.4.1
>
> b) We informed you in writing on 21 June 2019 of our intention to terminate and/or cancel the SBCs on that basis within 14 days written notice.
>
> c) We physically met following our 21 June 2019 notice and negotiated in good faith alternative arrangements to avoid termination.
>
> d) We have concluded that there is no other alternative financial arrangement to be provided by you to avoid termination and/or cancellation of the SBCs.
>
> 2. You said in your letter dated 18 October 2019 your position is that Addendum No. 9 did not enter into force or effect. If, however, Addendum No. 9 has entered into force or effect, we have an additional (or alternative) right to terminate the SBCs as a result of your failure to pay the Second Additional Payment as defined in Addendum No. 9. Further or alternatively, and without prejudice to the above, and only if the SBCs have not been terminated as above, we give you notice that the SBCs are terminated pursuant to Addendum No. 9 Clauses 3.3 and 9.4 on

> the basis of your failure to pay the Second Additional Payment by the agreed due date or at all.
>
> 3. Further or alternatively, and without prejudice to the above, and only if the SBCs have not been terminated as above, we give you notice that the SBCs are terminated pursuant to the agreement between us that the sum of EUR 5,000,000 would be paid within one banking day of 18 September 2019 or thereafter and you have failed to pay that sum by the agreed date or at all.
>
> 4. Further or alternatively, and without prejudice to the above, and only if the SBCs have not been terminated as above, we give you notice that we accept the repudiatory and/or renunciatory breach of the SBCs arising as result of the totality of your conduct as terminating the SBCs.
>
> All our rights under the SBCs and at law are fully reserved."

424. The Yard accordingly did not purport to terminate on the basis of both contractual rights and common law rights simultaneously (as discussed in *Dalkia*), nor could its letter be construed as doing so. Instead, the letter very deliberately set out a sequence of grounds, stating explicitly in § 4 that the Yard terminated at common law "*only*" if the SBCs had not been terminated pursuant to the contractual provisions referred to in §§ 1-2 or the right referred to in § 3.

425. Accordingly, based on the case considered earlier, a right to damages would arise only if the Yard was not entitled to cancel pursuant to Addendum 7 § 2.5.1 or Addendum 9 § 9.4, but was nonetheless entitled to treat the SBCs as having come to an end at common law by reason of repudiatory breach (or renunciation) by Havila.

(b) Repudiatory breach

426. I do not understand the Yard to maintain any argument that Havila was in repudiatory breach, or renounced the SBCs, other than by reason of the matters which the Yard alleged entitled it to terminate under Addendum 7/Addendum 8 or Addendum 9 (failure to make the Second Additional Payments). The conclusion reached in section (a) above would thus preclude a claim in any event.

427. For completeness (in case my conclusion in section (a) above is wrong), the Yard's case on repudiation is, in outline, that the events giving rise to the entitlement to terminate amounted to repudiatory breach here (citing *Dalkia* and *Stocznia Gdynia*). The Yard submits that, in the context of the delays to the project, the Yard's urgent need for cash, and the extent to which the 3rd instalment and in due course the Second Additional Payments were late (the 3rd instalment having been due in March/April following keel laying), time was of the essence and Havila's delays were repudiatory.

428. However, I would not have concluded that either a breach of Addendum 7 § 2.4.1 or Addendum 9 § 3 was a breach of condition or repudiatory breach. As to the former, § 2.5.1 provided a mechanism for the parties to seek to agree the consequences of a breach of § 2.4.1, making it unlikely that the breach in and of itself could properly be regarded as repudiatory. As to the latter, Addendum 9 § 3 was a simple payment obligation, one

of a number forming part of a wider scheme. Viewing the position in the round as at the date of the Yard's purported termination, Havila was in a position, and had expressed itself willing, to pay instalments and continue with the project, provided that the parties could fulfil the conditions set out in Addendum 9 § 12 so that Addendum 9 would come into effect, loan documentation be finalised, refund bonds be issued and the project proceed. Any breaches Havila had committed had not deprived the Yard of substantially the benefit of the SBCs, and in my view were not repudiatory.

(c) Exclusion clauses

429. The Yard seeks damages on a reliance basis, measured by reference to its outlay on the project, giving credit for the instalments Havila paid.

430. The SBCs contain default provisions in Article XII. These include at Article XII.2 provision for situations where Havila fails to pay an instalment due under Article IV.3 (possibly a typo for Article III.3), the Yard serves a notice requesting payment, the instalment remains unpaid, and the Yard therefore either stops work or (after 21 days) cancels the SBCs pursuant to that provision. In those events, it is provided that the Yard "*may claim compensation for losses caused thereby*".

431. Addendum 7 § 2.5.2 provides that, following a termination under § 2.5.1, the Yard shall be entitled to retain the instalments Havila has directly paid it under the SBCs. Clause 2.5.3 goes on to state:

> "It is expressly stated that no further direct claim nor any claim for compensation of any consequential losses and/or damages suffered by the Builder and/or any third party, can be addressed or submitted to the Buyer if termination and/or cancellation of the Contract is being exercised by the Builder according to clause 2.5 of the Addendum No 7."

432. There is no equivalent provision in Addendum 9 § 9.4.

433. The Yard submits that:

i) Clause 2.5.3 applied where the SBCs were terminated pursuant to § 2.5.1, but not where they also came to an end at common law following a repudiatory breach by Havila.

ii) The right to claim damages for repudiatory breach is fundamental to English law. In the present case, it was also a statutory entitlement under s. 50 of the Sale of Goods Act 1979 (the seller's right to claim damages for non-acceptance where the buyer wrongfully fails to accept and pay for the goods), and thus part of the applicable law, and presumptively a part of the contract unless clearly excluded.

iii) Moreover, the usual right to claim compensation for Buyer's default was expressly included in Article XII.2 of the SBCs from the outset (see above). Havila would need to show that this valuable right was abandoned by the Yard as part of the consideration for Addenda 7 and 8.

iv) Against that context:-

a) the words "*no further direct claim*" in § 2.5.3 meant nothing further *beyond* the basic legal/statutory entitlements to damages for repudiatory breach;

b) the phrase "*nor any claim for compensation of any consequential losses and / or damages …*" referred only to consequential loss claims rather than the primary claims for damages for repudiatory breach; and

c) the position is materially similar to *Stocznia Gdynia v Gearbulk Holdings*, where the words "*not be liable for any other compensation for damages…*" were construed as not excluding the right to recover damages for loss of bargain, which are an ordinary incident of termination for repudiatory breach.

434. I would not accept those submissions:

i) I would agree that Addendum 7 § 2.5.3 applied only where the SBCs had been brought to an end pursuant to § 2.5.1. Where that was the case, however, I consider that the exclusion must apply even where the Yard also seeks damages for repudiatory breach. Indeed, that is the most likely basis on which the Yard would (but for the exclusion) have a claim of the kind which § 2.5.3 seeks to exclude.

ii) It is unclear to me how s. 50 of the Sale of Goods Act would be engaged, but I would accept that the right to claim damages for a repudiatory breach is a fundamental one, and that clear words would be required to exclude it.

iii) Article XII.2 deals with specific circumstances where there has been a payment breach by Havila, the Yard serves a notice and the SBCs are then brought to an end on that ground. It has at best only broad contextual relevance here. Again, however, I would accept that clear words are required to exclude any right to damages for repudiatory breach.

iv) The ordinary meaning, in the context of § 2.5 as a whole, of the words "*no further direct claim*" is no claim over and above the entitlement set out in § 2.5.2 to retain the instalments. Those words stand in distinction from the ensuing words "*nor any claim for compensation of any consequential losses and/or damages*", which cover indirect losses. The former words are apt to catch claims for damage for direct loss, whether reliance loss or loss of expectation. Indeed, it is hard to see on the Yard's approach what they would catch. The Yard's citation of *Stocznia Gdynia v Gearbulk Holdings* does not assist. The court there held that, in context, the exclusion clause in question had no application to the situation that would arise on termination of the contract (§ 25).

435. Accordingly, I would have concluded that Addendum 7 § 2.5.3 excluded a claim by the Yard for damages for repudiatory breach arising from circumstances that entitled the Yard to cancel pursuant to Addendum 7 § 2.5.1.

(K) CONCLUSIONS

436. I conclude that Havila's claims succeed and the Yard's claims fail. The Yard was not entitled to cancel the SBCs. Havila was entitled to cancel them, and did so by its notice dated 11 February 2020. Havila is entitled to claim refund by the Yard of the instalments it paid, and is entitled to payment pursuant to the refund bonds issued by Abarca. I shall hear submissions on any outstanding matters and the appropriate form of relief. I am grateful to all counsel for their submissions.

ANNEX: THE YARD'S APPLICATION FOR PERMISSION TO AMEND

1. This annex sets out (a) the reasons for my decision, on the second day of trial, to refuse to permit the Yard's proposed amended case to be advanced at the trial, and (b) my decision (with reasons) as to whether to allow the amendment to be advanced in the context of the second phase of the case (if any). I assume the reader to be familiar with the general background to the matter, as set out in my main judgment.

The proposed amendment

2. The Yard seeks permission to amend its Particulars of Claim to advance a claim to recover the 4th and 5th instalments (€16.4m per vessel) as debts which fell due prior to termination, on a true construction of the shipbuilding contracts ("***SBCs***").

3. The application is supported by a witness statement of Mr Thomas Kelly, the Yard's solicitor, dated 28 June 2022. Havila opposes the application, and served a statement from its solicitor, Mr Charles Buss, dated 5 July 2022, to which Mr Kelly responded in his second statement dated 7 July 2022. Oral submissions were made by counsel for the Yard and Havila on the first and second days of trial.

4. The Yard relies on the following wording of Addendum 7 as showing that, whilst the parties agreed to extend the deadline for payment of the 3rd instalment, they did not agree to do so for the 4th and 5th instalments, which therefore fell due prior to termination.

> "2.2.2. If the Buyer has not provided confirmation of financing as set out in clause 2.4 of this Addendum No 7, the Buyer's payment of 3rd Instalment to the Builder shall be extended till such confirmation has been provided to the Builder.
>
> Any extension of payment of the 3rd Instalment as set out in this clause 2.2.2 of this Addendum No 7, shall not have any impact on the due date for the 4th and 5th Instalment as set out in Article III, clause 3 of the Contract (as amended by this Addendum No 7). [Consequently payment of both, 4th and 5th Instalment according to Article III, clause 3 of the Contract still will remain to be due as if 3rd Instalment should have been paid fourteen (14) days after keel laying of the Vessel.]"

The words shown above in square brackets appears only in Addendum 7 to the SBC for Hull 1711.

5. Pursuant to Addendum 7, which inserted a new Article III.3 into the SBCs:

   i) the 3rd instalment was due 14 days from keel laying (unless postponed): i.e., 15 March and 5 April 2019 respectively for the two SBCs;

   ii) the 4th instalment was due 60 days thereafter (14 May / 4 June 2019); and

   iii) the 5th instalment was due 60 days after that (13 July/ 3 August 2019).

6. By the proposed amendment, the Yard seeks to contend that whilst the 3rd instalment was postponed, the 4th and 5th were not. They therefore fell due on the dates set out above: as if the 3rd had been paid on time and not postponed. The proposed amendment also states:

> "(For the avoidance of doubt, the Defendant cannot rely on the absence of insurance bonds/refund security as precluding these installments from falling due. If the Defendant had complied with its obligations under cl. 2.4.1 of Add. No. 7, then the Claimant would have procured the refund security. The Defendant cannot rely on its own breach to defeat the Claimant's claim for these accrued debts)." (§ 64A(6) of the draft Amended Particulars of Claim)

Principles

7. The Yard cited my recent summary of the principles relevant to permission to amend in *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] EWHC 895 (Comm) (Annex, §§ 4-10), indicating that:

i) the Court has a discretion to permit amendments to a statement of case under CPR 17.1(2)(b) and 17.3. The discretion should be exercised in accordance with the overriding objective of dealing with cases justly and at proportionate cost (§ 4);

ii) the proposed amendment must be properly formulated (§ 5(i));

iii) if the proposed amendment raises a new claim or defence, it must have a real prospect of success (§ 5(ii));

iv) if the proposed amendment is "*very late*" – in that it would require the vacation of an existing trial date – then there is a heavy burden on the applicant to show that justice requires that it be permitted to advance the amended case (§ 5(iii));

v) in the case of "*very late*" amendments in that sense, various factors come into play as summarised in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) § 38:

> "Drawing these authorities together, the relevant principles can be stated simply as follows :
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be

> allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

vi) as regards the merits, the applicant must show a real prospect of success (i.e. the summary judgment threshold). An apparent lack of prospects is a factor against granting permission, even if not so low as to meet the summary judgment threshold; but the court should not conduct a "*mini trial*" (§ 8); and

vii) it is relevant to have regard to the degree to which the case sought to be advanced by the amendment is one which the parties have already been addressing, though the fact that an issue has received some attention is not necessarily sufficient to make permission to amend appropriate. (§§ 9-10)

8. As to the proposed amendment raising a point of construction only, reference was also made to *Apache Beryl Limited v Marathon Oil UK LLC* [2017] EWHC 2462 (Comm),

where permission to amend was granted less than three weeks before an expedited Commercial Court trial because the amendments went to questions of construction only and (properly analysed) did not raise new issues of fact. Cooke J said:

> "Given that the amendments raise points of construction, I would see no difficulty in the parties being ready for trial to deal with those arguments. They may be complicated arguments because a number of different documents have to be looked at, but they are not arguments which competent counsel, familiar with Commercial matters, and in particular with the North Sea Oil and Gas Industry, would not be able to deal with, master and present contrary arguments within, in my judgment, a matter of 24 hours or thereabouts. Since these points were put forward in amendments on 7th September, I can see no difficulty about those matters being dealt with at a trial on the 16th October." (§ 16)

Application (1): present trial

9. The Yard's explanation for the delay in bringing forward this proposed head of claim is, in substance, that its legal team did not think of it until its present solicitors came on the record for the Yard (as opposed to acting solely for Abarca) on 5 April 2022 and began considering monetary claims against Havila from the Yard's perspective. That is said to be how the proposed claim came to be put forward only three weeks before the start of trial.

10. As to the prospects of success of the proposed new claims, the Yard submits as follows:

    i) Addendum 7 stated expressly that the postponement of the 3rd instalment was not to affect the accrual of the 4th or 5th instalments.

    ii) Havila's obligation to pay the instalments was subject to the Yard providing refund guarantees from *"major first class Spanish financial institutions or first class insurance company, in both cases acceptable to the Buyer, securing the repayment obligation of the Builder if the contract is lawfully cancelled…"* (SBC Article III.3), which did not occur. However, the Yard was prevented from obtaining those guarantees because they were contingent on Havila demonstrating that its own finance was in place, and Havila in breach of Addendum 7 § 2.4.1 failed to provide the necessary evidence of that.

    iii) As a result, the refund guarantee condition is for these purposes deemed to have been fulfilled or waived: see *Mackay v Dick* (1881) 6 App Cas 251 (HL) at pp. 263 and 270, and *Compagnie Noga d' Importation et d'Exportation* [2002] CLC 207 §§ 106-107 (CA).

    iv) Addendum 7 provided that instalments including instalments 4 and 5 *"unless payable on specific dates, shall under no circumstances fall due until 14 days from receipt of written notice from the Builder".* No such notices were served. Under the SBCs as they originally stood, the 4th and 5th instalments were not payable on specific dates: the 4th was payable within 14 days after launching and the 5th 60 days prior to the scheduled delivery date of the vessel, so notices

> would have been required. However, Addendum 7 varied those provisions, making the 4th instalment payable 60 days after actual payment of the 3rd instalment and the 5th instalment payable 60 days after actual payment of the 4th instalment. Further, the provisions from § 2.2.2 quoted earlier meant that if time to pay the 3rd instalment were extended, then the 4th and 5th instalments would instead fall due 60 and 120 days after the date on which the 3rd instalment would otherwise have been paid (viz 14 days after keel laying). As a result, the Yard submits, the 4th and 5th instalments were payable on specific dates and no written notices were required.

11. Even on that analysis, an obvious difficulty arises in relation to the 4th instalment for Hull 1710, which the Yard says was due on 14 May 2019, since that preceded Havila's deadline under Addendum 7 § 2.4.1 as extended by Addendum 8 (which was entered into on 30 April 2019 and extended the deadline to 31 May 2019).

12. Further, if the GTLK letter which Havila provided to the Yard on 16 July 2019 would, if on time, have been compliant with Addendum 7 § 2.4.1, then in order to succeed in its proposed new claim the Yard would need to show that (but for the lateness of the provision of the GTLK letter to the Yard) CESCE would have issued its counter-guarantee, and Abarca its refund bonds, for instalments 4 and 5 based solely on the GTLK letter (and the term sheet it referenced) despite the absence of signed loan documentation.

13. The Yard's deemed fulfilment/waiver point is controversial. Proposed § 64A(6), quoted above, would plead that Havila "cannot rely on its own breach to defeat the [Yard's] claim" for the accrued debts for the instalments. I understand that to be an allegation that the refund bonds condition is deemed to have been fulfilled or (possibly) waived, rather than that the Yard is entitled to damages to place itself in the position it would have been in but for Havila's breach; and that is how the Yard presented the point in oral arguments.

14. The view expressed in Chitty (§ 4-204) and Lewison on "*The Interpretation of Contracts*" (7th edn., § 6.135, fn 377) is that Lord Watson's reasoning in *Mackay v Dick*, based on deemed fulfilment, is a civil law concept that does not form part of English law. (*Mackay* was a Scottish appeal case.) Chitty points out that the deemed fulfilment approach ignores the possibility that, even if the party who prevented the condition being fulfilled (in breach of a subsidiary obligation) had instead done what was required of him, the condition might still have remained unfulfilled. The better approach, they suggest, is to award damages for breach of the subsidiary obligation, so that the court can take account of that possibility. Otherwise an inappropriate punitive element is introduced. Chitty's approach is consistent with observations of Scott J in *Thompson v ASDA-MFI Plc* [1988] Ch 241, 266 and Millett LJ in *Little v Courage Ltd* (1994) 70 PCCR 469 to the effect that deemed fulfilment of conditions is not part of English law.

15. Rix LJ in *Compagnie Noga* (§§ 94-107) noted the difference of approach between Lord Watson and Lord Blackburn in *Mackay,* and proceeded on the basis that the case was authority for the implication for an implied term of co-operation and also the "potential waiver or deemed fulfilment" (my emphasis) of the condition precedent in the case before him. He made clear that, either way, there must be a causatively relevant breach

by the defendant that "*bears on the condition which otherwise needs to be fulfilled*" (§ 106).

16. I see considerable force in Havila's points that (a) if the point is based on waiver, then it is unrealistic to suggest that Havila ever did waive the need for refund bonds: they were clear in making it a requirement; and (b) a damages analysis is fairer, since it would take account of the fact that in order to earn the 4th and 5th instalments, the Yard would have had to continue working on the vessel, spending money in the process. Alternatively, the Yard in practice may still have run out of money and become insolvent (as it in fact did). Thus a deemed fulfilment approach could result in a large and unjustifiable windfall.

17. For present purposes, however, I proceed on the basis that it remains arguable that deemed fulfilment would apply. Even on that basis, though, it would be necessary to show that the (assumed) breach of Havila's obligation to confirm its financing by 31 May 2019 caused the Yard's failure to provide refund bonds for payment of the 4th and 5th instalments. Establishing such a causal link strikes me as difficult in circumstances where the Yard never sought to claim the 4th and 5th instalments from Havila at the times when (on the Yard's proposed new case) they fell due, nor made any suggestion that bonds would have been available but for the alleged breach by Havila. It would, in any event, be an issue of fact that would have needed to be explored at trial with the benefit of disclosure and witness evidence. As Havila points out, it would have been necessary to:

    i) investigate whether, if the Yard had believed that procuring it would trigger payment of €32.8m, refund security would have been available from a source other than the incumbent providers, or whether the existing guarantors would have provided security. As it is, there is no evidence that the Yard made any such enquiry, quite possibly because it never occurred to the Yard, at the time, that these instalments were falling due;

    ii) have disclosure on the issue of whether or not the Yard could have obtained a refund guarantee during the relevant period for the 4th and 5th instalments (no such issue having been included in the Disclosure Review Document); and

    iii) give Havila an opportunity to investigate whether the Yard's worsening financial position during the relevant period (June - August 2019) would have impacted on the Yard's ability to obtain refund security (a) as a matter of regulatory law or insurance/ banking practice, and/or (b) as a matter of fact in light of the terms of the CESCE Policy and the Abarca Policy. Havila notes that even the limited disclosure actually provided in this area indicates that the Yard was facing scrutiny from its financiers/guarantors about its financial position in the period July to September 2019 (e.g. an Abanca email to the Yard of 25 July 2019 saying that CESCE had asked Abanca *"to make a global assessment of the risk increase, this is the total situation of the Shipyard, not only of the Havila projects in particular and [Abanca's] assessment in this regard as a Bank, which response they [CESCE] require to be before tomorrow at 10 am so that the extension [to the policies under which the insurance bonds were to be issued] can be processed"*). Although that email post-dated three of the four 4th/5th instalment alleged payment dates, the Yard's financial position and the Ritz Carlton project were the subject of enquiry by Havila as early as February

2019. An internal balance sheet and profit and loss account dating from 12 July 2019 indicate that the Yard already had negative equity as at the end of June 2019. The Yard's proposed new claim would have made it highly relevant to enquire, in detail, what the position was in June and July 2019, and whether the Yard would in practice have found it possible to procure refund bonds to the tune of €34.8 million (as opposed to the smaller sums for which refund bonds were in fact issued).

18. I do not accept the Yard's suggestion that, because there already are some related issues about the bonds for the 3rd instalments, and disclosure has been given using date ranges extending past the dates on which it says the 4th and 5th instalments fell due, everything to do with the availability of insurance bonds should be treated as already in issue and covered by the existing disclosure. On the existing statements of case, it makes little difference whether or not the Yard is right to allege that, had there been compliance with Addendum 7 § 2.4.1, the Yard could have procured refund security for the 3rd instalment. There was no claim for the 3rd instalments as such, and the point arises in the entirely different contexts of Havila's claim to have terminated for delay in completion of the vessels (the refund bond issue being relevant to whether there was "Permissible Delay", as defined), and the Yard's claim against Havila for damages for repudiatory breach. In the circumstances, Havila could reasonably consider that it had other answers to those points, and take the approach of putting the Yard to proof on the allegation about the 3rd instalment but taking only limited further steps to investigate it. The focus and scope of disclosure would also be likely to have been different, since the emphasis would be on refund bonds in the amount and matching the timing of the 4th and 5th instalments. The position would be entirely different if the Yard's ability to procure refund security were an important facet of a new claim by the Yard for €32.8 million in respect of the 4th and 5th instalments. As Havila points out, proportionality includes devoting such time and money to an issue as the issue deserves, in the context of the shape of the case as a whole.

19. In addition to those matters, Havila states in evidence that it would also have wished to investigate whether the Yard was estopped by convention from claiming the 4th and 5th instalments. The Yard submitted that Havila had not identified in its evidence the key elements of any such estoppel claim. However, Havila's evidence made the point that there were extended negotiations about Addendum 9, followed by decisions about whether to make payments and decisions about whether to exercise rights of termination, all against the background of a common understanding between the parties as to the current state of accounts. Those negotiations culminated in the signing of Addendum 9 on 15 September 2019. There appears to have been no suggestion during those discussions that Havila had become liable to pay the 4th and 5th instalments on 14 May, 4 June, 13 July and 3 August 2019, even though the discussions evidently covered instalments and payments in detail. Havila would, had the proposed new claim been advanced on a timely basis, have been entitled to investigate in detail (with its witnesses and documents) whether communications 'crossing the line' could be pinpointed as evidencing a shared understanding that the parties were proceeding on the basis that the 4th and 5th instalments had not become due. There was and is not enough time for this to be done before or during the present trial, and it would not be fair to expect Havila to do so on top of the inevitably heavy preparatory work involved in a trial of this nature.

20. For all these reasons, I do not consider that the proposed amended claim could fairly be advanced at the present trial. Even taking account of the potential prejudice to the Yard of shutting it out from pursuing a substantial claim, I would refuse permission to amend.

Application (2): second phase

21. At the pre-trial review on 26 May 2022, I ordered that:

> "The quantum of the Yard's claim for wasted expenses, pleaded at paragraph 72 of its Particulars of Claim in Claim No CL-2020-000559 (the "Wasted Expenses Claim"), is to be determined after trial and judgment has been given on all other issues of liability and quantum in Claim No CL-2020-000559 and CL-2020-000246. All issues of further disclosure, security for costs, and directions for trial of the quantum of the Wasted Expenses Claim are to be dealt with after judgment has been handed down in the main hearing in July 2022."

22. The Yard submitted that even if its proposed new claim could not fairly be addressed as the present trial, it could be addressed as part of the second phase so ordered. Although that phase was ordered for a different reason, it would be wrong to shut out a substantial and meritorious claim.

23. In the light of my main judgment, no second phase will be needed to deal with the Yard's claim for wasted expenses. In addition, given the findings in that judgment:

    i) the Yard would have the difficulty identified in § 12 above, since I have concluded that Addendum 7 § 2.4.1 did not require Havila to confirm the existence of signed loan documentation; and

    ii) in any event, Havila was entitled to, and did, terminate the SBCs and is entitled to recover any instalments paid: so any obligation to pay the 4th and 5th instalments would be matched by a claim against the Yard to recover them (at common law and/or under the SBCs' termination provisions), with the result that the proposed new claim would fail for circuity.

24. Even if there were going to be second phase, I would have had considerable hesitation about permitting the proposed amendment, considering the lack of a good explanation for its lateness, the inherent weaknesses in it considered earlier, and the fact that the new claims would considerably lengthen the trial fixed for an entirely different purpose. As it is:

    i) there is to be no second phase to address the Yard's wasted expenditure claim: so allowing the amendment would thus result in a second trial made necessary solely by reason of the amendment, and

    ii) the findings referred to above mean that the amendment could have no real prospect of success.

25. Accordingly the appropriate course is to refuse permission for the amendment altogether.