Neutral Citation Number: [2022] EWCA Civ 231

Case No: CA-2021-000477

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr Justice Foxton
[2020] EWHC 3448 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2022

Before:
LORD JUSTICE MALES
LORD JUSTICE PHILLIPS
and
LADY JUSTICE CARR

- -

Between:

SK SHIPPING EUROPE LIMITED	**Respondent/ Claimant**
- and -	
3) CAPITAL VLCC 3 CORP	**Appellants/**
5) CAPITAL MARITIME AND TRADING CORP	**Defendants**

"C CHALLENGER"

- -
- -

Simon Rainey QC & Marcus Mander (instructed by **Reed Smith LLP**) for the **Appellants/Defendants**
Chris Smith QC & Mark Stiggelbout (instructed by **Preston Turnbull LLP**) for the **Respondent/Claimant**

Hearing dates: 8 & 9 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Friday 25 February 2022

Lord Justice Males:

1. This appeal arises out of negligent misrepresentations concerning the vessel's fuel consumption made by the Owner of the VLCC "C CHALLENGER" during negotiations for a two-year charterparty. Mr Justice Foxton held that, although misrepresentations were made, they did not induce the Charterer to enter into the charterparty and that in any event the Charterer affirmed the contract. Accordingly the Charterer's purported rescission of the charterparty was itself a repudiation of the contract, entitling the Owner to damages. The Charterer appeals, challenging these conclusions and contending for more extensive misrepresentations than were found by the judge.

2. Although in the event the point did not arise, the judge went on to say that even if the Owner's negligent misrepresentations had induced the Charterer to enter into the contract and there had been no affirmation, he would have exercised his discretion under section 2(2) of the Misrepresentation Act 1967 to declare the contract subsisting, with the consequence that the Charterer was still in repudiation of the contract and liable for damages. This was because the Charterer had taken the risk when purporting to rescind the contract that the court would declare the contract subsisting under section 2(2). The Charterer appeals on this issue also, if it arises, contending that the judge's approach was wrong in principle.

The facts

3. The facts which gave rise to this action are set out in detail in the judgment. For the purpose of this appeal the following summary will suffice. Many of the issues with which the judge had to deal do not arise on this appeal.

4. A Korean company, SK Shipping, was the operator of four VLCCs which, until October 2016, it had employed on the spot market through consecutive voyage charters. In October 2016, however, it formed the view that freight rates for VLCCs were likely to decline and decided instead to charter out its vessels on long term time charters.

5. That decision made it necessary to offer warranties as to the vessels' speed and fuel consumption. Such warranties, specifying the amount of fuel oil and diesel oil consumed at specified speeds and in specified weather conditions, are a standard feature of time charters. Often there are separate warranties, depending on whether the vessel is operating in ballast or laden conditions. They enable a charterer, who is responsible for supplying and paying for the vessel's fuel during time on hire, to calculate its costs of employing the vessel. The cost of bunkers is a major component of the economics of a time charter.

6. It is in a shipowner's interest to present its vessel to the market in the most favourable light in order to secure employment against competition from other owners. On the other hand, the shipowner will be aware that it will be required to give performance warranties and that to present speed or consumption figures with which the vessel is unable to comply will not only lead to claims but will sour the relationship with any charterer.

7. The task of determining what data could be provided to the market as the basis of speed and consumption warranties for the vessels was given to Mr Ray Kim of SK Shipping's Tanker Operations Team. Unfortunately Mr Kim did not have the expertise required for this task. He failed to understand properly the noon reports provided to him and did not consider the vessels' engine rpms, which were critical to an assessment of their fuel consumption. In addition he worked on the basis of out of date consumption figures from the vessels' sea trials which did not reflect accurately their most recent performance. Although he requested more up-to-date data from the Ship Management Team and the vessels' masters, he received no response to his enquiries.

8. The result of Mr Kim's labours was a document circulated to various brokers in the market from 7th November 2016 onwards ("the November 2016 Circular"). It contained speed and consumption data for all four vessels. The figures for the "C CHALLENGER" and "C INNOVATOR" were presented together, the figures being as follows:

Speed	**F.O Bunker Consum. (mt/day)**	
(Kts)	**Ballast**	**Laden**
15	81.2	99.4
14.5	73.2	90.5
14	65.6	82.1
13.5	58.7	74.2
13	52.2	66.8
12.5	46.4	60.0
12	41.0	53.7
11.5	36.2	48.0
11	32.0	42.7
10.5	28.3	38.0

10		33.8

9. The accompanying text stated (with emphasis added):

> "- F.O Bunker Consumption: The figure is sum of M/E and G/E daily consumption
>
> – D.O Bunker Consumption: 0.5 MT per 1 Voy in normal condition
>
> *- Above data is based on average of last 3 voys. And might be different depends on the seasonal ocean currents & weather conditions.*
>
> - Speed and consumption basis normal weather and wind force up to and including Beaufort scale 4
>
> - 0.5 Knot Margin Required on the C/P"

10. The November 2016 Circular was provided to the market without first being checked by SK Shipping's Ship Management Team. If it had been, it would have been appreciated that the figures in the circular did not reflect the vessels' most recent performance even though they were stated to be based on an average of their last three voyages. The result was that the Tanker Chartering Team believed that the figures contained in the circular were a realistic reflection of the vessels' performance, while the Ship Management Team (who would have known that they were not, even after taking account of the 0.5 knot margin) were not aware that these figures were being provided to potential charterers as the basis of contractual warranties to be provided by the Owner.

11. The judge pointed out that the information contained in the November 2016 Circular was ambiguous in a number of respects and that, as a reasonable reader would have understood, it suggested a greater degree of precision than could realistically have been achieved. In particular, it was highly improbable that the vessels had proceeded at each of the 11 ballast and 12 laden speeds, in weather Beaufort 4 or below, over the course of their last three voyages. It would have been apparent, therefore, that some degree of extrapolation had been used and that the figures were not derived exclusively from measured historical data over those voyages. Further uncertainty arose from the use of composite figures for the two vessels, which would almost certainly have had different recent trading histories. In addition, it was not clear whether the voyages referred to represented the last three voyages of each vessel or the last two voyages of one of them and the last of the other, nor whether ballast and laden voyages were treated separately, as distinct from a ballast and a laden leg being counted together as a single voyage.

12. One potential charterer which expressed interest in the vessels was Capital Maritime and Trading Corp, the second appellant in this court and the fifth defendant in the court below. It was provided by the brokers with the information contained in the November 2016 Circular in a letter dated 22nd November 2016. Negotiations ensued, leading to

the conclusion of two-year time charters for two vessels, "C INNOVATOR" and "C SPIRIT", on 25th November 2016. The Charterer was described in each case as "Company to be nominated and guaranteed by Capital Maritime & Trading Corp". Further negotiations followed for similar charters of the remaining two vessels, "C CHALLENGER" and "C PROGRESS", with binding contracts concluded for the "C CHALLENGER" on 6th December 2016 and for the "C PROGRESS" on 8th December 2016. The company nominated by Capital Maritime as the Charterer of the "C CHALLENGER" was Capital VLCC 3 Corp, a newly formed special purpose vehicle which is the first appellant in this court and was the third defendant in the court below. SK Shipping nominated the respondent, then named SK Shipping Europe Plc, as the Owner under the charterparty.

13. The time charter of the "C CHALLENGER" concluded on 6th December 2016 was contained in a fixture recap email which incorporated by reference the terms of the Shelltime 4 charterparty form. A formal charterparty was drawn up by the broker but was never executed, which gave rise to an issue under the Statute of Frauds whether Capital Maritime was bound by its guarantee. The judge's determination that it was is not challenged on this appeal.

14. The charter was for a period of two years at a hire rate of US $30,500 per day, with an option for the Charterer to take a further year at a rate of US $31,500 per day. The speed and consumption figures set out in the 22nd November 2016 letter, together with most of the accompanying text (but omitting the explanation that "Above data is based on average of last 3 voys"), were set out in the charter and were guaranteed by the Owner in clause 24 (a) of the Shelltime 4 form. These were the terms concerning performance on which the Owner had offered to contract. Thus the terms put forward in the negotiation had not included the statement as to the vessel's last three voyages which I have italicised above: the Owner had simply indicated the warranties which it was prepared to give, without explanation.

15. Clause 24 of the Shelltime 4 form went on to provide as follows (with deletions from the printed form struck through and the addition of the words italicised):

> "(b) If during any year from the date on which the vessel enters service (anniversary to anniversary) the vessel falls below ~~or exceeds~~ the performance guaranteed in Clause 24 (a), then if such shortfall ~~or excess~~ results:
>
> (i) from a reduction ~~or an increase~~ in the average speed of the vessel, compared to the speed guaranteed in Clause 24 (a), then an amount equal to the value at the hire rate of the time so lost ~~or gained, as the case may be~~, shall be included in the performance calculation; *Owners cannot make a claim for over-performance but over-performance, if any to be off set against underperformance, if any*;
>
> (ii) from an increase ~~or a decrease~~ in the total bunkers consumed, compared to the total bunkers which would have been consumed had the vessel performed as guaranteed in Clause 24 (a), an amount equivalent to the value of the additional bunkers consumed ~~or the bunkers saved, as the case~~

> ~~may be~~, based on the average price paid by Charterers for the vessel's bunkers in such period, shall be included in the performance calculation.
>
> The results of the performance calculation for laden and ballast mileage respectively shall be adjusted to take into account the mileage steamed in each such condition during Adverse Weather Periods, by dividing such addition or deduction by the number of miles over which the performance has been calculated and multiplying by the same number of miles plus the miles steamed during the Adverse Weather Periods, in order to establish the total performance calculation for such period.
>
> Reduction of hire under the foregoing sub-Clause (b) shall be without prejudice to any other remedy available to Charterers.
>
> (c) Calculations under this Clause 24 shall be made for *every six months* ~~the bi-annually yearly~~ periods terminating on each successive anniversary of the date on which the vessel enters service, and for the period between the last such anniversary and the date of termination of this charter if less than a year. Claims in respect of reduction of hire arising under this Clause during the final year or part year of the charter period shall in the first instance be settled in accordance with Charterers' estimate made two months before the end of the charter period. Any necessary adjustment after this charter terminates shall be made by payment by Owners to Charterers or by Charterers to Owners as the case may require. (d) Owners and Charterers agree that this Clause 24 is assessed on the basis that Owners are not entitled to additional hire for performance in excess of the speeds and consumptions given in this Clause 24."

16. Thus the charterparty contained a guarantee that the warranted performance would be achieved over the whole term of the charter, with provision for adjustments to be made during adverse weather periods. Compensation was payable to the Charterer in the event of over-consumption, based on a review of performance to be carried out every six months.

17. The judge found that the charter terms which the Owner was prepared to offer were particularly attractive to Capital Maritime in several respects: the Owner was prepared to carry various costs related to war risks, piracy and security; it was willing to deliver the vessel in West Africa, thus saving the Charterer the cost of the usual 25 day repositioning voyage from Singapore; there was a high rate of address commission; and the Charterer was entitled to re-deliver the vessel anywhere in the world. In these respects the Owner was unusually flexible: the judge recorded that in their submissions on quantum the defendants had described the terms as being "as attractive as it was realistically possible for charter terms to be".

18. SK Shipping's assessment that freight rates for VLCCs were likely to decline proved to be correct. Spot rates in the VLCC market increased to about US $50,000 per day by the end of December 2016, but thereafter fell dramatically during 2017. By the end of

February 2017, spot rates were around US $16,800 per day. For most of the period from mid-March onwards, with the exception of a small rally in April and May, rates were at or below US $10,000 per day.

19. Problems with over-consumption of bunkers did not take long to emerge. Initially these concerned the "C SPIRIT" and the "C INNOVATOR", which were the first vessels to be delivered, but from the beginning of each vessel's chartered service Capital Maritime was monitoring its speed and performance from the noon position reports. Even before the conclusion of the "C CHALLENGER" charterparty, Capital Maritime was questioning the consumption of the "C INNOVATOR". By February 2017 it was complaining that fuel consumption was far higher than warranted. SK Shipping's response was and continued to be vague and unsatisfactory, although the masters of the "C SPIRIT" and "C INNOVATOR" admitted that their vessels' actual consumption was not as warranted in the charterparties. In the same month payment of hire for the "C CHALLENGER" was made "under protest", and deductions were made from hire in respect of the "C SPIRIT" and "C INNOVATOR" to reflect over-consumption. Further discussions did not resolve the issue. SK Shipping said and continued to maintain that the position should be reviewed after six months in accordance with the terms of clause 24. This did not satisfy Capital Maritime and further deductions from hire were made in succeeding months. From June 2017 the Charterer stopped paying hire for the "C CHALLENGER" altogether.

20. By this time the Charterer was considering cancellation of the charterparty. There were other issues also, relating to a turbocharger breakdown, oil major approvals, and access to the vessel for a representative of the Charterer, with which the judge dealt but with which we are not directly concerned. Attempts to negotiate a revision to the charterparty, with the vessel going off-hire for an agreed period and only 50% of the hire being payable for a further period thereafter, came to nothing.

21. On 13th July 2017 the Charterer fixed the vessel for a voyage from Southwold to Tanjung Pelapas in Malaysia. The vessel left Antifer on its approach voyage on 14th July 2017. It began loading on 18th July 2017 and completed on 21st July 2017.

22. Meanwhile, on 20th July 2017 the Charterer sent SK Shipping a message alleging among other things that it had intentionally misdescribed the speed and consumption characteristics of all four vessels and was in breach of the speed and consumption warranties; and that the masters of the "C SPIRIT" and the "C INNOVATOR" had confirmed that the charterparty description of those vessels differed from their actual capability. The Charterer warned that if these matters were not resolved within seven days, the various charterparties would be rescinded and/or terminated. SK Shipping did not respond and on 24th July 2017 the Charterer said that it would cease to take steps to sub-charter the vessels at the end of their current voyages and would place them off-hire.

23. In response, on 26th July 2017 SK Shipping denied any misrepresentation entitling the Charterer to rescind the charterparty or that it was in breach. It said that it would try to obtain more performance data and suggested a meeting once that information was available. In return, the Charterer repeated its allegations in further emails of 30th July, 1st August and 11th August 2017, and reserved the right to rescind or terminate all four charterparties. It maintained that the over-consumption was so great that no further analysis was required to evidence the fact of misrepresentation.

24. The fuel consumption of the "C CHALLENGER" on the voyage to Tanjung Pelapas was particularly high, leading the vessel to run out of bunkers and halt operations in the course of discharge on 5th September 2017. The vessel had to re-bunker before discharge could resume, which was a source of major embarrassment for the Charterer with its sub-Charterer, Trafigura.

25. On 7th September 2017 SK Shipping informed the Charterer that it had concluded that hull fouling (which it attributed to the vessel's long waiting time at Antifer following the turbocharger breakdown) was the major cause of the over-consumption. An underwater inspection and cleaning of the hull and polishing of the propeller was arranged at Singapore, which took place on 13th and 14th September 2017. The Charterer continued to assert that the vessel had been mis-described and to reserve its rights. It also continued to refuse to pay hire.

26. Finally, on 19th October 2017 the Charterer purported to rescind the charterparty for misrepresentation, alternatively to terminate for repudiatory breach. The following day, the Owner purported to terminate the charterparty on the basis that the Charterer's message was itself a renunciation of the contract.

27. In the event the performance of the vessel improved after the hull cleaning at Singapore, which was effective to remove marine growth although it also scrubbed off the hull's anti-fouling coating in places. The vessel was due for dry docking as part of its special survey by the end of 2017, with a full hull re-coating and engine overhaul which, the judge found, was likely to have brought the vessel within its warranted performance. By then, however, the charterparty had been terminated.

28. Proceedings were commenced in respect of all four vessels on 20th July 2018. On 7th September 2020 the Charterers of the "C SPIRIT", "C PROGRESS" and "C INNOVATOR" accepted Part 36 offers relating to those vessels with the result that (leaving aside for the moment an issue as to the costs liability of Capital Maritime under its guarantees) the proceedings continued in respect of the "C CHALLENGER" alone.

The Charterer's case at trial

29. The Charterer's case was that three representations had been made on behalf of the Owner, as follows:

    (1) that over the vessel's last three voyages, in periods of normal weather and during which the wind speed had been force 4 or less, the vessel's average speed and performance had been as stated;

    (2) that the Owner believed and/or had reasonable grounds to believe that this was the position and/or knew facts which reasonably justified this statement; and

    (3) that the Owner expected the vessel to achieve substantially the same performance in the future and had reasonable grounds for that expectation; and/or that the Owner had no reason to believe that the vessel would not achieve substantially the same performance in the future.

30. The Charterer contended that each of these representations had been made both in the 22nd November 2016 letter and (by the Owner's offer to contract on the terms eventually

included in the charterparty itself) in the parties' negotiations, and that they had been made dishonestly (in the sense that SK Shipping and the Owner either knew that they were untrue or were reckless as to their truth), alternatively negligently for the purpose of section 2 of the Misrepresentation Act 1967; as a result, the Charterer had been entitled to rescind the charterparty and had validly done so by its message of 19th October 2017.

The judgment

31. The judge directed himself as to the applicable law relating to actionable representation at [112] to [117], noting that the general principles were not substantially in dispute. In brief summary those requirements were as follows:

    (1) The first requirement is to establish that a representation, i.e. a statement of fact on which the representee is intended and entitled to rely, was made. This involves interpreting what was said objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of those to whom the statement is made.

    (2) Second, the representation must be false; however, a representation may be true without being entirely correct, provided that it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the representee to enter into the contract.

    (3) Third, in a fraud case, the statement must have been made either knowing it to be untrue or recklessly, not caring whether it was true or not.

    (4) Fourth, in a non-fraud case, the representee would not have entered into the contract (or not on the same terms) but for the representation.

32. Applying these principles, the judge held, again in brief summary of a very detailed and careful judgment, that:

    (1) The offer to enter into a contract on the terms eventually agreed was not a representation by SK Shipping or the Owner as to the fuel consumption of the vessel; the terms put forward and agreed were simply the terms on which the Owner was prepared to contract, with the consequences of any over-consumption being regulated by clause 24 of the Shelltime 4 form as amended.

    (2) However, the 22nd November 2016 letter did contain representations made on behalf of the Owner to prospective charterers including Capital Maritime on behalf of the Charterer; the critical difference was that the letter had included a statement that the performance set out was based on the vessel's last three voyages.

    (3) The first such representation, after allowing for the ambiguity as to precisely what was being said in the letter, was that the data presented had been checked against, and so far as necessary adjusted so as to be reasonably consistent with, the average performance of each vessel over three recent voyages; the second was that SK Shipping was not aware of any reason why the data had ceased to be broadly

representative of the vessel's recent performance as at the date when the letter was provided to the Charterer.

(4) Capital Maritime understood these representations to have been made.

(5) However, the 22nd November 2016 letter contained no representation as to the expected future performance of the vessel.

(6) The representations made were false; in fact the vessel was consuming during its recent voyages significantly more than the figures provided, even allowing for a 0.5 knot tolerance.

(7) The representations were made negligently, but not fraudulently.

(8) Although the representations were material, in the sense that a reasonable person would have been influenced by them in deciding whether to enter into the charterparty, the charterparty would nevertheless have been concluded on the same terms (i.e. including the same speed and consumption warranties) if the representations had not been made; accordingly the Charterer's misrepresentation case failed.

(9) Even if the Charterer had known the vessel's actual fuel consumption, the charterparty would still have been concluded, although at a lower rate of hire (US $30,000 per day instead of US $30,500 per day).

(10) In any event, despite purporting to reserve its rights, the Charterer had elected to affirm the charterparty with knowledge of the vessel's significant over-consumption and of its legal rights; this was because the Charterer's order on 13th July 2017 to perform the voyage to Tanjung Pelapas was so inherently affirmatory that it was incompatible with an attempt to reserve the right at the same time to rescind the charterparty *ab initio*.

(11) For the same reasons Capital Maritime had affirmed the guarantee.

(12) Accordingly the Charterer was not entitled to rescind or terminate the charterparty and its message of 19th October 2017 purporting to do so was itself a repudiation of the contract, entitling the Owner to damages.

(13) In any event the court should exercise its discretion to declare the contract subsisting and award damages in lieu of rescission under section 2(2) of the Misrepresentation Act 1967; damages would have been calculated by reference to the reduction in hire of US $500 per day which would have been negotiated if the Charterer had known the true position.

(14) Damages under section 2(2) would not have extended to indemnify the Charterer against its liability to the Owner for having repudiated the charterparty; that loss was not caused by the misrepresentation, but by reason of the court's decision to award damages in lieu of rescission, a risk which the Charterer had assumed.

Grounds of appeal

33. For the appellant Charterer and for Capital Maritime as guarantor, Mr Simon Rainey QC and Mr Marcus Mander advanced six broad grounds of appeal. The first five grounds can be summarised as follows:

Misrepresentation

(1) The judge should have found that in circumstances where the offered warranty was qualified by a 0.5 knot margin, the terms proposed and included in the charterparty amounted to a representation (a) as to the vessel's current or recent performance and/or (b) that the Owner expected the vessel to be able to meet the stated consumptions, or had no reason to believe that it would not be able to do so.

(2) In any event the judge should have found that such a representation was made in the 22nd November 2016 letter and was repeated in each of the parties' subsequent communications by the restatement of the same data.

Inducement

(3) The judge was wrong to have found that the charterparty would have been concluded on the same terms if the representations had not been made. The representations referred to in ground (1) were inherent in the Owner's offer to contract, from which it all followed inevitably that without them, the charterparty would necessarily have been different, if it had been concluded at all.

(4) If it was relevant for the judge to consider what would have happened if the Charterer had known the vessel's true performance, he was wrong to find that the charterparty would have been concluded at a hire rate reduced by only US $500 per day; he gave no reason for not accepting the Charterer's evidence that any reduction would have had to be substantially greater or that the terms would have had to be materially different, with the probable result that no contract would have been concluded at all.

Affirmation

(5) The Charterer did not affirm the charterparty by ordering the vessel on the voyage to Tanjung Pelapas; on the contrary, its express reservation of rights in circumstances where the Owner itself was saying that more data was needed and the position should be reviewed after six months prevented this from amounting to an affirmation.

(6) The judge was wrong to have concluded that Capital Maritime had affirmed the guarantee; Capital Maritime could not have affirmed the guarantee because it never thought that it had given a guarantee at all; moreover, communications from the Charterer should not be interpreted as extending to the guarantee; further, the judge was wrong to find that Capital Maritime affirmed the guarantee by inaction or silence, that being inherently equivocal.

Rescission

(7) The judge was wrong to exercise his discretion to refuse rescission of the charterparty, which he had done on a mistaken basis; rescission for misrepresentation is effected by the act of the representee and does not depend on

an order of the court; it is wrong in principle for the court to declare a contract to be subsisting when that has the effect of rendering the representee liable in damages for a rescission of the contract which was lawful when carried out.

Damages

(8) Finally, if the judge was entitled to declare the charterparty and guarantee subsisting, he should have awarded damages with the aim of putting the Charterer in the same position as it would have been in had rescission been granted.

Ground 1: Misrepresentation

34. It is now common ground that in the 22nd November 2016 letter the Owner made (at least) the representations found by the judge to have been made. It is worth setting out the terms in which he made these findings:

> "147. For those reasons, I have concluded that the 22 November 2016 Letter made, through the 3 Voyage Average Statement, a representation that the data set out had been checked against, and so far as necessary adjusted so as to be reasonably consistent with, the average performance of both the "C INNOVATOR" and the Vessel over three recent voyages at the date when the exercise was done …
>
> 148. The third representation for which Mr Phillips QC contends is that SK Shipping 'expected the Vessel to achieve substantially the same performance in the future in the event that [it was] chartered; and had reasonable grounds for that expectation; and/or that SK Shipping had no reason to believe that the Vessel would not achieve substantially the same performance in the future in the event that [it was] chartered.
>
> 149. I am not persuaded that the 22 November 2016 Letter contained these additional representations. The position at the date of the charterparty might depend on a number of factors, including when the VLCCs entered the chartered service (which might be some time after the representation was made), and the length of any port stays and fouling over that period. There is also the inherent uncertainty as to what the words 'in the future' might mean, in circumstances in which deterioration over time was highly likely and the Charterparty was for two years. So far as the charterparty period is concerned, the issue of future performance was to be catered for by the continuing warranties offered, and those were offered on particular terms (including the benefit of the 0.5 knot margin). In these circumstances, I do not think there was any implicit representation as to the future position.
>
> 151. However, I accept that in putting forward the speed and consumption data in the terms in which they did, SK Shipping was impliedly representing that it was not aware at the date of

> the representation of any reason why the data had ceased to be broadly representative of the VLCCs' recent performance at that date ("the No Reason Representation"). The clear purpose and effect of providing the speed and consumption data, in the context in which was offered, was to provide some assurance that any warranties offered were compatible with the VLCCs' recent performance. I also accept that Mr Konialidis, and through him Mr Marinakis, would have understood the substance of this representation to be implicit.
>
> 152. Accordingly I accept that the 3 Voyage Average Statement contained the representations in [147] and [151] above."

35. Mr Rainey submitted that the judge did not go far enough. He should have found, not only a representation as to recent performance, but also a representation that the Owner expected the vessel to achieve substantially the same performance in the future, or at any rate that it had no reason to believe that the vessel would not do so. Mr Rainey submitted that a representation as to expected performance in the future was necessarily implicit in a representation as to actual performance in the most recent past.

36. I do not accept this. The issue is how the 22nd November 2016 letter would be understood by a prospective charterer familiar with the market: see generally the judgment of Mr Justice Christopher Clarke in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 at [81] to [86]. In my judgment that prospective charterer would have understood the Owner to be saying that "this is how my vessel has performed on its most recent voyages and these are the warranties which I am prepared to give", and nothing more. This would be enough for the prospective charterer to decide whether to pursue the negotiations. It might be a reasonable inference that the Owner believed that it would be able to comply with the proposed warranty (i.e. after taking account of the 0.5 knot margin), but it does not necessarily follow that the Owner was making any representation about this, let alone going further.

37. Other considerations suggest that no such representation was intended or would reasonably have been understood, as Mr Chris Smith QC for the Owner pointed out. One is the fact that the performance which the Owner was prepared to warrant (i.e. after applying the 0.5 knot margin) was expressly not as good as the average performance stated to have occurred over the last three voyages: the Owner was making clear that it was not prepared to be held to a repetition of that performance, but required a margin. Another is that, as the parties would have understood, a performance warranty extending over the term of any charter would have been incorporated into a charterparty form which, as in the case of clause 24 of Shelltime 4, contained no warranty as to any individual voyage, but only as to performance over a period (the standard clause provides for annual reviews; here six monthly reviews were agreed). There was, therefore, an element of swings and roundabouts built into any warranty of future performance, with the possibility that over-consumption in the early period might be compensated later on, for example by arranging for the hull to be cleaned. That tends against the implication of any representation as to performance during the early voyages of any new charterparty.

38. To the extent that there is any doubt about this, I would heed the caution given by Mr Justice Rix in *Avon Insurance Plc v Swire Fraser Ltd* [2000] EWHC 230 (Comm), [2000] Lloyd's Rep IR 535 at [200], echoed by Mr Justice Christopher Clarke in *Raiffeisen* at [85], that a misrepresentation should not be too easily found. The reason given for that caution was that, on the current state of the law, a misrepresentation which induces a contract leads to damages on the fraud basis (*Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, although the decision is controversial), to which I would add that a misrepresentation may result in the drastic consequence that the contract may be rescinded.

39. Mr Rainey submitted that because the judge had dealt first with the question whether an offer of a warranty of itself amounted to a representation as to the vessel's past, present or expected future consumption, and only then turned to consider the effect of the 22nd November 2016 letter, he had lost sight of the representations contained in that letter. He submitted that the judge dealt with these issues in an illogical order. The 22nd November 2016 letter came first and should have been considered first, with the representations which it contained being repeated in the parties' later exchanges. As it was, the judge had effectively treated the representations contained in the letter as having been spent, or having no further effect, once the parties began to negotiate the terms of the charterparty.

40. This would have been a valid criticism if it had been what the judge had done. However, there is nothing in the judgment to suggest that the judge treated the representations contained in the 22nd November 2016 letter as having been spent or nullified in any way. It was convenient for the judge to address the question whether the offer of a warranty amounted to a representation as to performance immediately after he had considered the law in this area.

41. That leaves the submission, which was the first point made in the Charterer's grounds of appeal and which took up much of its skeleton argument on this ground, that the Owner's offer to contract on the terms which were eventually agreed itself amounted to a misrepresentation as to the vessel's fuel consumption. In oral argument, however, Mr Rainey put the point much more narrowly. He accepted that, considered by itself, an offer to contract will not generally amount to a representation about future performance, as held by Mr Justice Moore-Bick in *Kingscroft Insurance Co Ltd v Nissan Fire &Marine Insurance Co Ltd (No. 2*) [1999] 1 Lloyd's Rep IR 603 and by Mr Andrew Baker QC, sitting as a Deputy High Court Judge, in *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm), [2016] 2 CLC 297. But he still contended that because the Owner's offer of the performance warranties which subsequently became contractual terms was preceded by the representations made in the 22nd November 2016 letter, those representations were effectively repeated in the parties' later exchanges and became "embedded" in the contractual terms eventually agreed.

42. Accordingly, although it is no longer contended that a representation as to the vessel's future performance is implicit in the mere offer of a speed and consumption warranty, it is necessary to consider whether the Owner's willingness to contract on the terms which were eventually agreed amounted to a repetition of the representations previously made in the 22nd November 2016 letter as to the vessel's fuel consumption on the last three voyages.

43. In my judgment it did not. I begin with the authorities.

44. *The Larissa* [1983] 2 Lloyd's Rep 325 was concerned with a performance warranty in a charterparty on the Shelltime 3 form and is therefore similar in some respects to the present case, although there are differences. There was no prior communication between the parties, but simply an offer made by the shipowner's broker. Mr Justice Hobhouse drew a distinction between words of obligation (an offer to contract on terms which, if accepted, impose an obligation) and words of representation (a statement as to an existing fact). He held that a shipowner's offer to contract on the terms of a proposed performance warranty involved no representation as to the vessel's actual fuel consumption:

> "Charterers' third contention was that there had been an actionable misrepresentation. The misrepresentation was said to have been contained in the telex by which the owners' brokers first offered the vessel to charterers' brokers. …
>
> The charterers contend that this telex contains a representation as to the vessel's actual speed and consumption. …
>
> The first point to be considered is whether the telex contained a representation. It is agreed that this is a matter of the construction of the telex, that is to say, is a matter of law. …
>
> The construction of this telex, therefore, has to be approached as a matter of the ordinary use of English words read in their context. Part of the context is the Shelltime 3 which is referred to in the telex and which is contemplated will be the form used for the fixture. Clause 24 of that form contains the references to form B and the performance guarantee which I have already read out. The side heading of clause 24 is 'Detailed Description and Performance'. The wording of the telex follows the same layout. It starts with 'Words of Description'. With the words 'Performance: Owners to guarantee', etc. These words on their ordinary meaning are words of contractual offer relating to a contractual term. The contractual term is a term of obligation, not a term of representation. As a matter of law I hold that the correct interpretation of these words in the telex is that they are words of obligation, not words of representation."

45. Mr Justice Hobhouse added that one of the difficulties in treating the telex as containing a representation was in deciding precisely what the representation was, which was itself a reason against reading the wording as containing a representation.

46. In *Kingscroft v Nissan* the question arose whether an offer to enter into a contract of reinsurance providing for a retention of 50% constituted a representation as to the reinsured's intention and ability to perform the contract with that retention. As in *The Larissa*, there was no relevant prior communication between the parties and any representation therefore had to be found in the contractual wording itself or in the documents which accompanied it. Mr Justice Moore-Bick said that the existence of any representation depended "on an objective assessment of what was said or done by the

person who is said to have made it and the likely effect of that on the person to whom the representation is said to have been made", so that each case would depend on its own facts. He distinguished between two kinds of representation, namely (1) a representation about the subject matter of the proposed terms and (2) a representation as to the honesty or good faith of the party in entering into the bargain. While in general an offer to contract on certain terms involved no representation about the subject matter of those terms, a party did normally hold itself out as offering to contract with a good faith belief that it was able and willing to perform its contractual obligations as it understood them to be:

> "In my view this argument raises two rather different questions. The first is whether by offering to contract on certain terms a person normally makes any representation about the particular subject matter of those terms. In my judgment he does not. He offers to become bound to certain obligations, but is not normally to be understood at the same time to be making statements about the subject matter of those obligations. That, as I understand it, is what Hobhouse J held in *The Larissa*. The position would no doubt be different where the offer included terms which were intended to stand as representations in the contract as ultimately concluded, for example, statements of the kind which sometimes form part of the preamble to a formal contract. Whether any particular term is a term of obligation or representation will be a matter of construction in each case. A rather different question is whether simply by offering to contract on certain terms a person by implication represents that he intends to perform any contract made on those terms and believes that he is, or will be, able to do so. In principle I think he does. That, after all, is the basis on which he expects the offeree to judge his offer. However, it is important to understand exactly what representation the offeror is making. In most cases it is unlikely that he will be saying any more than that he intends to perform the obligations which, *as he understands it*, a contract in those terms would impose on him. He is unlikely to be saying that he intends to perform the contract in accordance with its true construction whatever that may in due course be held to be. The distinction is well illustrated in the present case in which the parties have put forward substantially different interpretations of the contract wording. In practice, therefore, the representation is likely in most cases to come down to no more than one of honesty in entering into the bargain."

47. Accordingly, Mr Justice Moore-Bick held that, by offering to enter into a reinsurance contract, the reinsured represented that it intended to comply with the obligations which it understood the contract would impose on it. As there was no suggestion that the offer was not made in good faith, that representation was true. But there was no representation as to the amount of risk which the reinsured would in fact retain for its own account.

48. I would hesitate to endorse the suggestion that there is a general rule that, merely by offering to contract, a party represents that it is able and willing to perform the contract, even with the qualification that the representation is limited to performance of the obligations which the party understands itself to be offering to undertake. Whether there is any such representation must depend upon the circumstances of the particular case. Sometimes a party may choose to undertake an obligation in a state of doubt whether it will be able to perform. If it fails to do so, the counterparty will have its remedies for breach of contract. There is no need as a general rule for the law to provide further remedies for misrepresentation, which would include (subject to whatever is the effect of section 2(2) of the Misrepresentation Act 1967) a right to rescind the contract. To do so could introduce considerable uncertainty into commercial dealings.

49. *Idemitsu v Sumitomo* was concerned with a share sale agreement. The Deputy Judge stated the principle in these terms, with which I agree:

> "14. When a seller, by the terms of the contract under which he sells, 'warrants' something about the subject matter sold, he is making a contractual promise. Nothing less. But also I think (and all things being equal) nothing more. That is so just as much for a warranty as to some then present or past matter of fact as it is for a warranty as to the future. By contracting on terms by which he warrants something, the seller is not purporting to impart information; he is not making a statement to his buyer. He is making a promise, to which he will be held as a matter of contract in the sense that any breach of the warranty will be actionable as a breach of contract, subject to any other relevant terms of the contract and to general principles of the law of contract, for example as to remedies."

50. The Deputy Judge recognised the possibility that something said in the course of negotiations might amount to a representation capable of being actionable under the Misrepresentation Act 1967, but said that this would depend on the particular facts of any given case. In *Idemitsu* nothing was relied on beyond the bare fact of an offer to sign the proposed contractual document.

51. While these cases illustrate a general principle that, in the absence of words of representation, the mere offer of contractual terms will not amount to any representation, there are some circumstances where an offer to contract on certain terms carries with it an implied representation as to the party's honesty in relation to the proposed transaction. It is not difficult to see why this should be so. Such honesty is the necessary substratum for all commercial dealings. It goes without saying.

52. For example, in *Property Alliance Group Ltd v Royal Bank of Scotland* [2018] EWCA Civ 355, [2018] 1 WLR 3529 at [122] to [141], a bank which offered to enter into an interest rate swap with obligations calculated by reference to LIBOR was held to have made an implied representation that, at the date of the swaps, it was not itself seeking to manipulate LIBOR and did not intend to do so in the future. That representation was implied because the counterparty needed to be certain of the bank's honesty at the beginning of the deal and throughout its course. This court (Sir Terence Etherton MR, Lord Justice Longmore and Lord Justice Newey) endorsed as helpful a test first proposed by Mr Justice Colman in *Geest Plc v Fyffes Plc* [1999] 1 All ER (Comm) 672,

"whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it". However, the implied representation made by the bank was limited to sterling LIBOR (the currency of the proposed swap) and did not extend to a representation as to the bank's honesty, either in relation to other LIBOR currencies or generally. It was the bank's honesty in relation to the particular transaction proposed which mattered.

53. Similarly, in *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) at [733] to [740], approved in *Property Alliance Group*, UBS's invitation to Depfa Bank to become an intermediary in a transaction with UBS's customer was held to amount to an implied representation that UBS believed its customer to be honest and did not have any significant doubts about its honesty.

54. Such an implied representation may also exist outside the commercial field. A customer who orders a meal in a restaurant makes an implied representation that he is able to pay for the meal: *DPP v Ray* [1974] AC 370, 379D. That too is a representation which has to do with the honesty of the customer in relation to the transaction and which is so obvious as to go without saying.

55. However, it is unnecessary to consider further whether in the present case the Owner made any representation as to its honesty or good faith in putting forward the performance warranties. The judge acquitted the Owner of any dishonesty, finding that it was negligent but not fraudulent.

56. In the present case the parties' initial contact, contained in the 22nd November 2016 letter, included the representations found by the judge as set out above. Those statements were held to be representations only because they included the explanation that the figures were based on an average of the vessels' last three voyages, those being words of representation as distinct from words of obligation. But that explanation was deliberately omitted once the parties began to negotiate. In fact it was the Charterer who first put forward an offer to conclude a contract which was capable of being accepted. That offer included the performance warranties contained in the 22nd November 2016 letter, but deleted the words "Above data is based on average of last 3 voys" and sought to negotiate on what would count as adverse weather for the purpose of the proposed warranties. The Owner insisted, however, on retaining the qualification that the performance warranted was on the basis of normal weather and wind force up to and including Beaufort scale 4, and resisted also the Charterer's later attempt to delete the proposed 0.5 knot margin. Accordingly the performance warranties remained as originally proposed, with the deletion of the words of explanation, and were eventually incorporated in the contract agreed. But once the parties began to negotiate, there was no further representation by the Owner.

57. As in *The Larissa*, the warranties proposed in the parties' contractual negotiations in this case have to be understood in their intended context, which was that they would form part of clause 24 in a charterparty to be concluded on the Shelltime 4 form. That clause contains a "guarantee", but also contains detailed provision about what is to happen if the vessel fails to perform in accordance with the guarantee. These are words of obligation and not of representation. They expressly contemplate the possibility of over-consumption. I agree with the further reasons given by the judge at [129] for

concluding that the mere offer of a speed and consumption warranty should not of itself be held to involve an implied representation as to current or recent performance:

> "i) The language of such an undertaking – a warranty – is inherently promissory, and is expressed in relation to the future (performance during the chartered service).
>
> ii) The attempt to imply such a representation raises the difficulty of determining the date at which any particular level of performance is said to have been represented, in circumstances in which a vessel's performance will change over time depending on matters such as hull fouling and the efficiency of the engine, and also the issue of whether any representation is made as to the position (i) at the date of the communication said to constitute the making of the representation, (ii) the date of the charter or (iii) the date the vessel enters the charterparty service. This last is a well-known point of contention when determining the scope of a non-continuing warranty as to a vessel's speed and consumption (*Lorentzen v White* (1942) 74 LL L Rep 161, 163 having held such a warranty related to the position at the date of the charter and *The Apollonius* [1978] 1 Lloyd's Rep 53 having held it related to the position when the chartered service began – the two events can be some time apart, as is the case here).
>
> iii) Speed and consumption warranties are frequently the subject of negotiation – for example as to the degree of margin, or the weather conditions in which the warranted performance is guaranteed (as CMTC sought to do in respect of the Charterparty, both in respect of the definition of good weather and the 0.5 knot margin). That is inconsistent with the offered warranties involving a representation as to a vessel's actual consumption.
>
> iv) The wordings of most tanker time charterparties (and the Shelltime 4 form which was to be used here) provide for some off-setting of over-consumption and under-consumption over a set period, with the result that the warranty given takes effect not so much as a warranty as to the vessel's capability at any particular point in time but as to its average performance over a longer period. It has been noted that such provisions:
>
> > 'allows the Owner to get the benefit of the 'downhill' passages (e.g. with following current and weather) as well as the uphill'
>
> (Baris Soyer and Andrew Tettenborn, *Charterparties: Law, Practice and Emerging Legal Issues* (2018) para. 5.2.2). The Shelltime 4 form as amended in the Charterparty provided for an average over 6 months. As a result, a vessel which does not initially perform at the required level might 'make up that performance' (including as a result of further work on the vessel – for example hull cleaning or engine overhaul) such that there

> is no clause 24 claim. The intricacies of such a warranty make it difficult to spell out an implied representation from the fact of the promise alone."

58. Although the Charterer argued in the court below that the proposed charterparty terms did include representations as to the vessel's actual or future fuel consumption, its submissions below did not place any great emphasis on the words "0.5 Knot Margin Required on the C/P". These assumed greater importance in Mr Rainey's submissions on appeal, the argument being that it was inherent in the request for a margin that the stated consumptions did represent a fair reflection of the vessel's actual or expected performance: if it were not so, the warranted consumptions could simply have been adjusted downwards to reflect whatever level of consumption the Owner was prepared to warrant.

59. I do not accept this argument. It is standard practice for a performance warranty to be qualified, either by a stated margin or by a general word such as "about". The extent of any margin is a matter of negotiation, as the judge found that it was in this case. The fact that the Owner put forward (and succeeded in insisting on) a margin of half a knot does not mean that it was making any representation about the figures to which this margin was to be applied. Nor does the fact that the Owner could have adjusted the warranted figures downwards so as to render the margin unnecessary. The terms proposed served their purpose, which was to spell out what consumption the Owner was warranting. They went no further than that.

60. In these circumstances I do not accept that the representations contained in the 22nd November 2016 letter were repeated during the parties' further negotiations or that they became "embedded" in the charterparty. On the contrary, they were deliberately not repeated. That is not to say that the original representations were somehow spent. They continued to have whatever effect they had on the Charterer's decision to enter into the charterparty. But that is a matter which goes to the issue of inducement, to which I now turn.

Ground 2: Inducement

61. It is common ground that a party seeking to rescind a contract for misrepresentation must show that the representation played a real and substantial part in inducing it to enter into the contract in question. As explained by Mr Justice Christopher Clarke in *Raiffeisen* at [153], the misrepresentation need not be the only reason for the party's decision to enter into the contract, but the representee will have no grounds for complaint if it would have entered into the contract on the same terms even if the representation had not been made. The relevant enquiry is whether the claimant would have entered into the contract if the representation had not been made at all, not whether it would have done so if it had been told the true position: see *Raiffeisen* at [180], followed in other cases including *Leni Oil & Gas Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm). Sometimes these two distinct scenarios may become blurred. For example, if nothing had been said about a particular topic, it may be that the representee would have asked questions which would have led to the true position being revealed. In such a case, there will be no practical difference between saying that the contract would not have been concluded if no representation had been made and saying that it would not have been concluded if the truth had been known.

62. What would have happened if the representation had not been made is a question of fact, although (as with any counterfactual) necessarily hypothetical. Once it is proved that a false statement was made which was "material" in the sense that it was likely to induce the contract, it is a fair inference of fact, although not of law, particularly strong in a fraud case, that the representee was induced by the statement to enter into the contract. But that inference is capable of being rebutted.

63. The court is therefore required as a first step to identify the hypothetical factual scenario in which the representation had not been made. In the present case, three possibilities were canvassed. The first was that the Owner said nothing about the vessel's speed and consumption, as if the 22nd November 2016 letter had never been sent. On that scenario, the judge found, not surprisingly, that no charterparty would have been concluded: in practice, a shipowner wishing to let out its vessel on time charter must offer performance warranties.

64. The second possibility was that the Owner had offered the same performance warranty, but had stated expressly that it was making no representation about the vessel's actual performance. In that event, not least because such a statement would obviously have invited further enquiries, it would have become apparent to the Charterer that the recent actual consumption was materially higher than shown in the Owner's figures, but the judge found that the charterparty would still have been concluded on the same terms, save for a reduction in the hire rate of US $500 per day. Mr Rainey challenged this finding, submitting that it failed to take account of the evidence of the Charterer's witness, Mr Konialidis, that if the true position had been known, it was unlikely that any charterparty would have been concluded. However, the judge gave valid reasons for his finding and on this question of fact I see no justification for interfering with it.

65. The third possibility was that the Owner had offered the same warranty, but made no representation as to the vessel's recent performance: in effect, as if the 22nd November 2016 letter had omitted the explanation that the figures were based on the last three voyages. In that event, the judge found that the charterparty would still have been concluded on the same terms as it was in fact concluded.

66. The judge considered that the relevant scenario was the third possibility which I have mentioned, that is to say that the Owner had offered the same warranty, but made no representation as to the vessel's recent performance. In my judgment he was right to do so. That scenario corresponds with what, on the evidence, is the normal situation, whereby actual data are not normally provided to prospective charterers and a shipowner will simply indicate the warranties which it is prepared to give. The first and second scenarios are highly unrealistic, in the first case because everyone in the market will know that some warranty must be offered and in the second case because it is hard to envisage real world circumstances in which a shipowner would offer a warranty while at the same time spelling out that it was making no representation.

67. On the basis that the judge was right to say that the relevant enquiry was what would have happened if the representations contained in the 22nd November 2016 letter had not been made but the same warranties had been offered, there can be no challenge to the judge's finding at [191] that the charterparty would still have been concluded on the same terms as it was in fact concluded.

68. In making that finding, the judge recognised that the representations were material and took into account the inference that they had induced the Charterer to enter into the contract, but held that this inference had been rebutted. His conclusion, therefore, involves no error of law and there was ample evidence to support it. The terms offered by the Owner were attractive and what really mattered to the Charterer was the performance warranty which the Owner would give: if the vessel over-consumed, the Charterer would be compensated under the mechanism in clause 24. Actual performance data were not normally provided and it had not been the Charterer's practice in negotiating other fixtures to ask about this. If such data had really been important to the Charterer, it would have asked questions about the figures provided by the Owner, in particular to clarify some of the ambiguities referred to above. Finally, when asked the direct question in cross examination, Mr Konialidis had frankly accepted that the Charterer would probably still have been happy to enter into the charterparty if it had been provided with warranted consumption rather than actual data.

69. The finding is fatal to any claim based on the misrepresentations contained in the 22nd November 2016 letter which the judge found to have been made. For good measure, however, he also found that a misrepresentation case based on a representation as to expected future performance would have failed on the grounds of inducement for the same reason: it was the warranty which mattered.

70. Moreover, the finding that the charterparty would have been concluded on the same terms as it was concluded means that it would also have included the guarantee by Capital Maritime.

71. Accordingly, for the reasons which I have explained, the pre-contractual representations which the Owner did make did not induce the Charterer to enter into the charterparty. The Owner made no additional representation, either as to its expectation about future consumption or by putting forward the performance warranties which it was prepared to include in any contract. This is sufficient to dismiss the appeal in relation to the "C CHALLENGER", not only by the Charterer but also by Capital Maritime as guarantor.

72. Nevertheless the remaining grounds of appeal in relation to that vessel were fully argued and it is convenient to say something about them. I will do so relatively briefly.

Ground 3: Affirmation

73. Affirmation of a contract following a representation, like affirmation following a repudiatory breach, is a form of waiver by election, as Lord Justice Rix explained in *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] Lloyd's Rep IR 489 at [38]. The judge set out the applicable principles at [201] to [204] of his judgment in a summary which was not challenged. These include that a decision to affirm the contract must be communicated unequivocally to the other party, although this may be done by conduct or by necessary implication. The test is objective. The effect of a reservation of rights is, or at least may be, to prevent conduct which would otherwise amount to an unequivocal affirmation from having that effect (*Kosmar* at [80]).

74. Having reviewed the authorities, the judge expressed the applicable test in these terms:

> "210. Are there some acts, however, which are so intrinsically affirmatory that performing them will cause the contract to be affirmed, even if they take place under a reservation of rights? To put it another way, are there some occasions when, to paraphrase Long Innes J in *Haynes v Hirst* (1927) 27 NSW (SR) 480, 489, a man who eats his cake will find it gone, nonetheless so because he ate it without prejudice?
>
> 211. I have concluded that while (outside the landlord and tenant context) a reservation of rights will often have the effect of preventing subsequent conduct constituting an election, this is not an invariable rule. In the final analysis, the issue of whether there has been an election requires the court to have regard to all the material, including any reservations which have been communicated. Where conduct is consistent with the reservation of a right to rescind, but also consistent with the continuation of the contract, then an express reservation will preclude the making of an election. This is likely to be the case where there is a reservation of rights accompanying the exercise of a contractual right to obtain information as to a party's rights, or where a party is performing its own obligations while assessing its position. However, where a party makes an unconditional demand of substantial contractual performance of a kind which will lead the counterparty and/or third parties to alter their positions in significant respects, such conduct may be wholly incompatible with the reservation of some kinds of rights, even if the party demanding performance purports at the same time to reserve them. Determining whether particular conduct gives rise to an election is ultimately a matter of legal characterisation rather than a question of what label a party has attached to its own conduct, as reflected in Lord Goff's statement in *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, p.399 that 'if, with knowledge of the facts giving rise to the repudiation, the other party to the contract acts (for example) in a manner consistent only with treating that contract as still alive, *he is taken in law* to have exercised his election to affirm the contract' (emphasis added). There are some contexts in which actions speak louder than words. Similarly, there may come a time when delay in exercising a right will be of such a duration that, notwithstanding a reservation of rights, 'the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it' (*ibid* p.398)."

75. I agree with this analysis. I do not accept Mr Rainey's submission, based on what is said in *Wilken, The Law of Waiver, Variation & Estoppel* 2nd Ed (2012), para 4.14, that the only way in which a relevant reservation of rights cannot preserve a party's position is if the reservation is a sham. While a reservation of rights will often have the effect of preventing subsequent conduct constituting an election, this is not an invariable rule. The court must have regard to all the circumstances, including the nature and terms of

any reservation of rights which has been communicated and the nature and consequences of any demand for future performance. The judge was careful to say that an unconditional demand for future performance "may" be incompatible with a reservation of rights, not that it necessarily will be.

76. As I read the judgment, this is the test which the judge applied. Mr Rainey submitted that he had not done so, but rather had elevated the giving of a voyage order to perform a new fixture into a special category of conduct which was "so intrinsically affirmatory" that it necessarily overrode any reservation of rights, however expressed. It is true that, when he came to express his conclusion, the judge did use the language of "inherently affirmatory":

> "223. That raises the issue of whether the reservation of rights in the various communications in June 2017 prevents that conduct being affirmatory. I have concluded that it does not. … for the reasons I have set out in [221-222], the conduct of sub-chartering the Vessel and ordering it on a substantial cargo-carrying voyage is so inherently affirmatory that it is incompatible with an attempt to reserve a right at the same time to set the Charterparty aside *ab initio*."

77. However, when this section of the judgment is read as a whole it is clear that the judge was not treating the giving of voyage orders as a special category of intrinsically affirmatory conduct, regardless of other matters. Rather, he was taking account of all the circumstances as they existed at the time when the order was given, including the facts that the particular voyage would last almost two months and would take the vessel to the Far East where it would be difficult for the Owner to obtain new employment without incurring the cost of a significant ballast voyage; that the order itself was given without any reservation of rights by the Charterer; and that although the Charterer had previously complained about the misdescription of the vessel, the Charterer's recent complaints containing reservations of rights in general terms were directed to other complaints such as the breakdown of the turbocharger and the issue of oil major approvals. Accordingly, what the judge was saying at [223] was simply that in the particular circumstances as they existed in July 2017, the giving of the order to perform a voyage to Tanjung Pelapas was so inherently affirmatory that it outweighed the Charterer's rather general reservation of rights given in earlier correspondence.

78. I consider that the judge was entitled to conclude that the Charterer had affirmed the contract. That required an evaluation of all the circumstances which the judge, after a ten day trial, was far better placed to make than this court can be. In the absence of any legal error, I would in any event be reluctant to disturb his conclusion unless it was clear that something has gone seriously wrong. That is not the position here.

79. Shortly after giving the voyage order, and just after the vessel had begun to load, the Charterer did on 20th July 2017 send a message complaining about intentional misdescription of the vessels' consumption and warning that all four charterparties would be rescinded and/or terminated if matters were not resolved within seven days, although in the event the seven days passed without this happening. It was not suggested by the Charterer that, if the giving of the voyage order did amount to an affirmation, the message of 20th July 2017 could make any difference: once an election to affirm has been communicated, it is too late for the representee to change its mind.

80. Mr Rainey submitted that, even if the Charterer had affirmed the charterparty, Capital Maritime as the guarantor had not done so, as the voyage order had been given on behalf of the Charterer and not Capital Maritime. The judge gave this submission short shrift, saying at [269] that in circumstances in which the charterparty was concluded with a company to be nominated and guaranteed by Capital Maritime, it would be wholly artificial to treat an election to maintain the charterparty as not extending to the guarantee of the Charterer's obligations under the charterparty. The judge said that it would be uncommercial (which is another way of saying that the parties would not reasonably have understood it to be the position) for the charterparty to have continued by reason of the Charterer's affirmation but without the benefit of Capital Maritime's guarantee. I agree.

Grounds 4 and 5: Remedy

81. The judge indicated that, if the issue had arisen, he would have exercised his discretion under section 2(2) of the Misrepresentation Act 1967 to declare the contract subsisting and to award damages in lieu of rescission. Those damages would have been calculated by reference to the reduction in hire of US $500 per day which he found would have been agreed if the Charterer had known the true position when negotiating the charterparty. The judge made clear, however, that the result of this exercise of discretion would mean that, by purporting to rescind the charterparty on 19th October 2017, the Charterer committed a repudiatory breach and was liable for damages consisting of the difference between the charter rate of US $30,500 per day and the market rate of US $10,000 per day or less for the balance of the charter period. Damages awarded under section 2(2) would not have indemnified the Charterer against that liability, which the judge said was suffered "not by reason of the misrepresentation, but by reason of the court's decision to award damages in lieu", that being a risk which the Charterer had assumed by ceasing performance in advance of obtaining an order for rescission.

82. It is apparent that to some extent ground 4 (rescission or damages in lieu) and ground 5 (measure of damages) are opposite sides of the same coin. The exercise of a discretion to award damages in lieu of rescission must be affected by the measure of damages available to compensate the representee.

83. Section 2(2) of the 1967 Act provides:

> "Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party."

84. Section 2(2) is not free from difficulty and distinguished judges have on occasion been tempted to comment on it when it has not been strictly necessary to do so. Their *obiter*

comments have sometimes proved controversial (e.g. *The Lucy* [1983] 1 Lloyd's Rep 188; and *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016). In what is already a long judgment, I would have resisted that temptation, if it had not been for the fact that the judge's judgment on this issue has already attracted academic comment (see e.g. *Chitty on Contracts*, 34th Ed (2021) at para 9-119 and 9-128).

85. In these circumstances I should not be taken as endorsing the judge's approach, but would leave the issue whether his approach was wrong in principle for decision in a case where it matters. I would, however, make these observations.

86. First, the issue will only arise when a party has made a misrepresentation (in this case, a negligent misrepresentation) which has induced the representee to enter into a contract which it would not otherwise have entered into (or which it would only have entered into on materially different terms) and where there has been no affirmation or other bar to rescission. In those circumstances rescission is the normal remedy, as Lord Justice Longmore explained in *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745, [2015] CLC 269 at [24]. It should at least be a strong starting point.

87. Second, the discretion which the section gives the court is to "declare the contract subsisting". That may operate without difficulty in the straightforward cases discussed in the Tenth Report of the Law Reform Committee (1962) Cmnd. 1782 which led to the passing of the 1967 Act. But it is hard to see how this discretion is intended to operate in a case where, on any view, the contract has come to an end by the time the court adjudicates. In the case of a contract for the provision of services over a period, such as a time charter, what does it mean for a court giving judgment in December 2020 to declare that the contract is subsisting when, even if it had run its full course, the charter would have come to an end in early 2019? In practice, the effect of the judge's decision is not that the contract was declared to be subsisting, but that it was terminated the day after the Charterer's purported rescission by the Owner's acceptance of that rescission as a repudiatory breach.

88. Third, in a case like the present, uncertainty as to how the discretion under section 2(2) will be exercised creates what may well be insuperable difficulties for commercial parties who need to know where they stand. They need to know, or to be able to take legal advice, whether they are entitled to rescind a contract for misrepresentation. In the present case, the judge's approach means (as Lord Justice Evans put it in *William Sindall* at 1044F-G) that the court's order has restored a contract which had been lawfully rescinded by the innocent party at an earlier date. The stark consequences of this are demonstrated by the judge's comment that the Charterer's liability for repudiation damages was caused by the court's later decision to award damages in lieu of rescission. In such circumstances, what is a representee to do? If the Charterer exercises a right to rescind, it is at risk of being liable for repudiation damages. But if it continues to perform a contract into which it was induced to enter by a negligent misrepresentation, it may end up paying large sums by way of hire which it may never get back even if it is ultimately able to establish its right to rescind. The problem may be resolved by a without prejudice agreement, as in *The Lucy*, but that will not always be agreed. It was suggested that the Charterer's appropriate course is to make an urgent application to the court, but I note that the trial in this case took ten days. Notwithstanding the efforts which the Commercial Court (and, when applicable, maritime arbitrators) will always make to accommodate urgent cases, it is unrealistic to think that such a case could be heard in short order.

89. Fourth, it is apparent that the judge's approach was coloured by his view that rescission for misrepresentation is not a self-help remedy available to a representee, but depends on the representee obtaining an order for rescission from the court, even though in the end he said that this issue was not decisive. This is itself a highly controversial question, on which we did not hear argument. I note, however, that section 2(2) appears to be drafted on the basis that, at least in some circumstances, rescission does not depend on obtaining a court order. Hence the language "claimed … that the contract ought to be *or has been* rescinded".

90. Against all this, Mr Smith was able to point out that the Charterer was fully compensated for the vessel's over-consumption pursuant to the provisions of clause 24, with the sole exception of consequential damages in the sum of US $68,425 incurred when the vessel ran out of bunkers while discharging at Tanjung Pelapas, a relatively trivial sum in the context of a two-year time charter; and that the effect of the judge's decision was to leave with the Charterer the consequences of having made a bad bargain as a result of the fall in the market following the conclusion of the charterparty.

91. These are difficult issues. I would leave them to be wrestled with in another case where they will be critical to the outcome.

Ground 6: The guarantor's appeal

92. Capital Maritime as guarantor has a distinct ground of appeal relating to the costs of the proceedings ordered to be paid by the first, second and fourth defendants, i.e. the Charterers of the other three vessels. The judge ordered that the Owner was entitled to its costs of the claims against those defendants up to the date of acceptance of the Part 36 offers and that Capital Maritime was jointly and severally liable for those costs under the guarantees which it had given. Those guarantees were in the same form as the guarantee in the case of the "C CHALLENGER", that is to say that the charterparty provided for the chartering company "to be nominated and guaranteed by" Capital Maritime.

93. The judge held that these guarantees were not limited to amounts payable under the charterparties, but extended to any costs orders made against the Charterers in proceedings brought to enforce the charterparties. He recognised that this depended upon the true construction of the guarantees. His reasoning at [357] was that the guarantees were entered into as a condition of Capital Maritime's right to nominate the charterers, so that the natural scope of the guarantees was to extend to any liabilities which Capital Maritime would have come under to the Owner if it had not exercised any right of nomination but had been the Charterer itself.

94. The judge's conclusion as to the true construction of the guarantees is not challenged on appeal. Capital Maritime's argument, addressed orally by Mr Marcus Mander, is that if it was entitled to rescind the guarantee contained in the "C CHALLENGER" charterparty for misrepresentation, it must also have been entitled to rescind the equivalent guarantees contained in the other charterparties, or at any rate that the judge was not in a position to decide otherwise without a full trial of the issues in relation to those other charterparties. I am not convinced that this necessarily follows but, as I have decided that Capital Maritime's appeal in relation to the "C CHALLENGER" must fail, this issue does not arise.

Disposal

95. I would dismiss the appeal.

Lord Justice Phillips:

96. I agree.

Lady Justice Carr:

97. I agree and I too would dismiss the appeal.