Case No: CL-2014-000002

Neutral Citation Number: [2016] EWHC 1875 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 29/07/2016

Before :

MS SARA COCKERILL QC (sitting as a Deputy High Court Judge)

- -

Between :

(1) SAGA CRUISES BDF LIMITED	**Claimants**
(2) SAGA CRUISES LIMITED (formerly known as ACROMAS SHIPPING LIMITED)	
- and -	
FINCANTIERI SPA (formerly FINCANTIERI CANTIERI NAVALI ITALIANI SPA)	**Defendants**

- -
- -

MR CHARLES HOLROYD AND MR STEPHEN DU (instructed by **Reed Smith LLP**) for the **Claimants**
MR ADAM ROBB (instructed by **Curtis Davis Garrard LLP**) for the **Defendants**

Hearing dates: 9, 10, 13, 14, 15, 16, 20, 23 June 2016

- -

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.

.....

Ms Sara Cockerill QC :

Introduction

1. This action concerns two quite distinct claims, both of which arise out of a contract dated 28 September 2011 ("the Contract") between the First Claimant ("the Owners") and the Defendants ("the Yard") for the "Dry Docking, Repair & Refurbishment" of the Owners' cruise ship "SAGA SAPPHIRE" ("the Vessel").

2. The Owners are and were part of the Saga Group of companies; their role was as the owning company of the Vessel. The Second Claimant ("Acromas") is better known as "Saga Shipping". It is another company in the Saga Group which operates Saga Group's cruise business.

3. The Vessel is a 1981 built cruise ship. Formerly called "BLEU DE FRANCE" she was bought by the Owners in November 2010 with the aim of transforming her into the Saga Group's flagship. She was initially bareboat chartered back to her previous owners while Owners worked on a specification and contract for her refurbishment.

4. The contract was placed with the Yard, an Italian company which is one of the largest shipbuilding companies in the world. The price was €14,346,007, and covered both engineering and outfitting works. The work was scheduled to start at the Yard in Palermo on 9 November 2011 and to be completed by 17 February 2012.

5. In fact, the works were considerably delayed, principally by strikes. On or about 16 February 2012, the parties entered into an agreement at Trieste by which they agreed to postpone the Scheduled Completion Date to 2 March 2012 ("The Trieste Agreement"). However, there were further delays and the Vessel was not re-delivered to the Owners until 16 March 2012. The Vessel departed from Palermo on 19 March 2012.

6. On 1 February 2012, the Owners concluded a year long bareboat charter with Acromas, and the Vessel was to be delivered to Acromas under that charter on 30 March 2012 for the purpose of being operated as a cruise ship by Acromas.

7. The first and larger claim in this action relates to events which occurred during the course of the Vessel's inaugural cruise, only a few weeks after completion of the refit at Palermo. As the Vessel was preparing to depart Valencia on 12 April 2012, she suffered a serious failure of the port main engine lubricating oil cooler ("luboil cooler"). Investigation revealed that the tubes of both luboil coolers were heavily corroded, and they were both replaced. Given that one of the items which specifically fell within the ambit of the engineering refit was an overhaul of the Vessel's main engine luboil coolers, the Owners contend that this loss was caused by a failure on the part of the Yard to perform their obligations as regards the luboil coolers to the requisite contractual standard.

8. The Owners contend that the effects of the luboil cooler failure were severe in that (i) the inaugural cruise had to be abandoned and the passengers sent home, and (ii) while Acromas attempted to maintain the Vessel's next scheduled cruise (due to start on 18 April 2012 from Southampton) by re-arranging it to start later and with a shorter

itinerary, the luboil cooler repairs were not complete in time and so that cruise also had to be cancelled. All of this, they say, can be traced back to the Yard's default.

9. The claim for damages is pursued not by the Owners but by Acromas, since Owners have assigned to Acromas their rights against the Yard under the Contract in respect of the luboil cooler failure. The claim for damages amounts to £3,170,037 and is brought under the main provisions of the Contract, or alternatively under the guarantee clause, Clause 12.

10. The second of the two claims in this action is a claim for liquidated damages by the Owners under the Contract and the Trieste Agreement in respect of the delay in redelivering the Vessel. Since completion and signature of the Protocol of Delivery and Completion did not take place until 16 March 2012, the Owners claim liquidated damages in respect of the delay between 2 and 16 March 2012. The claim is in the amount of €770,000, which is the amount of a cap on liquidated damages agreed at the time of re-delivery. This is the equivalent of 4.3 days of delay under the Liquidated Damages clause.

11. The Yard advance a number of defences to each of the claims. I will deal with each claim, and the sub-issues which arise in relation to it, in turn below.

THE LUBOIL COOLER CLAIM

Introduction

12. In the context of this claim it is important to have some sense of the purpose of a luboil cooler and the structure of the actual coolers in question.

13. The function of a luboil cooler is to cool the lubricating oil which circulates through an engine. Without a functioning luboil cooler, the corresponding engine cannot be run. In the present case, the coolers served the Vessel's two main engines. There were thus two luboil coolers (port and starboard).

14. Luboil coolers are a form of heat exchanger. The hot engine oil is brought close to cooled water so that heat is transferred from the oil to the water. The coolers in this case were of the "shell and tube" type. In a cooler of this type, a cylindrical shell is closed by bolted cover plates and has two flanged pipe branches (one at each end) serving as the inlet and the outlet for the flow of warm lubricating oil. The fresh water cooling medium enters and leaves through similar flanged branches at one end. Inside the shell is an assembly of parallel small bore (14mm) tubes known as the tube stack or tube nest. At each end, the tubes are fixed into thicker metal "tube sheets" (also known as "tube plates" or "end plates") into which holes have been drilled. They are kept apart along their length by baffles which also help to direct the flow of oil around the tube nest. One end of the luboil cooler is attached to a water box and is referred to as the fixed end. The other end is known as the floating end.

15. The way the process works is that cold water flowing through the individual tubes is strictly separated from the surrounding warm lubricating oil but heat is conducted through the thin tube walls and is absorbed by the water and carried away from the luboil cooler. It is of note in the context of the issues in this case, that the tube walls in

these coolers were 1mm thick and of mild steel, rather than the more usual copper nickel mixture.

16. Unless the water is maintained to an almost impossible level of purity the walls of the tubes will tend to become coated in limescale (calcium deposits). This coating will reduce the efficiency of the heat exchange across the tube walls and therefore reduce the efficiency of the luboil coolers. In addition, unless the water is kept absolutely free of chloride ions, steel tubes will become subject to corrosion. Where this occurs holes may develop, allowing the luboil to enter the water tubes. The speed at which these processes occur will depend on the quality of the water passing through the tubes of the luboil coolers. To minimise problems the water should be treated with a chemical inhibitor, and the levels of that inhibitor should be regularly checked and maintained.

17. So far as corrosion is concerned, where a small number of tubes are compromised, they can be "plugged" (ie. have plugs of metal inserted in either end), which effectively take them out of the system. In small numbers there will be no significant loss of the cooler's utility. However once the number of plugged tubes rises it will become necessary to replace all the tubes: to "retube the coolers". The experts in this case were in agreement that if the coolers had copper nickel tubes and were well maintained they might have a life equal to that of the Vessel without needing retubing. These coolers, with their steel tubes, would certainly be expected to require retubing at some point, but if well looked after should have a life expectancy of well over five years and possibly over ten years.

18. In the present case the backdrop to the works undertaken by the Yard on the coolers is that the maintenance history, while not providing much in the way of detail of the maintenance of the coolers, suggests that there had been problems with them going back some years. In the early 2000's there are regular records of individual tubes being plugged. In April 2007, with 25 pipes plugged over the previous 2-3 years and more failing, the port cooler was retubed. In 2002 and 2008 following leakage problems, the starboard cooler was likewise retubed. In usual circumstances therefore the coolers would not have been scheduled for retubing as early as late 2011/early 2012. The evidence of Mr Blinston, who had been on board the Vessel since April 2011 for familiarisation purposes and drafted the engine room refit specification, was that there were no particular concerns about the coolers, but an overhaul was considered important because there was no spare cooler if something went wrong.

19. The other end of the factual background is the failure of the port cooler. Following the refit, the Vessel proceeded to Southampton where the Vessel's inaugural cruise began on 2 April 2012. It proceeded via El Ferrol, Casablanca, Cartagena, Palma, Barcelona and Valencia. During this period there are some limited indications of trouble. Mr Woodcock recalled some minor leakages from gaskets at the floating end of the port cooler, which he did not connect with the later casualty. Mr Box of the Owners recorded after the casualty that there were unexplained variations in the level of the luboil cooler tank at Barcelona; however nothing appears in the logbooks, and this report does not make sense in the context of the Vessel's actual construction so has to be treated with caution.

20. At about 16:00 on 12 April 2012, at the conclusion of the stay in Valencia and while the Vessel was preparing to depart, the port luboil cooler suffered a catastrophic

failure. The port main engine lubricating oil pump was started at around 15:53 and a high temperature alarm sounded a minute later. At 15:58 the LT circulating pump was started. Shortly thereafter the engineers experienced an inability to control the luboil and water temperatures. On checking the bleed air test cock, oil was observed to be coming out, and it was immediately deduced that there was a leak in the cooler. On examination several tubes were observed to be leaking, with oil coming out of the tubes and down the end plate. The crew started plugging tubes observed to be leaking, but more and more leaks manifested. When 49 tubes had been plugged and there were still signs of leakage, the exercise was stopped.

21. The decision was taken that the cooler would have to be retubed; and with significant corrosion also evident on the starboard cooler, that was also retubed. The cost of these works forms one portion of the damages claimed by the Owners. The remainder of the damages claim concerns the cancellation of the inaugural cruise and the Vessel's second scheduled cruise.

The Contract and the scope of the Yard's duties

22. This brings one to the obligations undertaken by the Yard in relation to the coolers, which is the first layer of the dispute. The Owners say that the Yard undertook to "recondition" and "overhaul" the luboil coolers during the refit, that this denotes more than an obligation to clean and the Yard did not do so competently, with the result that the luboil coolers were re-delivered to the Owners in a defective condition. They also say that the only way to have restored the luboil coolers to a satisfactory condition would have been to retube them, and that on the true construction of the contract the Yard were obliged to advise of the need for retubing and to retube the coolers accordingly.

23. The Yard disputes this characterisation of its obligations. It says that on the true construction of the Contract (in particular in the light of Appendix 11, which they contend set out the scope of works to be performed), it was not obliged to do any retubing and not obliged to ascertain or advise or notice whether retubing was required.

The Contract

24. The Contract included the following terms:

Clause 1.1 entitled "Definitions":

""Appendices" means the Appendices attached to this Agreement.…

"Guarantee Period" means as defined in clause 12.1(c)…

"Specification" means the Technical Specification, Outfitting Specification and Additional Specification set out in Appendix 1.…

"Technical Specification" means the technical specification based on the tender document and enclosed at Appendix 1 Part B and on the information and documentation listed in Appendix 15;…

"Works" means repair, refurbishment and the other works and services specified in the Specification and any and all works undertaken pursuant to any modifications, alteration and additions to the Specification agreed in accordance with Clause 8 and any and all preparatory, ancillary and other works which are necessary to be performed in order for the Contractor to perform its obligation under this Agreement or otherwise in connection with the same.…"

Clause 2.1:

"The Contractor shall perform and undertake the Works in accordance with, subject to and upon the terms and conditions of, this Agreement."

Clause 6.1:

"(a)At all times during the Works Period the Owner shall have in attendance at the Yard nominated Superintendents. The Superintendents shall supervise and approve stages of the Works on behalf of the Owner.

(b) The exercise by the Superintendents of the right to supervise and approve the stages of the Works shall not in any respect release the Contractor from any of its obligations under this Agreement."

Clause 6.6:

"(a) If a Superintendent discovers any construction, material or workmanship which does not or will not, conform to the requirements of this Agreement, he shall notify the Contractor in writing as soon as reasonably practicable of that non-conformity using a "notice of non-conformity" as set out at Appendix 10.…"

Clause 9.2:

"…(b) The Ship shall be redelivered by the Contractor to the Owner following completion of the Works on the Completion Date, safely afloat and in a seaworthy condition at a quay or anchorage at the Yard.

(c) Completion of the Works shall be evidenced by the execution by the Owner and the Contractor of the Protocol of Completion.…"

Clause 12.1:

"(b) The Contractor shall use all reasonable endeavours to procure (for the benefit of Owners) … from subcontrators performing the Works, guarantees of 12 months …

(c) Without prejudice to (a) and (b) above the Contractor shall for the period of 6 months after the Completion Date (the "Guarantee Period"), guarantee all the Works against all defects occurring within the Guarantee Period which are due to defective design works (other than design as specified by the Owner) and/or materials and/or poor workmanship or negligent or other improper acts or omissions on the part of the Contractor, its employees, agents or sub-contractors."

Clause 12.2:

"(a)The Contractor's guarantee pursuant to Clause 12.1 shall not apply to any defect resulting from any accident, ordinary wear and tear, misuse, mismanagement, negligent or improper acts or omissions or neglect on the part of the Owner.

(b) The Contractor shall not be liable pursuant to Clause 12 for any consequential losses suffered by the Owner arising out of or in connection with any defeat to which the guarantee in Clause 12.1 applies."

Clause 12.3:

"The Owner shall notify the Contractor in writing as soon as reasonably practicable after becoming aware of any defect to which Clause 12.1 applies. The Contractor shall only be liable under this Clause 12 in respect of any defect discovered during the Guarantee Period unless such defect is notified to the Contractor within 14 days after the expiry of the Guarantee Period."

25. The "Specification" is defined as meaning the "Technical Specification, Outfitting Specification and Additional Specification set out in Appendix 1". Part B of Appendix 1 refers to the technical specification on a CD Rom.

26. Section 04/04/08 of that document, which sets out the various areas where work was to be carried out and the nature of the work sought by the Owners, relates to the luboil coolers and provides:

"Job Description:

Removal and reconditioning of 2 x main engine lub oil coolers

PRIORITY MUST BE GIVEN TO PORT COOLER FIRST…

Specification of Work

When the vessel is in service it is possible to clean the water side of these coolers quite readily. However the extremely restricted access renders it almost impossible to clean or overhaul the oil sides of the coolers within a sensible time frame with the vessel in service.

Therefore:-

Giving priority to the Port Cooler yard to supply labour, tools and materials to remove main engine lub. oil coolers and land to workshop for overhaul of water and oil sides.

Access and space for removal is very restricted and therefore it may be more practical to overhaul in place by withdrawing the tube stack as far as possible in the restricted space.

After completion of overhaul work pressure test to be carried out to the requirements of the attending Class Surveyor."

27. Clause 3.1 of the Contract states that the Contract Price is €14,346,007.00 "as further specified in Appendix 11". Appendix 11 is headed "Contract Price Breakdown" and sets out (inter alia) the price in relation to the Technical Specification of €1,978,707.00. It also states that the breakdown of this is detailed in Part B. Part B is an attached document headed "Refit Work Breakdown" and included the following with respect to the luboil coolers at Section 04/04/008:

"Indicative price €19,260

Assuming cleaning by chemical and pressure test for checking leakages.

Re-tubing if required will be quoted apart."

28. The factual background to the conclusion of these documents may be summarised as follows.

29. In mid-2011, the Owners issued various tender documents, including what would later become the Technical Specification. On 5 August 2011, the Yard submitted a proposal letter, which stated that the "Specific Notes and Comments" in Enclosures B and C were "to be considered". Enclosure B was an earlier version of what later became Appendix 11 or "the Refit Work Breakdown".

30. Meetings took place on 18 and 23 August 2011 and various drafts or letters were exchanged. On 31 August 2011, the Yard signed a non-binding Letter of Intent which stated "Works as per Refit breakdown Enclosure B Rev. 01 dated 19/08/2011". This version of Enclosure B already contained the price and "Remarks" wording in relation to the luboil coolers in the same form as the final version which later became Appendix 11.

31. Contractual negotiations continued (with increased intensity), including in relation to how exclusions suggested by the Yard should be dealt with, and these led up to meetings held on 13 and 14 September 2011. Ruth Sloan, the lawyer who co-ordinated the drafting on behalf of the Owners, circulated contract drafts at the end of both 13 and 14 September, reflecting the outcome of the discussions. The modus operandi for changes to works from what was originally outlined in the Specification was that such changes were reflected in Appendix 11 rather than amendments to the Tender Specification itself.

32. By the end of the meetings, the "Specification" was defined as meaning the "Technical Specification, Outfitting Specification, Additional Specification set out in Appendix [1]".

33. The parties continued to discuss the drafts following the meetings. In the morning of 21 September 2011, Owners emailed the latest draft to Mr Zammit, for the Yard. This draft had been updated so as to refer in Appendix 11 to Rev 03 of Enclosure B. The definition of "Technical Specification" in Clause 1.1 had also been amended to its final form.

34. At around lunchtime that day, Mr Rizzo of the Yard emailed Mr Wright and Ms Sloan, sending a proposal for wording to be included in Appendix 1. The proposal included the provision that the Technical Specification should be defined by reference to the Owners' specification of 24 June 2011 "as amended on 15th September 2011 (see document entitled "SAGA SAPPHIRE – REFIT (ENCLOSURE B) REV 03 DEL 15 SETT2011") under Appendix 11 of this Contract".

35. In response to this, Ms Sloan emailed Mr Rizzo version 15 of the draft contract. She included some of Mr Rizzo's proposed text for Appendix 1 Part B, but she struck out the words "as amended on 15th September 2011 (see document entitled "SAGA SAPPHIRE – REFIT (ENCLOSURE B) REV 03 DEL 15 SETT2011") under Appendix 11 of this Contract".

36. Later that day the Yard's senior lawyer, Mr Boico, emailed Ms Sloan and confirmed that "Further to our call... The Appendices are fine".

37. Mr Wright emailed Mr Rizzo "the final agreement" on 23 September 2011 and said that he would arrange for the Owners to sign on Monday [26 September]. In fact, the contract was ultimately dated 28 September 2011.

38. The final document which is relevant to the scope of the Yard's duties is Change Order 55. This was agreed between the parties in December 2011 in circumstances to which I shall revert below. What matters for present purposes is that it was agreed that such work as the Yard was required to carry out with respect to the luboil coolers would be carried out in situ; the Yard was no longer required to remove the luboil coolers to the Yard. A draft of Change Order No 55 (the signed document accidentally incorporated completely irrelevant text) provided:

"Change to contractural [sic] obligations requires cost reduction of 50%. No exclusion specified for removing the coolers from the machinery spaces to the workshop for cleaning. Hence due to the difficult access and restricted space for removal of the coolers, cleaning in situ should reduce the costs by an estimated 50%."

39. The essence of the dispute as to the Yard's obligations relates to the role of Appendix 11 in the contractual structure.

40. The Owners regard the Specification as having primacy. They say that this (subject to the Change Order 55 change) identifies the scope of work which the Yard contracted to undertake in relation to the luboil coolers and that the principal obligation is to "recondition" or "overhaul" both the oil and the water sides of the luboil coolers with reasonable care and skill. They emphasise that the word "overhaul" is used 4 times in Section 04/04/08 and point to the usual meaning of "overhaul" as connoting examination and repair by reference to a number of dictionary definitions.

41. They say that the focus of the Appendix 11 document is on the price, not on the scope of work, which is defined in the Technical Specification. The assumptions set out in Appendix 11 do not, they submit, affect the scope of the work to which the Yard is committed. So, pressure testing is indeed required, but that is because the Technical

Specification expressly requires it, not because of any stated pricing assumption. Similarly, chemical cleaning of the water side may or may not be required, depending on the conditions found when the cooler is disassembled.

42. As for retubing, the Owners say that the third sentence indicates that the Yard has recognised that retubing is something which might be required as part of overhauling of the coolers, but that it has not allowed for it in the price, and if it is required it will be quoted for separately. So if, when it performs the overhaul, the Yard ascertains that retubing is required, it will provide a quote to the Owners. But that does not mean that retubing has been removed from the scope of work and the Yard would not be entitled, on ascertaining that retubing was necessary, to say to the Owners that it did not wish to carry out the work.

43. Thus the Owners say that section 04/04/08 and the relevant part of Appendix 11 fit together in a way which is consistent with the primacy of Section 04/04/08 in defining the scope of work. In practical terms they allege that the Yard was under an obligation to do five things:

    i) To mechanically and chemically clean the tubes;

    ii) To pressure test the oil and water circuits to "the requirements of the attending Class surveyor".

    iii) To inspect the Luboil coolers;

    iv) To advise the Owners as to whether the Luboil coolers needed to be re-tubed and provide a quote if so advising;

    v) To recondition the Luboil coolers.

44. The Yard says that although (following the pre-contractual exchanges) the definition of Works in the Contract does not expressly incorporate Appendix 11, where the description of a particular element of the Works in the Technical Specification is unclear, reference should be had to other contractual documents - in particular, here, Appendix 11 - to determine what the parties in fact agreed.

45. They suggest that Section 04/04/08 of the Technical Specification did not provide sufficient certainty as to the work required with respect to the Luboil coolers. In particular, the meaning of "reconditioning" and "overhaul" were insufficiently clear as to the work actually required by the Owners. In support of their case that Appendix 11 at least became the primary document, they point to various items of work which were in the Specification, but which were noted as "cancelled" in Appendix 11 and which were not performed without complaint from the Owners.

46. They contend that the Yard's relevant obligations with respect to the Luboil coolers, following Change Order No 55, were limited to the following in situ works:

    i) Mechanically and chemically cleaning the tubes;

    ii) Pressure testing the oil and water circuits to "the requirements of the attending Class surveyor";

iii) Renewing the seals.

47. In essence the dispute between the parties so far as obligations are concerned was therefore as to the Yard's obligation to inspect and to advise.

48. This translated in litigation terms into a somewhat arid dispute about the primacy of the Specification over Appendix 11 and to a rectification claim advanced by the Yard as a back up to their primary construction argument.

49. It seems to me that in the modern world of contractual interpretation such formalism is misplaced. Perhaps because of the plethora of helpful citations available the parties urged very little judicial guidance upon me as regards the exercise of contractual construction. Apart from the usual review of the principles set out in *ICS v WBBS* [1998] 1 W.L.R. 896, I have had particular mind to the following:

i) *"the resolution of an issue of interpretation in a case like the present is an iterative process, involving 'checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.'."* per Lord Neuberger in *Re Sigma Finance* [2009] UKSC 2; [2010] 1 All E.R. 571

ii) *"The language used by the parties will often have more than one potential meaning. … the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."* Per Lord Clarke in *Rainy Sky v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900

iii) *"contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner … Despite differences in detail, however, one would expect the two provisions to complement each other and that only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it."* per Moore Bick LJ in *RWE npower Renewables Ltd v JN Bentley Ltd* [2014] EWCA Civ 150; [2014] C.I.L.L. 3488.

50. The exercise which the court has to conduct is to ascertain the objective meaning of the Contract against the relevant background. In terms of structure the Specification is plainly the primary document, but it must - unless there is clear and irreconcilable inconsistency - be read together with Appendix 11, which incorporates the parties' later agreement as to price (and to some extent scope of works) in particular areas, to achieve this objective.

51. Regard must also be had to the fact that the parties plainly envisaged something of the nature of an overhaul, but subject to constraints of access and also subject to the constraint that retubing was contemplated as a possible "added extra".

52. In my judgment, bearing all this in mind, what the parties objectively intended the Yard were obliged to do as a consequence of the Contract and following the agreement of Change Order 55 was in this context: (i) do an in situ overhaul, short of retubing and (ii) do what was necessary to enable the Owners to make an informed decision as to whether retubing was necessary.

53. It is common ground that the first limb of the Yard's obligation required them to open up the coolers and clean as was necessary and then pressure test. This, it seems to me, necessarily imports an obligation to inspect at least for the purpose of ascertaining the requisite level of cleaning. This proposition was not seriously disputed by Mr Robb for the Yard in closing.

54. As for the second limb, I partly accept the Owners' submission; I agree that it cannot be the case that the Yard could be entitled, having examined the coolers for the purposes of doing their own work, simply to redeliver coolers to the Owners which were defective because they obviously needed retubing. They could not, for example, fail to mention that 400 out of 423 tubes were plugged, if that was what they found. Nor, if they found a single pinhole which inspection by Owners might not discern, could they neglect to mention it.

55. As to the question of retubing this is, it became apparent in the course of expert evidence, a question of judgment and one into which commercial factors might well enter. Normally failure would be gradual and would be presaged by individual tube failures. Retubing would then be a judgment call depending on the number of tubes already plugged. Thus, bearing in mind also: (i) the absence of specific advisory wording in either the Specification or Appendix 11 (ii) the provisions of Appendix 11 that retubing be performed "if required", and (iii) the focus of Change Order 55 on cleaning in situ, I conclude that the Yard would not be under any duty to positively advise as to whether retubing was necessary or to make a recommendation one way or the other.

56. However given: (i) the need to determine the issue of retubing, (ii) their obligations as contractors performing what was characterised as an overhaul and (iii) the fact that as such their (or their sub-contractors') opportunity to observe details was better than that of the Owners, at least in the sense of longer close up exposure to the coolers as cleaning was done, it seems to me the Yard were under a duty to report to Owners anything material to the question of retubing – and so to advise in that sense. This also logically correlates to the Yard's own case as to "as required"; Owners could only advise of what was required regarding retubing if they had material on which to base a meaningful decision. The obligation therefore is one to advise in the sense of reporting, and not one to advise in the sense of recommending a course of action. They were also under an obligation to make the opened cooler available to the Owners for the purpose of Owners' inspection.

57. This conclusion probably makes the question of rectification otiose. However since my conclusion does not entirely cohere with the case advanced by the Yard, I will deal with the rectification argument for completeness.

Rectification

58. The Yard's case is that "If … the Yard's obligations in relation to the luboil coolers were not specified and/or limited by" the relevant words in Appendix 11 they are entitled to have Part B of Appendix 1 to the Contract rectified to include the words "subject to the Contract Price Breakdown at Appendix 11". This claim is advanced in the alternative on the basis of common mistake or unilateral mistake.

59. I do not consider that this rectification case advances matters beyond the conclusion I have reached above. It is common ground, and I have found, that the Specification and Appendix 11 must be read together. I consider that this is, as a matter of law, to be done in the round, and not subject to the hierarchy of documents which both the parties appeared to urge (albeit each advocated a different hierarchy). Further there is nothing in Appendix 11 which provides the particular qualifications upon which the Yard seeks to rely, so elevating Appendix 11 above the Specification would not, in and of itself, assist.

60. Neither party suggests that these provisions were specifically discussed during the contractual negotiations. Neither of the Yard's witnesses in relation to rectification (Mr Rizzo and Mr Zammit) gave any evidence of having had a particular subjective understanding of what Section 04/04/08 or the relevant words in Appendix 11 meant, either when read separately or when read together. Their evidence dealt with their belief as to the status of Appendix 11 in general. This does not assist in relation to the specific issues of construction which arise.

61. Further, had it been necessary to do so, I would have had grave difficulty in elevating the status of Appendix 11 above that of the Technical Specification as the wording of the proposed rectification sought to do, given the exchanges on 21 September 2011 wherein the proposed amendment by the Yard to this effect was expressly rejected. This series of exchanges seems to me to make the argument that there was any mistake of either variety next to impossible. There was no common continuing intention which was not reflected in the agreement. Nor did the Yard, to the knowledge of Owners, wrongly believe that the agreement contained "their" version of the wording. I would therefore reject the rectification argument.

Breach

The Owners' case

62. Given the complexities in the evidence it is sensible to start by summarising the Owners' case on breach of contract. They say that the coolers were, at the time of the works, heavily corroded from years of neglect by the previous owner and manifestly in need of retubing. They contend that there were six deficiencies in the work performed:

    i) Failing to ascertain that the tubes in the coolers required retubing in order for the coolers to be restored to fit or serviceable condition. Consequently failing to advise the Owners of this, and failing to provide a quote for the work.

    ii) Failing adequately to clean the water side of the tubes in the luboil coolers.

iii) Failing adequately to clean the oil side of the luboil coolers.

iv) Failing to replace the seals in the coolers.

v) Damaging the seal at the floating end of the port cooler when replacing the end cover.

vi) Failing adequately to pressure test the luboil coolers and (possibly) failing to pressure test the port cooler at all.

63. By the date of closing submissions it was clear that in essence the breaches complained of related to the first and second heads; such other breaches as there may have been were not contended to be causative of any of the losses suffered. Nonetheless Owners continued to urge consideration of other breaches as potentially relevant to the question of breach of the key obligations.

64. The Yard's case has shifted somewhat in the run up to trial. Until two months before trial the Yard agreed with the Owners that there was "substantial" longstanding corrosion in the tubes of the port cooler at the time of the refit. However they contended that it was not possible for the Yard to conduct any meaningful inspection of the tubes without withdrawing the tube stack and that they were under no duty to inspect the tubes or to identify or notice the corrosion in the tubes or to notice that the port cooler needed to be retubed. Accordingly it was their case that they did not inspect the tubes because no meaningful inspection was possible. This approach was supported by the first witness statement of Mr Tripi.

65. The experts did not dovetail with this case. The initial expert evidence was that it was possible to ascertain corrosion by means of the inspection which was capable of being performed in situ, without removing the tube stack. Further the experts agreed that "Any engineer or Contractor examining the water side of the coolers at Palermo with the end covers removed would see the same degree of corrosion as was observed at Valencia." (As will be discussed below, extensive corrosion was definitely observed at Valencia.)

66. On 12 May 2016, the Yard served a Re-Amended Defence which set forth a somewhat different case, whereby it was the Yard's case that it did inspect the tubes and that when doing so it observed some corrosion and some plugged tubes, which it drew to the attention of Mr Blinston and Mr Faulkner. As to cleaning, it suggested that it had removed "all or all material" visible corrosion from the tubes of the coolers but could not and did not identify corrosion unless within 30mm of the tube ends.

67. More recently and with increasing fervour throughout the trial, the Yard has also placed emphasis on what began as a rejected hypothesis by their own expert, Mr Sinclair, namely that it was possible that the coolers were not in the same condition at Palermo as they were observed to be at Valencia, that they had in fact been in good condition at Palermo and that something highly unusual and damaging had happened to them in the intervening month or so.

68. The key questions in the light of these cases, and my findings on the ambit of the Yard's duty, are: the condition of the coolers at Palermo, whether the Yard breached

its duty as to cleaning the coolers, and whether it breached its duty to advise, in the sense of to report to the Owners, as to the condition of the coolers.

The facts

69. Ascertaining the facts surrounding the condition of and work on the luboil coolers at Palermo is far from straightforward. There are the usual conflicts of evidence and recollection – to be expected some four years after the event. The luboil coolers were a minor and comparatively simple and unexciting part of very extensive overall works – so detailed that the specification was on a CD-Rom. The original Contract Price was originally just over €14,000,000, of which €1,978,000 related to the "refit" works. Of that less than 1% related to the luboil coolers. Over €3,500,000 of extra works were added during the course of the refit. Nothing dramatic happened in the course of works on the luboil coolers. An expectation that witnesses would remember details perfectly in these circumstances is obviously unrealistic.

70. But the case presents two special features. The first is that, perhaps because of the changes in the legal case as the evidence has emerged, the evidence of the witnesses shows more than usual signs of having been innocently corrupted by the exercise of searching their recollection in the light of directed questioning. The second is that in some respects the evidence of the witnesses as given at trial is flatly at odds with the expert evidence based on the inspection of the vessel at Valencia.

71. I will therefore rehearse the factual evidence and the relevant parts of the expert evidence before attempting to evaluate it.

72. Like most shipbuilding and ship repair contracts, the Contract provided for the Owners to appoint Superintendents who would be present at the Yard. The Superintendents who had most to do with the luboil coolers were John Faulkner and Paul Woodcock, who were Staff Chief Engineers. Mr Faulkner was on the verge of retirement – this was his last project. Both reported to Mr Len Blinston, the Project Superintendent and the Vessel's future Chief Engineer who had spent time aboard the Vessel in the run up to the refit. All three gave evidence at trial. The Owner's Representative/Project Manager, who made the decisions as to what work should be done, was Bob Maddison who did not give evidence.

73. The work on the luboil coolers was not performed by the Yard, but by subcontractors called RINAV. There was no evidence (documentary or witness) from RINAV. On the Yard's side the employee most closely concerned with the work on the luboil coolers was their technical superintendant Mr Corrao, who also did not give evidence. Evidence for the Yard was given by Mr Corrao's supervisor Mr Tripi, the Yard's Mechanical Superintendent with overall responsibility for the refit works and Mr Tripi's colleague Mr Giordano, who was in charge of the technical side of the refit.

74. My impression was that all of the witnesses were trying to assist the Court within the constraints I have outlined above, though Mr Tripi did not entirely seem to have grasped that the evidence required from him was his own recollection and not his reconstruction of what he considered he or even Mr Corrao must have done. His personal knowledge of details was limited, since his role was primarily that of co-ordinator and trouble shooter, yet frequently he asserted something as a fact where further questioning ascertained that he had no personal or even hearsay knowledge.

75. The story begins around the time of the conclusion of Change Order 55. Each party contended that the impetus for Change Order 55 came from the other side. The Owners (supported by Mr Blinston) said that the Yard essentially refused to remove the coolers because of access problems. Removing the tube stack would have required moving other nearby machinery, pipework and equipment and involved difficulties of manoeuvring the tube stack out to a place of inspection. Similar difficulties had been noted in an earlier inspection of the starboard cooler in 2008. The Yard (supported by Mr Tripi and Mr Giordano) said that the Owners refused to pay the uplift which would have been necessary to deal with the very tricky access issue.

76. I do not consider that the answer to this question makes any difference to any issue in this case. To the extent that it has any significance, it seems to me that there is truth in both sides' case. It seems that the initial impetus came from the Yard, making clear that access was an issue and that on their reading of the Contract they were not obliged to do this without extra payment; their very strong preference to inspect in situ was made manifest. However I do not consider that there was a flat refusal to remove the coolers. Rather, following an indication of likely costs, and a lively exchange of views in which it became clear that there was no chance of persuading the Yard that they were obliged to perform the works without extra payment, the Owners (via Mr Maddison) decided that the inspection could proceed in situ. As to the usefulness of an in situ inspection, the decision reached by the Owners is a view with which the experts agreed. They were both of the view that an in situ inspection was slightly, but not materially, inferior to an inspection ashore. All three of Mr Faulkner, Mr Woodcock and Mr Blinston however appeared to consider that the decision to clean in situ was a bad one in which their clearly expressed views had been ignored.

77. There was an issue as to whether at the time of reaching this agreement anyone had actually looked at the interior of the cooler to gain a preliminary feel for how much work was likely to be needed. This issue, which emerged only in May 2016, was addressed in Mr Tripi's third statement. Prior to that it had been the account of all witnesses that substantive work on the coolers started in late January or early February, and that it was at that point (i.e. after agreement of the Change Order) that the end covers were removed and it therefore became possible to view the water side of the coolers.

78. Mr Tripi in his third statement and in his evidence to the court stated that he participated in a joint inspection with Mr Blinston, during which they discussed retubing and the lead times for new tubes shortly before the Change Order was signed. Mr Blinston did not support this evidence, being clear that he did not participate in such an inspection. He however agreed that it would have made sense for such an inspection to be conducted and gave a sort of endorsement to a suggestion that either Mr Faulkner or Mr Woodcock had done this. Mr Faulkner and Mr Woodcock denied involvement in any such inspection. They however both thought they remembered an "inspection" attended by Mr Tripi and Mr Blinston, but with the covers on. This would not have been very revelatory as to the condition of the coolers, but would have been a good vantage point for discussing the access issues relevant to Change Order 55.

79. On this issue I prefer the evidence of Mr Woodcock and Mr Faulkner. I consider it is likely that the decision to inspect in situ was made following a discussion between Mr Tripi and Mr Blinston - but without the removal of the end covers.

80. When it came to the works on the coolers, Mr Faulkner was more involved than Mr Woodcock. Unlike Mr Woodcock, he had a broadly favourable view of RINAV, having worked with them on other jobs on this contract. There were suggestions that these points were not unconnected; Mr Woodcock was apparently not at all happy with RINAV and their standard of work and so Mr Faulkner, who had a better relationship with them, "took point" on this aspect of the refit.

81. There were issues as to when the work was performed, but these resolved themselves in the course of evidence. Work commenced around 18 January 2012, beginning with the starboard and then the port cooler.

82. The overall duration of work on the starboard cooler was somewhat prolonged and the Owners' witnesses recalled dissatisfaction with the pace of the work. In their recollection the delay was much greater than the documents demonstrated that it was – an area of evidence which showed clearly that the witnesses' recollections of the events of the refit were imperfect. However at some point Mr Faulkner was invited to inspect the water side of the starboard cooler with a view to approving the work as complete, and he rejected it saying that further cleaning was required. Further cleaning was then done on that cooler.

83. On 13 February 2012, Mr Blinston sent an email to Mr Shaw which said that "Air coolers and lub oil coolers have had to be rectified again by the yard after ship staff finding poor workmanship". A sign off document referred to as the "Call for inspection" or "handover document" was issued on 18 February 2012 and signed off by Mr Faulkner on 20 February 2012. This was probably immediately after the pressure test, which marked the end of the luboil cooler works, had been completed.

84. The key witness evidence regarding the condition of the coolers therefore came from Mr Faulkner. He could only recall having inspected the starboard cooler, and indeed in his statements denied ever having inspected the port cooler. However in evidence he accepted that, without recalling it, it was likely that he had inspected the port cooler also.

85. As regards the starboard cooler of which he did have a recollection, his evidence was to the following effect.

86. He had no clear recollection of watching the active "swabbing" of the cooler with a metal brush. To the best of his recollection during his initial inspection of the water side of the starboard luboil cooler he saw limescale, and considered further cleaning was required. However he said in response to Mr Robb's questions that he saw no substantial corrosion and no corrosion that worried him at all.

87. Following the further cleaning he carried out a second inspection of the water side of the starboard luboil cooler, this time with both end covers removed and someone shining a torch through the tubes from the far end.

88. This enabled him to see whether any of the tubes was blocked, and to see about 30mm down each tube. He did not see anything which concerned him. The tubes were not in a perfect condition of cleanliness, but he could see enough to inspect and to tell that none were blocked. The essence of his evidence was that he was satisfied that the cooler had been cleaned to a relatively satisfactory state, was in reasonable condition and would be fit for a further 2 years in service. Mr Faulkner's recollection was that he had seen a small number of plugs in the tubes of the starboard luboil cooler which alerted him to the possibility of unseen corrosion, that he told Mr Blinston about the plugs, but he considered that the pressure test would definitively decide whether the starboard luboil cooler was leaking.

89. Mr Faulkner's evidence when confronted with the photos from Valencia was that the condition of the starboard luboil cooler in Palermo was very different from that shown in photographs of the cooler at Valencia and that if he had seen the starboard luboil cooler in the condition shown in the photographs he would have informed Mr Blinston, so that a decision could be taken as to whether to continue cleaning or instruct further remedial works.

90. My impression as to Mr Faulkner's evidence is that by the time he gave evidence he had very little independent recollection of events in Palermo, some four years previously, and shortly before he retired. He could not himself recall whether he or Mr Woodcock had been primarily responsible for checking the work on the coolers, for example. He oriented himself largely by reference to his statements, which themselves dated from over three and a half years after the refit. Where he accepted that he had seen something or done something, it was largely in response to Mr Robb's careful cross examination which presented the act or observation as the logical correlate of a fact already established or of what an experienced engineer would do. Naturally too Mr Faulkner and the other witnesses who were involved in the refit would be unwilling to conclude that their own actions were open to criticism.

91. The evidence of Mr Woodcock was to broadly similar effect. He very much distanced himself from the inspection of the coolers and the flavour of his evidence as regards the work he saw done was more negative. However he said that he inspected the starboard cooler before cleaning was complete and saw no corrosion product or significant rust but did see surface oxidation. He wanted a better cleaning performed so that a better assessment could be made of the condition of the coolers. He agreed that the Valencia photographs did not reflect what he saw in Palermo. He said that he had also seen the port cooler in Southampton and that too did not look like the Valencia photos; it exhibited what he thought of as typical corrosion for a cooler of its age. Again his reference to typical corrosion was not really consistent with his evidence as to seeing no corrosion.

92. Overall the impression was that these two witnesses had been unhappy about the decision not to remove the tube stacks, were not really happy with the performance of RINAV but concluded that the coolers were "good enough" for some continued service.

93. This, I note, was also broadly consistent with Mr Tripi's evidence. His evidence was not entirely satisfactory, as his position did change somewhat through his statements and oral evidence and he did at times (for example at the end of this third statement) suggest that all visible corrosion had been removed and that the Valencia photos

showed new corrosion not present at Palermo. However a consistent theme of his evidence both in writing and orally was that the Owners were content with the clean, and that was good enough for him.

94. I therefore conclude that the witnesses' evidence that there was no substantial corrosion, which is not entirely consistent with the evidence that the coolers were in a "reasonable" state and good enough for another two years' service (or the expert evidence, or indeed what might be expected of these coolers after some years' service) cannot be taken at face value.

95. One facet of the factual evidence which requires to be dealt with separately is the question of whether there were any plugged tubes. Mr Tripi stated that he recalled seeing some plugged tubes, but did not say in which cooler. He also suggested that he had discussed these with Mr Faulkner and a decision had been made not to do anything about this. However his oral evidence suggested that his actual involvement in inspecting the coolers had been minimal.

96. Mr Faulkner's evidence was that there were a small number of plugged tubes in the starboard cooler and that he had had no discussion with Mr Tripi but did report to Mr Blinston. Mr Blinston denied that Mr Faulkner mentioned plugged tubes to him. Mr Blinston and Mr Woodcock gave evidence that there were no plugged tubes in the port cooler. This is consistent with the post-casualty photographs, which show only shiny new plugs in the port cooler, presumably part of the work done by Mr Blinston as the cooler failed. Neither Mr Blinston nor Mr Woodcock recollected there being any plugged tubes in the starboard cooler either and Mr Chell, who did not observe any when he attended at Valencia, gave evidence that he thought he would have noticed them if they had been there.

97. The other factual evidence concerning the condition of the coolers is that relating to the cleaning process, and in particular the descaler used. It was common ground that the coolers could have been cleaned back to "clean bright metal" with sufficient descaler, sufficient time and sufficient elbow grease. The historical records of the coolers show that difficulties had been encountered in the past with cleaning.

98. On this subject the evidence was incomplete. Mr Woodcock was clear that he was requested by RINAV to supply some descaler and that he supplied them with half a drum of a suitable product called Descalex, that being all that that the Vessel had. That amount, the experts agreed, was a sufficient quantity to make up only a weak solution of 2.5% which was possibly not even enough for one cooler and was certainly not sufficient for adequate cleaning of two coolers. They agreed that well established corrosion might require use of a stronger cleaning solution.

99. The Yard did not suggest that they supplied any additional descaler. On the contrary, Mr Tripi's evidence was that RINAV used Descalex supplied by Mr Woodcock on both coolers. He said that he would have expected to know if the Yard had supplied further descaler because he would buy non standard products (such as Descalex) only if requested. Mr Tripi also suggested that sometimes a sub-contractor will supply its own product and then seek reimbursement from the Yard. However he did not suggest that this happened – and the subcontractor's invoice, which refers to an original quote price only, would tend to negative any such suggestion. So too does Mr Giordano's report after the incident which refers to the cleaning done as having

been performed with "owners supply" chemical solution. However the report of Mr Box, for the Owners, produced in the immediate wake of the failure indicates that the second round of cleaning was performed with an unidentified stronger acid, possibly for as much as 2 days. The possibilities therefore are (i) that the cleaning was carried out with insufficient cleaning product and (ii) that further (unspecified) cleaning product was supplied (for example by Mr Woodcock, contrary to his recollection or by the subcontractors themselves).

100. The final evidence as to the condition of the coolers at Palermo and the standard of cleaning achieved there is the evidence from Valencia. In the forefront of this evidence was the factual evidence of Mr Chell, the Claimant's expert, who attended at Valencia in the immediate aftermath of the cooler failure and took photos which were in evidence. His evidence, supported by Mr Sinclair, was that the end plates of the coolers were heavily corroded and were consistent with long term neglect, including a failure to add inhibitor to the water used in the coolers. Mr Chell said that he would expect any competent engineer viewing coolers in this condition would regard them as in in need of retubing. Mr Sinclair did not go quite so far, saying that the Owners should have seriously considered whether both coolers needed to be retubed. Both agreed that the condition seen at Valencia was not prima facie consistent with the factual evidence of adequate cleaning disclosing no significant corrosion. This tied in with one aspect of the evidence of the factual witnesses, who agreed that the photos of the coolers at Valencia did not accord with their recollection of the state of the coolers in Palermo.

101. I note however two points which must be taken into account in assessing the evidence of the experts (and also that of the factual witnesses) as to the condition of the coolers in Valencia. In the first place it must be borne in mind that their evidence may be to some extent subconsciously biased by the fact that they were looking at a cooler which they knew had failed in a spectacular fashion which demonstrated a need for retubing – i.e. with the wisdom of hindsight. Secondly as regards Mr Sinclair, the factual witnesses and as regards Mr Chell's evidence at trial (given the lapse of time) all were largely dependent on Mr Chell's photos. These were not taken with a view to forensic analysis but as a simple record of observation, and were not of the highest quality or very numerous or detailed. Moreover questioning during the trial demonstrated the difficulties in drawing firm conclusions from the photos, as Mr Chell struggled to identify on the photographs features which he stated in his report existed, such as visible thinning of the ends of the tubes. Finally the coolers post casualty, removed from the Vessel, in perfect lighting and with a fresh bloom of surface rust on them would inevitably present rather differently from the coolers in situ.

102. Two facts were clear in relation to the coolers at Valencia. The first was that at least one tube demonstrated pinholing towards the plate end of the tube. Mr Chell suggested that he found more than one example from a relatively small sample of the short ends cut from the tubes as part of the process of dismantling the port cooler. The extent of holing in the central portions was unknown, but the experts both suggested that the centres of the tubes would be at least as badly affected as the ends. The second fact was that the inner portions of at least one tube, which had been sectioned, revealed extensive corrosion and scaling apparently extending to a considerable depth.

103. The experts differed on the exact extent of corrosion which existed at Palermo. Mr Chell considered that a number of the tubes were probably holed in Palermo, by reference to their condition at Valencia. Mr Sinclair, though accepting that there was substantial corrosion and some pitting, and that it was possible that some holes had formed, did not consider that it was possible to conclude that holes probably existed at this stage.

104. Mr Sinclair also suggested (at least in his later reports – his first report tended to discount this as a possibility) that the mismatch in the evidence could be accounted for by the use of highly aggressive water in the period between Palermo and Valencia. In particular he drew attention to the possibility that a temporary shortfall in the levels of anodic inhibitor as the system came back up to proper levels and the presence of chloride ions through seawater contamination could have produced a drastic change in the condition of the coolers. There was however no positive case to this effect, nor was it supported by detailed evidence, for example explaining the likely rate of progress of corrosion at particular levels of inhibitor or seawater contamination. Mr Sinclair's initial evidence (supported by Mr Blinston) was that even without inhibitor the kind of corrosion seen would have taken "months or years" to develop.

105. Two other sources of factual evidence as to the condition of the coolers at Valencia exist. The first is the report of the Owners' surveyor Mr Box, who produced a report following an inspection a few days after the failure of the cooler. That report, produced on 17 May 2012, noted the coolers' troubled history and suggested that the coolers had been treated first with Descalex and then a more powerful acid. It goes on to note:

"It is considered that the lack of water treatment chemicals over a prolonged period of time may also have contributed to failure of the Cooler. It is still unclear why so many tubes would all suddenly fail at the same time as failures of this type usually build up over a number of smaller occurrences. … One of the pipe fragments was holed – this would appear to be local pitting which had eaten through the pipe wall. It is expected that the inner layers of the cooler stack will exhibit greater failures…

Evidence would support the assumption that the FW cooling system had not been treated with any chemical inhibitor for a considerable amount of time prior to the final delivery of the vessel to SAGA … Chemical cleaning of the Cooler, with to date unknown chemicals or dilution of the same, further weakened the wall structure of the pipes to minimum thickness in places … When the unit was run at operational pressure a partial failure occurred at Barcelona … and this failure became catastrophic when trying to depart the next port, Valencia. It is without doubt that failures by the Project Team in [Palermo] have contributed to the final catastrophic failure of the Cooler…".

(He identifies in this connection absence of QA records, apparent absence from inspections, sign off of the cleaning process, reduction of scope of work and inability to identify the chemicals used.)

106. The second additional source is the report of Mr Giordano, who produced a similar report for the Yard. Mr Giordano, after describing the works done by the Yard reported:

> *"on-board: outside the tube, excessive dirty, caused by not cleaning the entire oil circuit and not in our scope of work at Palermo. In the workshop: An excessive amount of corrosion inside the tubes of tube bundle, as if water had circulated the circuit without additive treatment. For these reasons we believe that damage to the oil cooler which forced Saga to stop the ship, is not entirely attributable to activities carried out by the Yard".* [In a later version of this email the final phrase is amended to read: "*…is entirely not attributable to activities carried out by the Yard."*

107. My conclusions on the factual issues are as follows. The coolers, on their arrival in Palermo were suffering from a considerable degree of corrosion and limescale caused by long term neglect of the water maintenance regime by their previous owner. I am not satisfied that there were any plugs present in either cooler at Palermo. The coolers therefore looked far from new or in perfect condition but they did not raise the "red flag" for incipient failure which would have been provided by plugs in one or both of the coolers.

108. I do not consider that, given (i) the absence of clear evidence as to condition at Palermo (ii) the absence of evidence as to the normal rate of progress of well established pitting towards pinholing (iii) the lapse of a month between Palermo and Valencia and (iv) the range of possible co-operating causes, the evidence establishes that on the balance of probabilities that holes existed at Palermo.

109. The initial cleaning of the coolers was performed by RINAV using the inadequate amount of Descalex supplied to them. With considerable corrosion and limescale present the result was unsurprisingly not satisfactory. When the result of that cleaning was rejected, they performed a further cleaning exercise either with the remains of the initial solution or (perhaps more likely given the fact that the second cleaning was reported to have improved matters) with a stronger product, but neither the Yard nor the Owners ascertained what the product was or in what concentration it was used.

110. The result of this exercise was to produce coolers in some measure cleaner than when they arrived in Palermo, but upon which corrosion was still observable – as might be expected from coolers with some years already in service. To the extent it was the evidence of the witnesses that there was no corrosion observable or observed I reject that evidence. I conclude that some fairly considerable degree of corrosion was observed by them but based on their limited observation, following the cleaning and without any plugs present at all, Mr Faulkner and Mr Woodcock regarded the condition as good enough for a couple of years running before full replacement was needed.

Failure to advise

111. The Owners' case was that the tubes in both luboil coolers were substantially corroded at the time of the refit and required retubing in order for the luboil coolers to be restored to good or serviceable condition. They contended that the Yard failed to

ascertain this when overhauling the coolers and failed to advise the Owners that the luboil coolers either required retubing or that retubing should be seriously considered.

112. If that reflected the duty owed by the Yard there would have been a failure to comply with that duty. However as I have found, the duty on the Yard to advise did not reach so high. In my view the obligation on the Yard was to report any relevant findings and to provide the Owners with an opportunity to make an assessment of the coolers.

113. Aside from a slightly half hearted suggestion by Mr Tripi that he reported the existence of plugs to the Owners, there is no evidence of the Yard (or RINAV, who were really the people best placed to make a report) reporting anything at all regarding the condition of the coolers. The Yard therefore did breach their obligation to advise the Owners as to the condition of the coolers, though the obligation to enable Owners to inspect was complied with.

Failure adequately to clean the water side of the coolers

114. The Owners' case on this issue is based on contentions that cleaning of the water side of the coolers would have removed any existing corrosion product so as to restore the tubes to "clean bright metal" and hence enable any holes to be detected on a pressure test, whether that pressure test was conducted at 6 bar or 9 bar.

115. The Yard contends that it removed all visible corrosion by the end of the works at Palermo, and that the significant corrosion shown in the photographs from Valencia was not present at the end of the works.

116. In the alternative the Yard contends that the obligation to clean was not an absolute obligation, but was an obligation to use reasonable skill and care to clean the coolers, that it was not practicable to clean these coolers to clean bright metal and that their obligation was discharged by the cleaning performed, even though it fell short of cleaning to clean bright metal. Mr Sinclair's evidence was that while clean bright metal might be the aspiration, that it would be the expectation absent considerable corrosion and that it could be achieved with sufficient work, the combination of repeated descaling and brushing required was a long process and not really practicable where there was thick long term corrosion. Mr Chell tended to conflate the question of descaling via descaler and removing corrosion product via manual cleaning, but indicated that he considered cleaning of serious corrosion was pointless.

117. I accept the Yard's alternative submissions in part. This contract was essentially a contract for services, and there were not contended to be specific terms within it imposing on the contractor a higher duty than would be imported at common law or as a matter of statute. In coolers of a more recent vintage the discharge of reasonable levels of competence and skill and care might well result in clean bright metal. I do not consider it realistic that in coolers of four to five years' service history, and that history characterised by neglect leading to considerable corrosion, it could reasonably be expected that the cleaning would produce such a result.

118. However, although discharge of their obligations might not have required so much from the Yard, I do not consider that they complied with this obligation. Whatever the truth about the cleaning product used, the cleaning performed was not a competent clean. The initial clean was performed with inadequate product, the later clean was

either performed with that same product or a product which apparently was not approved by the Yard or the Owners. The expert evidence was clear that the presence of more corrosion product does not inhibit the removal of such product; it simply means that there is more product to be removed. A reasonably careful and skilful clean might not produce clean bright metal, but it would have dealt with much of the evidence of long term corrosion. Yet at Valencia considerable deep seated corrosion strongly suggestive of long term neglect still remained.

119. This conclusion is consistent with the findings of the experts at paragraph 11 of the Experts' Joint Memorandum: "Cleaning of the water side of the coolers at Palermo was not effective. After cleaning corrosion product was still present within the tubes as revealed by photographs and tube sectioning at Valencia."

Failure to conduct any or any adequate pressure tests

120. I will deal with this issue for completeness, though by the close of the hearing it was accepted by the Owners that they could not say that any breach of this obligation would have been causative of loss.

121. On this subject the evidence clarified over the course of the trial. It was common ground that strictly speaking both sides of the coolers should have been tested and that the oil side of the cooler should have been pressure tested to 9 bar (1.5 x the working pressure). There was then an issue as to the pressure which was used for the actual test, with Owners contending that the Yard only tested the starboard cooler at the working pressure of 6 bar.

122. In fact it would appear that what was done was to test the water side of the coolers (and the evidence was that both were tested) to 1.5 times the working pressure. With working pressure for the water side being 3.5-4 bar, the coolers were pressure tested 1.5 times the working pressure, namely to 6 bar. This was in line with what Mr Faulkner and Mr Woodcock would have expected. There was no testing of the oil side of the coolers.

123. The tests performed were not compliant with the contractual requirements. However it is common ground that any breach of testing requirements was not causative. Mr Chell was unable to say that the difference between 6 and 9 bar was material to revealing issues with the coolers.

Other breaches

124. The other breaches alleged by the Owners were alleged failures to clean the oil side of the coolers and failures to replace the seals in the coolers. The former was formally pursued but was not the subject of much evidence or detailed submissions. Mr Faulkner and Mr Tripi gave evidence that some cleaning was carried out using a degreaser. However the Valencia witnesses suggested that the oil side of the cooler was covered in sludge, which the Owners said was indicative of poor cleaning. Although the Yard suggested that this was attributable to dirt in the rest of the oil circuit, it seems likely that Owners' submission was correct.

125. The position on the seals was unclear. Owners' witnesses gave evidence to the effect that seals had not been replaced, and nor had the sacrificial anodes (which might play

a minor part in inhibiting corrosion). Mr Tripi was adamant that the seals had been replaced. However again it was not clear to what extent he was giving evidence of what he himself recalled, or what he thought Mr Corrao must have seen or done. Overall I consider it likely that Owners were also correct on this point.

126. Neither point is material however, since I do not consider that the answers to these questions inform the answers to the more significant questions above.

Causation and loss

127. A number of causation issues follow in the train of the issues on duty and breach. They fall into two categories: causation issues relating to the physical damage to the coolers and causation issues relating to the cancellation of the Vessel's two initial cruises.

Causation part 1: physical damage

128. It was the Owners' case that the leakage of the port cooler at Valencia was due to pin-holing in a number of the tubes. Mr Chell considered that to be the cause of the failure. Mr Sinclair considered that the cause was either this, or a seal failure.

129. If the cause was pinholing there was a disagreement between the experts as to whether (as Mr Chell contended) there would have been some pinholing at Palermo, such that if the tubes were cleaned to clean bright metal the holes would have been manifest on the pressure test or whether (as Mr Sinclair argued) the tubes were probably just short of pinholing at Palermo, such that pressure testing would not have revealed the problem, however well the tubes were cleaned.

130. In response to the witness evidence suggesting that the coolers were substantially free from corrosion in Palermo, Mr Sinclair offered an alternative theory accounting for pinholing, namely that something extraordinarily bad had happened to the water in the intervening period and this related to the quality of the water used by the Claimants. He suggested that it was possible that accelerated pinholing could have been caused by lack of anodic inhibitor or by seawater contamination of the water. This theory effectively ran contrary to his earlier scepticism that the level of corrosion observed could have been accounted for by lack of inhibitor in the time between Palermo and Valencia. This was a particularly speculative theory given that the means of seawater contamination all appeared from the evidence to be either inherently very unlikely or, if present, bound to manifest elsewhere also, or both. Furthermore, this theory really offered no reason for the simultaneous or near simultaneous failure of so many tubes.

131. There was also disagreement as to the mechanism of failure. The experts were in complete agreement that the sudden failure of so many tubes at once due to corrosion was highly unusual. In normal circumstances one or two tubes would fail, and then more would fail over a period of time – as occurred in the run up to the 2007 port cooler retubing.

132. Mr Chell advocated a theory of "thermal shock". In his view the incident was caused by the fact that the oil in the sump tank had been heated to an unusually high temperature, and would have rapidly heated the coolers when the system was started at 15:53. The coolers would then have experienced a sudden inflow of cold water at

15:58 when the cooling water pump was started, it having slightly unusually been stopped for a period while in port. This shock led to the dislodging of hard scale in pits which had already perforated the steel, through which no oil could previously pass because the hard scale was blocking the aperture. The sudden dislodging of the scale due to the thermal shock was the reason why so many leaks occurred simultaneously. Mr Chell and the Owners placed considerable weight in support of this theory on the factual co-incidence of the failure and the occurrence of this sudden temperature change.

133. Mr Sinclair accepted that sudden contraction of the tubes might in principle loosen corrosion product blocking pinholes which, although formed, were not yet open and leaking but doubted both that the temperature change was sufficient to account for any very considerable result, or that such a temperature change would result in the opening of so many holes at once. He warned of the danger of conflating coincidence with causation. Mr Sinclair's initial response to Mr Chell's theory was to suggest that the mechanical cleaning had disrupted and removed some of the corrosion product inside the tubes which would have had a semi protective effect, thereby speeding corrosion in a number of already seriously corroded places and facilitating an atypical failure pattern.

134. In the end Mr Sinclair seemed to prefer the theory that the temperature change caused the manifestation of a seal defect which resulted in oil cascading down the face of the tube plate. In other words, in his view no tubes were holed, it just looked like they were. However when tested in cross examination this theory seemed to lack any substantial basis in fact or to account for the observations of those present at the failure, namely that oil was leaking out of pipes at the top of the cooler after water had been drained out of the system and oil was being circulated.

135. For reasons which will become apparent I do not consider that the precise cause of the casualty is significant. However to the extent that it is, my conclusions are as follows.

136. The primary cause of the failure was long standing corrosion probably caused by inadequate water treatment by the previous owners. This was essentially agreed by the experts (subject to Mr Sinclair’s alternative theories) and was also the conclusion of all those who examined the coolers after the failure.

137. As I have found above, and as the experts also agreed, the corrosion thereby caused was significant and was not fully or adequately cleaned away at Palermo.

138. The extent of that corrosion could not be fully ascertained by visual inspection. However any competent engineer inspecting the coolers would have seen that while no tubes had yet failed there was considerable corrosion present. It is uncertain whether any actual holes had formed at the time; however failure in a number of tubes must have been close.

139. The actual failure in so many tubes at once was directly initiated by the sudden change of temperatures at Valencia, although it is possible that, as Mr Box suspected, there had been some earlier failures at Barcelona which had not been picked up.

140. It is likely that the failure was also contributed to, at least to some extent, by one or more of a number of other factors. These include the cleaning process (either as to

the disruption of semi protective layers of corrosion, the effect of the pressure test itself, or possibly the use of unsuitable stronger cleaning product after the Descalex ran out), the possible acquisition of chloride ions in the Vessel's system during the refit process when opening of the system in a marine environment allowed ingress to pipes and other surfaces, the effect of the gradual process of adding anodic inhibitor or even some possible but unlikely contamination with seawater. In essence the port cooler was close to failure at Palermo, but was not helped by what happened thereafter. Failure would have occurred in any event, but may well have occurred slightly earlier and in a more dramatic form because of the contributing factors.

141. The key question in this context is whether the Yard's breaches of contract were causative of the casualty and hence of the loss suffered. On this question I conclude that the Yard's breach was not causative.

142. Causation as regards the cleaning obligation depends on the Owners establishing two things: first that there were holes established at Palermo and second that proper cleaning would have reached clean bright metal so as to allow those holes to manifest in a pressure test. I have already concluded that the Yard was not obliged to clean to clean bright metal to discharge their duty. That being the case, the Yard could have cleaned short of this level, and even if holes existed it could not be said that they would have manifested on a pressure test. Owners' case therefore fails on causation at this point. In addition however I am not satisfied, for the reasons I have given above, that there was at the time of the Palermo stop any actual holing in the tubes. It follows that neither of the conditions to establish causation is satisfied.

143. So far as failure to advise is concerned I do not regard the breach by the Yard as causative because there was no evidence that the Yard knew or saw or should have known or seen anything more than was apparent to the Owners on their own inspection.

144. The nature of the inspection agreed to was that only the end plates and the first 30mm of the tubes would be visible to anyone. There is no evidence that any holes were present at Palermo, still less that they would have been visible in the first 30mm of the tubes. There is nothing specific alleged to have been the case in the state of the end plates that the Yard/RINAV (and most likely in practice Mr Tripi or Mr Corrao) should have seen and advised Owners (most probably via Mr Faulkner or Mr Woodcock, as the men on the spot). While Mr Chell claimed to discern thinning of tube ends where they emerged from the end plates no other Valencia witness mentioned it. The question of ascertaining thinning in the extremely small protrusion also seemed to be somewhat impressionistic. I am not persuaded that it can be concluded that thinning existed.

145. On the evidence therefore, the Yard could have done no more than advise the Owners that there was significant corrosion on the end plates; this the Owners could and did see (in the persons of Mr Faulkner, and to a lesser extent Mr Woodcock). On the basis of what they saw they concluded, as Mr Faulkner said, that the coolers should be good for another two years' use. While it was their job to report to Mr Blinston and Mr Blinston's evidence was that if alerted to significant corrosion he would have authorised retubing, the events which occurred indicate that although corrosion existed such reporting did not happen; the superintendents were content to make the

decision to approve the coolers. It is unlikely that the addition of advice from the Yard replicating their observation would have produced a different result.

146. To the extent that the question of causation were to arise in relation to the wider duty to advise contended for by the Owners, I likewise conclude that the breach, which I have found above, would not be causative. The position is similar to that set out above. While the Owners' evidence is that they would have authorised retubing if it had been reported to be necessary, in the light of the less than clear position as to the necessity for retubing and the conclusions reached by Mr Faulkner and Mr Woodcock, I conclude that it is implausible that a report up the chain of command would have been made or, if made, that it would have been to such effect that retubing would have been ordered.

147. It follows from this conclusion that the remainder of the issues on the damage claim do not arise. However for completeness, and lest they at a later stage do become relevant, I set out my conclusions on these issues below.

Causation part 2(a): Cancellation of the First Cruise

148. It is common ground that the port cooler had to be retubed at Valencia. Ultimately the Yard also did not contest the need to retube the starboard cooler. For that retubing, the Owners urgently sought quotations and accepted one from ID Marine Services on 13 April 2012 which quoted approximately 10 days as the repair time.

149. The Yard also originally contested the need to cancel the inaugural cruise, suggesting that it would have been possible to attempt to continue the cruise on one engine. However this was rightly not pursued, given that both Class and the Harbour Master detained the Vessel until completion of the port luboil cooler repairs. Ultimately it accepted that the loss and damage caused by the cancellation of the first cruise was attributable to the failure of the port cooler.

Causation part 2(b): Curtailment and Cancellation of the Second Cruise

150. What was however in issue was whether the loss and damage caused by the cancellation of the second cruise was attributable to the cooler failure.

151. The Owners' case was that, given the projected duration of the repairs, and that the next cruise was due to commence on 18 April 2012 at Southampton it was immediately clear that that cruise could not be performed as planned either. They initially decided to curtail and re-arrange the second cruise so that it started on 25 April 2012 at Marseilles. However the re-arranged itinerary required the Vessel to depart Valencia by the end of 23 April 2012.

152. In the morning of 20 April 2012, the Owners were informed that the repairs were about 24 hours behind the original 10-day estimate. The current forecast was for completion late on 24 April 2012, and various systems would need to be restored thereafter.

153. The Owners say that this overrun meant that the Vessel could no longer meet the itinerary required for the second cruise, and the Owners therefore decided to cancel the second cruise.

154. The Yard accepts that costs of the curtailment of the second cruise do flow from the failure, but submits that the second cruise was not cancelled because of the luboil cooler repairs. They argue that the real cause of the cancellation was the fact that on 17 April 2012, Flag carried out an examination of the Vessel and officially detained the Vessel based on concerns unrelated to the luboil coolers, imposing a condition requiring the repairs to the Vessel to be completed and verified prior to departure from Valencia. Those works were not completed until 27 April 2012, when the Vessel was released.

155. The question here is what, as at 20 April 2012, caused the cancellation of the second cruise. Despite Mr Robb's best efforts he was not able to point to anything which showed that as at 20 April 2012 the Owners were concerned about their ability to deal with Flag concerns in the relevant window or that the Flag issue operated as a cause, still less the dominant cause, of the cancellation. All the material tending in that direction postdates the decision to cancel. I therefore conclude that the cancellation of the second cruise was, as the Owners allege, caused by the failure of the port cooler.

156. Further regardless of the decisions to cancel, the port cooler operated at a more fundamental level as the cause of the cancellation; the Vessel would never have been detained by Flag had it not been for the luboil cooler failure.

Alleged estoppel and/or compromise

157. Two possible compromises of the Owners' claim were relied upon by the Yard. The first related to the "snagging list" and the second to the Protocol of Delivery.

The snagging list

158. This issue related to a comment regarding the luboil coolers which appeared on a snagging list created by the Owners' Superintendents near the end of the project. The list appears to have been created on 11 March 2012, and the relevant comment stated "Luboil Coolers were not cleaned properly after several attempts by shipyard".

159. This comment was then deleted from the snagging list during a meeting at which (at least) Mr Magnani, Mr Davassi, Mr Shaw and Mr Duguid were present. The amended snagging list (with the luboil coolers deleted) became the list of "minor defects" referred to in paragraph 2 of the Protocol and attached to it as Annex 1.

160. The Yard contends that this document encapsulates the settlement of any claims which might arise in relation to the coolers. They say that at the final commercial meeting for the agreement of the Protocol, the parties discussed the issue of the cleaning of the coolers as an alleged deficiency on its snagging list. While the validity of that claim was not accepted by the Yard, in order to reach an agreement with respect to the Protocol, it agreed a credit of €80,000 so that the allegation with respect to the cleaning of the coolers and some other matters could be compromised.

161. The Owners say that there was an €80,000 credit given to the Owners, but this had nothing to do with the snagging list; it related to a dispute concerning Change Orders and was in any event agreed before the deletions were made to the snagging list. They suggested that the €80,000 figure represented 50% of a figure composed of $128,520 for some identified disputed Change Orders and a balance relating to other

(unspecified) credits. They contend that the luboil coolers (and other items) were removed from the list of outstanding work in the light of the Yard's assurances that the work had been properly completed.

162. As with other issues, it seems to me that on consideration of the evidence as it emerged over the course of the hearing, the truth lies somewhere between the parties' respective positions. The credit related to more than the Change Orders, and encapsulated as well as the US$128,520 figure, a charge of $500 per man day for items noted as "Additional Cost" items on the snagging list; but it did not relate to the luboil coolers. In essence the Owners were correct; there was no compromise in relation to any claims arising out of the Yard's work on the coolers.

Alleged effect of the Protocol

163. The next issue is the effect, if any, of the execution of the Protocol on the Owners' entitlements with respect to the luboil coolers. The Yard contends that the Owners' claim for breach of the Contract is precluded by the execution of the Protocol so that they can only proceed under the Guarantee Clause, Clause 12. That, they say, reflects the usual way in which shipbuilding and/or ship repair contracts operate, namely following execution of the Protocol, the owners' only remedy is by way of the guarantee provision. They then proceed to argue that the claims are barred under Clause 12, a point which is considered below.

164. The Protocol as executed included the following terms:

"By this Protocol of Completion and Acceptance dated 16 March 2012 pursuant to clause 9.2(c) of the Dry Docking, Repair & Refurbishment Agreement (the "Agreement") dated 28 September 2011 made between [the Owners] as owner (the "Owner") and [the Yard] as contractor (the "Contractor") for the repair of the passenger vessel "Saga Sapphire" (the "Ship"). The Contractor has today completed the Works and the Owner has accepted that the requirements of the Agreement have been complied with pursuant to the provisions of Clause 9 of the Agreement in all respects except as outlined herein.….Each party confirms that, with the exception of the above described matters ... it has no other requests or claims against the other party whatsoever"

165. The Yard alleges that in signing the Protocol the Owners confirmed that the works had been fully carried out in compliance with the terms of the Contract and confirmed that it had no further claims relating to those works. The Yard also points to the complexity of clause 12 and contends that the parties would not have put in place such an elaborate scheme to deal with defects which occur after the execution of the Protocol if they had intended that the Owners would retain the right to claim damages for breach of contract.

166. By way of fallback the Yard contends that the execution of the Protocol precludes any claims in relation to incomplete work, such as incomplete cleaning (unless expressly excluded). In the premises, any claim based on insufficient cleaning could not be pursued thereafter as this was not an excluded item.

167. The Owners deny that this is the correct approach, noting that the Contract does not (as is not uncommon in shipbuilding contracts) contain any exclusion of the Owners' right to claim damages at common law after delivery in relation to the condition of the vessel on delivery

168. They also argue that the dichotomy between contractual damages and a claim under the guarantee on which the Yard's argument is based is a false one, in that is well-established that an exclusion cannot be implied from the presence of a guarantee clause: see *Hancock v BW Brazier (Anerley) Ltd* [1966] 1 WLR 1317; *Pearce & High Ltd v Baxter* [1999] BLR 101.

169. Finally they contend by reference to a close reading of the full text of the Protocol that the true effect of the Protocol is simply that the Owners accept and acknowledge that Completion has occurred. It does not mean that the Owners give up any right to damages in the event that the Yard's work should prove to be defective. Similarly they say the final paragraph stating, "it has no other requests or claims against the other party whatsoever" simply relates to requests or claims in relation to completion and delivery. It was not intended, and could not reasonably have been understood by the Yard as meaning, that the Owners were agreeing to give up all their common law rights to damages for claims not yet discoverable if it later transpired that the Yard had not properly performed its obligations. There could have been no conceivable reason for Owners voluntarily to give up such valuable rights.

170. I accept the Owners' submissions. In general terms, when construing a contract which is said to exclude a remedy for breach which would otherwise exist:

> *"one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption"* per Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689.

To similar effect is *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2010] QB 27, where Moore-Bick LJ (with whom the other members of the Court agreed) held that:

> *"It is important to remember that any clause in a contract must be construed in the context in which one finds it, both the immediate context of the other terms and the wider context of the transaction as a whole. The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be."*

171. Further the specific argument relating to the effect of a Protocol of Delivery is one which is frequently encountered in the context of shipbuilding contracts and it is well established in that context that clear words are required to displace the right to contractual damages: see for example *Riva Bella S.A. v. Tamsen Yachts GmbH* [2011]

EWHC 1434 (Comm). See also in the similar context of a Protocol of Delivery for an aircraft lease *ACG Acquisition v. Olympic Airways* [2012] EWHC 1070 (Comm).

172. The kind of clear words required to get the Yard's argument off the ground do not exist here. Properly construed the Protocol does no more than record completion.

Quantum

173. The claim is made up of two parts: (a) repair costs; and (b) cancellation costs.

174. On repair costs the claim amounts to £206,465.87. The Yard disputes this amount saying:

i) A deduction of €18,000 per luboil cooler must be made to reflect what it would have cost the Owners to have the luboil coolers re-tubed in Palermo. The Claimants accept that this is right.

ii) The remaining costs of £143,571.27 are various costs from 12 to 27 April 2012. This argument proceeds to some extent on a false premise that these are all time costs and that they are purely linear. In fact not all of the costs involved were time costs. The towage, mooring and vessel tax items for example are not time costs. The majority of water supply and garbage removal items would have been incurred while the Vessel was still carrying passengers.

iii) To the extent that they are time costs, the Yard submits that any costs incurred from 17 April 2012 were not caused by the repairs to the Port or Starboard luboil cooler because the Vessel was then detained for reasons unrelated to the luboil coolers. For essentially the same reasons as I have given above I do not accept this submission. They also argue that the repairs to the luboil coolers were completed on 24 April 2012, and no costs incurred after 24 April 2012 can be attributed to either the Port or the Starboard luboil cooler. In fact the luboil cooler repairs were formally completed on 26 April 2012 because Class required a harbour trial of the main engine.

175. Were it necessary I would find that the large majority of the remaining US$143,571.27 costs were incurred prior to 26 April or cannot sensibly be allocated. Only the following sums fall to be deducted from this amount:

i) €922.16 and €334.82 in respect of water supply

ii) One sixteenth of the agency fees, namely €275

iii) €3,007.15 for vessel taxes.

176. As to cancellation costs, they amount to £2,963,571 and can be summarised as follows:

i) The total costs incurred in relation to the repatriation were £155,866.

ii) Part of the inaugural cruise had already been cancelled and refunded before it started. The failure to depart Valencia occurred when there were 6 days left. By way of compensation for the cancellation and the disruption of having to

return to England by other means, the passengers were given a full refund of that part of the cruise not already refunded (i.e. they were refunded 16/23 of the original cost of the cruise). The total cost of this to Saga was £1,421,359.

iii) The passengers on the first cruise were also given future cruise credits. The value of the credits redeemed was £161,291.

iv) Had the second cruise gone ahead at all, it would have been with a reduced duration (reduced by 8 days) and with the passengers receiving a 50% refund. However, it was ultimately cancelled entirely, and so the passengers received full refunds. The cost to Saga was £1,866,792.

v) The passengers on the second cruise were also given future cruise credits. The value redeemed was £15,105.

vi) Owners/Acromas give credit for the net operational savings from not operating the two cruises. The net savings amount to £641,737.

177. The Yard says that as regards the first cruise, the compensation substantially reflects the fact that the cruise up till that date had been plagued by many problems for which the Yard was not responsible, such as a significant smell issue caused by a sewage leak in an inaccessible area. Secondly as regards future cruise credits there is no evidence that passengers using these cruise credits meant that Acromas was unable to sell full price fares. For this reason, there is no recoverable loss as claimed. I do not accept the first point. It seems to me that the repatriation and refund costs were essentially caused by the cooler failure.

178. However the point as regards future cruise credits is sound. The calculation of loss deriving from these credits is not a simple process. In order to calculate loss where there is no evidence of Acromas being unable to sell a full price fare because a cruise credit passenger had taken the place, Acromas would have to show:

i) the marginal cost of having the cruise credit passenger above the sum in fact paid by that passenger; and

ii) the credit for the profit made from any passenger spending money on a cruise paid for by a cruise credit.

179. Similar points arise as regards the cancellation of the second cruise. For the same reason I would if necessary hold that the Owners were entitled to the refund costs, but not to the future cruise credits.

Contributory negligence

180. In the event that the Yard were liable to the Owners, they contended that any damages should be reduced by reason of the Owners' contributory negligence. The negligence referred to is principally that of Mr Faulkner and Mr Woodcock, in that they were in as good a position to ascertain the need for retubing as the Yard; but it also takes in the actions of Mr Blinston and Mr Maddison, in particular in relation to the decision to inspect in situ.

181. In response the Owners contend that the Act does not apply.

182. The backdrop to this argument is the well-known judgment of *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 Lloyd's Rep. 179 where at first instance Hobhouse J. (as he then was) identified three categories of case involving a breach of contract: (i) where liability does not depend on negligence but arises from breach of a strict contractual duty; (ii) where liability arises from breach of a contractual obligation which is expressed in terms of exercising reasonable care, but does not correspond to a common law duty of care which would exist independently of the contract; and (iii) where the defendant's negligent breach of contract would have given rise to liability in the tort of negligence independently of the existence of the contract. Only in a category (iii) case, he held, could damages be reduced for the claimant's contributory negligence. This view was later endorsed by the Court of Appeal.

183. The Owners reserve the right to argue in a superior court that *Vesta v Butcher* was wrongly decided, but for present purposes they contend that the Act does not apply. They do not admit whether the Yard owed Owners any independent duty of care in tort and contend that any tortious duty which it did owe was not concurrent with the contractual duty which was breached.

184. They say that although the Yard remained fully responsible under the Contract for the acts of its subcontractors as if it had performed the work itself, the same is not the case in tort. The Yard owed the Owners a duty of care in tort to take reasonable care in the selection of a subcontractor, but they did not have a tortious duty in respect of the carrying out of the work itself.

185. In this they say the case resembles *Raflatac v Eade* [1999] 1 Lloyd's Rep. 506 where Colman J held that (i) where an employer contracts with a main contractor that a sub-contractor will carry out certain work with reasonable care and skill, the main contractor will not normally (subject to certain well recognised exceptions) owe to the employer a co-extensive and concurrent duty of care in tort to carry out such work with reasonable skill and care and (ii) the Court must ask itself whether and if so in what circumstances the party who provided the work or services would owe a duty of care in tort if there were no contract in existence (pp. 508-9).

186. The Yard contends that this is over simplistic and that the nature of the concurrent duty is dependent upon the relevant act by the Yard. They accept that to the extent that work was carried out by a sub-contractor, the Yard's duty was simply to use reasonable skill and care in selecting the sub-contractor. They relied in evidence on the Yard's view that RINAV were merely manpower and responsibility remained with them. However as the authorities show, the subjective view of the contractor is not the question.

187. The Yard also submitted that to the extent that the Yard itself did work, such as inspecting the luboil coolers to see if the cleaning had been effective or notifying the Owners of the presence of plugs, the Yard was required to do so with reasonable skill and care and the appointment of the subcontractor is irrelevant.

188. In oral closing Mr Holroyd for the Owners accepted that there was some force in this distinction. Having considered the authorities I concur with the Yard's submissions on this. In the context of the findings already made this means that there could be no

claim in contributory negligence for a breach of the cleaning obligation, but there could be a claim for breach of the duty to advise.

189. In any event insofar as the duty to advise is concerned, given the nature of the exercise involved here – the decision to retube - it would be artificial to divorce the Owners' personnel from that decision. I do not accept that the Owners can escape from their Superintendents' decisions by relying on the clause in the Contract (6.1(b)) which states that the activities of the Superintendents "shall not in any respect release the Contractor from any of its obligations under this Agreement".

190. This clause relates not to secondary obligations or to causation, but to primary performance; it is there so that the Yard cannot rely on the Superintendents' approval to do something different from what they are contractually obliged to do. It is not there to give the Owners an escape from the application of the Law Reform (Contributory Negligence) Act.

191. I would therefore if necessary have found that losses flowing from a breach of the duty to advise would fall to be reduced in the light of the actions of Mr Faulkner and Mr Woodcock and applied a discount of 50%. I note that this approach is consistent with the conclusions to which both parties came in their contemporary reports on the incident; both of them considered that there was some fault on Owners' side.

The claim under the guarantee

192. The Owners make an alternative claim under the guarantee clause, clause 12, in case any of their losses claimed may be not be recoverable under a normal claim for breach of contract (though it seems principally in case the Protocol argument succeeds).

193. In respect of repair costs Owners rely upon the specific obligation under Clause 12.5(b) and otherwise they in particular rely on Clause 12.1(c), which provides that

> *"…the Contractor shall for the period of 6 months after the Completion Date ("the Guarantee Period"), guarantee all the Works against all defects occurring within the Guarantee Period which are due to … poor workmanship or negligent or other improper acts or omissions on the part of the Contractor, its employees, agents or sub-contractors".*

194. The Owners say that the defects in the coolers fall within this provision.

195. The Yard for their part relies on a succession of exclusions within the clause. First they look to the exclusion at Clause 12.2(a), saying that the defects resulted from "ordinary wear and tear".

196. I agree with the Owners that this argument is misplaced. "Wear and Tear" usually denotes matters occurring after the guaranteed works, not as here a long-term failure on the part of the previous owners to treat the cooling water properly. Even if it might just fall within the wording of wear and tear, to the extent that the loss was caused by a failure to clean or to advise the loss would not be covered by the exclusion.

197. The Yard then rely on the exclusion under Clause 12.2(a) for negligent or improper acts or omissions or neglect on the part of the Owners, praying in aid on the same matters upon which it relies for the purposes of its contributory negligence case. The Owners suggest that it would subvert the contractual scheme to construe this clause so as to allow the actions of Superintendents during the project to qualify as the requisite negligence on the part of the Owners. However it is hard to understand at what else this sort of provision is aiming. Further the result in relation to this clause of course does not undermine the position as regards damages; it only affects a claim made under the Guarantee which ex hypothesi is only pursued if there is no claim for damages. I would add that for similar reasons to those given above in relation to contributory negligence I do not consider that Clause 6.1(b) provides an answer for the Owners in this context either.

198. The Yard then submits that the sums claimed by the Owners fall within the exclusion in clause 12.2(b) of "consequential losses". Despite the reservation made by Lord Hoffmann in *Caledonia North Sea Ltd v Norton (No.2) Ltd* [2002] UKHL 4, [2002] 1 All E.R. (Comm) 321 at [100] I consider this, on the current state of the law, to be a false point. It is well established that an exclusion of "consequential" loss does not exclude losses occurring naturally in the usual course of things, but only losses falling within the second limb of the rule in *Hadley v Baxendale* (1854) 8 Ex 341 (see for example *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyds Rep 55 and similar cases).

199. In the present case, all of the losses suffered by the Owners were direct losses and not consequential losses in that sense.

200. The Yard finally submits that the Owners failed to comply with the notice provisions in clause 12.3 which (i) requires the Owners to notify the Yard in writing as soon as reasonably practicable after becoming aware of any defect to which the guarantee applies and (ii) requires that the notice under the Protocol to be addressed to Mr Magnani and to provide all information, detail and data relevant to the guarantee defect.

201. The facts in relation to notification are as follows:

    i) Owners first gave notice of a defect in the luboil coolers on 10 April 2012, before the casualty. An email sent that day by Peter Wright to Emilio Magnani set out a list of 34 "outstanding works/technical defects" that had been identified to date. In respect of the luboil coolers, it stated "Despite complaints and reports to FC these were not cleaned sufficiently and remained in dirty condition".

    ii) The Yard rejected the list in its entirety, in an email sent by Piero Boico on 12 April 2012.

    iii) On 13 April 2012, Owners notified the Yard of the failure of the port luboil cooler, in an email from Peter Wright to Piero Boico responding to his blanket rejection of all claims (including in respect of the luboil coolers), rather than to Emilio Magnani. Mr Wright informed the Yard (by Mr Boico) that "The vessel has suffered a failure on the Port M/E Lube Oil Cooler today and will

be alongside in Valencia for the next week if you wish to put somebody aboard".

iv) This was communicated by Mr Boico to the requisite people at the Yard, who despatched Mr Giordano and Mr Tripi to Valencia.

v) Subsequently on 24 April a Guarantee Failure List was sent by Mr Blinston to Mr Giordano, copied to Mr Magnani. This repeated the complaint about inadequate cleaning and noted the failure of the port cooler against the complaint.

202. The Owners say that these communications were plainly sufficient to constitute (i) notification of the defects pursuant to Clause 12.3 and (ii) notification of the time and place of repairs pursuant to Clause 12.5(b). In the alternative they contend that if they would otherwise be invalid, the notices are protected from invalidity by Clause 18.5 of the Contract which provides (in summary) that a notice under the Contract shall not be invalid if its contents or method of service were incorrect, if that failure does not cause any significant loss or prejudice.

203. While the Yard technically resisted this point, they did not do so with any great fervour. It seems to me that adequate notice was given to the Yard, and to Mr Magnani, by means of the 24 April notice, particularly against the backdrop of earlier communications. Even if that were not so, this is exactly the sort of situation for which Clause 18.5 seems to be designed, and there is no case of significant loss or prejudice advanced by the Yard. Accordingly the Owners' guarantee claim, if otherwise sound, would not fail for lack of proper notice.

Repairs and replacement by a third party

204. There was a pleaded issue as to whether, if the Guarantee claim was otherwise good, the Owners were entitled to proceed with the repairs via a third party pursuant to Clause 12.5(a). For reasons given above, this does not arise. However to the extent that it does, it did not seem to be seriously in issue. As the Owners pointed out, Clause 12.5(a)(ii) states that the Owners may cause a third party to carry out the repairs if "the Contractor cannot arrange the provision of the materials, facilities, and personnel to make the necessary repairs without impairing or delaying the operation of the Ship". Plainly, repairs to the luboil coolers needed to start immediately, and what is more the parties effectively agreed to this course of action. The Yard sent engineers to Valencia to observe the repairs, and made no objection to the repairs being done by a third party.

Recovery of substantial damages

205. A still further issue arises in relation to the recovery of damages by Acromas. The Yard contends that this falls foul of the general rule that a claimant cannot recover more than the amount required to compensate him for his loss, and so cannot, in general, recover damages for breach of a contract made for the benefit of a third party, in respect of loss suffered, not by the claimant, but by the third party.

206. Acromas contends that as the assignee of the Owners' rights, it is entitled to recover substantial damages in respect of them.

207. The Yard accepts that this is the case as far as concerns the repair costs. It does not however accept that this is the case as regards cancellation costs.

208. In respect of cancellation costs Acromas advances its case on two fronts. Firstly they say that before the assignment, the Owners were entitled to recover substantial damages in respect of Acromas' loss on the basis of a line of authority passing through *Dunlop v Lambert* (1839) 6 Cl & F 600, *The Albazero* [1977] AC 774 , *Linden Gardens Trust v Lenesta Sludge Disposals* [1994] 1 AC 85 and subsequent cases. By reason of the assignment, Acromas can therefore recover those losses.

209. Secondly they submit that but for the Bareboat Charter, the losses suffered by Acromas would have been suffered by the Owners and under the principle set out in *Offer-Hoar v Larkstore* [2006] 1 WLR 2926 can be recovered by Acromas as assignee.

210. I shall consider first this second argument, on which Acromas lean much more heavily. The argument focusses squarely on the principle explored in *Offer-Hoar*. In that case, a landowner commissioned an expert to produce a soil report in respect of a planned development on a sloping site. He then sold the site to Larkstore with the benefit of planning permission. Larkstore carried out development, relying on the soil report. Landslip occurred which resulted in Larkstore being sued by the neighbouring uphill property owners whose properties were damaged. The original property owner assigned his right in respect of the soil report to Larkstore who then sued as assignee. The expert argued that Larkstore could not recover substantial damages because the original property owner had suffered no loss, having parted with the property at full value before any loss and before the assignment. The argument failed; Larkstore was held entitled to substantial damages.

211. The key passage in the judgment is to be found at paragraphs 42 and 43, where the Court of Appeal (Mummery LJ) held:

> *"42. The principle invoked … that the assignee cannot recover more than the assignor does not assist it on the facts of this case. The purpose of the principle is to protect the contract-breaker/debtor from being prejudiced by the assignment in having, for example, to pay damages to the assignee which he would not have had to pay to the assignor, had the assignment never taken place. The principle is not intended to enable the contract-breaker/debtor to rely on the fact of the assignment in order to escape all legal liability for breach of contract.*
>
> *43. In this case the assignment of 23 February 2004 did not, in itself, prejudice [the expert] by exposing it to a claim for damages by Larkstore, which [the original property owner] could not have brought against [the expert]. The assignment of the cause of action .. to Larkstore was a delayed consequence of the earlier sale of the site. It completed the transaction. If [the original property owner] had not sold the site to Larkstore, it would not have assigned the cause of action … to Larkstore and it could have recovered substantial damages … for the landslip. The increased exposure of [the expert] for damages for breach of contract was a consequence of the landslip after the cause of action arose. It was not a consequence of the assignment of the cause of action, which was made to enable Larkstore to step fully into the shoes of [the original property owner] following on the earlier sale of the site."*

212. The other key passage is probably that of Rix LJ at [84-5] :

"in order to prevent the loss caused by a defendant's breach disappearing into the proverbial black hole, the courts are nowadays willing to go far to create a working, and developing, analysis which will accommodate a claim for substantial damages. Those cases also demonstrate, in my judgment, that if substantial damages may be claimed by the assignor in such circumstances, then there can be no objection to a claim brought by an assignee of a valid assignment, in whom both cause of action and loss unite in the same party. Underlying all these cases can be heard the drumbeat of a constant theme, which could possibly be described as ubi ius ibi remedium , the maxim that where there is a right there is a remedy; but it could also be said that the courts are anxious to see, if possible, that where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered the loss."

213. I also note the similar approach of Mann J in *Pegasus Management Holdings SCA v Ernst & Young* [2012] EWHC 738 (Ch) [2012] P.N.L.R. 24 where he said:

"the courts have sought to apply the law as to causation of loss in a manner which reflects justice and reality, in particular where the application of pure logic would, unfairly, lead to the "disappearance" of a loss which would, absent an assignment, have been plainly recoverable. Where a wrong has been committed in relation to property, and loss is capable of arising as a result, the fact of an assignment … does not mean that it thenceforth has to be acknowledged that the assignor no longer can be said to have suffered loss. Whatever the metaphysician may say, the law says that the loss flowing can and should still be treated as a loss of the assignor which the assignee can recover. Black holes are to be (as all black holes should be) avoided where possible."

214. The essence of the Yard's argument is that the cancellation losses are those of Acromas and that they would not have been suffered by the Owners if there had been no Bareboat Charter, as the Owners were not a cruise ship operator. But for the Bareboat Charter, the Owners may have suffered some other losses, but these would not have been the same losses as claimed by Acromas. Those losses were dependent upon the particular contracts entered into by Acromas and its customers and were peculiar to Acromas. Unlike *Offer Hoar* the losses are not only capable of taking on one guise (repair/reinstatement costs). The losses claimed are use costs which might change depending on who the user is.

215. Acromas submits that this runs contrary to the principle in the judgment of Staughton LJ in *Linden Gardens* at pp. 80-81 (which was endorsed in *Offer-Hoar* by Mummery LJ (at paras 51 to 54) and per Rix LJ (at paras. 73-77)), that the assignee can recover no more damages than the assignor could have recovered if there had been no assignment and the property in question had not been transferred to the assignee – but can recover those damages, even if they are slow in materialising.

216. The losses which Acromas is seeking to recover are those which follow from the original breach. The breach was one which could be expected to cause loss in the operation of a cruise ship business. This was the only conceivable purpose for which the Vessel, a cruise ship, would be used. Further it was confirmed by Mr Rizzo, one of the Yard's witnesses in relation to contractual construction/rectification, that the Yard was aware that the Vessel would be used for cruise business. Acromas say that they are seeking to recover no more than the loss which Owners would have suffered had they been operating the cruise business instead of Acromas. This falls squarely within the principle of *Offer-Hoar*.

217. It seems to me that there is very real force in these arguments, and also that the Yard's approach amounts to the kind of unrealistic logical prestidigitation against which the recent authorities have turned. The reality of the situation, as was well known to both parties, was that the Vessel was a cruise ship and that the purpose of her refit was to enable her to operate as a cruise ship for Saga. Cruise related losses of Saga are therefore exactly what would have been expected to flow from deficiencies in the Yard's work. In the circumstances, were it necessary to do so, I would conclude that Acromas can recover its losses under the principle in *Offer-Hoar*.

218. Turning to the alternative route relied on by Acromas the key passages are as follows. In *The Albazero,* Lord Diplock, having considered *Dunlop v Lambert* held thus*:*

> *"in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."*

219. In *Linden Gardens* Lord Browne Wilkinson (at pp 114-5) applied and clarified the *Albazero* holding that there:

i) The case fell within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss because the contract, which was for a large development of property, was known to both parties to be going to be occupied, and possibly purchased, by third parties. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party;

ii) There would be no automatic vesting of any right of suit in the occupier or owners of the property who sustained the loss because of the specific prohibition on assignment;

iii) It was therefore right to treat the parties as having entered into the contract on the footing that the contracting party would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but

> who, under the terms of the contract, could not acquire any right to a remedy for breach. It was therefore a case, as contemplated by *The Albazero* in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."

220. Owners say that before the assignment they were entitled to recover for Acromas' loss and thus Acromas has the same rights post the assignment. They submit that the *Linden Gardens* principle is not confined to cases (such as *Linden Gardens* itself) where there is an actual prohibition of assignment and no transfer of property. They rely in this regard on *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68, a case where the defendants had entered into contracts with a finance company to construct a recreational centre on the claimant council's land. Wiltshier resisted the Council's claims for damages for defective performance, advanced as assignee of the finance company, since the finance company had suffered no loss.

221. Dillon LJ at pp. 74-75 rejected in particular the argument that the *Linden Gardens* result depended on the prohibition against assignments as one which would "lead to absurdity", and found a right to recovery where it was obvious to the defendant throughout that the works were being done for the benefit of the council, a third party to the contract. The extent of the decision is open to debate, with both Dillon LJ and Steyn LJ discussing but not adopting Lord Griffiths' "broader principle" from *Linden Gardens.* Chitty (paragraph 18-058) concludes that the effect of *Darlington* is to extend *Linden Gardens* so that at least in the context of defective performance of building contracts a transfer of the property affected by the breach to the third party is no longer required.

222. Acromas say that *Darlington* is analogous to the present case and rely on the evidence of Mr Rizzo that the Yard was aware that the purpose of the Works was for the Vessel to be used in Saga's cruise business – in essence, by Acromas.

223. The Yard says that in order to succeed under *The Albazero* exception (as clarified by *Linden Gardens*) and show that the Owners had a right to substantial damages prior to the assignment, Acromas must show that the Contract was a contract for its benefit. They submit that, particularly in the context of the express exclusion of any relevant operation of the Contracts (Rights of Third Parties) Act 1999 by Clause 19.5 of the Contract, this simply cannot be done.

224. I am naturally cautious about the argument advanced by Acromas in the context of an area of law which is proceeding gradually by exceptions. However given the essential nature of this contract – construction/engineering - the use of the *Albazero* exception as extended into *Darlington* does not seem impermissible. Further the factual set up of this contract, as confirmed by the evidence of Mr Rizzo, is that the whole purpose of the Works was to equip the Vessel for cruise operations and the Yard would expect any losses suffered by the Owners to be felt by the Owners' cruise operating arm, not the Owners themselves. This brings the scenario to a very close parallel with the *Darlington* case.

225. The Yard's argument does not rest on any suggestion that the line of authority is precluded in this particular context. Nor am I attracted by the argument that use of the exception hinges on the contract being for the benefit of a third party and Clause

19.5 precludes the contract being for the benefit of Acromas. What Clause 19.5 does is to preclude a direct right of action under the Contract by a third party; it cannot affect whether in substance it was for the benefit of a third party. On that point it seems that with Acromas being the contemplated operator of the Vessel, the Contract was indeed essentially for Acromas' benefit.

226. Therefore were the point to arise, I would find for the Owners.

THE DELAY CLAIM

Introduction

227. The second claim advanced by the Owners is one in delay, amounting to €770,000. The way in which this claim is said to arise is that by Clause 9.2(c), the Yard undertook that the Works would be completed before 23.59 on the Scheduled Completion Date ("SCD"). The SCD was originally 17 February 2012. However, following the Trieste Agreement of 16 February 2012 the SCD was amended to March 2, 2012.

228. The Owners' case is simple. They say that completion did not take place until 16 March 2012, on which date the parties signed the Protocol stating that "The Contractor has today completed the Works".

229. The Owners therefore claim liquidated damages in respect of the delay between 2 and 16 March 2012, pursuant to Clause 10.1 of the Contract. However, because of a deal done at the time of redelivery and embodied in the Protocol previously referred to, it is common ground that the maximum quantum of the claim is limited to €770,000, which is the equivalent of 4.3 days of delay.

230. The Yard however says that for a variety of reasons the delay is neither so long as claimed, nor delay for which they bear the consequences under the contractual scheme. The debate between the parties is focussed on three issues which apply to the substantial range of discrete issues which they each pray in aid. Those issues are: (i) how responsibility for delays is allocated under the contractual scheme and what the Yard must prove in relation to "Other Works", (ii) whether any or all periods of delay for which the Yard is found responsible were also the fault of Owners and therefore concurrently caused and (iii) when works were completed so as to permit time to stop – the date of the Protocol or earlier.

231. Underpinning these superficially simple issues lie a number of points of construction.

Contractual framework and the issues

232. The clauses of the Contract which are relevant to this debate are as follows:

"Clause 7.3:

"(a)The Owner shall provide an interactive resource which shall be responsible for liaising between the Contractor and the Other Workers in order to prevent delay to the Scheduled Completion Date. …

(b) If at any time during the Works Period the carrying out of the Other Works interferes with the undertaking of the Works by the Contractor pursuant to this Agreement such that the undertaking of the Works is hindered or delayed, the Contractor shall:

(i) immediately notify the Owner in writing of such interference giving details of the cause of such interference; and

(ii) …

(iii) promptly notify the Owner of any potential change in Contract Price and Completion Date as a result of any action under 7.3(a) and (b) above to enable the Owner to consider any options which may be available.…"

Clause 9.2:

"(a)The Works shall be completed before 23.59 GMT on the Scheduled Completion Date.

(b) The Ship shall be redelivered by the Contractor to the Owner following completion of the Works on the Completion Date, safely afloat and in a seaworthy condition at a quay or anchorage at the Yard.

(c) Completion of the Works shall be evidenced by the execution by the Owner and the Contractor of the Protocol of Completion...."

10. LIQUIDATED DAMAGES FOR DELAY

Clause 10.1:

"10.1 Amount of liquidated damages. If the completion of the Works is delayed beyond 23.59 GMT on the Scheduled Completion Date (as adjusted pursuant to this Agreement) for any reason whatsoever for which the Contractor is, or its employees, agents or sub-contractors are, responsible, the Contractor shall pay to the Owner liquidated damages by exclusion of any further claims for delay (except in the case of wilful default or wilful neglect by the Contractor or its employees, agents or sub-contractors) as follows:

(a) For each 24 hour period of delay (or any part of such period) after 23.59 on the Scheduled Completion Date, liquidated damages shall be payable at the rate of 1% of the total Contract Price for each 24 hour period of delay (or any part of it).

(b) The total amount of liquidated damages shall not exceed 12.5% ... of the total Contract Price."

11. PERMITTED DELAY

Clause 11.1:

"The Scheduled Completion Date shall be extended only in the following circumstances:

(a) in the case of an agreed extension of the Scheduled Completion Date pursuant to Clause 8;

(b) ….

(c) failure of the Owner to comply with the delivery dates of the Owner Supply items marked as critical as specified in Appendix 13 shall give rise to a Permitted Delay to the extent of any delay thereby caused to the Works; or

(d) if a Force Majeure Event occurs."

Clause 11.5:

"The Contractor shall not be entitled to rely on an extension of the Scheduled Completion Date pursuant to Clause 11.1 to the extent that such delay has been caused by the carrying out of the Other Works except in circumstances where:

(a) such delay has not been caused by the Contractor; and

(b) the Contractor has been informed by the Owner (or the Owner's Representative) in accordance with clause 7.3(a) that such delay would occur and the Contractor has acted in accordance with its obligations as set out in that clause 7.3."

233. The Trieste Agreement included the following relevant terms:

Clause 4:

"The parties agree that Scheduled Completion Date is reset as of March 2, 2012 (the "SCD"). This takes account of all extensions of time to which the Builder may be entitled by reason of Force Majeure which have occurred on or before 16 February 2012 and the Builder waives rights to claim any additional extension of time by reason of such matters. ...

The Builder agrees to use all its reasonable efforts to achieve a reasonable completion to allow the Vessel's departure enabling possible work completion during the transfer voyage."

Clause 6:

"If the Vessel is delivered between the 3rd and 5th of March 2012, Saga would limit the total exposure to liquidated damages of the Yard to Euro 70,000 per day.

If the Vessel is delivered after the 5th March 2012, Saga would be entitled to claim the liquidate damages daily amount under the Contract provisions.

The work completion shall be considered as fulfilled for the purposes of the Contract on the date on which the Builder delivers the Vessel undertaking – if necessary – to embark its workers for completing the unfinished work during the transfer voyage to Southampton, upon signature of Appendix 3 to the Contract, so that no liquidated damages will be applicable from the date such delivery is offered (for the minor defects resulting at arrival the contract provisions shall apply)."

The final clause:

"These Minutes of Agreement supplement and amend the Contract and shall prevail (and any clause of the Contract that should not be consistent with the provisions and principles underlying these Minutes of Agreement shall be deemed to be superseded). Clause 20 of the Contract applies to these Minutes of Agreement."

234. On the subject of the role of "Other Works" in the contractual scheme, the Owners start with Clause 10.1 which provides that where "completion of the Works" is delayed beyond 23:59 GMT on the SCD (as adjusted) "for any reason whatsoever for which the Contractor is, or its employees agents or sub-contractors are responsible" then the Yard shall pay liquidated damages as specified.

235. Owners say that these words have to be read together with the rest of the Contract, in particular the Yard's unequivocal obligation (in Clause 9.2(a)) to complete by the SCD and the rather elaborate regime as to when the SCD can and cannot be extended. They argue that if the Yard fails to deliver by the SCD, then under the Contract it is at least prima facie responsible and it is for it to prove any reason which it contends means that it is not responsible for its failure.

236. They submit that:

i) Clause 11.1 states that the SCD shall only be extended in 4 circumstances, which are set out. The first consists of agreed extensions pursuant to Clause 8, which extensions are subject to a regime set out by the clause which must be complied with.

ii) The other heads of clause 11.1 are not relevant. However clause 11.1 has to be read together with Clause 11.5, and this implicitly does provide for a fifth reason for an SCD extension, in that:

a) it states that the Yard shall not be entitled to an SCD extension to the extent that "such delay has been caused by the carrying out of the Other Works except in circumstances where: (i) such delay has not been caused by the Contractor and (ii) the Contractor has … acted in accordance with its obligations as set out in clause 7.3 [the notice regime for an SCD extension]."

b) therefore if delay is caused by Other Works and the Yard complies with clause 7.3, an extension follows. But unless clause 7.3 is complied with there is no effect on liquidated damages.

iii) The reference in Clause 10.1 to the SCD "as adjusted" shows that the liquidated damages regime is to be based on the extensions as permitted by the Contract.

237. On this question, the Yard rejects the Owners' argument for three reasons. Firstly they say that it elides liability for liquidated damages under Clause 10 and entitlement to an extension of the Scheduled Completion Date (with its concomitant entitlement to

additional payment). They say that Clause 11 is a separate scheme and is not relevant to liquidated damages under Clause 10; at most, a failure to give notice under Clause 7.3(b) could preclude the Yard from recovering additional sums by reason of the delay caused by Other Works.

238. There are in the Yard's submission two regimes, as is often the case in construction contracts: one deals with extensions of time by the Yard for matters not accountable to them and enables them not only to avoid liability for liquidated damages, but also to make a claim for time related costs; the other deals purely with liquidated damages where the Yard is responsible for the delay. They are complementary, not contradictory. The Yard points to the distinction drawn in the cases on concurrency and specifically by Edwards Stuart J in *De Beers UK v Atos Origin IT Services* [2010] EWHC 3276 (TCC) 34 Con LR 151 at [177] between liability for liquidated damages and costs arising to the contractor by reason of the delay.

239. Secondly the Yard submits that the Owners' construction effectively deprives the words "*any other cause for which the Contractor is, or its employees, agents or sub-contractors are, responsible"* of any meaningful content, and that this is an approach which, on ordinary contractual principles, the Court should be cautious of adopting; the more so when it is not uncommon for liquidated damages clauses to be triggered simply by a date, with no correlation of fault at all. In essence they say that the parties to this contract have on its terms taken a decision which precludes any claim for liquidated damages by the Owner when the Owner is responsible for the delay and this wording should be respected.

240. Thirdly, the Yard suggests that the Owners' argument ignores the fact that under Clause 11.5(b)(ii), the Yard could only be required to act in accordance with Clause 7.3 where it "has been informed by the [Owners] in accordance with clause 7.3(a) that such delay would occur", and that Clause 7.3(a) required the Owners to "provide an interface resource which shall be responsible for liaising between the Contractor and the Other Workers". No evidence has been adduced, they say, to deal with these requirements and therefore any claim must fail.

241. On this point I prefer the submissions of the Yard. The approach which they advocate is consistent with the apparent scheme of the Contract, with its separate clauses for liquidated damages and permissible delay. It is consistent with the approach which is adopted in many construction contracts. It avoids the oddity of a list of reasons for extension being supplemented by the back door. And most importantly it gives meaning to words which otherwise struggle to find content. Owners' approach is over elaborate and neglects what is obviously meant to be important wording. I would be reluctant to come to a conclusion which deprived the words "*any other cause for which the Contractor is, or its employees, agents or sub-contractors are, responsible"* of any meaning, and it seems to me that this is the likely consequence of Owners' submission. I regard it as not insignificant that Mr Holroyd was not able to put forward any real suggestion as to when the words in clause 10.1 would bite if his construction were correct.

242. As to the question of concurrent causes Owners reject the Yard's suggestion that concurrent delays effectively drop out of the equation, and rely upon *Royal Brompton Hospital NHS Trust v Hammond (No. 7)* 76 Con LR 148, where HHJ Seymour QC explained in paragraph 31 what was not considered concurrent delay in this context:

"However, it is, I think, necessary to be clear what means by events operating concurrently. It does not mean, in my judgment, a situation which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a relevant event, 'the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date.'

The relevant event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not. In such circumstances there is a real concurrency of causes of the delay."

243. They suggest that the Court should be cautious about accepting that concurrent delays disentitle them from liquidated damages and give as an example of what is to be considered concurrent delay is in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32 where Dyson J said at para. 13: "*if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week...*" then an extension of time is required to be granted for the week.

244. They submit that in the present case, the Court is not concerned with concurrent delay in the *Malmaison* sense. If completion of the project was already delayed for reasons for which the Yard was responsible, then delays to completion of particular activities by the Owners are not examples of concurrent delay and do not give rise to any entitlement to an extension of time by the Yard. That is because they do not in fact cause any delay to completion.

245. On the Yard's side they submit that the court should approach the question with "the prevention principle" in mind. They rely on the judgment of Hamblen J in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) at paragraphs 238 to 243. In particular they cite the quote at paragraph 240, from the judgment of Jackson J (as then was) in *Multiplex v Honeywell* where the learned judge recites how in the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date, and that it is to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provisions for extension of time.

246. The Yard relies on the fact that this Contract, unlike many others, does not contain a general extension of time clause entitling the Yard to an extension of the Scheduled Completion Date in the event of any act of prevention by the Owners. Instead, they say that Contract respects the operation of the prevention principle by providing in Clause 10 that the Owners would only have a claim for liquidated damages where the

failure to meet the Scheduled Completion Date was due to a matter for which the Yard was responsible and in clause 11.5(a) by providing that the Yard is not entitled to rely upon an extension to the SCD if that delay has been caused or contributed to by the Yard.

247. The result, in their submission, is that where the completion is delayed by two events concurrently, one for which the Yard was responsible and one for which Owners were responsible, no liability for liquidated damages arises. In support of this approach they pray in aid the approach adopted in *Henry Boot* and also in *Walter Lilly v Mackay* [2012] EWHC 1773 (TCC) 143 Con LR 79 which they say support the proposition that when there are two concurrent causes of delay, one of which would be a relevant event and the other would not, the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.

248. The question of the treatment of concurrent delay in the context of extensions of time has been the subject of considerable academic and professional debate, as *Hudson's Building and Engineering Contracts* (13th ed 2015) notes at paragraph 6-058. While *Hudson* and a number of cases and academic articles all debate the issues, perhaps the most useful synthesis is found in the judgment of Hamblen J (as he then was) in *Adyard*. That judgment considers in turn the cases of *Balfour Beatty*, *Henry Boot*, *Royal Brompton Hospital NHS Trust v Hammond (No 7)* (2001) 76 Con LR 148 (HHJ Seymour QC) and *City Inn Ltd v Shepherd Construction Ltd* [2010] BLR 473.

249. It also lays out some of the important groundwork for any such analysis. In particular the learned judge:

    i) adopts from John Marrin QC's analysis of *Concurrent Delay* in (2002) 18 Const LJ no 6 436 the proposition that concurrent delay is "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency" (see also *Keating on Construction Contracts* 10th ed 8-025);

    ii) highlights the importance in concurrency arguments of distinguishing between a delay which, had the contractor not been delayed would have caused delay, but because of an existing delay made no difference and those where further delay is actually caused by the event relied on: "*There is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two effects is felt at the same time"* (paragraph 279 and see also *Royal Brompton* paragraph 31);

    iii) notes the parallel reasoning in the prevention principle cases which establish that "*The act relied upon must <u>actually prevent</u> the contractor from carrying out the works within the contract period or, in other words, must cause some delay"* (paragraph 282);

    iv) soundly rejects the idea of reliance on "notional or theoretical delay" as contrasted with proof that the event or act causes actual delay to the progress of the works (paragraph 264).

250. The other passage which is of particular use is the extract from the judgment of Colman J in *Balfour Beatty* which has been repeatedly cited with approval by later judgments, including in *Adyard* and *Henry Boot:*

> *"…. it is right to examine the underlying contractual purpose of the completion date/extension of time/liquidated damages regime. At the foundation of this code is the obligation of the contractor to complete the works within the contractual period terminating at the completion date and on failure to do so to pay liquidated charges for the period of time for which practical completion exceeds the completion date. But super-imposed on this regime is a system of allocation of risk. If events occur which are non-contractor's risk events and those events cause the progress of the works to be delayed, in as much as such delay would otherwise cause the contractor to become liable for liquidated damages or for more liquidated damages, the contract provides for the completion date to be prospectively or, under clause 25.3.3, retrospectively, adjusted in order to reflect the period of delay so caused and thereby reduce pro tanto the amount of liquidated damages payable by the contractor.…*
>
> *The underlying objective is to arrive at the aggregate period of time within which the contract works as ultimately defined ought to have been completed having regard to the incidence of non-contractor's risk events and to calculate the excess time if any, over that period, which the contractor took to complete the works. In essence, the architect is concerned to arrive at an aggregate period for completion of the contractual works, having regard to the occurrence of non-contractor's risk events and to calculate the extent to which the completion of the works has exceeded that period."*

251. These extracts, in my judgment, point the way clearly. A careful consideration of the authorities indicates that unless there is a concurrency actually affecting the completion date as then scheduled the contractor cannot claim the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay. The Yard's approach is over broad. The submissions of Owners are to be preferred.

252. As to the third issue (completion), the Yard submits that the effect of the Trieste Agreement is that if an item of work would not prevent departure and could be completed on the transfer voyage or at Southampton, the fact that it was not complete would not prevent the Completion of the Works required for the execution of the Protocol and liquidated damages could not accrue.

253. The Owners contend that the position following the Trieste Agreement is that:

i) The Yard was required to achieve "a reasonable completion" such as to allow any further work (beyond Minor Defects) to be completed during the transfer voyage.

ii) However, all Class items or items related to the safe operation of the Vessel had to be completed.

iii) Completion would be considered achieved on the date the Yard delivered the Vessel, in a condition complying with these two requirements and with any

necessary undertaking in relation to work on the transfer voyage, on signature of the Protocol.

iv) That is the point in time at which any entitlement to liquidated damages would cease.

254. On the facts as placed against this structure they submit that work completion for the purposes of the Trieste Agreement was achieved on 16 March 2012, since this is when the Yard delivered the Vessel and gave the requisite undertaking and the Protocol was signed. This is therefore the point in time up to which any liquidated damages are payable.

255. They say that the evidence demonstrates that numerous items were worked on and completed by the Yard at various times after 2 March 2012, many of them long after it. Indeed the Yard kept on working on some items, such as the Bolidt decking, right up until 16 March 2012. These matters show that the Yard was responsible for the delay up to 16 March. As for the matters which the Yard says could have been completed on the voyage to Southampton, the Owners dispute that the Yard had any contractual right to, or could in fact have, completed the matters relied on by the Owners during the transfer voyage (absent a waiver by the Owners).

256. The facts relating to each head of delay to which this is relevant will be considered below. However as a matter of principle I consider that absent specific agreement, Class items required to be completed before departure. As regarded other items, time would stop running once the Yard reached a stage where remaining works could be completed on the transfer voyage subject to an undertaking being given about actual completion en route. The parties plainly contemplated that this would be embodied in a Protocol of Delivery, although were the other requirements fulfilled, a refusal by the Owners to execute a Protocol would not, in my judgment, preclude the stopping of time.

Specific items of delay

257. A number of specific items whose completion is relevant to the overall question of when the Works were finished and to the question of responsibility for delay beyond the SCD, were the subject of evidence at trial. They fall into two sets, namely items relied upon by the Owners as delays giving rise to liquidated damages and items relied upon by the Yard as extending the SCD. The former are: (i) Deck 10 Cabins, (ii) Bolidt decking (iii) Glass Balustrade (iv) Reinstallation of gas bottles (iv) Engine Room steam valves. The latter are (i) Lifeboats, (ii) Genset No 3, (iii) Genset no 1, (iv) Davits, (v) Aft main stairtower.

258. The witnesses who were called to deal with these issues were, for the Claimant Mr Duguid and to a lesser extent Messrs Faulkner, Woodcock and Blinston. The Yard's delay witnesses were Mr Magnani and Mr Giordano. In their differing ways each of the three main witnesses, though giving essentially honest evidence, showed a tendency to fight the corner of the party for whom they appeared. Their evidence therefore has to be carefully considered against the documents.

Delay relied on by Owners

Deck 10 Cabins

259. These were new cabins to be created by the Yard by converting available space on Deck 10 aft. The first 5 cabins were delivered on 9 March 2012, and the remaining ones over the following days, with the last cabin delivered on 16 March.

260. The question in this case was when the cabins were sufficiently complete for the purpose of clause 6 of the Trieste Agreement, i.e. such that the remainder of the work could be completed during the transfer voyage.

261. The Yard contended that the outstanding works could very well have been done on the transfer voyage. The Owners on their side argued that the sheer quantity of work which remained contradicted this argument, since completion did not take place until 16 March and some help was given to reach that point by Owners' employees.

262. Owners also argued that there were numerous Class items which were not resolved as at 14 March 2012, and possibly even later, while the Yard said that these were minor points which could have been dealt with by compensatory measures.

263. Owners also originally suggested that no work was possible in the Deck 10 cabins during the transfer voyage at all, because Class required that they be kept shut, and the cabins were closed to all contractors. However, the Yard pointed to the fact that the causes of this prohibition appeared to rest with Owners and in the face of evidence to this effect this ground of argument was not ultimately pursued by Owners.

264. On this issue prima facie the documents demonstrate that completion took place on 16 March. Although Mr Duguid appeared to accept in cross examination that the cabins were complete enough to be accepted on 13 or 14 March this was evidence which was not consistent with the underlying documents – or indeed with the way the Yard initially advanced their case, which proceeded on the basis of accepting the 16 March date.

265. Of course 16 March was two weeks after the SCD. Certainly completion, even if Mr Duguid's evidence were taken at face value (which I am not minded to do) it was at least ten days after the SCD. Further while the Owners' help may indeed have been minor, the Yard did not complete this item unassisted. I therefore accept Owners' submission that the work was not advanced to the stage where it could have been completed on the transfer voyage before 16 March 2012.

266. I further accept the submission that there were outstanding Class items identified on 4 and 8 March 2012 including fire doors (albeit these were not ultimately insisted on by Class at Southampton), the hi-fog riser, the overboard scupper pipe, electrical locker doors and the AC duct. Completion therefore could not have occurred until these were resolved, which was not before 16 March 2012.

267. Had it arisen I would have found for the Yard on the subject of the Class exclusion from accessing the Deck 10 area.

Bolidt decking

268. The Bolidt decking was a proprietary decking system which has the appearance of teak. It was to be installed on various exterior decks. Again the debate is whether outstanding work was "Trieste complete" so that it could have been completed on the voyage. This involves a consideration of how Bolidt decking is installed.

269. The process of installation involves three stages: pouring, curing and finishing (marking the product to resemble planks). The Owners' case was that pouring and curing could not have been done on the transfer voyage. Mr Magnani suggested that all stages could have been done on the voyage, though he accepted that Bolidt did not agree as regards the pouring stage. As regards pouring, I do not accept Mr Magnani's evidence on this point, which was inconsistent not just with the evidence of Messrs Duguid and Shaw for the Owners, but more importantly with: (i) Bolidt's view, (ii) his own acceptance that pouring can only be done in calm surroundings and (iii) the service of Force Majeure notices relating to the decking when bad weather interfered with pouring. The evidence is not clear but tends to indicate that pouring was in fact completed on 11 March 2012, with the possibility that it may have completed one day later on 12 March.

270. As to curing, only 24 hours was required. It seems that curing could possibly have been completed en route, so long as the weather was not rough (which might disturb the set of the product in the early part of the curing process). However the prudent course would have been to cure the product before commencement. In all the circumstances I therefore conclude that the work on the Bolidt decking was complete for Trieste Agreement purposes on 12 March 2012.

271. The Yard have relied upon a force majeure argument, namely that rain during the pouring of the decking constituted Force Majeure. However this argument was advanced only faintly, and rightly so, since it was clear that the reason why installation had to stop was that, contrary to the terms of the Bolidt specification, the Yard had chosen not to install temporary shrink wrap weather proofing, which would have enabled pouring to proceed uninterrupted.

Glass balustrade

272. The Yard was required to fit a glass balustrade to the stairs in the atrium of the Vessel. It had not done so by 2 March 2012, and tried hard to do so in the days that followed. However, it was not successful and the work had not been completed by 16 March 2012.

273. On that date, a commercial deal was done (reflected in Annex 5 to the Protocol) whereby the Vessel would sail with a temporary structure instead of the balustrade, and the Yard would fit a balustrade in Southampton.

274. The Owners' case is that until that deal was done, the Yard had no entitlement to deliver the Vessel because it had not completed the Works and could not do so during the transfer voyage; a new balustrade needed to be supplied, and this was not yet available.

275. The Yard submits that by the agreement on delivery the parties agreed that completion of the Works for the purposes of the Trieste Agreement did not require the installation of the glass balustrade which the Owners wanted. In the premises, they

submit, this issue did not cause any delay to the completion of the Yard's Works within the meaning of the Trieste Agreement and no entitlement to liquidated damages can arise. They also suggest that since Mr Duguid was prepared to do a deal on this item from 12 March, when it became apparent that the second iteration of the balustrade was not satisfactory, there was no delay for the purposes of the liquidated damages clause after that.

276. On this item the reality is that the contractual works remained uncompleted on 16 March 2012. Unless and until agreement to accept the Vessel was reached, despite the non-completion of the balustrade, the Yard were not actually entitled to redeliver the Vessel. Like an unaccepted repudiation, an unconcluded agreement is a thing writ in water. The agreement reached in the Protocol did not include any waiver of accrued liquidated damages. Accordingly liquidated damages ran on this item from 2 March 2012 until the conclusion of the Protocol of Delivery.

Reinstallation of gas bottles

277. This item relates to the CO2 system for the emergency generator, an item covered by Class rules. By Change Order no. 152 dated 11 February 2012, the Yard agreed to modify the CO2 room for the emergency generator. The Change Order included the physical reinstallation of the gas bottles, and such installations have to be certified in order to satisfy Class requirements.

278. The Yard did not finish the installation of the gas bottles until an extremely late stage. One of the bottles had somehow been emptied and needed to be refilled and there were various faults with the installation.

279. The Yard's case is that it did the modifications in accordance with a design provided by the owners, and that design was inadequate in that the CO2 cylinders did not fit in the reconfigured room. This led to the Owners needing to liaise with Class to find a new acceptable location. This issue appears to have been resolved by 10 March. After that it was the question of the empty gas bottle which held matters up.

280. As for the actual reinstallation they submit that recertification was the Owners' responsibility. The Yard provided the name of a suitable company to do this work, but delays were down to the Owners not the Yard. The local gas bottle service company attended on 13 and 14 March 2012. The refilling appears to have been completed by recertification on 14 March 2012. There is therefore a period of about 4 days attributable to this remaining issue.

281. So far as concerns the initial delays, I am satisfied that the initial delay was due to a design issue, and therefore the period of time until 10 March would lie at Owners' door. As for the empty gas bottle, this was an anomalous point which arose during the course of the works. No-one anticipated that this would have to be done, and I do not consider it can be properly made to fall within the ambit of CO 152. Accordingly the entirety of Owners' claim in relation to this item fails.

Engine room steam valves

282. The engine room steam valves had been fitted by the Yard, but they were rejected by Class on 6 March. The Yard ordered replacement valves on 9 March 2012, but there

was an issue with the delivery time. The replacement valves seem to have arrived at Palermo (but not at the Yard) in the evening of 14 March 2012, and at the Yard in the morning of 15 March 2012, being presumed to have been fitted the same day.

283. The issue here is as to whether any delay was caused, given that Mr Magnani's evidence was that Class would not have prevented the Vessel sailing with the old (uncertified) valves, suggesting that the Vessel might have been allowed to sail with a condition of Class, and that the new valves could have been delivered at Southampton.

284. I do not accept Mr Magnani's speculative evidence on this point, unsupported as it was by evidence from Class. Further his evidence was not only contradicted (as might be expected) by the evidence of Mr Duguid, who thought that Class had refused this suggestion and would not have given ground on this point, but also by the urgency of the correspondence within the Yard about the valves. The evidence suggests that this was regarded as an important and urgent matter by the Yard. Further I note that, as this was a Class item which affected the safety of the Ship, the Yard had no entitlement to deliver the Vessel unless and until it had been attended to.

285. Accordingly the delay attributable to this item counts as liquidated damages.

Other items and conclusion on Owner's delay claims

286. Two other items, power to the port accommodation ladder and the repair of the exhaust leak on the auxiliary engine No 2 were pleaded in the Amended Reply and Defence to Counterclaim. Some exception was taken by the Yard to their being pursued, but the evidence in any event indicated that these were not critical items likely to delay the completion of the Works. They therefore do not give rise to any claim for liquidated damages.

287. Overall therefore I consider that the Owners have made out a claim on more than one head that completion of the contracted works was delayed by matters for which the Yard were responsible for the period between 2 March 2012 and 16 March 2012.

The Yard's items

Lifeboats

288. One particular feature of this case is that at a relatively late stage (around 3-5 March 2012), the Owners discovered a major problem with the weight of the lifeboats, which turned out to be considerably heavier than their certified weight owing to foam inside the lifeboats having become saturated with water. This was a problem which the Owners needed to resolve before the Vessel's departure. It turned out to be a serious problem with Class, in the wake of the recent Costa Concordia casualty, being very exercised by safety issues. It undoubtedly caused delay in the Vessel's departure from Palermo.

289. One of the lifeboats was sent to Germany, to be reunited with the Vessel at Southampton. The other lifeboats were worked on by Saga's contractors, RC Hydraulik and Hatecke at Palermo before being weighed onshore. Mr Shaw contacted Mr Davassi directly on Friday 9 March 2012 to request that the Yard

provide support for the subcontractors' work and received assurances of the Yard's support.

290. On Monday 12 March, most of the lifeboats were put back in the water for weighing, and all of them were in the water by 13 March. It seems that weighing was completed on 13 March. Statements of fitness were issued on 14 March 2012. Two lifeboats were left behind and not returned to the Vessel. The revised weights were ultimately found to be acceptable by the authorities, but it took days for Owners to sort out all the official paperwork, and this ended up delaying the Vessel's sailing to 19 March 2012. However the question is whether the issue prevented the completion of the Yard's works.

291. The Yard provided a variety of support services during this process, in particular in moving the lifeboats, and providing facilities including a crane for the weighing of the lifeboats and equipment for the overload test. The Yard's case is that their provision of assistance until 15 March 2012 at the earliest and the agreement of Change Order 194 in connection with the Yard's support works, means that Owners delayed the completion of the Yard's Works up to 15 March 2012 at the earliest.

292. The Owners' position is that they did not and that the work on the lifeboats is irrelevant to the completion of the Yard's Works. They say that the Yard did not have any substantive work to do on the lifeboats during this period. There was no reason for the Owners' request for assistance in an essentially unrelated matter to delay contractual works or prevent delivery.

293. On concurrent delay they say that even if lifeboat issues did have the effect that the Yard would not have been entitled to deliver the Vessel before 13 / 14 March 2012, this was not a critical delay because the Yard had in any event not completed other (substantive) work which it needed to complete (unless it was waived) before it would be entitled to deliver the Vessel.

294. Moreover, they contend that any extension to the SCD would have required a notification which does not exist.

295. On this issue, save as to notification, I am not persuaded by the Yard's arguments. The only way in which the works performed by the Yard might fall within the Works so as to prevent completion and delivery would be if the support services were somehow made part of the contractual scheme. On this the Yard rely on Change Order 194. However this document was agreed ex post facto on 16 March 2012 as part of the discussions surrounding the Protocol of Delivery. At the time when the services were given there was no obligation to give them under the Contract and the provision of support for the lifeboat repairs did not prevent completion of the Yard's works or delivery of the Vessel. Further the Change Order was not agreed on terms whereby it resulted in an extension to the SCD.

296. Nor do I consider that if there would otherwise have been an extension it could have taken effect where there were already items outstanding, for the reasons which I have given in relation to the concurrent delay argument and the individual items relied on by the Owners above. As at 13/14 March the Deck 10 cabins had outstanding Class items and safety items, neither the steam valves nor the glass balustrade had been delivered on board the Vessel, and the CO2 gas bottles still needed to be certified.

Alternator bearings for Genset No. 3

297. The Yard was required to install some alternator bearings in Genset no. 3, and the parts were Owner's Supply. It could not complete its work of installing them until the spares had arrived. They had not arrived as at 2 March 2012. It appears that they were installed on 7 March 2012.

298. The Owners accept that late delivery of the spares caused a delay to completion of this activity, which was completed on 7 March 2012. They also accept that the activity was one which was required to be completed before completion could be achieved by the Yard.

299. However, the Owners submit that this delay cannot be prayed in aid by the Yard because (i) the Yard was already in delay in respect of the various matters identified above and (ii) the Yard has not pleaded and so does not appear to be pursuing any claim to an SCD extension in respect of this item.

300. On the latter point the Yard's primary case is that it was not required to submit any notice under Clause 7.3(b) or alternatively, it served such notice by its letters dated 1 and 4 March 2012.

301. On this item the issues already discussed above resolve the point: the Yard cannot rely on this as a period of concurrent delay which disentitled the Owners from liquidated damages which would otherwise accrue from other delays which are the responsibility of the Yard. However if they could have done, the absence of notice would not prevent such reliance.

Genset No. 1

302. The Owners accept that the Yard completed its work on Genset no. 1 on or before the SCD. Owners then had work to do on this Genset before it would be operational. The Yard say that the use of the Yard's scaffolding, which was provided as part of the Owners' works, prevented the Yard completing its works.

303. Owners maintain that no delay can be for their account because of the existing delays on the part of the Yard. For reasons already given I concur with that submission.

304. Were that not the case, I would conclude that the scaffolding did not prevent the Works from being sufficiently complete for delivery under the Trieste agreement, and so did not cause delay.

Davits

305. The parties agreed that the Yard was to provide staging to enable the Owners to reach and repair the davit heads by Change Orders 158 and 167 on 17 and 22 February. The work was to be done sequentially, so that staging was erected under pairs of davits, and then moved once the repairs had been done.

306. However work was delayed because Owners discovered that some davit heads were in poor condition and so more extensive repairs were needed than had been anticipated. These were completed on 7 March 2012.

307. The Owners accept that the repairs did cause delay, but say it did not exceed the delay attributable to Owners arising from Genset No 3 therefore nothing is gained by the Yard, and that no notice under clause 7.3(b) was served.

308. I accept the Owners' submissions on the first point and, as elsewhere, reject the notice point.

Aft main stair tower and lift

309. Following a Class inspection of the Vessel, the Owners requested the Yard to install new A60 insulation through Change Order 168. The additional insulation was required because structural fire insulation installed by the Owners was found to be incomplete and also contaminated by defective flooring which had enabled oil to leak into the cavities.

310. The work required by Change Order 168 could not be completed until the defective flooring had been repaired. The Owners carried out the repair of the defective flooring through its sub-contractor, Cardiff Craftsmen. This led to a delay between 2 March and the afternoon of 10 March 2012.

311. The Yard therefore contends that Owners were responsible for delaying the completion of the Yard's Works up to 11 March 2012, since works could not restart until then.

312. Owners argue that there was no right to an extension because the works were critically delayed by the other matters for which the Yard was responsible. Alternatively the maximum extension would be from afternoon on 2 March until afternoon on 10 March, with the remaining period being ample to reach the allowable liquidated damages total.

313. For the reasons which I have given above in relation to concurrency, the delays caused by this item do not operate so as to cancel out the delays caused by the Yard. Had it been necessary to do so I would find that the period of delay caused by this item operated until 11 March 2012.

Earlier agreement of Protocol

314. The Yard advanced a further case, namely that even if any of the above events might otherwise have caused completion of the Works to be delayed, they were not the cause of delay in completion after about 12 March because the Owners had in any event indicated their willingness to sign the Protocol.

315. Therefore, even if the Yard were responsible for some of the period of delay from 2 March within the meaning of clause 10.1, they were not responsible for delay after 12 March 2012.

316. This argument cannot succeed in the face of the findings above about the delays for which the Yard was responsible. However willing the Owners might have been in theory to accept delivery at an earlier date this seems to have been in part dependent on progress; and in any event contractually the Yard was not in a position to tender the Vessel until 16 March 2012. Absent an actual agreement to stop time running, or

an unequivocal waiver (neither of which is alleged) liquidated damages continued to accrue. Further it is by no means clear that the Yard would have agreed any Protocol proffered as at 12 March because of their own desire to tie up all outstanding Change Order disputes

Quantum

317. It is common ground that the Claimants can recover a maximum of €770,000, as a result of the agreement reached in the Protocol.

318. Under the Refit Agreement, the Yard is liable for 1% of the total Contract Price for each day of delay, which equates to €179,003 per day. This means that if the Owners are entitled to liquidated damages for at least 4.3 days of delay, then they will recover the amount of the cap, i.e. €770,000.

319. It follows from the findings I have made above that the Owners are entitled to this sum.

320. There was a subsidiary issue which would arise if a lesser period of delay were found. Under the Trieste Agreement, it was agreed that "if the Vessel is delivered between 3rd and 5th March 2012, [the Owners] would limit the total exposure to liquidated damages of the Yard to Euro 70,000 per day".

321. The Yard contend that on a true construction of the Trieste Agreement, and by reason of the application of the prevention principle, if the Owners were responsible for delay to the completion of the Works (as provided for in the Trieste Agreement) after 2 March 2012, the Yard remained entitled to the benefit of the reduced rate for the first three days of any delay for which it was solely responsible.

322. The Owners say that this provision has no effect because the Vessel was not delivered between 3 and 5 March 2012. They submit that the agreement reached was plainly to the effect that the reduced rate of damages would only be applicable only if the Vessel were delivered on or before 5 March 2012. It was in effect an incentive to the Yard to deliver before 6 March. So, if the Vessel were delivered on 6 March 2012, the normal contractual rate of damages would be payable for each of 3, 4, 5 and 6 March.

323. In my judgment, to the extent that this point arises, Owners are right on this issue. The wording of the agreement contained within the Trieste Agreement is clear. If the intention had been to provide for staged amounts taking into account the possibility of delays caused by the Owners, this is not the way one would expect the parties to go about it.

324. Of course, on the basis of what I have found above, this point does not arise. The Yard was not ready to deliver the Vessel by 5 March 2012. This was for reasons which were not the responsibility of the Owners. Although there may have been matters for which the Owners were responsible which would have prevented the Yard being able to complete by 5 March, such matters were of no causative effect and do not count as concurrent delays.

325. Finally, lest it should become relevant at some later stage I should record the competing positions on how liquidated damages accrue if the cap is not necessarily reached.

i) Owners say that:

a) If one works forwards from 23:59 on 2 March 2012, then the Owners reach the cap if there was delay attracting liquidated damages up to 07:12 on 7 March 2012.

b) If one works backwards from the actual time of completion, then the Owners reach the cap if there was delay attracting liquidated damages from sometime on 12 March 2012.

ii) The Yard says that:

a) The first three days of any delay accrue only at the rate of US$70,000 per day;

b) It follows that it would require 3.9 days after this initial period to exhaust the ceiling on liquidated damages.

c) Thus if the Yard's analysis is correct and liquidated damages did not commence to accrue until (say) 7 March, accrual at full rate would not commence until 10 March and would not be exhausted until nearly the end of 14 March.

CONCLUSION

326. For the reasons more fully set out above I find that:

i) On the true construction of the Contract the Yard owed Owners a duty to use reasonable skill and care in cleaning the luboil coolers and a duty to report to the Owners on the condition of the luboil coolers to enable the Owners to reach an informed decision whether retubing was necessary;

ii) The Yard breached both those duties;

iii) However those breaches did not cause the Owners' loss. A proper compliance with the duty to clean would not on the balance of probabilities have revealed the need for retubing. There is no evidence that the Yard should have been aware of and informed the Owners of anything which Owners did not themselves observe;

iv) The Yard was responsible for a number of delays beyond the SCD extending to the date of redelivery under the Protocol of Delivery and is not entitled to rely on delays for which the Owners were responsible during this period, as stopping time running under the liquidated damages clause. Accordingly the Owners are entitled to €770,000 by way of liquidated damages.