Neutral Citation Number: [2016] EWHC 2674 (Comm)

Case No: CL - 2013 - 000925

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

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

Date: 27 October 2016

Before :

MR JUSTICE PHILLIPS

- -

Between :

REGULUS SHIP SERVICES PTE LTD

Claimant

- and -

(1) LUNDIN SERVICES BV
(2) IKDAM PRODUCTION SA

Defendants

- -
- -

Yash Kulkarni and Koye Akoni (instructed by **Duval Vassiliades**) for the **Claimant**
Nevil Phillips and Christopher Jay (instructed by **Norton Rose Fulbright LLP**) for the **Defendants**

Hearing dates: 1, 2, 3, 4, 8, 9 February 2016

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Approved Judgment

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MR JUSTICE PHILLIPS

Mr Justice Phillips :

1. By an ocean towage contract on BIMCO terms dated 21 August 2012 ("the Towcon") the claimant ("Regulus") agreed that its tug, the AHTS HARMONY 1, would tow the FPSO IKDAM from Sousse, Tunisia to Labuan, Malaysia, a voyage of over 12,500 nautical miles via the Cape of Good Hope ("the COGH"), for the lump sum of US$2,750,000. The IKDAM was owned by the second defendant, but the hirer under the Towcon was the first defendant, acting both on its own behalf and as disclosed agent for the second defendant. Both defendants are members of the Lundin group of companies and have been treated for the purposes of these proceedings as a single party, referred to as "Lundin".

2. It was an express term of the Towcon that the IKDAM would be provided "*in light ballast condition*". The central allegation made by Regulus in these proceedings is that Lundin breached that term by providing the IKDAM in heavy ballast condition, causing the voyage to take longer than it should have done and HARMONY 1 to use more fuel than should have been required. Regulus claims (i) delay payments for 31.49 days at the contractual rate of US$21,000 per day, totalling US$661,290 and (ii) damages to reflect the cost of excess fuel, port demurrage charges and miscellaneous expenses.

3. Lundin denies that the IKDAM was not in light ballast condition and further denies that Regulus has established that, even if there was any excess ballast, such excess was the cause of delay or the consumption of extra fuel. On the contrary, Lundin asserts that the slow progress of the convoy (averaging 3.54 knots) was a breach of an implied obligation of Regulus under the Towcon (or otherwise of a collateral warranty given by Regulus) that the convoy would maintain an average speed of 4.5 knots. Lundin counterclaims damages of US$529,455.127 in respect of the alleged breach.

4. Towards the end of the voyage, Regulus diverted the convoy to Singapore in order to assert a lien over the IKDAM in respect of its delay claim referred to above. Regulus and Lundin each claims that it accepted the other party's repudiation of the Towcon whilst at Singapore, the only common ground being that the Towcon came to an end on about 23 March 2013, the tow ropes being cut by Regulus two days later. Lundin entered a new towage contract to complete the IKDAM's voyage to Labuan. Regulus claims the sum of US$100,000, being the unpaid balance of the lump sum price payable under the Towcon, whilst Lundin counterclaims the US$550,000 paid for the hire of the substitute tug and associated costs of SGD70,546.67.

The background facts and essential chronology

(i) The IKDAM

5. The IKDAM was built in Sweden in 1971 as a single-hull Aframax tanker. She was converted to an FPSO (Floating Production, Storage and Offloading vessel) in 2001, when her bulbous bow was cut and replaced with a flat plate. She was upgraded in 2006, at which point she had a 10-year fatigue life. She was deployed in the Oudna oil field off the coast of Tunisia between 2006 and 2012, after which she was redeployed to Malaysia. It was for the purposes of that redeployment that she undertook the voyage, under tow, with which these proceedings are concerned. The IKDAM was

registered in Liberia and classed with Det Norske Veritas (DNV). Her lightship weight was 26,065mt.

(ii) The HARMONY 1

6. The HARMONY 1 was an anchor handling tug supply vessel built in Denmark in 1980 and re-built in 2008. She had four main engines generating 12,820 BHP and had a certified Bollard Pull of 146mt. She was owned and operated by Regulus, registered in Singapore and was classed with Nippon Kaiji Kyokai (Class NKK).

(iii) Negotiation of the Towcon

7. On 10 August 2012 Graham Markham of Lundin emailed Regulus seeking an expression of interest in the towage of an Aframax tanker from the Mediterranean to Malaysia either via the Suez Canal or around COGH.

8. Bhaskarvilas Radhakrishnan ("Capt. Krishna"), the Managing Director and principal shareholder of Regulus, replied the same day stating that the HARMONY 1 was available and asking for further details so as to offer a lump sum price. Capt. Krishna indicated that, if the route was via the Suez Canal, Lundin would have to pay the substantial canal fees and that an anti-piracy security team would be required.

9. The following day Mr Markham informed Capt. Krishna by email that the tow would be a FPSO with an overall length (LOA) of 292m and beam of 41.2m. The vessel's draught would be according to ballast requirements and trim/stability and it would be a gas free ballast passage only from the Malta region to Labuan, likely commencing late September 2012.

10. Capt. Krishna replied that, on the basis that the tow was "*AFRAMAX TANKER (Production facility, FPSO?) - as described - deadship in light ballast seaworthy condition*", Regulus would offer a lump sum price of US$1,450,000 via Suez or US$2,800,000 via COGH.

11. On 15 August 2012 Mr Markham informed Capt. Krishna that Lundin was not in a rush to receive the FPSO and asked if the COGH price could be improved if Lundin agreed to accept a reduced tow speed. Captain Krishna replied that the quoted price "*is at economic speed of abt 4.5 knots WP. There is hardly any margin for improvement with the very best being USD 2,750,000*". Captain Krishna further stated that the voyage duration via the COGH "*is abt 120 days WP*". To the extent that there remains any dispute between the parties, I consider it is entirely clear that, in both the above instances, Capt. Krishna used the letters "WP" as shorthand for "weather permitting"

12. On 22 August 2012 Capt. Krishna sent a draught BIMCO Towcon contract to Kevin Donnan of Lundin. The following day Mr Donnan confirmed that there would be a riding crew aboard the tow.

13. On 28 August 2012, following a telephone call, Capt. Krishna confirmed that Regulus' quote was based on using two of the tug's four engines, with the voyage duration at about 115 days. He indicated that if Lundin required the voyage to be done

within about 90 days Regulus would need to use three engines to achieve a speed of 5.526 knots, with an increase in the price to US$2,950,000.

14. On 29 August 2012 Mr Donnan informed Capt. Krishna by email that preliminary Met-Ocean results indicated that wave height around COGH could reach 8.00m and so the voyage should be limited to sea state conditions of no more than 5m wave height, wind speed of 20 m/sec and current of 0.50 m/sec. The following day Capt. Krishna replied that the tug could deviate to a port of refuge or take shelter if weather conditions were expected to exceed those advised by the marine warranty surveyors, but that anticipating extremely severe conditions was not the most practical approach. He further stated that the voyage round COGH should not last more than 3 to 4 days.

15. On 3 September 2012 Mr Donnan provided further details, including that the tow was the IKDAM. Capt. Krishna emailed Mr Donnan pointing out that, before signing the Towcon, it was necessary to confirm the average speed which Lundin expected as that determined the number of engines to be used, with the other engines being added if and when required due to bad weather, counter-currents etc. Mr Donnan replied that Lundin would "*go with 4.5kts*", adding that they could decide to increase that later, although it was unlikely.

16. On 4 September 2012 Lundin forwarded to Capt. Krishna a bollard pull calculation from GNLD, based on the IKDAM having a displacement of 113,492mt.

17. The Towcon was signed on behalf of Regulus on 7 September 2012 and forwarded to Lundin for approval and countersignature.

18. On 11 September 2012 Nebil Temani of Lundin emailed Regulus with various details of pre-towage matters. These included notification that there would be a HAZID meeting in Tunis on 17 September 2012. Mr Temani further provided figures for the proposed condition of the IKDAM during the tow, expressed to be "*pending on desires of tugboat*". The figures showed a forward draught of 9.63m and an aft draught of 10.55m, resulting in a displacement of 90,061.5mt.

19. The Master of the HARMONY 1 (Capt. Sergey) emailed Capt. Krishna on 12 September 2012 in the following terms:

> "*I'm already received the draft condition of tow and it is too much. In this condition the speed will be 3- 3,5 knots only and in the good weather condition only. The trim is only 1M. Two meters is more best for towing.*
>
> *If possible it is necessary to pump out 15 – 20 thousand metric tonnes of ballast. Crew and me will do all our best to successfully complete of towing*"

Capt Krishna did not, at that point, pass on those concerns to Lundin.

(iv) The Towcon

20. On 15 September 2012 Lundin signed the Towcon and emailed the signed version to Regulus. Part 1 of the Towcon set out the details of the parties, the vessels and the voyage as referred to above and included the following further terms:

> "*[Box] 12. Particulars of Cargo and/or ballast and/or other property on board the tow NIL CARGO, GAS FREE CONDITION; IN LIGHT BALLAST CONDITION. Draught Fwd – TBA, Draft Aft TBA"*
>
> *[Box] 20. Estimated daily average bunker consumption in good weather and smooth water: Estimated voyage duration from Malta to Labuan is abt 90 DAYS WP*
>
> *(a) at full towing power with tow 18 TONS /DAY; ECONOMIC SPEED – 12.5 TONS / DAY*
>
> *(b) at full sea speed without tow 11TONS / DAY*
>
> *[Box] 22. Nature of Services TOWAGE ONLY, ALWAYS WITHIN SAFE CAPABILITIES OF TUG BUT ALWAYS AT DISCRETION OF TUG MASTER IN USING 2 OR MORE MAIN ENGINES*
>
> *[Box] 29. Delay payments (a) Port rate US$14,500 - PDPR (b) Sea rate - US$21,000 PDPR*
>
> *[Box] 30. Riding crew to be provided by N /A*"

21. Part II of the Towcon included the following printed terms[1]:

> "***2. Price and conditions of Payment***
>
> *c) … each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 32. Tug and/or Tow lost or not lost, and all other sums shall be fully and irrevocably earned on a daily basis.*
>
> ***3. Additional Charges and Extra Costs***
>
> *b) The Hirer shall bear and pay as and when they fall due:-*
>
> *i) All port expenses, pilotage, charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of both the Tug and the Tow.*
>
> *…*
>
> *iv) All costs and expenses necessary for the preparation of the Tow for towing (including such costs or expenses as those of*

[1] Some text in the printed BIMCO terms was moved in the course of copying and/or transmission. The parties were agreed that this was unintentional and that the standard wording was intended to be incorporated.

raising the anchor of the Tow or tending or casting off any moorings of the Tow).

…

5. Interest

If any amounts due under this Agreement are not paid when due, then interest shall accrue and shall be paid in accordance with the provision of Box 34, on all such amounts until payment is received by the Tugowner.

11. Permits and Certification

The Hirer shall arrange at his own cost and provide to the Tugowner all necessary licenses, authorisations and permits required by the Tug and Tow to undertake and complete the contractual voyage together with all necessary certification for the Tow to enter or leave all or any ports of call or refuge on the contemplated voyage.

b) Any loss or expenses incurred by the Tugowner by reason of the Hirer's failure to comply with this Clause shall be reimbursed by the Hirer to the Tugowner and during any delay caused thereby the Tugowner shall receive additional compensation from the Hirer at the tug's Delay Payment rate specified in Box 29.

12. Tow-worthiness of the tow

a) The Hirer shall exercise due diligence to ensure that the Tow shall, at the commencement of the towage, be in all respects fit to be towed from the place of departure to the place of destination.

…

c) The Hirer shall supply to the Tugowner or the Tugmaster, on the arrival of the Tug at the place of departure an unconditional certificate of tow-worthiness for the Tow issued by a recognised firm of Marine Surveyors or Survey Organisation, provided always that the Tugowner shall not be under any obligation to perform the towage until in his discretion he is satisfied that the Tow is in all respects, trimmed, prepared, fit and ready for towage but the Tugowner shall not unreasonably withhold his approval."

…

16. Cancellation and Withdrawal

...

c) The Tugowner may without prejudice to any other remedies he may have leave the Tow in a place where the Hirer may take repossession of it and be entitled to payment of the Lump Sum less expenses saved by the Tugowner and all other payments due under this Agreement, upon any one or more of the following grounds:

…

v) If any amount payable under this Agreement has not been paid within 7 running days of the date such sums are due.

d) Before exercising his option of withdrawing from this Agreement as aforesaid, the Tugowner shall if practicable give the Hirer 48 hours notice (Saturdays, Sundays and Public Holidays excluded) of his intention so to withdraw.

17. Necessary Deviation or Slow Steaming

(a) If the tug during the course of the towage or other service under this Agreement … slow steams because either the tugowner or tugmaster reasonably consider

…

(ii) the Tow is incapable of being towed at the original speed contemplated by the Tugowner or …

because of any other good and valid reason outside the control of the Tugowner or Tugmaster or because of any delay caused by or at the request of the Hirer … the Tugowner shall be entitled to receive from the Hirer additional compensation at the appropriate Delay Payment rate as set out in Box 29 for all time spent in such port or place and for all time spent by the Tug at sea in excess of the time which would have been spent had such slow steaming or deviation not taken place.

…

(d) Any deviation howsoever or whatsoever by the Tug or by the Tugowner not expressly permitted by the terms and conditions of this Agreement shall not amount to a repudiation of this Agreement [which] shall remain in full force and effect notwithstanding such deviation.

…

21. Lien

Without prejudice to any other rights he may have, whether in rem or in personam, the tugowner, by himself or his servants or agents or otherwise shall be entitled to a possessory lien upon

> *the tow or in respect of any sum howsoever or whatsoever due to the tugowner under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Tow; provided always that the Hirer shall pay to the Tugowner all reasonable costs and expenses howsoever tempting (sic) or preparing (sic) to exercise such lien and the Tugowner shall be entitled to receive from the Hirer the Tug's Delay Payment at the rate specified in Box 2 for any reasonable delay to the Tug resulting therefrom.*
>
> ***22. Warrant of Authority***
>
> *… the Hirer expressly represents that he is authorised to make and does make this Agreement for and on behalf of the Owner of the said Tow subject to each and all of these conditions and agrees that both the Hirer and the Owner of the Tow are bound jointly and severally by these conditions.*
>
> *…*
>
> ***25. Law and Jurisdiction***
>
> *This Agreement shall be construed in accordance with and governed by English Law. Any dispute or difference which may arise out of or in connection with this Agreement or the services to be performed hereunder shall be referred to the High Court of Justice in London. No suit shall be brought in any other state or jurisdiction except that either party shall have the option to bring proceedings in rem to obtain conservative seizure or other similar remedy against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found.*
>
> *…*
>
> ***Payments:*** *All outstanding payments, including demurrage, if any, to be settled in full without discount, deductions, set-off etc prior release of Tow.*"

(v) Post-contract discussions regarding the ballast condition of the IKDAM

22. On 16 September 2012 Capt. Krishna emailed Mr Donnan, acknowledging receipt of the signed Towcon. He also raised the question of the IKDAM's proposed condition in the following terms:

> "*… 0.92 M is quite less for a ocean towage. We would like to have around 2.00 – 2.25 M trim. Maybe, they can pump out one of the forward tanks to reduce the displacement too. Ballast should be sufficient for stability and all excess ballast must be pumped out to avoid wasting fuel towing water ballast! Pls see*

> *how best we can reduce ballast by abt 20,000 Tons and increase Trim.*"

23. The request to reduce the displacement of the IKDAM by about 20,000mt was relayed to the Master of the IKDAM (at that time Capt. Malek). He reported to Lundin that, according to the ship's Loadrite computer (which performs stability calculations), it was only possible to reduce the ship's weight by 15,000mt, giving a trim of 2m. The calculation showed a forward draught of 7.464m and aft draught of 9.495m (a trim by stern of 2.03m), resulting in a displacement of 74,551.1mt (a deadweight of 48,486.1mt).

24. On 17 September Mr Temani forwarded Capt. Malek's answer to Mr Donnan, copied to Regulus, stating that "*the excess weight was dictated by our advisor to mitigate move of the vessel around the CoGH*". This was a reference to the fact that Lundin had engaged a naval architect, Andrew Comley, to advise in relation to the towage operation and to liaise with the marine warranty surveyors, GL Noble Denton (GLND), and that Mr Comley's advice was that the IKDAM should carry more ballast.

25. Capt. Krishna replied the same day as follows:

> "*- Regarding Trim / deballasting requirements – we accept Mr. Malek Zaghounai's email below, wherein it is possible to reduce ballast by abt 15,000 Tons and increase trim to abt 2.0 Mtrs. Appreciate same. As regards passing COGH – this is a long way off – abt 6,000 miles from Sousse; more than 50 days away! There is no need to start preparing now for rounding Cape 50 days away. You have crew on the Tow. Our Tug Master will see the performance of the Tow during passage and will advise if something needs to be done with the ballast during voyage. Further, weather conditions in November are much better round South African coast and we will watch the weather closely as we reach there.*"

26. Lundin then sought Mr Comley's views. The same day Mr Comley forwarded to Lundin the first version of a Motions Analysis and Structural Integrity Assessment he had performed for the towage. He had based his analysis on models which had previously been developed, using the Orcaflex software package, at the time of the conversion of the IKDAM to an FPSO. The mooring system Orcaflex models were based on two conditions, taking into account the estimated weight of the topside process models, flare tower and mooring system loads:

    i) a fully loaded condition with a mean draught of 14.16m and a displacement of 127,714mt; and

    ii) a ballast condition with a mean draught of 9.2m and a displacement of 79,026mt.

    DNV had classed the mooring systems for the IKDAM based on these models. Mr Comley's analysis considered the accelerations and forces which would be exerted on the IKDAM during the towage, including on the topsides, and demonstrated

(primarily to satisfy the marine warranty surveyors, GLND) that at any loading condition between "fully loaded" and "ballast condition", such forces would be within the original design envelope and that, therefore, the IKDAM's strength and integrity would be acceptable given that the design analyses had been reviewed and accepted by DNV.

27. Shortly afterwards Mr Comley emailed Lundin in the following terms:

> "*… I can understand Regulus wanting a trim on the vessel as it will make it easier to tow as the stern of Ikdam will act like a giant rudder thus stabilising the tow. I also agree with Ian that having a vessel low in the water should minimise the motions, even if the analysis doesn't show much change. In addition, I am not sure Regulus understand that our bulbous bow is rather flat at the front and therefore it would be better for it to be under the surface rather than slamming into waves. I would suggest that we run some other loading patterns to try and fine something that:*
>
> 1. *Gives us 1 to 2 metres trim by the stern;*
> 2. *Submerges our bulbous bow if possible;*
> 3. *Gets us below ballast draught at Midships in order to minimise motions.*
>
> *At the end of the day, we need to minimise fatigue usage during the voyage in order to maximum useful working life at the new location and the cost of tug fuel in comparison to life extension of the hull is very little.*"

28. That same evening Capt. Malek informed Lundin that the upper limit of IKDAM's flat bulbous bow was at 9.5m draught, and attached a revised ballast departure condition calculation to meet Mr Comley's advice, including that the bulbous bow should be submerged if possible and the mean draft should be 9.53m, as per the IKDAM's ballast transit condition in its 2001 operating manual. The calculation produced a forward draught of 10.951m and an aft draught of 12.819, providing a trim of 1.87m and a displacement of 107,290.6mt. Mr Comley told Lundin that he agreed with this revised ballast condition, stating that "*we are safeguarding our hull, which means we are meeting our aims*".

29. The Hazid meeting (originally planned for 17 September 2012) took place on 20 and 21 September in Tunis, attended by Foo Siang Lim from Regulus, Mr Temani, Mr Comley and others from Lundin and representatives of GLND. That same day Lundin emailed the proposed departure conditions of the IKDAM to Mr Lim. Mr Lim forwarded the details to Capt. Krishna and explained as follows:

> "*About the IKDAM draught, they have finalise the vessel draught as attached, when I ask for further reduce vessel draft. Mr Nebil refuse to do it due to the vessel stability issue, which they didn't justify it.*

> *On the hand, Mr Andrew reply is to reduce the pouding effect on the FLAT bolbous bow which may create fatigue stress and failure. Therefore, they need to submerged the FLAT bolbous bow in the water (min Fwd draft 10m) They have increased the vessel trim to 1.868m. NO BODY interested further discuss about this.*"

30. On 26 September 2012 Capt. Krishna emailed Lundin about various matters, including the need to reduce ballast, stating:

> "*2. BALLAST CONDITION: we have to reduce ballast further. I had had discussions with Capt Malek who had served as Master on 'IKDAM'. His contention was that by reducing ballast, the 'bulbous' bow gets exposed and this may affect towing speed. HARMONY 1 Master does not feel so. In fact, in the present condition, we will be towing unnecessary dead ballast. Since IKDAM has crew on board, during voyage, if they meet condition when additional ballast is required for better speed or safety, it could be put in. the current ballast conditions are very heavy and will affect towing speed.*
>
> *Further, present Master on board HARMONY 1 had towed a similar FPSO, 'MODEC VENTURE' recently, with cut bulbous bow & flare tower, speed was not affected by exposed bulb.*"

31. The following day, 27 September, the new Master of the IKDAM (Capt. Samir) sent a revised stability calculation to Mr Temani, based on a displacement of 85,000mt. On 28 September Mr Temani sent the proposal to Mr Comley, with a suggestion that the crew could take on ballast at Walvis Bay (Namibia) to increase its weight to 107,000mt for the passage round COGH, then revert to 85,000mt on arrival at Port Louis in Mauritius.

32. Mr Comley rejected the proposal the same day, stating as follows:

> "*Why does the tug wish the FPSO to be at a lower draught when fundamentally this will increase the wind loadings on the tow and make it more difficult to control the vessel passing along the Mediterranean and through the crowded waters at Gibraltar particularly if the scirroco or winds start up. With regard to the specific loading condition it is difficult to comment as there is no graphic showing which tanks are full and which are empty, however, the [s]hear force diagram looks reasonable. With regard to the motions analysis, this was done for an even keel draught of 9m, hence it could be argued that the condition still applies but it would be safer to have the FP draught at over 9m to make sure it applicability cannot be questioned. Given the situation with getting the necessary approvals I do not think a late change in the loading condition is the best idea and should be subject to review, hence my opening question.*"

33. On 30 September 2012 Lundin notified Regulus that the towage would commence from Malta as it was not possible to comply with certain requirements of GLND in relation to the connection of the vessels in Tunisia. Both the HARMONY 1 and the IKDAM sailed to Malta, under their own steam, on 1 October 2012.

34. On 4 October 2012 Capt. Krishna sent an email to Lundin making a further complaint about the proposed ballast condition of the IKDAM as follows:

> "*Kindly note that our Towage offer of the IKDAM in '**light, ballast condition**'. Over 81,000 Tons of ballast is not **light, ballast condition**. Further, the TRIM of the Tow is not sufficient for efficient towage.*
>
> *This will affect the towage speed and Tug's fuel consumption. We had quoted basis general average speed of 4.5 knots for the voyage, in normal weather condition and in light ballast condition. Since, Lundin, Tunisia have advised that they cannot reduce ballast any further, we may have a claim for loss of speed due to Tow's heavy ballast condition.*
>
> *We would request you to re-consider the case, arrange to pump out at least abt 20-30,000 Tons of ballast and achieve a TRIM of about 2 meters plus. In the event of bad weather and if so desire by IKDAM Master, we could have additional ballast pumped in during voyage. It makes no sense towing 81,000 Tons of water. We have towed similar FPSOs in the past with abt 25-40,000 Tons of ballast which is quite sufficient for stability. Understood from my discussions in Tunisia, IKDAM Masters had re-worked the calculations and found it possible to reduce ballast during voyage*"

35. Mr Donnan replied as follows:

> "*Lets get the tow going firstly. I want no more iterations with Noble Denton to delay the tow commencement further. It may be the case that adjustments to ballast and trim are needed once the behaviour of the Ikdam is understood. No problem for you to keep your records as you see fit.*"

Capt. Krishna's response, still on 4 October, was "*Well understood Kevin!*"

36. On 6 October 2012 GLND issued a Certificate of Approval for the towage on the basis of its review of Mr Comley's Motion Analysis, the Towing Manual and the Stability calculations. GLND's approval was subject to the following conditions and comments:

> "*The towage has to stop when seastates in excess of 5.00 m significant wave height and 1-minute wind speed in excess of 20 m/sec*

> *FPSO has to be maintained in sheltered area prior espouser to seastates in excess of 6.80 m wave height and 1-minute wind speed in excess of 25m/sec*
>
> *Maximum allowed towage speed is 4.50 Knots*
>
> *A riding crew of 14 men shall be on board the tow throughout the towage*
>
> *This office, having received no instructions to consider fatigue aspects of the towage, makes no comment and gives no approval of the ability of the cargo and sea-fastenings to withstand fatigue damage.*"

(vi) Commencement of the towage and deballasting on 17 October 2012

37. The towage commenced from Malta at about 17.10 on 6 October 2012. Regulus' pleaded case is that the IKDAM's displacement on departure was 90,000mt, but it became clear during the trial (and Capt. Krishna accepted) that it was in fact 107,000mt and that Regulus well knew that to be the case.

38. It soon became apparent that the convoy was not achieving desired speeds. On 8 October 2012 Capt. Krishna emailed Mr Markham to say that he did not expect speed to improve due to excess ballast on the tow and adverse current along the North African Coast. On 9 October Capt. Samir of the IKDAM emailed Lundin, proposing pumping out 20,000mt of ballast:

> "*Please note that average speed for the towage convoy for last 24 hours Was about 2.8 knots (Wind force 28 Knots and Rough Sea state).*
>
> *On departure the speed was 4.0 knots with no wind and calm sea state.*
>
> *According to my observations, I believe that it becomes necessary to Lighten IKDAM by pumping out ballast and this for many reasons:*
>
> 1. *The convoy will be subject to excessively delays (e.g. 1 knot Less in convoy speed will result in 33 days of delay to arrive to Malaysia). These delays which can go to more than one month if we take into consideration expected currents and occasionally Bad weather.*
>
> 2. *Expected delays will result in huge increase of bunkers to be used By Tug and IKDAM, as well for all others charges.*
>
> 3. *Reducing displacement of 20.000t (IKDAM Proposal) doesn't affect The stability of the ship and make the life easier for the tug with More speed and less consumption, remain to confirm motions analysis.*

> 4. *Even there is no limitations for arrival time at Malaysia, we have to get there within a reasonable duration (I believe delays beyond 1 month would be unacceptable, if that will be only because of unnecessary ballast water onboard IKDAM, obviously this to be confirmed by recalculation of Motions Analysis.*
>
> 5. *Other costs induced by delays and inherent to charter-party and Warranty Association Coverage period etc …*
>
> *So here I have a proposal to pump out 20.000t of ballast water as per attached Stability condition.*"

39. On 12 October Mr Comley, asked to comment by Lundin, expressed the view that deballasting would not necessarily increase speed and would adversely affect the fatigue life of the IKDAM, stating:

> "*The Certificate of Approval is only valid up to a tow speed of 4.5 knots, so whilst I appreciate that a reduction in ballast may enable us to hit top speed, I am also not surprised that the speed has dropped with 28 knots of wind and a rough sea state. 28 knots of wind of around 14 m/s of wind will be using up around a 1/3rd of the available bollard pull just to hold station, hence the speed drops by around a third hence 2.8 knots. That is pretty much exactly what you would expect to happen and is happening. We can take the ballast out and yes it will lighten the vessel, however, it will also potentially increase the drag on the vessel as more of the hull is exposed, which means it could well have a negative effect and we will go through the loop again when they find this, particularly given it will cause the flat part of the "bulbous" bow to emerge causing it to slam into every wave. As I have stated before, and will state again for the record, the more the hull is worked during the voyage the less its remaining fatigue life and potentially the greater CAPEX required to get it fit to go on station in Malaysia.*"

40. However, Mr Comley did not object to the proposal on grounds of the safety or seaworthiness of the vessel, recognising that the proposed revised condition fell within his Motions Analysis. He suggested some wording to be used in approaching GLND for approval of the change in ballast condition as follows:

> "*Although we appreciate that the trim of the revised sailing condition is a little different to the analysed condition (although it still only amounts to 0.769 degrees), given that the overall displacement is still some 7.5% greater than the analysed condition and the revised KG (corrected) is some 3% lower than the analysed KG then the condition is still within the analysed envelope and the motions analysis is still valid, particularly given the environmental limitation stated within the Certificate of Approval.*"

41. GLND approved the change on 14 October 2012, finding the revised stability calculations to be within acceptable limits. Lundin instructed Capt. Samir to proceed with deballasting on 15 October. Capt. Samir subsequently confirmed that the operation (which required firing up the IKDAM's boilers) had concluded on 17 October 2012, resulting in a displacement of 85,000mt and a trim of 3.5m.

(vi) Regulus's initial delay claim based on excess ballast

42. On 22 October 2012 Capt. Krishna emailed Lundin to make plain his position that, despite the deballasting, the IKDAM was still not in light ballast condition and that Regulus would claim for resulting loss of speed on a monthly basis. On 6 November 2012 Capt. Krishna duly made such a claim for the period 6 October to 5 November, asserting that general average speed had been reduced from 4.5 knots to 3.64 knots due to excess ballast, resulting in a loss of about 7.1 days. Regulus claimed sea demurrage at the daily rate of US$21,000 for that period, totalling US$149,100.

43. On 9 November 2012 the HARMONY 1 stemmed fresh water and 152mt of MGO from the IKDAM.

44. On 20 November 2012 Mr Markham asked the Master of the IKDAM how he felt about taking out more ballast, and if so how much, noting that "*We are now under Noble Denton Singapore so maybe we could negotiate a bit more lightening of deadweight?*"

45. Capt. Samir replied the same day, expressing the view that, at that time, it was not a good idea to lighten the IKDAM further, stating

> "*Lightening the ship now means taking out water from the central cargo tanks, and this will increase considerably the effect of free surfaces on the ship's movement.*
>
> *For prevailing weather and current conditions in this area, a significant reduction in displacement will cause the ship to roll heavily and may be will not have enough effect on speed of the convoy as the main constraint now is the strong current.*
>
> *I believe it is better to wait a few days till the speed increases again with less effect of equatorial current. At that time if we could make more than 4.0 knots till arrival at Walvis Bay, it will be ideal.*"

46. Capt. Krishna pursued Regulus' slow speed claim on 21 November 2012, stating as follows:

> "*We are seriously concerned that our 'Slow Speed Claim' has not been settled thus far. It is very important for Owners that Charterers understand our predicament since this towage is getting longer resulting in higher fuel costs for Owners everyday. Every extra day that the convoy spends at sea is costing us by way of bunker costs & operational costs. And the only reason for this delay is the excess weight of the Tow.*

> *IKDAM has abt 30,000 tons of extra ballast on board. In addition to towing the IKDAN, our Tug is also towing abt 30,000 of extra ballast. This is not IKDAM in "light ballast condition""*

47. Mr Donnan replied on 22 November, acknowledging that some payment was due to Regulus for the slow speed prior to deballasting. He attached a calculation reaching a figure of US$55,157.

48. Capt. Krishna responded on 28 November 2012, asserting (wrongly) that the IKDAM's displacement on departure was about 90,061mt and that, after deballasting, its displacement (calculated from draughts observed by Capt. Sergey at Gibraltar) was 87,300mt. Capt. Krishna therefore concluded that the IKDM had pumped out only 2,300mt of ballast. He further asserted that the IKDAM still had 20-25,000mt of excess ballast and that the convoy "*would most certainly have done a speed of abt 4.5 knots and within anticipated consumption of abt 12.5 Tons/day*" if this excess had been pumped out.

49. Mr Donnan replied on 29 November 2012, accepting that "*things in the early days had not gone to plan. Therefore, know some payment is due*".

50. On 14 December 2012 the convoy arrived at Walvis Bay, Namibia, where the IKDAM was inspected by a marine surveyor from Raffles. The surveyor calculated the IKDAM's displacement as 83,025.071mt based on measuring its draughts and as 84,915.1mt based on measuring its ballast, cargo, fuel and fresh water. The surveyor reported that the draughts were difficult to measure due to a large swell and marine growth obscuring draught marks, suggesting that the measurement by weights on board was likely to be more accurate.

51. The convoy then proceeded round the COGH and headed for Port Louis. Capt. Krishna continued to raise Regulus' slow speed claims, adding a claim for US$111,300 for delay in the balance of November 2012. On 14 January 2013 Capt. Krishna informed Mr Markham that the convoy was expected at Port Louis on 21 January and put Lundin on notice that the HARMONY 1 would not resume the towage from Mauritius until Regulus's claims were settled, failing which Regulus would exercise its rights under clauses 16(c) and 17(a) of the Towcon. The same day Capt. Krishna raised further invoices for US$155,400 for alleged delay in December and US$13,033.80 for excess fuel consumed.

52. On 15 January 2013 Mr Markham replied seeking to arrange a meeting with Capt. Krishna, but also raising the fact that Regulus owed Lundin for the fuel supplied on 9 November 2012, amounting to US$159,600 at the rate specified in the Towcon of US$1050. Capt. Krishna countered that a rate of US$800 had been agreed.

(vii) Delay at Port Louis and the agreement to proceed

53. The convoy arrived at Port Louis on 22 January 2013, where it remained at anchor in open water whilst Regulus and Lundin sought to negotiate a resolution of the speed claims. Those claims were not in the event resolved, but on 30 January 2013 the parties reached an interim agreement to permit the convoy to continue the voyage ("the January Agreement"). The terms were, in outline:

i) Lundin would pay US$725,000 directly to suppliers for fuel to be supplied to the HARMONY 1;

ii) The sum so paid would be offset against the final payment of US$825,000 due to Regulus under the Towcon, the balance of US$100,000 being due on safe arrival at Labuan;

iii) Regulus would recommence and complete the towage as soon as reasonably practicable and would take no further action against the IKDAM, subject to point (v) below;

iv) On resumption of the voyage the parties would negotiate in good faith with a view to settling all outstanding claims before arrival at Labuan;

v) If a settlement was not achieved 7 days prior to arrival at Labuan, Lundin would provide a guarantee from its parent company in the sum of US$1,350,000.

54. The convoy left Port Louis on 5 February 2013.

(viii) Diversion to Singapore and termination of the Towcon

55. Further negotiations in relation to the outstanding claims were unsuccessful. On 13 March 2013, with the convoy due to arrive at Labuan on 24 March, Lundin offered to provide Regulus with a guarantee for US$1,350,000, to be issued by its parent company, Lundin Petroleum AB, understanding that that would meet its obligations under the January Agreement. The guarantee was duly executed on 15 March 2013 and sent to Regulus. However, Capt. Krishna refused to accept the guarantee. The same day, Regulus' solicitors demanded that US$1,375,000 be paid into an escrow account in London, asserting that there had been no agreement as to the form of the parent company guarantee to be provided. The solicitors concluded by stating that they were instructed to make arrangement to arrest the IKDAM.

56. On 17 March 2013 Capt. Krishna instructed the HARMONY 1 to alter course from Labuan to Singapore. He informed Lundin that the diversion was in order to take a possessory lien on the IKDAM as security for Regulus' unpaid claims up to February 2013.

57. The convoy arrived at Singapore on 19 March 2013 and dropped anchor outside port limits. Capt. Krishna stated that the deviation was 95nm and that the distance to Labuan was 650nm.

58. It appears that on 21 March 2013 Capt. Krishna had a change of mind, informing Mr Nicholson of Lundin in an email that he would accept the parent company guarantee and had instructed the Master of the HARMONY 1 to resume the voyage to Labuan and deliver the IKDAM to Lundin. Capt. Krishna stated as follows:

> "*We are professionals and you will appreciate that fact that we have done a very professional job by towing the IKDAM safely round Cape and delivering the Tow. We would like to be remembered for the professionalism and commitment to do the*

> *job given to us safely and efficiently. Our intention was never to squeeze money out of Charterers. We have suffered losses because IKDAM was heavier than we had anticipated. And our anticipation was from the numerous similar towages that we had done in the past. We still maintain that the IKDAM displacement should have been closer to 70,000 rather than the present 90,000t*
>
> *We still have about 7 days to arrival of Tug & Tow in Labuan. We would request you to once again seriously re-consider our claim and offer us a settlement in order to reduce our losses.*"

59. However, the Master of the IKDAM refused to heave up anchor. On 22 March 2013 Lundin's solicitors (then Navin & Co LLP) asserted that Regulus was in breach of both the Towcon and the January Agreement and had repudiated the Towcon. They put Regulus on notice that Lundin would not permit the towage to resume unless Regulus agreed to a full and final settlement under which the parent guarantee was released and all claims waived except for the final US$100,000 to be paid on the tug and tow arriving safely and unencumbered at Labuan within 10 days of the settlement agreement.

60. Also on 22 March 2013 the first defendant issued *in personam* proceedings against Regulus in Singapore seeking damages and a declaration in relation to the Towcon, although the proceedings were not served on Regulus until 25 March 2013. Lundin now accepts that issuing those proceedings in Singapore was a breach of the exclusive jurisdiction clause in the Towcon (clause 25).

61. On 23 March 2013 Capt. Krishna emailed Lundin as follows (referred to as "the 1980 email" by reason of its place in the trial bundle):

> "*… as per Cl.16 (c) of BIMCO Towcon Contract, we hereby give you Notice of Cancellation of Contract & withdrawal of Tug. Further, as per Clause 16 (d) we will give you 48 Hrs Notice, which commenced March 21/2000 LT [8pm local time]. As you know, IKDAM is safely anchored and your Master is in full control of the Tow*"

62. Navin & Co replied the same day ("the 1982 email"), asserting that Regulus' notice of cancellation was a repudiatory breach of the Towcon and purporting to accept that repudiation on behalf of Lundin. Navin & Co also reserved Lundin's right to claim damages, including the cost of a fresh towage for the IKDAM.

63. On 25 March 2013 the HARMONY 1 asked the IKDAM to release the connection between the vessels. When the IKDAM refused to do so, the crew of the HARMONY 1 cut the mooring ropes and released the tow wire. The HARMONY 1 then departed, leaving the IKDAM at anchor.

64. On 28 March 2013 Lundin entered a towage contract (again on BIMCO terms) with Posh Terasea Offshore Pte for the IKDAM to be towed from Singapore to Labuan for the price of US$550,000. The Towcon provided that the IKDAM would be "*in ballast condition meeting with the MWS requirement for the intended towage*".

65. The IKDAM departed Singapore on 29 March 2013, towed by the AHTS Posh Salvanguard, arriving at Labuan on 4 April 2013.

Regulus' claim that the IKDAM was not "*in light ballast condition*"

(a) The meaning of the term "*in light ballast condition*"

66. In its defence Lundin pleaded that the provision in the Towcon that the IKDAM would be "*in light ballast condition*" meant that she would carry (as well as any constants and consumables) the minimum ballast that would enable her to proceed safely and in a seaworthy condition on her intended voyage.

67. That definition was taken, word for word, from §110 of the decision of Andrew Smith J in *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] 1 Lloyd's Rep 673, another case in which Capt. Krishna, on behalf of Regulus, had included in a towage contract a term that the tow (in that case *Kent Reliant*, a bulk carrier being scrapped) would be in light ballast condition. It is the only authority on the meaning of the term.

68. Regulus was and remains content with that definition, emphasising the obligation on the hirer to reduce ballast on the tow to the minimum necessary for her to proceed safely on her voyage.

69. At trial, however, Lundin relied on a later paragraph in the same decision in which Andrew Smith J provided a slightly differently worded definition as follows:

> "*118. … At its simplest it comes to this: ballast is any material placed on board the vessel to add weight and the reference to "light" refers to the least amount of ballast with which the vessel can safely and properly proceed on her voyage.*"

70. Placing reliance on the addition of the word "properly", Lundin contends that the tow must be legally fit for the towage, which includes being insured for the voyage. This entails, Lundin submits, that the condition of the tow must be in accordance with the requirements of the marine warranty surveyor, including whatever ballast condition (draughts and displacement) that surveyor deems necessary, and within the vessel's class. Of course, different surveyors are likely to have different approaches: in this case Lundin thought that GLND's Singapore office was likely to take a more relaxed view of ballast requirements than the Egypt office which provided the Certificate of Approval.

71. In my judgment the inclusion of the word "properly" in the reformulation of the test cannot have the effect for which Lundin contends, transforming the test from one of the minimum ballast required for physical safety and seaworthiness (producing, at least in theory, a single ascertainable figure) to one based on the wishes of a third party (capable of multiple solutions, depending on the approach of the surveyor engaged). Indeed, Lundin's argument entails that if the particular marine warranty surveyor engaged prefers that the tow should be in what could only be regarded as heavy ballast condition, that condition would, perversely, be deemed light ballast condition. The effect would be to deprive the term of any sensible meaning and to remove from Regulus the protection the provision was plainly intended to confer.

72. Further, as Mr Yash Kulkarni, Counsel for Regulus, pointed out, obtaining insurance was an obligation of Lundin under the Towcon, its obligation being both (but separately) to provide a tow in light ballast condition and to arrange insurance. The fact that Lundin's attempted compliance with one of those obligations placed it in difficulties complying with the other could not excuse proper performance of both. Lundin's obligation was to obtain insurance for the IKDAM in light ballast condition.

73. Indeed, I do not consider that Andrew Smith J intended, by slightly re-phrasing his definition, to introduce the additional considerations for which Lundin now contends. In the very next paragraph, he further explained:

> "*119. The question, therefore, whether there was a breach of the undertaking in the towcon that the "Kent Reliant" was in light ballast condition depends upon whether she was carrying more ballast than was necessary to ensure her stability for the voyage. …*"

74. That further formulation makes it entirely clear that light ballast condition is concerned with ensuring physical fitness, primarily stability, for the tow's voyage. I am satisfied that that is the proper test.

(b) Did the parties agree what constituted light ballast condition for the IKDAM?

75. Lundin refers to the fact that Capt. Krishna was sent proposed ballast conditions of the IKDAM of 113,492mt on 4 September 2012 (before he executed the Towcon) and of 90,061.5mt (before Lundin countersigned). Lundin argues that the objective intention of the parties, construed in the context of that factual matrix, was that ballast conditions at those levels satisfied the requirement that the IKDAM be in light ballast condition.

76. I see no merit in this contention. Capt. Krishna did not at any time agree that any particular displacement satisfied that requirement. In the absence of such agreement I do not see any basis on which the contractual term could be "construed" on the basis of documents sent to Capt. Krishna, but on which he did not comment and was not asked to comment. Further, the email sending Capt. Krishna the proposed displacement of 90,061.5m was expressly stated to be "*pending on desires of tugboat*". That reference makes it clear that Regulus was not viewed as consenting or otherwise bound by proposals for the ballast condition of the IKDAM.

77. Capt. Krishna's failure to express his and Capt. Sergey's concerns as to the proposed displacement until after Lundin had countersigned the Towcon (which I accept was deliberate) may be considered unattractive, but there is no suggestion that Lundin was operating under a mistake, let alone that Capt. Krishna knew that to be the case. I can see no obligation on Regulus to express its views that, if the Towcon was executed, the proposed provisional displacement was not in accordance with its terms. Regulus was therefore entitled to continue to rely on the express terms of the Towcon, unrestricted by any pre-contract exchanges.

(c) Was the IKDAM in light ballast condition on departure?

78. Mr Comley confirmed in giving oral evidence that he did not see the Towcon at the time and was unaware of the contractual requirement that the IKDAM should be in light ballast condition. Indeed, it is apparent that nobody at Lundin instructed him to seek to minimise the IKDAM's displacement and that such an aim did not feature in his assessment of the appropriate departure condition.

79. Instead, having demonstrated that the IKDAM's structural integrity was sufficient at a displacement of 79,026mt in seas up to 6.8m (resulting in GLND imposing the wave height conditions in the Certificate of Approval), Mr Comley focused on identifying a (heavier) ballast condition than 79,026mt which would minimise fatigue to the IKDAM during the voyage and so maximise its service life on arrival. In so doing Mr Comley was taking on board GLND's Guidelines for the Approval of Towing Vessels, which provide in relation to FPSOs as follows:

> "*For barges and large towed objects, such as FPSOs, the draught and trim should be selected to minimise slamming under the forefoot, to give good directional control, and to allow for the forward trim caused by the towline pull.*
>
> ……
>
> *FPSOs are intended to remain at sea without dry-docking for their entire working life, usually in the order of 20 years. In this respect the integrity of the hull must be maintained and precautions taken to ensure no damage occurs during the tow. A commercial vessel is usually assumed, for design purposes, to spend about 20% of its life in port, and is periodically dry-docked. These differences place much greater emphasis on the reliability, integrity and quality of the hull including its coating. These qualities must not be compromised during the tow other than by reasonable wear and tear*"

80. This caused Mr Comley to propose that the cut bulbous bow be submerged to prevent slamming, requiring a forward draught of at least 9.5m and therefore an even deeper aft draught to provide a trim by the stern as required by Regulus. The resulting displacement was 107,290.6mt, the condition in which the IKDAM departed Malta.

81. However, a vessel will inevitably suffer some fatigue on a voyage (particularly one of over 12,500 nm round the COGH), no matter how safe and seaworthy its condition. As Mr Nevil Phillips, Counsel for Lundin, accepted in closing, minimising such fatigue cannot in itself be a factor in calculating the minimum ballast required to enable the vessel to proceed safely and in a seaworthy condition. It is noteworthy that the Certificate of Approval made it clear that GLND was not concerned with fatigue aspects of the towage.

82. Indeed, the fact that Mr Comley accepted shortly after the towage had commenced that deballasting to 85,000mt presented no difficulties from the point of view of his Motions Analysis (and that GLND duly approved the lower weight) appears to be conclusive of the fact that 107,290.6 was not light ballast condition.

83. In closing argument, whilst not formally abandoning Lundin's contention that 107,290.6mt was light ballast condition, Mr Phillips recognised Lundin's difficulty in that regard once it was accepted that the vessel was in a safe and seaworthy condition with 22,000mt less ballast.

84. It follows that, from departure on 6 October 2012 until at least 17 October 2012, Lundin was in breach of its obligation to provide the IKDAM in light ballast condition.

(d) Was the IKDAM in light ballast condition after deballasting to 85,000mt?

85. Mr Comley was content with the reduced displacement because it was (a) within the range shown to be acceptable in his Motions Analysis and (b) still ensured that the IKDAM's mean draught was at least 9.53m (it was in fact stated to be 9.623m), thereby within the vessel's classed ballast transit condition.

86. Mr Comley did not subject any lighter ballast conditions to analysis because, perhaps understandably given his instructions, he took as his starting point conditions which were within the vessel's class. The result is that Lundin's case that the revised ballast condition of the IKDAM complied with the requirement of the Towcon was based solely on the contention that light ballast condition must be one which is within class, not based on the safety and seaworthiness of the vessel (although the two questions are, of course, linked). As Mr Kulkarni pointed out, it was open to Lundin to seek class approval for a lighter ballast transit condition, such matters being a matter on Lundin's contractual side of the line. A proper approach to complying with the obligation under the Towcon would have been to assess the minimum ballast required for stability and seaworthiness during the towage and then, if necessary, to seek approval from DNV. As Lundin did not take that approach, it cannot be assumed that 85,000mt was compliant with its obligations and, further, Lundin's expert mariner, Capt. Nicholson, did not provide any independent assessment on the issue.

87. It follows that I accept Regulus' contention that 85,000mt was not necessarily light ballast condition. However, the question remains as to whether the evidence establishes a lower figure so as to prove that Lundin remained in breach of the Towcon after 17 October 2012.

88. Capt. Krishna's evidence was that his "rule of thumb" was that a vessel's light ballast condition was twice its lightship weight plus about 10,000mt. As a result he had expected IKDAM's light ballast condition to be in the range of 60,000-65,000mt. However, whilst not discounting Capt. Krishna's experience of towages, I can give little weight to such a broad and unscientific approach, one which does not reflect the type of vessel or its condition or factor in the nature of the voyage to be undertaken.

89. Regulus' expert mariner, Capt. Stirling, expressed his opinion that the IKDAM's light ballast condition was at a displacement of 60,907mt. He took a starting figure of 54,503mt, adjusting it upwards to allow for trim and propeller immersion of 50%. However, there were two major difficulties with Capt. Stirling's approach:

i) first, his starting displacement was based on figures for an Aframax tanker, not an FPSO, the latter being a significantly different type of vessel given the extensive additions to its topsides, it being necessary to take into account

whether the stresses which would be imposed on the foundations of such topside modules were within design limits;

ii) second, Capt. Stirling had not determined whether his proposed condition would comply with statutory stability and strength requirements, not having had access to the IKDAM's LoadRite computer and not having performed a manual calculation.

90. Given those factors, I cannot be satisfied that the ballast condition proposed by Capt. Stirling would have enabled the IKDAM to proceed in a safe and seaworthy condition.

91. However, Capt. Stirling also pointed out that the IKDAM's 2007 Operating Manual, approved by DNV on 18 July 2007, provided for a Ballast Departure Condition (full of fuel oil and fresh water) of 77,109.273mt and a Ballast Arrival Condition (10% fuel oil and fresh water) of 71,568mt. The state of both these conditions was described as "*Intact hull with all appendages*" and notes that the vessel passes all requirements in these conditions. He expressed the view that, whilst the lowest displacement approved by DNV with a mooring system was the Orcaflex ballast draught model of 79,026mt, the fact that the IKDAM had been approved to travel anywhere in the world at a displacement of 71,568mt was strong evidence that DNV would have approved a displacement for the towage below 79,026mt.

92. In this regard, it is noteworthy that the IKDAM's class-approved LoadRite software (which calculates displacements on the basis that it is self-propelled) approved a displacement of 74,500mt on 17 September 2012. Although that approval placed an exclamation mark against the propeller immersion figure of 66%, that reflected that the propeller would ideally be lower in the water for a self-propelled voyage. The Master of the IKDAM regarded the condition so produced as satisfactory, but also the lightest displacement to which the IKDAM could deballast.

93. In my judgment the 74,500mt displacement proposed by the Master of the IKDAM on 17 September 2012, on the basis that it was only possible to reduce the IKDAM's weight to that level, is the best evidence as to what amounts to its light ballast condition for the voyage. It is noteworthy that Capt. Krishna expressly stated that he accepted that ballast condition. I find that 74,500mt was the light ballast condition of the IKDAM for the towage and that Lundin therefore remained in breach of its obligation in that regard after 17 October 2012.

(e) Did the excess ballast impact the speed of the convoy?

94. Capt. Stirling calculated that, on the assumption that the convoy would have maintained an average speed of 4.5 knots if the IKDAM had been in light ballast condition (which he put at 60,907mt), the effect of weather and sea conditions would have resulted in an average over the ground speed of 4.41 knots. As the convoy in fact averaged only 3.54 knots, his opinion was that the effect of the excess ballast (Capt. Stirling proceeding on the basis that the IKDAM's displacement was 90,061mt throughout) was to delay the voyage by 31 days 11 hours and 46 minutes.

95. There are, however, a number of fundamental problems with that analysis and its applicability to the facts as I have found them to be :

i) First, there is no basis for the assumption that the HARMONY 1, using only two of its engines, would have been able to tow the IKDAM at an average speed of 4.5 knots, no matter what its ballast condition. Capt. Stirling relied on GLND's bollard pull calculations, which showed that the tug could tow the IKDAM in heavy ballast condition at 4.9 knots, but that was using all 4 engines. Capt. Stirling did not perform any bollard-pull calculations of his own to support his assumption that an average of 4.5 knots would be maintained in light ballast condition with two engines. The only evidence in that regard was Capt. Krishna's bare assertion (based on his experience) that 4.5 knots would have been achievable. Mr Comley's evidence was that, although the convoy was capable of reaching 4.5 knots on two engines (as indeed it did on occasion), it would be slowed appreciably by weather and current such that it would not average 4.5 knots using two engines.

ii) Second, Capt. Stirling's opinion is based on an assumption that the IKDAM's displacement throughout the voyage was 90,061mt, when it should have been 60,907mt, a difference of almost 30,000mt. However, it is now agreed that for most of the journey the IKDAM had a displacement of about 85,000mt, and I have found that it should have been at 74,500mt, a difference of just over 10,000mt. It is quite unclear what delay Capt. Stirling would suggest was caused by that smaller degree of excess ballast, if any.

iii) Third, the voyage logs for the towage do not demonstrate that the IKDAM gained any speed after it deballasted on 17 October 2012, as accepted and asserted by Capt. Stirling. Indeed, it is precisely for that reason that Capt. Stirling formed the view that the IKDAM could not have deballasted by any significant amount at all, resulting in his continued insistence that the IKDAM proceeded throughout with a displacement of 90,061mt, a proposition that even Capt. Krishna resiled from during the course of the trial. The fact that the IKDAM did deballast by 22,000mt, but did not increase average speed, demonstrates that Capt. Stirling's basic assumption that extra ballast caused a reduction in the IKDAM's speed is wrong.

96. Mr Comley expressed the view in October 2012 that deballasting would not necessarily increase speed, and it appears from the above that he was right. Increased wind resistance due to the vessel being higher in the water and a reduction in stability counteracted the reduction in resistance through the water. For the purposes of the trial Mr Comley produced bollard calculations demonstrating that reducing ballast substantially would make only a small difference to the bollard pull required (in the region of 10 tons), a factor which would readily be counteracted by other forces arising due to the vessel being lighter.

97. I therefore conclude that Regulus has not proved that Lundin's breach of its obligation to provide the IKDAM in light ballast condition caused any delay to the voyage. Indeed, such evidence as there is in that regard points in the opposite direction. It follows that Regulus is entitled to no more than nominal damages in respect of Lundin's breach of the Towcon.

Regulus' claim under clause 17

98. Regulus claims that it is entitled to delay payments under clause 17(a)(ii), Regulus reasonably considering that the IKDAM was incapable of being towed at the original speed contemplated by the tugowner. Regulus asserts that this entitlement arises regardless of whether the slow speed was caused by a breach of Lundin's obligations in relation to the ballast condition of the Tow.

99. I reject this claim for the following reasons:

    i) The clause plainly requires that the tugowner makes a decision to slow steam because it considers that the tow cannot be towed at the originally contemplated speed. But in this case there is no evidence that Regulus made a decision to steam slowly, or that it did so. All the evidence points to the tug attempting to reach the intended speed and, on occasions, doing so.

    ii) Further, there is no suggestion that the IKDAM was incapable of being towed at 4.5 knots, merely that the tug could not average that speed using just two engines.

100. It follows that Regulus is not entitled to any delay payments. Further, Regulus' reliance on such payments being due as a ground for cancellation of the Towcon in Singapore was unfounded. I recognise that Lundin expressly acknowledged that some payment was due to Regulus, but that was in the context of an acceptance that the IKDAM had initially been presented too heavily ballasted and in an attempt to maintain good relations during the towage. Lundin's offer was, in any event, not accepted.

Lundin's counterclaim for Regulus' failure to achieve about 4.5 knots

101. Lundin accepts that there was no provision in the Towcon to the effect that the convoy would average 4.5knots (pointing out that there is no "box" on the BIMCO form for speed), but contends that there was a collateral agreement between the parties to that effect, to be inferred from, in particular, the following:

    i) Capt. Krishna's exchanges with Lundin on 28 August 2012 in which he stated that the lump sum price he had quoted was based on the use of two engines and that Regulus would operate a third engine in order to achieve a general average speed of 4.5 knots;

    ii) Capt. Krishna's insistence, before he executed the Towcon, on receiving confirmation from Lundin of the general average speed expected during the towage, making it clear that the expected speed would determine the number of engines to be used and therefore the amount of fuel consumption, affecting the price.

    iii) Mr Donnan's reply the same day that Lundin would "*go with 4.5 knts*";

    iv) Capt. Krishna's references in his witness statements in these proceedings to 4.5 knots as the "*contractual speed*" and his express acceptance when giving oral evidence that Regulus "*was agreeing*" that the convoy would average 4.5 knots.

102. However, the Towcon expressly provided for Lundin to make payments to Regulus if Lundin was responsible for delay, but made no provision for Regulus to be liable for delay in any circumstances. Lundin's contention is that Regulus, by seeking to ascertain Lundin's expectation as to speed, thereby agreed to bind itself to achieve that expectation and to accept a liability for delay which the contract did not remotely envisage. I see no basis for finding that such a collateral agreement was made for the following reasons:

    i) The Towcon did in fact make express reference to the speed/duration of the voyage, stating (in relation to fuel consumption) that the estimated duration was about 90 days, weather permitting. It is plain that was an estimate of the duration at "*full towing power*", using more than two engines, requiring 18mt of fuel a day. The duration at "*economic speed*", requiring 12.5mt of fuel daily, is notably not stated, although it plainly could have been;

    ii) Capt. Krishna's exchanges with Lundin were designed to ensure that he was calculating the price on the correct basis, namely, that only two engines would be used for most of the voyage. The issue under discussion was whether Regulus could charge a lower price for lower engine usage, not whether Regulus would charge a higher price to guarantee a particular speed/duration;

    iii) Lundin did not express any concerns as to achieving a particular speed, even informing Regulus on 15 August 2012 that it was "*in no rush to receive the FPSO*". There is no suggestion that Lundin sought or intended to impose any speed obligation on Regulus. Indeed, the Certificate of Approval issued on 6 October imposed a maximum speed limit of 4.5 knots on the voyage, making it impossible to average that speed over a long voyage. Lundin raised no concerns in that regard. Whilst that was after the Towcon was executed, it evidences the fact that Lundin did not at any stage require that the towage average 4.5knots.

103. In my judgment the exchanges on which Lundin relies in this regard were part of the negotiation and agreement of the contractual price, based on anticipated fuel consumption, not an agreement as to a guaranteed speed/duration. Capt. Krishna's references to the "contractual speed" were, in my view, a reference to the fact that he calculated the contract price with a view to achieving that average speed. It may be that Lundin would have a stronger argument that Regulus had agreed to use two engines (and more than two in adverse conditions), but there is no suggestion that Regulus failed in that regard.

104. In the alternative, Lundin contends that a warranty as to speed should be implied "*on the basis that the exchanges form a relevant part of the contractual background, and that it is clear from that background that the obvious (albeit unexpressed) intention of the parties was that 4.5 knots was the contractual speed*". I reject the premise of that contention for the reasons set out above: neither party intended, in my judgment, that Regulus should guarantee a particular speed. But in any event, a term will only be implied into a detailed commercial contract if it is necessary to give it business efficacy or it is so obvious that it goes without saying: see *Marks and Spencer plc v BNP Paribar Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 per Lord Neuberger at [16]-[21]. In the present case the Towcon is on a well-recognised form

which provides an entirely efficacious set of terms of the towage: a term as to contractual speed is neither necessary nor obviously required.

105. Accordingly I reject Lundin's claim for damages based on a collateral warranty or implied term as to the average speed of the voyage.

Termination issues

(a) How the Towcon was terminated

106. Although Regulus' action in diverting the convoy to Singapore and threatening to arrest the IKDAM was clearly in breach of the January Agreement and probably in breach of the Towcon, Lundin did not purport to terminate the Towcon at that stage. It follows that, when Regulus sought to resume the towage on 21 March 2013, it was Lundin which was in breach of the Towcon by instructing Capt. Samir not to proceed.

107. The parties, between them, have identified the three potential ways in which the Towcon was thereafter brought to an end, as follows:

i) Regulus contends that Lundin's refusal to proceed was a repudiatory breach of the Towcon, such repudiation being accepted by the 1980 email, in which Capt. Krishna purported to cancel the Towcon and withdraw the tug from service pursuant to clause 16(c). Mr Kulkarni did not contend that that email gave rise to a valid contractual cancellation of the Towcon pursuant to clause 16: Capt. Krishna's statement that he was giving the 48 hours notice required by clause 16(d), but that it had somehow "commenced" two days before, was plainly misconceived and ineffective. Mr Kulkarni's contention was that such invalid notice was, nonetheless, an effective acceptance of Lundin's repudiation. Lundin denies that it was in repudiatory breach of the Towcon and further denies that the 1980 email was an acceptance of any such repudiation.

ii) Lundin contends that the 1980 email was itself a repudiation of the Towcon, evincing a clear and unequivocal intention not to proceed with the towage, a repudiation which Lundin expressly accepted by the 1982 email sent by Navin & Co. Regulus disputes that the 1980 email was a repudiation, asserting that (if it was not itself accepting a repudiation) it was an attempt to invoke the termination provisions of the Towcon, not to repudiate those terms.

iii) If the 1980 email was not a repudiation by Regulus, capable of being accepted, Regulus contends that Lundin's purported termination of the Towcon by the 1982 email (including the statement that it had entered a fresh towage contract) was a repudiation (or yet further repudiation) of the Towcon, which Regulus accepted by cutting the towropes to the IKDAM on 25 March 2013.

108. I shall consider the first two of the above contentions below. As my conclusion is that Regulus repudiated the Towcon by the 1980 email (which was accepted by the 1982 email), the third possibility does not arise for consideration.

Did Regulus accept a repudiation by Lundin by virtue of the 1980 email?

109. In my judgment Lundin's refusal to proceed with the towage between 21 March 2013 and the sending of the 1980 email on 23 March 2013, whilst a breach of contract, was not sufficient to amount to a repudiation of the Towcon. Delay of just two days was not significant in the context of the towage, particularly as clause 17 provided that Regulus was entitled to daily payments for delay caused by Lundin. Neither did Lundin's solicitors' statement on 22 March 2013 that it was "*not amenable to allow the towage to resume … unless you agree to execute a full and final settlement agreement*" evince an unequivocal intention not to be bound by the terms of the Towcon. On the contrary, the language used was equivocal and appeared directed at reaching a position where the towage could resume according to its terms.

110. But even if Lundin was in repudiatory breach (actual or anticipatory) of the Towcon, the 1980 email cannot, in my judgment, be read as an acceptance of such repudiation. Capt. Krishna did not in that email refer to Lundin being in breach of contract, let alone purport to accept a repudiatory breach, but instead purported to exercise a contractual termination provision which required 48 hours' notice and was therefore plainly of no effect, or at least of no immediate effect, on its face. I can see no basis on which such an obviously defective notice, which would seem on its face to leave the contract on foot, could be construed as an unequivocal and immediate acceptance of a repudiation by Lundin. It follows that I reject Regulus' contention that the Towcon was terminated by the 1980 email.

Did Regulus repudiate the Towcon by the 1980 email?

111. Whilst the 1980 email was not effective as a contractual notice of termination, the email made it very clear that Regulus was withdrawing the HARMONY 1 from service with immediate effect. It was therefore, on its face, a wrongful declaration that Regulus would not be bound by the Towcon and would not perform its obligations thereunder.

112. Mr Kulkarni contends that the 1980 email should nevertheless not be interpreted as a renunciation of the Towcon. He relies on the proposition that a party who relies on a contract and invokes its terms in good faith should not be treated as having repudiated that contract simply by reason of the factthat it later transpires that he was mistaken as to his contractual rights: such a party has not manifested an ulterior intention to abandon that contact: see *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 HL.

113. *Woodar Investment* (together with *The Nanfri* [1979] AC 757 HL) was considered more recently by the Court of Appeal in *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168. Etherton LJ (as he then was), with whom Mummery and Sullivan LJJ agreed, emphasised the importance of applying the simple legal test to the particular facts of each case, that test being:

> "*... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly showed an intention to abandon and altogether refuse to perform the contract.*"

114. The difficulty facing Regulus in the present case is that its attempt in the 1980 email to "commence" the required period of notice of cancellation 48 hours before the email, was so obviously hopeless as (i) to put in question whether Regulus was acting in good faith and (ii) to demonstrate that Regulus was not in reality relying on the terms of the Towcon, as sensibly understood. In my judgment, an objective reading of the 1980 email shows that Regulus appreciated that it could not cancel the Towcon pursuant to clause 16 without giving 48 hours notice and that it was not giving such notice, but was nonetheless abandoning the Towcon forthwith. The purported "commencement" of the notice period two days earlier was at best an indication that Regulus was not even attempting to exercise clause 16 according to its terms. At worst it was an attempt at sleight of hand. In either case, the reasonable reader would understand that Regulus was refusing forthwith to perform the Towcon without giving any notice as required by the contract, not that Regulus was attempting to exercising a contractual right and would be willing to continue to perform if and when it transpired that that attempt was mistaken.

115. I therefore find that Regulus repudiated the Towcon by sending the 1980 email. Lundin expressly accepted that repudiation by the 1982 email, bringing the Towcon to an end on 23 March 2013.

(b) Liabilities flowing from and/or following termination

116. In view of my above finding, Regulus is not entitled to recover the US$100,000 which would have been due on delivery of the IKDAM at Labuan. Instead, Lundin is entitled to recover, as damages, the costs and expenses of engaging an alternative tug to complete the voyage.

117. Regulus disputed Lundin's entitlement to the costs of engaging an alternative tug on the grounds that the Towcon could have been terminated on 48 hours' notice in any event due to the alleged failure of Lundin to make delay payments, but I have found that not to be the case. I did not understand Regulus otherwise to dispute that such costs were as quantified by Lundin (US$550,000 hire costs SGD70,546.67 in agency fees and associated costs). However, and although the point was not canvassed in argument, I see no reason why Lundin should not be required to give credit for the US$100,000 which it would have had to pay to complete the towage had Regulus performed the Towcon.

118. As Lundin validly terminated the Towcon on 23 March 2013 and did not therefore purport to arrest the HARMONY 1 or exercise any form of lien, there would appear to be no basis on which Lundin was entitled to refuse to allow Regulus to disengage the connection between the vessels after that date. Regulus therefore claims US$6,760.04, being the cost the mooring lines it claims it was forced to cut on 25 March 2013 in order to disengage (although the precise nature of Regulus' cause of action in this respect has not been made explicit). However, the email correspondence reveals that, in response to a demand from the HARMONY 1, the Master of the IKDAM expressly agreed to disengage at 7.02pm on 25 March 2013, prior to the Master of the HARMONY 1 directing that the mooring lines be cut at 8.25pm. Capt. Krishna, when cross-examined about this, explained that the IKDAM could have released the ropes in just 5 minutes. He contended that it was therefore clear that the IKDAM was not complying when nearly 90 minutes had passed. However, as the last communication from the IKDAM signalled its willingness to disengage and there was no chasing

email from the HARMONY 1, I cannot infer from a delay of 90mins, without more, that the IKDAM was refusing to release the mooring ropes. Regulus' claim in this regard fails.

Agreed or unopposed claims

119. Lundin accepts that it is liable to Regulus for its costs of dealing with the proceedings the first defendant brought in Singapore in breach of the exclusive jurisdiction clause in the Towcon, amounting to US$47,044.06. Regulus does not pursue a claim for the costs of resisting Lundin's arrest in Singapore of another of Regulus' tugboats, the SYMPHONY 14.

120. Lundin has also raised no answer (other than by seeking to set-off its counterclaim) to claims by Regulus pursuant to clause 3(b) for port expenses incurred at Gibraltar and Port Louis in the sums of US$6,923.86 and US49,823 respectively.

121. Regulus has accepted that it is liable to Lundin for the 152mt of MGO stemmed from the IKDAM on 9 November 2012 at the contractual rate of US$1,050/mt, amounting to US$159,600.

Conclusion

122. In summary, I have found the following:

i) Lundin breached its obligation under the Towcon to provide the IKDAM in light ballast condition, but Regulus has not proved that the breach caused any delay in the towage or otherwise caused Regulus to suffer any loss;

ii) Regulus is not entitled to any delay payments under clause 17 of the Towcon;

iii) Regulus did not provide a collateral warranty, and no term is to be implied, requiring Regulus to ensure that a speed of about 4.5 knots was maintained during the towage: Lundin's claim in that regard fails;

iv) Regulus' email of 23 March 2013, purporting to cancel the Towcon pursuant to clause 16(c), was not an effective contractual notice but was itself a repudiation of the Towcon which Lundin accepted. Lundin is therefore entitled to damages in respect of the additional costs of making alternative towing arrangements in the sums of US$450,000 and SGD70,546.67;

v) A further US$55,809,08 is due to Lundin, being the net result of setting off agreed or unopposed claims referred to in paragraphs 119 to 121 above.