Neutral Citation Number: [2020] EWHC 3448 (Comm)

Case No: CL-2018-000495

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2020

**Before** :

**MR JUSTICE FOXTON**

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**Between :**

**SK SHIPPING EUROPE PLC**

**Claimant**

**- and -**

**(3) CAPITAL VLCC 3 CORP**
**(5) CAPITAL MARITIME AND TRADING CORP**

**Defendants**

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**Chris Smith QC** (instructed by **Preston Turnbull LLP**) for the **Claimant**
**Stephen Phillips QC** and **Marcus Mander** (instructed by **Reed Smith LLP**) for the **Defendants**

Hearing dates: **19-22, 26-29 October** and **2-3 November 2020.**
Draft judgment to parties: **7 December 2020**

# Approved Judgment

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Mr Justice Foxton

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**Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed 16 December 2020 at 10:00 am.**

## MR JUSTICE FOXTON:

1. This action arises out a long term charterparty ("the Charterparty") entered into between the Claimant ("the Owner") and the Third Defendant ("the Charterer") in early December 2016 in respect of the Owner's very large crude carrier, the "C CHALLENGER" ("the Vessel").

2. In summary:

   i) The Charterer alleges that it was induced to enter into the Charterparty by fraudulent misrepresentations made by the Owner as to the Vessel's fuel consumption, and claims rescission and/or damages.

   ii) If the Charterparty cannot be rescinded, the Charterer alleges that it was entitled to and did terminate the Charterparty by reason of the Owner's breaches of the Charterparty.

   iii) The Owner seeks damages for what it contends was the Charterer's repudiatory breach of the Charterparty.

   iv) The Owner also claims that the Fifth Defendant ("CMTC") guaranteed the Charterer's obligations and liabilities under the Charterparty. CMTC (now) accepts that a guarantee was concluded ("the Guarantee"), but contends that it is not enforceable because s4 of the Statute of Frauds 1677 has not been complied with.

3. The Owner was represented by Chris Smith QC, and the Defendants by Stephen Phillips QC and Marcus Mander. I am grateful to all counsel, and their instructing solicitors, for the considerable work which went into ensuring an efficient hearing, for the high quality of their written and oral submissions and for the spirit in which the case was conducted.

4. The case was heard on a mixed hybrid/wholly remote basis, with 7 days of evidence and three days of opening and closing submissions. Unfortunately, the range of issues which the case raised meant that a number of points received little (if any) attention during the hearing, and have had to be resolved on the basis of the parties' written submissions and the documents.

## THE WITNESSES

### The Owner's witnesses

5. Mr Ray Jin Sung Kim ("Mr Ray Kim") worked in SK Shipping Co Ltd ("SK Shipping")'s Tanker Operations and Tanker Chartering Teams until July 2018, when he went to work for GS Caltex. He moved from the Tanker Operations to the Tanker Chartering Team on 7 November 2016, when he was 33 years old. Before his involvement in the fixtures which give rise to this litigation, he had never been responsible for fixing or chartering any vessel (whether on a spot or period basis). However, over the Friday and weekend before he began in the Tanker Chartering Team, he was responsible for preparing the speed and consumption data circulated by SK Shipping which is at the heart of this action.

6. Mr Ray Kim was subjected to demanding, but conspicuously fair, cross-examination by Mr Phillips QC over the course of two days, giving evidence by video link at the end of his working day in Korea from 6pm to midnight. He gave evidence in English, and his English was good but not fluent. For the most part, I found Mr Ray Kim an honest and forthcoming witness. He was frequently willing to accept propositions which were adverse to the Owner's case, and expressed disagreement with the evidence of other witnesses called by the Owner when it did not accord with his own views or experience. He was also willing to acknowledge deficiencies in the work he had performed when these were pointed out to him by Mr Phillips QC, and to accept that the verification exercise he undertook proved essentially beyond his capabilities.

7. However, he was somewhat less forthcoming in acknowledging the awareness within SK Shipping after the Charterparty had been concluded of the fact and extent of the over-consumption as compared with the warranted position; the Ship Management Team's disquiet when it learned of the warranties which had been offered; and the tensions which this generated within SK Shipping. On those matters, I have found the contemporaneous documents and inherent probabilities a better guide to Mr Ray Kim's perceptions at the time than his evidence at the trial.

8. Mr Sebin Im ("Mr Im") was the head of the Tanker Chartering Team from January 2016 until he left SK Shipping in March 2020. I found him a more guarded witness than Mr Ray Kim, but someone who once again gave honest answers, a number of which were supportive of aspects of the Charterer's case. He too had had very limited experience of time chartering vessels before November 2016. His recollection of events in November 2016 was limited, and I formed the clear impression that, so far as the consumption analysis was concerned, he did not concern himself with the detail of the work Mr Ray Kim had done, but only with the outcome as reported to him. His command of English was much more limited than Mr Ray Kim's.

9. Once again he was markedly less forthcoming when giving evidence about the internal reactions and views within SK Shipping once consumption issues began to manifest themselves during the charters. In particular, I find that in his evidence, he sought to downplay the extent of the tensions which emerged within SK Shipping towards the end of December 2016 and in January and February 2017 about the level of consumption which had been warranted on the VLCCs.

10. The Owner's final witness was Mr Hae Yong Son ("Mr H Y Son"), who has worked within SK Shipping since joining it as a 3rd Engineer in March 1994 and who was technical manager and head of the Ship Management Team from 1 January 2016. I formed the impression that Mr H Y Song was reluctant to make any criticisms of the company for whom he still works, even in relation to matters which are not susceptible to serious dispute (such as the fact that the VLCCs' performance under the various charters fell significantly short of the warranted consumption or the likelihood of the VLCCs' consumption performance having deteriorated between 2013 and 2016). This may have been, as Mr Phillips QC suggested, out of a sense of loyalty to the company within whom he has been all his life, or it may have been from a reluctance to criticise past or present colleagues with the "SK Shipping family".

11. Whatever the reason, I have approached his evidence with caution and, as with all witnesses, sought to test it against the inherent probabilities and the contemporaneous documents. On technical issues, I have relied on the views of the expert witnesses

rather than those put forward by Mr H Y Son, which on a number of issues (e.g. the influence of the cargo loaded on the Vessel's performance on the Southwold-Tanjung Pelepas voyage) the experts did not support.

## The Defendants' witnesses

12. The Defendants' first witness was Mr Andreas Koniliadis. Mr Koniliadis is the managing director of Curzon Maritime Limited ("Curzon"), a firm of chartering brokers. However, his relationship with CMTC and the Capital Maritime group went far beyond that of a conventional chartering broker. Curzon was owned by the beneficial owner of CMTC until it was sold to its management in 2004. Thereafter, the overwhelming majority of business undertaken by Curzon– some 90% - was performed on behalf of the Capital Maritime group. Curzon was not paid in the conventional way by receiving commission on each transaction. The effect of the evidence was that Mr Marinakis (the ultimate shareholder of the Defendants) would decide whether Curzon would receive commission on a particular transaction, and how much. Mr Koniliadis explained that "we discuss kind of on an on-going basis about which commission, in which deals we take commission or not". Mr Konialidis used a Capital Maritime email address as well as his Curzon email address in his communications. Mr Rexer of the brokers Poten & Partners ("Poten"), who clearly had a close personal and professional relationship with Mr Konialidis, described him in contemporary correspondence as Capital Maritime's "Chartering Manager" and Mr Ventouris gave evidence that Curzon "continue to manage some of the chartering activities of" Capital Maritime's fleet. While Mr Konialidis' relationship with Capital Maritime was *sui generis*, in my view these descriptions capture the extent to which Mr Konialidis was integrated into the Capital Maritime organisation.

13. Mr Konialidis was a careful witness, who was fully on top of the issues in the case and the evidence before the court. He was subjected to testing cross-examination in court for nearly three days. On certain topics, I formed the view that he was reluctant to give answers which might undermine the Charterer's case:

    i) His reluctance to accept that many of the exchanges which Poten had with him would not have been appropriate if Poten had been acting as SK Shipping's exclusive broker.

    ii) His evidence that he understood Poten to be SK Shipping's brokers, and that that was how he treated Poten during the negotiations. For reasons I explain below, I am satisfied that Poten operated as intermediate brokers, and that Mr Konialidis knew this to be the position.

    iii) Aspects of his evidence on the Guarantee issue. For example both he and Mr Ventouris suggested that the reason why the Charterparty was never signed was because serious problems began to emerge with the VLCCs. I accept that there was a period when revision to the terms of the Charterparty was under consideration (in particular as to laycan and delivery) as a result of the late delivery of the Vessel, during which period finalisation and signature of the written contract were put on hold. Thereafter, it is clear from the documents that the delay in signing was on SK Shipping's side, it being the Defendants' expectation and experience that the owner signed first. This was both the evidence of Mr Ventouris as to the "unwritten practice" and the position

recorded in a note of a meeting which took place between representatives of both sides in March 2017. Had the Defendants told Mr Konialidis that a decision had been taken not to sign the charterparties due to problems which had arisen on the Owner's side, I am satisfied that this would have been mentioned in one of Mr Konialidis' frank instant messenger conversations with Mr Rexer.

14. On these issues, I have concluded that Mr Konialidis' recollection had become coloured by the dispute and his awareness of which answers would support the Charterer's case. That has made me approach Mr Konialidis' evidence with some caution. As with the other witnesses, I have sought to test the evidence against the documents and the inherent probabilities. I make further findings in relation to the production of documents sent or received by Curzon below.

15. Mr Ventouris was the Chief Commercial Officer of one of the Capital Maritime group companies until he retired from that role in 2020, and he remains the Chief Executive officer of CMTC. He clearly has great experience of the tanker market. He had no direct involvement in negotiating or concluding the Charterparty, and for those reasons I found the passages in his witness statement addressing the issues of representation and inducement of no real assistance.

16. I had concerns as to certain aspects of Mr Ventouris' evidence:

    i) In cross-examination, he recalled in detailed terms a conversation with Mr Marinakis in which Mr Marinakis had told him how important the apparent fuel efficiency of the VLCCs had been to the decision to charter the vessels. While the truth of this recollection was not challenged in cross-examination, I found it surprising – in a case in which a central issue was whether statements about the Vessel's consumption had induced the Charterparty – that this recollection had not featured in Mr Ventouris' witness statement. It suggested to me a real risk that Mr Ventouris' recollection had come to be coloured by the issues in the case.

    ii) As with Mr Konialidis, I am unable to accept Mr Ventouris' evidence that his discussions with Mr Rexer "were conducted on the basis that his client was SK Shipping", or that the reason why the Charterparty was never signed was because of problems with the Vessel. On both of these points, Mr Ventouris was giving evidence with a view to supporting the Defendants' case.

    iii) The figures of over-consumption he advanced in his witness statement were significantly higher than those set out in the evidence of another of the Defendants' witnesses, Mr Iliou. He was unable to explain how they had been prepared and he accepted that Mr Iliou's figures were more reliable. In addition, he made various criticisms of SK Shipping's conduct in his witness statement which were based on a misunderstanding of the position, and which he withdrew in cross-examination. This reflected a tendency on his part to overstate the position.

    iv) Another good example of this tendency was the suggestion in his witness statement that the turbocharger incident (which I address at [82-83] and [289-290] below) had caused Total to place all of the vessels in Capital Maritime's

> fleet – some 34 vessels - "on hold for chartering purposes", and that it "took us several weeks" to convince Total not to penalize Capital Maritime's other vessels. However, there was not a hint in the documents of any such suggestion being made, Mr Ventouris' own evidence about it was inconsistent, and if there had been any such suggestion, even for a short period, I am sure it would have featured in the contemporary documents – for example in the Charterer's own communications (in which it clearly wished to communicate the significance of the turbocharger breakdown in the most forceful terms) or in Mr Konialidis' instant messenger exchanges with Mr Rexer (in which criticisms of SK Shipping were not in short supply).

17. For these reasons, and in particular given the tendency for his recollection of events to have been shaped by the Defendants' case in the litigation, I have approached Mr Ventouris' evidence with caution.

18. The Defendants' final witness was Mr Mavrelos who was Capital Maritime's Technical Director until his retirement in February 2020. His evidence, as served, contained a great deal of inadmissible opinion evidence, which the parties agreed to exclude. He gave evidence about what he saw during his inspection of the Vessel in June 2017 and produced a number of contemporaneous photographs. I have relied on the evidence of the experts as to the conclusions to be drawn from those photographs.

**Absent witnesses**

19. Both sides made submissions as to the inferences which should be drawn from the fact that particular individuals were not called as witnesses by the other side (applying the well-known principles set out in Wiszniewski v Central Manchester Health Authority [1998] PIQR P324).

20. The Defendants pointed to the absence of Mr Byung-Jin Huang who was head of the Tanker Operations Team in 2016. On the evidence, he had left SK Shipping's employment three years ago, and I do not therefore draw any inference from his absence. However it is noteworthy that the only individual who had worked in the Tanker Operations Team who gave evidence was Mr Ray Kim, who moved on from that department at around the time the decision was taken to send the speed and consumption data in issue to the market. I have considered whether I should draw any inferences from the failure to call a witness from the Tanker Operations Team in the context of the misrepresentation claim. However, as I explain below, in my view it is sufficiently clear that it was Mr Ray Kim and Mr Im who were involved in the work on the data, and that if others had been involved in the decision to send out this data in this form and use it as the basis of the speed and consumption warranties, this is something which would have featured in the internal emails which were sent once problems emerged, especially the emails which Mr Ray Kim sent defending his conduct. In particular the July 2017 email discussed at [40] below was forthright – particularly so in the corporate environment in which it was sent - in calling out the Ship Management Team as "the people who try to evade responsibility for the FOC data". If there were similar arrows to be fired in the direction of the Tanker Operations Team, I am confident Mr Ray Kim would have fired them.

21. However, I have drawn an adverse inference from the failure to call someone from the Tanker Operations Team when considering the Owner's case as to the investigations undertaken into the cause of the over-consumption in 2017.

22. The Owner pointed to the absence of Mr Marinakis, who, on the evidence, took the decision to charter the VLCCs, including the Charterparty, and was the principal source of Mr Konialidis' instructions. No explanation was offered for Mr Marinakis' absence, and I accept that it is appropriate to draw an inference from his absence that his evidence would not have assisted the Defendants on the issues of inducement and as to process by which the decision that CMTC would provide the Guarantee was reached and communicated within CMTC. However, the drawing of such inferences has not proved determinative of any findings I have made and I accept, so far as the Defendants' case in fraud is concerned, that their entitlement to rely on the strong presumption of inducement in that context would not have been set at nought merely because Mr Marinakis was not called to give evidence.

## The expert witnesses

23. Mr Justice Teare gave permission for expert evidence on the following topics:

    i) From engineering experts on the cause of the alleged overconsumption of bunkers, the steps that ought to have been taken by the Claimant to resolve the same, and the efficacy of the steps in fact taken in this regard by the Claimant.

    ii) From ship-broking experts on the quantum of the Claimant's claim and the Defendants' counterclaim.

24. However, the instructions given to the experts, and consequently their reports, ranged far beyond the permission granted, and the major part of the expert cross-examination was addressed to topics for which no permission had been obtained.

25. The marine engineering experts, Mr Tom Masters for the Owner and Mr Steven Salt for the Charterer, both addressed the exercise which Mr Ray Kim (who was not a marine engineer) had performed to verify the speed and consumption data. That evidence proved to be of limited assistance, because this topic did not raise any issues of marine engineering expertise. The evidence which the experts were qualified to give – on the causes of over-consumption, the extent of under-performance and the reasons for the turbocharger failure – was subject to only limited cross-examination because of time constraints.

26. Similarly, the evidence of the two chartering brokers – Ms Jean Richards for the Owner and Mr Peter Clements for the Charterer – ranged far beyond the (permitted) issue of quantum. Overruns in the trial timetable, some resulting from unforeseeable events, meant that even after adding a day to the trial, there was very limited time for the cross-examination of these experts. In the event, part-way through Ms Richards' cross-examination, it was necessary for reasons for which no one was in any way at fault to bring the cross-examination to an early end. There was no re-examination of Ms Richards nor any cross-examination of Mr Clements, and it was agreed that I would deal with the quantum issues on the basis of their reports.

27. There was an attempt by the Defendants in closing to rely on some of the answers given in Ms Richards' cross-examination, and parts of the experts' reports, on the issue of what representations, if any, would be understood by a reasonable recipient as implicit in an owner's offer of speed and consumption terms. Even if there had been a pleaded case as to a relevant market understanding or practice (which there was not), and permission to adduce expert evidence on this issue had been granted (which it had not), I would in any event have felt unable to place reliance on the evidence of the experts in the circumstances I have set out in [26] above.

28. I note that in Showa Oil Tanker Co Ltd of Japan v Maravan SA of Caracas (The Larissa) [1983] 2 Lloyd's Rep. 325, 330, Mr Justice Hobhouse observed of a very similar argument in a very similar context:

> "Where a representation is alleged to have been made by conduct, the question whether that representation was made will normally be solely one of fact provided that the tribunal of fact has properly directed itself in law. In the present case it is a matter of the construction of a document. This is a matter of law and questions of fact will only come into it in so far as the Court has to take into account the surrounding circumstances and any special usage of words. In the present case, the arbitrator has made no special findings with regard to the surrounding circumstances nor has he made any finding with regard to a special meaning of the words different from their ordinary meaning. This is hardly surprising because the surrounding circumstances are completely straight forward. They are the making of an offer by one broker to another with a view to effecting a fixture of a vessel. There is nothing peculiar about the nature of the transaction or the type of charter-party which is being entered into. The telex was one which was sent at an early stage, if not the outset of the negotiations, and does not require the consideration of earlier communications between the parties in order to understand its context. Counsel for the charterers was not able to suggest any special circumstances which should qualify the ordinary construction of this telex. As regards the use of the trade terms or the use of words with some special meaning different from their ordinary meaning, there again is no finding by the arbitrator that this was the case. Indeed it would be surprising if it was. The words used in the material part of the telex are straightforward English words subject only to some of them being abbreviated. Again, Counsel for the charterers was not able to suggest any special usage of words in the relevant part of this telex".

29. The issues in this case also involve the interpretation of the words used in the context in which they were used, without any suggestion that there was any special market understanding as to their meaning, an issue on which the opinions of the experts are neither admissible nor helpful.

## THE FACTS

30. I will now set out my findings as to the underlying facts, including the reasons for my conclusions on those points where the factual position was in dispute.

## Work on the speed and consumption figures within SK Shipping

31. SK Shipping's business was conducted through various teams. The Tanker Business Division was divided into the Tanker Operations Team, which operated the various tanker vessels, and the Tanker Chartering Team, which was concerned with the chartering out of those vessels. Those teams worked in close physical proximity in SK Shipping's offices in Seoul. There was also a Ship Management Team which was based in Busan, which was more closely involved with the masters and crews of the vessels.

32. The tankers, and SK Shipping's very large crude carriers in particular, had generally been chartered by SK Shipping on the spot market, through consecutive voyage charters. However, in late October 2016, the Tanker Business Division, and SK Shipping's CEO, decided on a change of strategy, and to charter out its very large crude carrier vessels on long term period charters. In addition to the Vessel, the tankers included the "C SPIRIT", the "C INNOVATOR" and the "C PROGRESS". I will refer to these four vessels as "the VLCCs". The reasons for this decision were not revealed in any document available at trial, but the decision appears to have been an attempt to protect SK Shipping against an anticipated downturn in the freight market. That proved to be a shrewd assessment, as freight rates for very large crude carriers fell very dramatically over the course of 2017 (see [62] below).

33. When a vessel is traded by an owner under a voyage charter, fuel (or bunker) costs are for the owner's account. Under a time charter, by contrast, fuel consumed while the vessel is on hire is for the time charterer's account. For that reason, time charters generally contain speed and consumption warranties – contractual promises by owners as to the amount of fuel oil and diesel oil the vessel will consume at specified speeds, when operating both in ballast and laden conditions. Those warranties almost invariably specify the weather conditions in which the promised performance will be achieved (e.g. "85 mt of IFO at12 knots in good weather" or "in winds up to Beaufort force 4") and they are often qualified by a margin of error (e.g. 5% or 0.5 knot). While an owner operating on the spot market is not really concerned with differences in consumption in different weather conditions (because these costs are for its account regardless), this is a significant issue when a vessel is time chartered because of the qualified terms in which the speed and consumption warranties are given.

34. SK Shipping's decision to time charter out the VLCCs made it necessary for it to offer warranties as to the VLCCs' speed and consumption performance, something which it had not previously had to do. SK Shipping did not have templates of the speed and consumption warranties to be offered. What it did have was speed and consumption data set out in four tables in a spreadsheet with the title "Open VLCC FOC Final" ("the Spreadsheet"):

    i) Table 1 comprised speed and consumption data from the VLCCs' sea and shop trials, adjusted to reflect the use of different fuels and for performance as assessed 6 months and 12 months after delivery (August 2013).

    ii) Table 2 comprised the data in Table 1 with 5.5mt added to each consumption figure to allow for auxiliary engine consumption (i.e. the generators which consumed fuel in addition to that consumed by the main engine).

iii) Table 3 took the data in Table 2 and added a 4% margin on top and Table 4 rounded the data in Table 3 to 1 decimal place.

iv) The meta data in the Spreadsheet suggested that it had last been updated in October 2014, but the extent of any alterations on that date is unknown (save that there was no change to the Table 2 data).

35. The data for the Vessel and the "C INNOVATOR" (which were sister ships) was presented as a composite set of figures. That for the other VLCCs was presented on a free-standing basis.

36. There was some debate before me as to the reasons why Tables 3 and 4 had been brought into existence, and what that said about SK Shipping's knowledge about the continuing reliability of Table 2. Mr Phillips QC suggested that Tables 3 and 4 had been created because it was known within the Tanker Operations Team that the data in Table 2 seriously understated the VLCCs' speed and consumption performance. My conclusions on this issue are as follows:

i) Tables 3 and 4 had clearly been prepared at the latest by October 2014, at which point Table 2 would have been relatively up to date (just over a year old), and possibly before.

ii) The Tables were not updated when the Vessel was drydocked and its hull recoated in October 2015. If the 4% adjustment in Table 3 was intended to be a more accurate reflection of the Vessel's actual performance, I would have expected some update at this time.

iii) Had the Spreadsheet been revised to reflect the actual operation of the VLCCs, a straight 4% uplift on the figures in Table 2 would have been a crude means of doing so. The evidence before me was that the VLCCs' deviation from the Table 2 performance was more pronounced in ballast than in laden conditions, and at some speeds rather than others. Applying a straightforward 4% increase across the board would have been a very rough and ready means of adjusting the figures for the VLCCs' actual performance.

iv) In these circumstances, I accept Mr Ray Kim's evidence that Tables 3 and 4 were originally prepared for use by the Tanker Operations Team for the purpose of evaluating the profitability of fixtures in a conservative way, against a background in which a conservative estimating and reporting of results was required by the applicable audit regime, and when the fuel costs which it would fall to SK Shipping to bear when voyage chartering the VLCCs would be those consumed in all weathers, not simply those consumed in the good weather conditions to which the speed trials data related.

37. Mr Im, the Team Leader of the Tanker Chartering Team, who had been instructed to carry the time chartering strategy into effect, instructed Mr Ray Kim to validate the VLCCs' speed and consumption data as recorded in the Spreadsheet for the purpose of determining what data could be provided to the market as the basis of a speed and consumption warranty. Mr Ray Kim was a surprising choice for that role. He had been working in the Tanker Operations Team, but was due to be transferred to the Tanker Chartering Team with effect from Monday, 7 November 2016. He was given

this instruction on either 3 or 4 November 2016, and he worked over the weekend on the task. He had never negotiated a charter fixture before (voyage or time) and he had not had close involvement in the operation of the VLCCs during his time at the Tanker Operations Team. He appears to have been chosen because he had worked in the Tanker Operations Team, and had previous experience at sea (although there is no evidence he had served on one of the VLCCs). The instructions given by Mr Im to Mr Ray Kim were in the most general terms – essentially to check the data in the Tables for the purpose of determining what speed and consumption warranties should be offered.

38. It was not suggested that any pressure was applied to Mr Ray Kim to come forward with the most favourable set of figures, and I would have rejected any suggestion that it was. It is clear (as I explain below and is confirmed by emails sent by Mr Ray Kim in January and July 2017) that Mr Ray Kim made efforts to obtain actual performance data from the Ship Management Team and the masters of the VLCCs – something scarcely consistent with someone who had been instructed to carry out a "whitewash".

39. It was suggested by Mr Phillips QC that Mr Im, Mr Ray Kim and the Tanker Operations Team knew before any validation exercise had been conducted, that Tables 1 and 2 materially over-stated the vessel's speed and consumption performance. My findings on this are as follows:

    i) I accept that there was awareness within the Tanker Operations Team, including Mr Ray Kim, that the data in Tables 1 and 2 had been collected some time ago, and might well be out-of-date. Not only would any competent operator of VLCCs be aware of the likelihood that the VLCCs' performance would deteriorate over time, but Mr Ray Kim gave evidence that he had asked "several times" for the Tanker Operations Team to update that data, to assist in the calculation and monitoring of the VLCCs' earnings. Those repeated requests reflected, in my view, an awareness that the figures might well no longer be substantially accurate, something which Mr Ray Kim accepted when pressed in cross-examination: "I was not in a position to tell whether it is accurate or not".

    ii) However, as I have stated, the Tanker Operations Team was still using the data which cannot have been updated any later than October 2014, with a 4% adjustment already in place at that date, in order to assess the profitability of fixtures. Further, the hulls of the Vessel and the "C INNOVATOR" had been cleaned and re-painted in drydock in October 2015.

    iii) When Mr Im asked Mr Ray Kim to verify the Spreadsheet data, and Mr Ray Kim sought to do so, I am satisfied that this was a genuine attempt by those individuals to ascertain whether the Spreadsheet data could appropriately be used for the purposes of a speed and consumption warranty, rather than an instruction to Mr Ray Kim to verify data which was already known to be unverifiable and substantially inaccurate.

40. As I have stated, I accept that Mr Ray Kim asked both the Ship Management Team and the masters of the various VLCCs for data to assist him in the exercise he had been asked to undertake. There is an email from Mr Ray Kim to Mr Shang Hyeon Kim of the Ship Management Team of 4 November 2016 attaching the Spreadsheet,

following a telephone conversation on the subject, which is consistent with Mr Ray Kim seeking the Ship Management Team's help. While no record survives of any attempt by Mr Ray Kim to contact the masters, in an email to one of the masters on 12 January 2017 he referred to having made previous attempts to obtain fuel oil consumption data from the masters of the VLCCs without success. Further, in an email on 11 July 2017, which was copied into the Ship Management Team, he stated:

> "I have continually made query about the FOC [Fuel Oil Consumption] since the days I worked in the Tanker Operation Team. Last November, I requested Mr Sanghyun Kim and Mr Hyung You from the Ship Management Team to update the FOC Table of SK Shipping's vessel's regarding SPMS [the Ship Performance Maintenance System] which were in the trial stage and you can check this from the attached email.
>
> ….
>
> In preparation for them saying that they do not remember, I am currently looking for my email requests which I have sometimes sent *to the vessel* or ship management team but I have to check since they were sent a long time ago.
>
> Anyways, I have not received any FOC updates nor feedback regarding SPMS".

(emphasis added).

41. As Mr Ray Kim's emails indicate, he did not receive any response to his enquiries. He therefore asked Mr Im to make contact (no doubt hoping that an approach from a more senior employee would prove more productive), but Mr Im reported that the Ship Management Team considered it too difficult to update the data in the Spreadsheet. The reasons why the Ship Management Team, in particular, washed its hands of this matter, are not clear, but may well have reflected a view that it had enough on its hands, and that work required to charter out the VLCCs was someone else's problem.

42. In the form in which Mr Ray Kim sent it to Mr Shang Hyeon Kim of the Ship Management Team on 4 November 2016, the Spreadsheet included additional tabs for the VLCCs which had been prepared by Mr Ray Kim, working with Mr T H Kim, and which were in English. Those tabs ("the Additional Tabs") – which must have been prepared on or around 4 November – set out the Table 4 data, and:

    i) In the case of the "C EXCELLENCY", "C NOBILITY", "C INNOVATOR" and the Vessel contained the following words:

    > "FO Bunker Consumption: This figure is the sum of M/E and G/E daily consumption
    >
    > G/E daily consumption is normally 5.5 mt/d
    >
    > DO 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".

ii) For the "C SPIRIT", "C PASSION" and "C FREEDOM" , the additional words "all details 'about'. About equals 0.5 knot allowance".

43. The Additional Tabs are, in my view, significant:

i) I accept (contrary to the evidence of Mr Ray Kim and Mr Im) that they must have been prepared with a view to their possible use for the purpose of chartering out the VLCCs. It was for that reason that they were written in English and included language appropriate to a context in which the information was being provided or warranted to potential or actual charterers.

ii) At one stage (but not in closing), the Charterer suggested that the Additional Tabs demonstrated that a decision was subsequently taken not to circulate Table 4 data to the market, even though it was believed to be more accurate, but to use the Table 2 data with the benefit of a 0.5 knot tolerance instead. I would not have accepted that there was any such decision:

a) The Additional Tabs were clearly prepared at a very early stage in Mr Ray Kim's involvement in this matter, and when the verification process was in its early stages (for example before he had approached Mr Shang Hyeon in Busan or accessed the noon reports).

b) The tables for three of the ships included the words "all details about. About equals 0.5 knot tolerance". I accept Mr Ray Kim's evidence that the presence of these words in relation to some ships, and not others, is likely to have been unintentional.

c) Any suggestion that a deliberate decision had been made to verify only the Table 2 data, and not the Table 4 data is belied by the fact that any attempt to verify one would necessarily verify the other (as Table 4 was simply Table 2 with a 4% margin).

iii) It is clear from the narrative accompanying the Additional Tabs that there had been discussions within SK Shipping as to the language which should accompany the data when it was presented to potential charterers. Mr Ray Kim's evidence, which I accept, was that he was told that the use of such language was typical practice in the market. It should be noted that the terms of the additional language for the "C SPIRIT" and other vessels would have had the effect of qualifying any representation made by the data, such that the figures would then have been stated within a 0.5 knot tolerance only.

iv) That is not, as will be seen, the form in which the 0.5 knot allowance was presented when the data was sent to the market. However, it is important to keep it in mind when considering the criticisms of Mr Ray Kim.

44. The Ship Management Team's response that updating the data in the Spreadsheets was "too difficult" ought to have raised a red flag for Mr Im and Mr Ray Kim. However, given the instruction they had received from the CEO to charter the VLCCs

out on long term charterparties, they may well have felt they had no choice but to do the best they could. Mr Ray Kim decided to consider the VLCCs' noon position reports (which reported average speed and bunker consumption over a 24 hour period, and the weather conditions), and to use them to verify the data in the Spreadsheet. I accept that he discussed this approach with at least Mr Im, and some colleagues from the Tanker Operation Team who did not suggest that it was not viable. As Table 2 had involved adjusting sea trials data by reference to 6 and 12 months' operation as ascertained from noon reports, it is not surprising that this was seen as an appropriate way forward.

45. So far as the Vessel is concerned, Mr Ray Kim accessed voyage reports for voyages 19, 20, 21 and 22, covering a period from 23 November 2015 to 4 June 2016. He sought to exclude data for periods of weather over Beaufort 4, and where there had been a slip of 8% or more (slip being the difference between the speed of the engine and the actual speed of the ship through the water, as a result of external factors) and extracted that data into a table divided into 0.1 knot increments between 10 knots and 15 knots. He produced average values where more than one figure was available from the noon position reports for a particular speed. As a result, for some speeds, he had a single data point, and for others an average derived from more than one data point. However, the data appears to have been extracted by a computer programme rather than inputted manually, such that Mr Kim did not know and did not attach any weight to the number of data points available for any particular speed. The results of that exercise were recorded in a table which was referred to as the "0.1 Table".

46. The data in the noon tables, and hence in the 0.1 Table, did not correspond to all of the speeds in Table 2. Where there were gaps, Mr Ray Kim sought to take the nearest value. There was at least one occasion when this was not done, albeit I accept that this was the result of the imperfect execution of the intended approach rather than a deliberate deviation from his methodology or any systemic bias.

47. When comparing the data, Mr Ray Kim adopted the following course:

> "Considering that a margin of 0.5 knots is generally taken into account in underperformance claims, I applied the margin when comparing the data retrieved from the noon reports with Table 2".

48. I shall return to this issue, and Mr Ray Kim's evidence in relation to it, below. Mr Ray Kim transposed the selected entries from the "0.1 Table" to Table 2. That exercise (at least as performed by Mr Ray Kim) revealed two significant discrepancies, which Mr Ray Kim highlighted in red – for 14 knots laden and for 12 knots in ballast. It revealed two conditions in which there was no data from the "0.1 Table" to compare with the speeds in Table 2. And it showed that for all bar one of the ballast figures, and all bar three of the laden figures, the figures extracted from the noon reports were higher than the Table 2 figures if a 0.5 knot allowance was ignored. Mr Kim's evidence was as follows:

> "When considering that [0.5 knot] margin I was confident that Table 2 was still valid, there being only 1-2 discrepancies, which was negligible and did not warrant the correction of figures in Table 2. I was also aware that the data in Table 2 was interrelated and was concerned about making the amendments to one or two of the figures, as this might invalidate and unbalance Table 2".

It is now clear that, even taking account of the 0.5 knot margin, there were not two entries in the table comparing the results of the exercise with Table 2 which should have been highlighted in red, but five (and six if account is taken of the 10 knot ballast condition which had never had an entry in Table 2). However, I find that that was not because Mr Kim had not set out to do what he said he claimed he was seeking to do, but rather because he did it inaccurately. On 11 July 2017, when Mr Ray Kim was reporting internally on the exercise, he stated:

> "The conclusion is that there seems to be no big problem if 0.5 kts margin is applied, except for the values in red which stands out".

49. Mr Ray Kim did not carry across any data from the 0.1 Table to Table 2 so far as the 10 knot ballast condition was concerned. The consumption data in the 0.1 Table for 10 knots in ballast was significantly higher than the Table 2 consumption at 10.5 knots in ballast, and it was suggested to Mr Ray Kim that the reason that he had not carried the number across was because "it would call into question all of the other consumption figures". Mr Ray Kim denied this, saying that Table 2 had never had an entry for consumption at 10 knots in ballast. I accept that explanation: Mr Ray Kim understood his job as being to see if he could verify the figures in Table 2, and he stuck to that task, even if in some respects in a rather mechanical manner. As any figures which Mr Ray Kim was producing himself were not to be circulated in the market but only provided to Mr Im, there would have been no reason for Mr Ray Kim not to include a figure for 10 knots in ballast in his own figures simply because it was out of line with the figures in Table 2 (just as he included the two figures he highlighted in red).

50. At the time he did the exercise, the Vessel's most recent voyages were voyages 23 and 24, but Mr Ray Kim did not use data from these voyages in his analysis. The overall effect of Mr Ray Kim's evidence was that he had used the most recent data that was available to him. I have concluded that there was nothing sinister in this. In particular, there was nothing before me to suggest that Mr Ray Kim deliberately chose not to use voyages 23 and 24 in an effort to skew the outcome. Having completed the exercise, he provided the results to Mr Im. I find that Mr Im understood from Mr Ray Kim that the Table 2 data had been substantially verified by the noon report analysis, once a 0.5 knot allowance was taken into account. Mr Im did not concern himself with the detail of the exercise which Mr Ray Kim had done, merely the "takeaway" that the Table 2 data could be used with a 0.5 knot margin.

51. Thus it was that data in the form of Table 2 from the Spreadsheet was circulated by SK Shipping to various brokers in the market from 7 November 2016 onwards ("the November 2016 Circular"). On 15 November 2016, the November 2016 Circular was sent by Mr T H Kim in the Tanker Chartering Team to Poten. It will be necessary, in due course, to consider the terms of the November 2016 Circular in more detail, but for present purposes it should be noted that:

    i) The November 2016 Circular said that the data was "based on average of last 3 voyages", picking up the language which had appeared on the Additional Tabs prepared by Mr Ray Kim. It was Mr Ray Kim's evidence, which I accept, that he suggested this wording, and that he obtained it from individuals with more familiarity with the types of wording used in the market. I find that Mr Ray Kim took the wording from the Additional Tabs, which had been prepared

before he had performed the validation exercise. In fact, as I have stated, that exercise had not used the Vessel's last three voyages, but the third to sixth most recent voyages.

ii) It stated "0.5 knot margin required on the CP". That expression, I find, originated in the discussions which Mr Ray Kim had had with those more familiar with practices in the time charter market. However, the language used (and its legal implications) were, as I set out below, different in an important respect to the language which had appeared on one of the Additional Tabs. There was no evidence as to who was responsible for the difference in language, or as to whether Mr Ray Kim was even aware that the data was being sent out with this language, rather than the language used for some of the vessels on the Additional Tabs. The difference in language was not explored in evidence, but based on my assessment of their experience in chartering, and their proficiency in English, it seems to me highly improbable that either Mr Ray Kim or Mr Im would have been alive to any linguistic or legal nuances arising from the change.

52. The data which was sent out to the market relating to the VLCCs' speed and consumption performance was not sent to the Ship Management Team, even though it was best placed to provide a sense check on what was being put forward. That conclusion is not only consistent with the evidence of Mr Ray Kim, Mr Im and Mr H Y Son, but supported by the following facts:

i) There is no documentary evidence of the data being sent to the Ship Management Team.

ii) As I set out below, when the Ship Management Team became aware at the end of December 2016 of the warranties which had been agreed, it criticised the decision to offer those warranties and Mr H Y Son noted that it was unclear how they had come to be issued. Neither Mr Im nor Mr Ray Kim made what would have been the obvious retort: "you knew we were offering warranties in those terms and did not suggest there was a problem". Rather the gist of the response was "we asked for help and you didn't give it".

**Negotiations between SK Shipping and CMTC**

53. On 22 November 2016, Mr Ray Kim sent an email to Rob Rexer of Poten referring to the fact that SK Shipping was considering chartering out some of its VLCCs, and saying:

> "It would be great if you provided us a chance to make a time charter deal with some Ship owners or operators".

54. That evening, at a party in London organised by China Cosco Shipping Corporation Ltd ("COSCO"), Mr Rexer met with Mr Marinakis and Mr Konialidis. It is clear that in the course of those discussions, Mr Rexer stated that he had been approached by SK Shipping who were seeking to time charter the VLCCs out, and that CMTC expressed an interest in them. It is also clear that Mr Rexer made positive comments about SK Shipping and its fleet.

55. Later that evening, Mr Konialidis sent Mr Rexer a pro-forma charter from another fixture which a company in the Capital Maritime group had concluded, which could serve as the basis for the detailed terms of a deal with SK Shipping. Mr Rexer sent Mr Konialidis and Mr Marinakis a comparison of the VLCCs' speed and consumption data with that of other vessels in the market ("the 22 November 2016 Letter"), and which cast the consumption performance of the VLCCs in a favourable light. The data which Mr Rexer used for the VLCCs came from the November 2016 Circular. It will be necessary to consider the terms of the 22 November 2016 Letter further, for the purposes of determining whether any representations were made (and, if so, by who, to whom and to what effect), or whether these documents were simply a statement of the contractual promises which SK Shipping would be willing to make in any charterparty as to the VLCCs' speed and consumption performance.

56. In the early hours of 23 November 2016, Mr Rexer sent SK Shipping a proposal from CMTC to charter the "C INNOVATOR" and, at CMTC's option, the "C SPIRIT" or the "C CHALLNGER". Mr Rexer stated in his email that:

> "The authority for this negotiation is coming from the top boss/Owner – Mr Evangelos Marinakis".

57. The offer communicated by Mr Rexer provided for 1.25% brokerage to be paid to Poten, and 1.25% address commission to be paid to CMTC and withheld at source. The offer included the speed and consumption data which SK Shipping had circulated, with certain adjustments to the accompanying text (namely striking out the reference to the data being based on the average of the last three voyages, that it might depend on currents and weather, and replacing the reference to Beaufort force 4 with Beaufort force 5).

58. There followed a series of offers and counteroffers that day, with agreement on most of the main terms recorded in an email of 13.38. This provided for two-year charters, with CMTC having the option to extend for a further year, and commission of 2.5% payable to CMTC, 1.25% to Poten and 1.25% to Curzon. The speed and consumption weather range was up to Beaufort force 4. At this point, the fixture was subject to board approval on both sides. Board approval came on the SK Shipping side on 24 November 2016.

59. During 25 November 2016, CMTC informed Poten that the chartering entity would now be a wholly owned subsidiary, Product & Crude Tanker Chartering Inc. Poten passed that information onto SK Shipping, under cover of what might be thought to be a somewhat understated message, describing it as "as a fairly minor amendment to the signatory in the Recap". SK Shipping did not agree to the change, and Mr Konialidis proposed wording, which was passed through Poten to SK Shipping, identifying the charterer as "Company to be nominated and guaranteed by Capital Maritime & Trading Corp".

60. That wording was accepted by SK Shipping in the afternoon of 25 November 2016. At 16.47, Mr Konialidis informed Poten that CMTC had lifted all subjects, and was exercising its option to take the "C SPIRIT" on the same terms. Poten sent the "final charter party recap" to both SK Shipping and CMTC on 25 November, and it is common ground that binding charterparties came into existence in respect of these two VLCCs at that point.

61. On 29 November 2016, Poten sent SK Shipping an offer from CMTC to charter the Vessel on the same terms, save at a reduced hire rate. A later iteration of this proposal included an option to take the "C PROGRESS". Exchanges in relation to these fixtures included a request by CMTC to withhold the commission which would be paid both to the charterers and Curzon at source (which SK Shipping would not agree to), with the final agreement being that Poten's commission would be paid by the Owner and the address commission deducted at source. On 6 December 2016, SK Shipping asked that the owner be identified as "SK Shipping Co Ltd or its guaranteed nominee", to which CMTC consented later that day. Over the course of 6 December 2016, SK Shipping made what it described as its "final offer". Mr Marinakis informed Mr Rexer that he was accepting that offer, and Mr Rexer passed that communication onto SK Shipping at 13.35 on 6 December 2016. A binding charter for the Vessel came into existence at that point. Two days later, CMTC exercised its option to charter the "C PROGRESS" as well.

62. Evidence as to the market for spot rates in the VLCC market attached to the expert report of Mr Clements shows a daily spot rate on 9 December 2016 of $37,027. Spot rates rose to nearer $50,000 by the end of December, but fell thereafter. By the end of February 2017, spot rates were around $16,800 a day, and for most of the period from mid-March onwards, with the exception of a small rally in April and May, spot rates were at or below $10,000 a day.

63. On 12 December 2016, CMTC nominated the Charterer as the charterer of the Vessel and on 2 January 2017, SK Shipping nominated the Owner as its counterparty.

64. On 3 January 2017, Mr Rexer informed SK Shipping that Poten would draw up the final charters and send them to Mr Konialidis for confirmation. The charterparties for all four vessels were sent to the Defendants on 4 January 2017. Comments were provided to Poten by 11 January 2017, who in turn passed on the charterparties to SK Shipping "for your records". Hard copies were sent by Poten to SK Shipping via mail for signature on 7 March 2017. At a meeting between the parties (with which I deal below) on 25 March 2017, it was agreed that the Owners would sign and return the hard copy charters by 28 April 2017, at which point they would be sent to the charterers for signature. This never happened, and it is this issue which gives rise to CMTC's contention that the Guarantee is unenforceable by reason of s4 of the Statute of Frauds 1677.

## The performance of the VLCCs

65. At Capital Maritime's request, SK Shipping began providing noon reports for the "C SPIRIT" and "C INNOVATOR" from about 1 December 2016. Mr Konialidis (or someone within Capital Maritime who reported the matter to Mr Konialidis) noted that the reported consumption of the "C INNOVATOR" on 1 December 2016 was 80.89 mt for the main engine and 4.81mt for the diesel generator. Mr Konialidis, through Poten, asked:

> "Is the (80.89) inclusive of the (4.81) or is this (80.89 + 4.81)? This is basically outside the range of warranty. Kindly clarify."

66. Mr Rexer of Poten was promised a reply (as recorded in his instant messenger chat with Mr Konialidis on 2 December 2016), although no witness was called by SK

Shipping to deal with these exchanges. There was the following exchange between Mr Rexer ("RR") and Mr Konialidis ("AK") on 2 December 2016:

> "AK I think the consumption of ME doesn't include the extra 5 tonnes...
>
> RR Well that's contradictory to the extra paragraph in terms of the descript[ion].
>
> …
>
> AK What is contradictory in innovator description?
>
> RR F.O Bunker Consumption: The figure is sum of M/E and G/E daily consumption.
>
> AK [So] it means they made a mistake?
>
> RR I'm not sure, waiting for their reply on that
>
> AK Oh dear, we're going to have to hire a guy just for performance claims …
>
> Your recap for c challenger doesn't have s&c
>
> RR Its on the bottom".

67. It will be noted that Mr Konialidis' immediate reaction to the suggestion that the "C INNOVATOR" might be consuming more than warranted was to check the terms of the speed and consumption warranty in the pending fixture for the Vessel. Mr Rexer forwarded the enquiry about the consumption on the "C INNOVATOR" to Mr Ray Kim on 2 December 2016. Mr Ray Kim passed the enquiry to the master. A response came back from the master to Mr Ray Kim that day, which (in effect) suggested that there had been additional consumption due to testing the ship's inert gas system, which should have been added to the boiler consumption but had been wrongly added to the main engine consumption by mistake. However, no such operation was recorded in the "C INNOVATOR"'s logs, and I am satisfied that the explanation offered was a false one, and that someone had decided to smooth things over by getting the master to send a false account. Even with the benefit of that explanation, the report showed the "C INNOVATOR" to be consuming in excess of the warranted figure. Mr Ray Kim essentially passed on the email from the master to Mr Rexer very shortly after it came in. Mr Rexer did not forward the reply to Mr Konialidis immediately, and was chased for it on 5 December 2016. He then forwarded it to Mr Konialidis on that date.

68. These events raise the important issue of whether the obvious question mark raised about the VLCCs' speed and consumption performance was communicated to those members of the Tanker Chartering Team involved in the negotiations with CMTC regarding the Vessel before the Charterparty became binding on 6 December 2016. I have given careful consideration to this matter. My conclusions are as follows:

    i) The master of the "C INNOVATOR" must have raised the issue with the Ship Management Team before sending a reply. However, there was no trace of

such a discussion in the documents and Mr H Y Son (the only witness called from the Ship Management Team) claimed not to know about it. I accept that it is unlikely it was raised with Mr H Y Son immediately, because there is no evidence of any attempt on his part to obtain a copy of the speed and consumption warranties until the end of December, and the documents suggest that the issue only came to his attention in the week of 19 December 2016.

ii) As I have stated, Mr Ray Kim essentially passed on the email from the master very shortly after it came in. I accept his evidence that he sent the request out to the master and forwarded the response without himself getting into the detail of the matter.

iii) The Ship Management Team appear to have asked the master to do a speed and consumption analysis, which the master sent through to Mr Jae Young Yang and Mr Si-Hyeon Lee of the Tanker Operations Team on 7 December 2016, but not to the Tanker Chartering Team – something which is once again consistent with the Tanker Chartering Team not being "in the loop" at this stage.

iv) It is clear from the documents that the issue had been raised with the Tanker Chartering Team by the week of 19 December 2016 because it was discussed by the head of the Tanker Operations Team (Mr Byung-Jin Huang) and Mr H Y Son (head of the Ship Management Team) in what was known as a "can" meeting, because it involved a more informal (and no doubt less hierarchical) exchange over a drink. There are no documents recording events at that meeting, but given its nature, I do not find that of itself surprising. However, I have concluded that concern was expressed at that meeting at CMTC's suggestion that, at the levels of consumption reported by the master, the "C INNOVATOR" was performing outside its warranty.

v) That meeting clearly led to discussion within SK Shipping as to the basis on which the speed and consumption warranties for the VLCCs had been arrived at, an issue which was discussed further between Mr Ray Kim and Mr H Y Son in a telephone conversation on 20 or 21 December. On 23 December 2016, in what is likely to have been a response to a request made by Mr H Y Son in that telephone conversation, Mr Whang sent Mr H Y Son and the Ship Management Team a copy of the speed and consumption clauses which had been mentioned at the "can" meeting. I infer from this email that neither Mr H Y Son nor his team had had a copy of the speed and consumption warranties before, and had not, therefore, been involved in determining what information would be provided to potential charterers. The email stated:

> "If there is a discrepancy between the actual performance and the actual contractual contents, all involved (the vessels, tanker management team, tanker operation team, and tanker chartering team) should be aware of this and co-ruminate the countermeasure. Please reply once you have reviewed."

vi) My conclusion that the Ship Management Team had not previously been aware of the terms of the warranty is reinforced by Mr H Y Son's email to Mr

Lee Young-Chul and Mr Yang Jae Young (technical superintendents in the Ship Management Team) when he stated:

> "The figures have already been reflected in the TCP so amendment is impossible. Therefore, let us figure out later through what process the data as below was reflected in the TCP. In order to counteract in an effective manner by recognising any expected problems which may incur in the future, please review thoroughly for any problems that are expected for the duration of the TIC and let us know".

Once again, this email suggests that Mr H Y Son had not been involved in the process by which the speed and consumption warranties had come to be included in the charters. However, contrary to Mr H Y Son's evidence, I find that the statement that it was too late to revisit the terms in the Charterparty reflected a view on the part of the Ship Management Team that the Tanker Chartering Team had offered speed and consumption warranties at a level which the Ship Management Team would not have supported, and that claims should be expected as a result.

vii) Mr H Y Son made a similar reference to expected claims in his email of 3 January 2017 (referring to work to be done "in preparation for Speed and Consumption Claim which may occur in the future"). I am satisfied that his oral evidence understated the reaction of the Ship Management Team when discovering the speed and consumption warranties which had been offered, and the Team's view was that claims were very likely as a result.

viii) It is clear that Mr H Y Son asked for work to be done by all the VLCCs to ascertain how serious the problem would be. He only received a response in respect of the "C SPIRIT" on 12 January 2017. That stated that "in general, there is more consumption in ballast condition in comparison to CP" but that this did not take account of the weather and was not 100% accurate. While SK Shipping was not yet in a position to quantify the full extent of the problem, it clearly knew there was one. It is possible that further work was done to assess the main engine performance of the VLCCs, as Mr H Y Son said in his evidence, but if so, that work left no documentary trace, and I have concluded that any investigation is likely to have been largely superficial.

ix) On 12 January 2017, Mr Ray Kim sent the masters of the VLCCs a copy of the speed and consumption warranties, stating:

> "Currently the biggest problem in relation to the above contract is the vessel's FOC. There is a discrepancy from the vessel's current condition from the information that the original team had of the TC OUT status. You could be severely harassed by the Charterer following the delivery due to this. We consistently requested the relevant fleet's FOC information before the captains boarded for this vessel and regarding the SM [ship management] section but due to the difference in weather and route, updates were not done well. In such a state (at the request of the Company group) the number that was updated for [*business/commercial purposes*] was released and this situation has arisen."

There were competing translations of the highlighted words, but I find that the sense of the words was that the number had been updated for the Tanker Chartering Team (which the evidence shows was referred to as the "business team" in internal documents).

x) It is significant that this was the first communication from Mr Ray Kim to the masters about the speed and consumption warranties offered for the VLCCs. This reflected the fact that it was only at this point, and a result of the work done following the "can" meeting in the week of 19 December 2016, that Mr Ray Kim became aware of the views of the Ship Management Team that the VLCCs had been over-warranted. This is consistent with my conclusion that Mr Ray Kim had not been anticipating any issue before that point.

xi) On 1 February 2017, Mr Ray Kim sent an email to Mr H Y Son saying that he had only had feedback from one of the masters in response to his email of 12 January 2017. In that email Mr Ray Kim informed Mr H Y Son:

> "If the figure turns out to have a significant discrepancy from the specification, even after applying the margin above, a further additional negotiation with the charterer may become necessary".

That email is inconsistent with any suggestion that Mr Ray Kim had known or suspected before the Charterparty was concluded that the speed and consumption data was significantly inaccurate, or that Mr H Y Son had been privy to a decision to mislead potential charterers in this regard. Rather, in what I find to be an honest response to the issue, Mr Ray Kim recognised that something appeared to have gone wrong with these figures, that CMTC would have grounds for complaining about them, and that a commercial negotiation might be necessary. Unfortunately, as set out below, SK Shipping's subsequent interactions with Capital Maritime did not display a similar degree of frankness or realism, but involved a persistent refusal to acknowledge the problem.

69. For these reasons, I have concluded that:

i) none of Mr Ray Kim, Mr Im nor the Tanker Chartering Team were aware before the Charterparty was concluded that the Ship Management Team believed the warranties being offered were not a realistic reflection of the VLCCs' performance, and

ii) neither Mr H Y Son nor the Ship Management Team had been aware before the Charterparty was concluded of the speed and consumption data which had been provided to potential charterers as the basis of the warranties to be offered.

70. Further, I reject the suggestion that Mr Ray Kim's email of 12 January 2017 contains a statement that the figures had been offered for "business purposes" even though they were known to be inaccurate. The effect of Mr Ray Kim's email was that, the Ship Management Team and masters having refused to engage, it was necessary for the Tanker Chartering Team (often referred to, as I have stated, in the documents as the "business" team) to do the work itself. However, I am satisfied that if the Ship

Management Team had been told that the Tanker Chartering Team intended to provide Table 2 to potential charterers as the basis of the speed and consumption warranties to be offered, the Ship Management Team would have strongly resisted that course, and informed the Tanker Chartering Team that the VLCC's consumption was likely to be materially higher.

71. On 8 January 2017, Den Norske Veritas ("DNV"), the Vessel's Classification Society, imposed a condition of class on the Vessel because of an issue with its emergency generator. This led to the Vessel being rejected for fixtures by Total and then by Chevron. The Owner and Charterer agreed to amend the laycan under the Charterparty to provide for delivery Caribbean/East Coast of Mexico once the Vessel was 3,513 nautical miles from Cape Town. On 27 January 2017, the Charterer narrowed the laycan to 9 February. There is a dispute between the parties as to when the Vessel was delivered into service which I address at [278-282] below.

72. From the start of the chartered service, Capital Maritime appears to have been monitoring the speed and consumption performance of the VLCCs from the noon position reports provided. On 31 January 2017, Mr Konialidis contacted the master of the "C SPIRIT", noting that in the last two noon reports, consumption had significantly exceeded the warranted performance. In response, the master offered various comments about the weather conditions, but also stated "it seems that the data on the T/C description is different to actual consumption". In an instant messenger conversation with Mr Rexer, Mr Konialidis noted "this last sentence is quite worrying". Poten, through Ms Murray, raised the issue in a long email to Mr Ray Kim, which stated that Capital Maritime wanted "a more comprehensive explanation as to why the warranted and actual consumptions differ so greatly". Poten asked SK Shipping for a standalone email with the "official reason" for overconsumption (for example weather conditions), and separately an explanation of what the master had meant when he stated "the data on the T/C description is different to actual consumption." She noted:

> "As you can understand, this a very sensitive matter as it could contradict the agreed TCP terms".

She also asked SK Shipping to provide calculations of the degree of under-performance, saying Poten was "surprised to see such a discrepancy".

73. On 7 February 2017, Capital Maritime sent Poten its analysis of the latest voyage of the "C INNOVATOR", noting that the vessel was consuming more fuel than warranted. On 10 February 2017, after receiving a report from the master of the Vessel as to its expected consumption on its next voyage which would have required the Vessel to bunker on route, Mr Iliou sent an email to Mr Konialidis stating that consumption was "far higher" than warranted, and that this was the second occasion on which a message had been received from one of the VLCCs stating that the warranted consumption differed from the actual consumption. Mr Konialidis raised these overconsumption issues with Mr Rexer on 13 February 2017, and reverted to the master of the Vessel on the same day pointing out that, on its warranted performance, the Vessel should be able to reach Singapore without bunkering. Exchanges with the Vessel followed, in which the master sought to suggest that there were weather-related issues, but stated:

> "Regarding to the difference between the c/p warranted bunker consumption and the actual bunker consumption, you do better ask to my head office."

74. When the issues were raised with "head office", SK Shipping asked for time to collect more data. Mr Rexer of Poten described SK Shipping's response to Mr Konialidis as "vague", and Mr Konialidis responded that over-consumption was an issue on all four VLCCs, and by a significant margin. In the case of the Vessel, this meant that the Vessel was having to bunker in Spain, at high prices, in order to complete a voyage to Singapore. By 7 February 2017, Capital Maritime had engaged the services of Accuritas Global Solutions ("Accuritas"), a company who performed speed and consumption analyses, who also noted that the "C SPIRIT" was consuming "at a much higher rate … than warranted" in an email of 7 February 2017. Accuritas sent periodic reports of over-consumption to CMTC and to the masters of the VLCCs thereafter.

75. Within SK Shipping, the VLCCs' consumption was monitored and shared on a weekly basis, and efforts were made to obtain data on any possible excuses for the VLCCs' performance including weather and slip. SK Shipping was aware that CMTC was also monitoring consumption using weather service providers. On 14 February 2017, Mr Jae Hon ("Jake") Han sent a message to the master of the VLCCs stating:

> "In terms of carrying out the chartering, as the probability of the charterer(s) raising an issue about 'consumption' is high and such the raised issues to the vessel(s) are likely to incur frequently in the future, we would appreciate if you could counteract as below;
>
> > 'It is difficult to calculate the accurate figure(s) on the vessel as the weather and other relevant factors can influence and vary the conditions in a significant way. For this reason, please contact the head office for any FOC related matters.'
>
> Also, if there are any ambiguous enquiries from the charterer, please contact the head office first before you respond to the charterers. We, the head office, have not been perfectly equipped in the way how to counteract TC related enquiries. In the consequence, we may have caused inconveniences to masters and we would like to apology for burdening you".

76. Once again, I regard the timing of this email as significant. If there had been an awareness within SK Shipping from the outset that the VLCCs were being significantly "over-warranted" in order to time charter them out, then it is likely that the masters would have been equipped with "lines to take" at a much earlier stage. However, the email exemplified the unsatisfactory approach which SK Shipping adopted to the over-consumption issue once it emerged.

77. Against a background of this and other problems with the VLCCs, Mr Ventouris visited SK Shipping in Korea on 21 February 2017. In advance, Mr Ventouris was sent a list of underlying issues to raise on Capital Maritime's behalf, including the significant difference between actual and warranted consumption. At the meeting, Mr Ventouris appears to have mentioned that Capital Maritime would be monitoring this issue through weather routing services, and SK Shipping said it was and would

continue to look into it. On the same day, the noon report for the "C PROGRESS" as provided to Capital Maritime once again showed significant over-consumption.

78. The Charterer's payment of the February 2017 instalment of hire for the Vessel was made "under protest", and the following month, deductions were made from hire in respect of the "C SPIRIT" and the "C INNOVATOR" to reflect over-consumption. That led to a further meeting between Mr Ray Kim, Mr Konialidis and Mr Rexer in London on 21 March 2017. A summary of the meeting prepared by Poten (which I find to be broadly accurate) refers to the Capital Maritime side having said that the VLCCS were under-performing "by a considerable margin" and that:

> "Charterers do not feel it is fair that they essentially pay the current charter rate with actual experienced consumptions well in excess of the TCP descriptions (they feel as though they are financing Owners)".

SK Shipping said that it was monitoring consumption through a machine on the "C SPIRIT" with a view to improving performance, and that it wanted to collect six months of data before reverting.

79. That response clearly did not satisfy Capital Maritime. On 24 March 2017, it repeated its position, saying that over-consumption was clear from a number of sources and that:

> "this vessels misdescription is also advised several times by the Masters when asked about the high consumption stating that 'Seems that the data on the T/C description is different to actual consumption' i.e. admitting that the vessels are mispresented to the Charterer by Owners. With the misrepresented Speed and Consumption all voyage estimations made are based on unrealistic data leading to significant economic losses to the Charterers by Owners fault".

80. Deductions from hire continued, with SK Shipping taking the line that the position should be reviewed after 6 months in accordance with clause 24 of the VLCC charterparties which provided:

> "If during any year from the date on which the vessel enters service (anniversary to anniversary) the vessel falls below the performance guaranteed … then if such shortfall … results… (ii) from an increase in the total bunkers consumed … an amount equivalent to the value of additional bunkers consumed based on the average price paid by Charterers for the vessel's bunkers in such period shall be included in the performance calculation.
>
> Calculations under this Clause 24 shall be made for every six months periods terminating on each successive anniversary of the date on which the vessel enters service.
>
> 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."

From June 2017 onwards, the Charterer stopped paying hire for the Vessel altogether.

81. Within SK Shipping, there were exchanges between Mr H Y Son and Mr Jake Han in April 2017 about the over-consumption issue, with a view to putting SK Shipping in the best position to reduce the Charterer's claim as to the degree of under-performance and the deductions which could be made. To that end, SK Shipping decided to purchase performance data from an external weather routing agency. There was also consideration of how far the under-performance might be the result of hull fouling, leading to an inspection of the "C PROGRESS" at Fujairah in April 2017.

82. On 5 June 2017, the turbocharger on the Vessel broke down during a voyage from Ras Tanura to Cherbourg, stopping it dead in the water for 15 hours in a busy shipping lane. After initial investigations which revealed that the nozzle ring and turbine blade were heavily damaged, the Vessel was able to continue at a slow speed to Antifer in France, arriving on 12 June 2017 and completing discharge on 15 June. Repairs were not completed until 2 July 2017, and the Vessel remained at Antifer for about 4 weeks.

83. There is a dispute between the parties, which was addressed in the expert evidence, as to the cause of the breakdown and whether it was a result of:

    i) a defect in the manufacture of the turbocharger blades, as the Owner alleges; or

    ii) the result of the Owner's failure to perform routine maintenance, in breach of the Charterparty, as the Charterer alleges.

    I return to this issue at [289-290] below.

84. This second incident led the Charterer to make enquiries about the maintenance history of the turbochargers, and Capital Maritime's technical director, Mr Mavrelos, formed the view that the turbochargers had been operated beyond the scheduled date for maintenance. There was also internal consideration within Capital Maritime, as recorded in an email of 7 June 2017, of the Charterer's rights under clause 61of the Charterparty. This provided, inter alia, that the Owner had to obtain and maintain approval of at least 3 of the following oil majors: Shell, BP, ExxonMobil, ChevronTexaco, Conoco, TOTAL, Valero and Tesoro. It continued:

> "Without prejudice to clause 43 … and in addition to charterer's right to terminate under that Clause and in respect of a breach of the above paragraphs, in the event that the Vessel fails or ceases to be accepted by more than (2) oil companies… the Owners shall forthwith rectify the situation to make the vessel acceptable and arrange the vessel's reinspection within 30 days, provided that the vessel has called at ports where inspectors were available. ….. In the event that the vessel is not acceptable within that 30 day period the Charterer shall have the right to terminate the charter".

85. Mr Iliou referred to Mr Mavrelos' advice about the turbocharger and stated:

> "We may lead them to report damage to Majors who shall put vessel on hold and we may exercise clause 61 (not helpful as it give them 30d grace period to rectify the situation)".

86. The Charterer asked the Owner to confirm that the oil majors had been informed of the turbocharger breakdown – a communication clearly designed to assist the Charterer in exercising any clause 61 rights. The Owner had reported the incident to ExxonMobil, whose cargo was onboard the Vessel at the time, but had not raised the issue with any other oil majors, and was reluctant to do so (no doubt as a result of concern as to the potential clause 61 consequences).

87. On 8 June 2017, the Charterer wrote to the Owner alleging that there had been repeated breaches of the Charterparty, and requiring the Owner to rectify all of the deficiencies as quickly as possible, with the Vessel being placed off-hire in the meantime. It was suggested that the Owner could use the Vessel on a spot basis pending completion of the repairs to the turbocharger.

88. The Charterer notified Shell of the turbocharger incident, in the context of exploring a possible fixture, who in turn approached the Owner. The issue also came to the attention of Total, although it is not clear by what means, who informed the Owner on 9 June 2017 that the Vessel would not be approved by Total until it had been fully repaired. On the same day, Mr Iliou gave the Owner 30 days to obtain the oil major approvals required under clause 61, failing which the Charterer would have the right to terminate the Charterparty. A message was also sent alleging that the Owner was in breach of its maintenance obligation, and reserving the Charterer's rights generally. The Owner provided a response, of an essentially legal character, refuting all the Charterer's allegations on 13 June 2017.

89. On 9 June 2017, Mr Konialidis had an instant messenger conversation with Mr Rexer, in which Mr Rexer said that the Charterer should start declaring clauses under the Charterparty "to cancel this thing asap". Mr Konialidis complained that "they never say anything and we have to rely on you to transmit information given to you by a junior with no authority". Mr Konialidis said that if the Owner's response was aggressive, "it's not impossible for us to consider redelivery all the ships". Later in the same conversation, he said "I have been instructed to send a message cancelling the charter", although in the event, no such message was sent at this time.

90. On 12 June 2017, the Charterer informed the Owner that it wanted to exercise its right under clause 23 of the Charterparty to place a representative (Mr Mavrelos) on the Vessel. Clause 23 provided:

> "Charterers shall have the right at any time during the charter period to make such inspection of the vessel as they may consider necessary. This right may be exercised as often and at such intervals as Charterers in their absolute discretion may determine … Owners affording all necessary co-operation".

91. A dispute arose as to the extent of access which Mr Mavrelos was granted, with the master initially seeking to confine him to inspecting the turbochargers. It is clear that Mr Mavrelos was sent to the Vessel to obtain as much information as possible to support the Charterer's position. In doing so, the Charterer claimed, inter alia, to be exercising its right under clause 1 of the Charterparty to audit the Owner's compliance with HSE (health, safety and environmental) requirements, and its right to inspect the Vessel's logs under clause 12. Mr Mavrelos' evidence at the trial, which I find to be the position he took in June 2017, was that the clause 1 audit right allowed the Charterer to investigate "performance, how much fuel the vessel is burning". I

have concluded that the purported exercise of the clause 1 audit right was not legitimate – the Charterer was not seeking, in any meaningful sense, to check the Owner's compliance with its health and safety or environmental code, but to investigate the Vessel's speed and consumption performance.

92. The Owner's attempt to limit Mr Mavrelos' access led to a protest by the Charterer on 15 June 2017. In response, Mr Mavrelos was allowed wider, but still heavily supervised, access, with the Owner seeking to ensure that Mr Mavrelos had the minimum possible access, while seeking to avoid any clear breach of the Charterer's contractual rights. The parties' exchanges on this issue were essentially legal in character and were conducted by Reed Smith LLP for the Charterer. The Charterer also asked the Owner to provide a broad range of documents, including the sea trial records and records from the Planned Maintenance System for the period of the Charterparty. While continually promising to provide this information, the Owner delayed in providing much of it, leading to further complaints in correspondence.

93. The Owner had interactions with the various oil majors in relation to the repairs of the turbocharger, and provided them with a report of the work done, together with the Owner's account of the reasons for the breakdown. On 3 July 2017, the Owner gave an update on the repair of the turbocharger to the Charterer, and informed it that BP, Shell, Exxon and Total had said that they did not need to vet the Vessel at that time. The issue of oil major approval was the subject of continuing exchanges between the Owner and the Charterer, as the Charterer sought to maintain that the requirements of clause 61 had not been complied with, and that the Owner had not given an accurate account of the causes of the turbocharger incident. In this context, the Charterer raised the turbocharger issue with some of the oil majors, with a view to improving its position in relation to any potential exercise of its clause 61 rights. As Mr Konialidis informed Mr Rexer on 7 July 2017 of one of these contacts, "the clearance is not needed for this potential voyage, only for our position re clause 61".

94. Attempts to negotiate a revision to the Charterparty - which would have involved the Vessel going off-hire for an agreed period, and only 50% of hire being payable for a further period thereafter – came to nothing. On 13 July 2017, the Charterer fixed the Vessel for a voyage from Southwold to Tanjung Pelepas in Malaysia, the Vessel leaving Antifer on its approach voyage on 14 July 2017 and beginning loading on 18 July 2017 and completing loading on 21 July 2017. However, on 20 July 2017, the Charterer sent SK Shipping a message alleging that:

    i) it had intentionally misdescribed the speed and consumption characteristics of all four VLCCs in the charters and/or was in breach of the speed and consumption warranty and clauses 1 and 3 of the charters so far as the VLCCs' performance was concerned;

    ii) the masters of the "C SPIRIT" and "C INNOVATOR" had "candidly confirmed that the Charterparty description of those vessels differs from their actual capability";

    iii) the Owner had breached its obligations under clauses 1, 3 and 61 of the Charterparty so far as the turbocharger on the Vessel was concerned; and

iv) the Owner had breached its obligation to provide the Charterer with documents;

and that if these matters were not resolved within 7 days, the various charterparties would be rescinded and/or terminated. On 24 July 2017, not having heard from SK Shipping, the Charterer said that it would cease to take steps to sub-charter the VLCCs at the end of their current voyages, but would place them off-hire.

95. In response, on 26 July 2017, the Owner denied any misrepresentation "entitling rescission of the Charterparty" or that it was in breach of the Charterparty. On the same date, it sent a further email with a proposal to adjust the rate of hire for the turbocharger incident. It said that it was going to try and obtain more performance data, suggesting that the parties meet once that data was available. In return, the Charterer repeated its allegations, including those of misrepresentation, in further emails of 30 July, 1 August and 11 August 2017, and reserved the right to rescind or terminate the VLCC charterparties. The first of these messages stated:

> "The Vessels' actual consumption is so substantially different from that represented and guaranteed that no further analysis is required to evidence the fact of misrepresentation … The fact is had the Vessels been truthfully described at the time of contracting, the Charterers would never have fixed them".

96. Throughout this period, the Charterer was monitoring the VLCCs' consumption, with the benefit of the Accuritas reports. On 14 June 2017, Mr Iliou circulated the latest Accuritas report, and said that speed and consumption had been "misdescribed on all 4 VLCCs resulting in extraordinary overconsumption". Capital Maritime made various deductions from hire on the other VLCCs to reflect overconsumed bunkers, such that by 7 August 2017, over $2m had been deducted.

97. SK Shipping arranged hull cleaning for the "C SPIRIT" on 24 July 2017, and continued to take the line in communications with Capital Maritime that it was carrying out investigations to determine if there was a problem. That was the position which SK Shipping took at a meeting with Capital Maritime in August, at which a claims analyst acting for Capital Maritime, Mr Stavros Paros, tried to get Mr Im and Mr Ray Kim to accept that SK Shipping had misrepresented the VLCCs' speed and consumption performance.

98. As I have stated, the Charterer had fixed the Vessel for a laden voyage from Southwold to Tanjung Pelepas on 13 July 2017 for Trafigura Maritime Logistics Pte Ltd ("Trafigura"). The Owner issued a number of bills of lading for the cargo to allow for delivery to multiple consignees. Over the course of that voyage, the Vessel's consumption was particularly high, as Accuritas reported to the Charterer on 4 September 2017, leading the Vessel to run out of bunkers, and halt operations, in the course of discharge on 5 September 2017. The Vessel had to re-bunker before discharge could resume, leading to a loss of time which is the subject of a counterclaim by the Charterer in the amount of $68,425, and to complaints by Trafigura. There can be no doubt that this incident was a source of major embarrassment for the Charterer, although in the event the significant disruption which had at one stage looked likely was avoided.

99. On 7 September 2017, the Owner informed the Charterer that it had concluded that hull fouling was the major cause of the over-consumption, which might have been exacerbated by the Vessel's long waiting time at Antifer following the turbocharger incident. An underwater inspection and cleaning of the hull and polishing of the propeller was arranged at Singapore. That took place on 13 and 14 September 2017. It is clear that at this stage, the Charterer was giving very serious consideration to terminating the Charterparty, but was concerned as to the legal merits of that course. Mr Ventouris sent an internal email on 14 September 2017 stating:

> "If we are going to try and terminate I would suggest we first, on an urgent basis, ask for authority to appoint our own diver to inspect the vessel tomorrow am and report to us on the condition. We all believe that the short cleaning operation cannot be effective. It is a shot in the dark worth taking I believe in case it somehow strengthens our weak legal position".

On 26 September 2017, the Charterer informed the Owner that it expected it to "feel extremely embarrassed by the events in Singapore but also by your misrepresentation of the vessel which is even worse than we thought".

100. There is a dispute as to whether the Vessel came back on hire after the Singapore cleaning, the Charterer insisting either that the Vessel perform a voyage on its own account to prove its speed and consumption performance, or that the Vessel be dry-docked for cleaning and repainting of the hull. The Charterer continued to assert that the Vessel had been misdescribed and to reserve its rights. It also continued to refuse to pay hire, leading the Owner to serve an anti-technicality notice.

101. Finally, on 19 October 2017, the Charterer purported to rescind the Charterparty for misrepresentation, alternatively to terminate it for repudiatory breach. The Charterer referred to:

> "The negotiations for the `C CHALLENGER' which included the Owners' representations that the speed and consumption of the Vessel was guaranteed to be at certain speeds on certain corresponding consumptions, in laden and ballast conditions, which formed part of the inducement for the Charterers to ultimately contract on the terms of the … Charterparty"

and

> "The various admissions made by the Owners that the Vessel cannot meet the said speeds/consumptions, and their promises to properly investigate the speed/consumption issues, to report to the Charterers on these, and to remedy them."

and then stated:

> "The Owners' representations that the guaranteed speeds and consumptions of the Vessel (as ultimately described in clause 24 of the Charterparty) were false and negligently made and as a result the Charterers are entitled to rescind the Charterparty, entered into as a result of the actionable misrepresentations set out above, and to claim an indemnity in respect of the loss and damage for which the

> Owners are liable to the Charterers in tort and/or pursuant to Section 2 of the Misrepresentation Act 1967".

102. The following day, the Owner purported to terminate the Charterparty on the basis that the Charterer's message was itself a renunciation of the Charterparty.

103. On 30 November 2017, the Owner through Poten approached CMTC to ask it to sign the Charterparty. Mr Ventouris replied that "legal … are against doing this but let me try to get to the bottom of it and see if it is `legal inflexibility' or something of essence". On 4 December 2017, in an unsigned message passed through Poten, CMTC replied saying:

> "There is already an agreement in place regarding the performance of the charters. Such agreement, legally, covers the liabilities towards the owners. The request for Capital's counter-signature at this stage is not understood in the circumstances, and seems to totally ignore the millions of dollars already paid on all ships, bar the dispute on the `C CHALLENGER'. The Owners delivered a vessel to the Charterers in the first place without any Capital counter-signatures, and were clearly content to do business with Charterers on that basis. Therefore Charterers feel that the request being made now is both extortionate and without any legal or practical bases, so as a matter of principal is rejected".

It is clear that by this stage, CMTC was alive to the issue of whether s4 of the Statute of Frauds had been complied with, and was keen not to prejudice any argument it might have.

104. The Fourth Defendant purported to terminate the charterparty for the "C PROGRESS" on 19 December 2017 (on the basis that the "C PROGRESS" had been rejected by ExxonMobil), which communication SK Shipping treated as an unlawful repudiation bringing that charterparty to an end on 25 January 2018. On 7 March 2018, the Second Defendant said that it had:

> "not been able to obtain market employment for the `C Innovator' as a result of the poor operational reputation the SK vessels currently enjoy among the oil majors wholly attributable to the Owners' technical management of their tanker fleet and which means that the Vessel cannot be traded at anything other than substantially loss making rates".

SK Shipping elected to treat that communication as an unlawful repudiation bringing the "C INNOVATOR" charterparty to an end on 2 April 2018.

105. On 3 May 2018, the First Defendant said that it could not secure any further employment for the "C SPIRIT" to make the continuation of that charterparty economically viable, and announced that it would redeliver the "C SPIRIT" on the completion of its dry-dock. SK Shipping purported to accept that communication as a renunciation bringing that charterparty to an end on 4 May 2018.

106. Proceedings were commenced in respect of all four VLCC charterparties on 20 July 2018. On 7 September 2020, the First, Second and Fourth Defendants accepted Part 36 offers which the Claimants had made in respect of the claims relating to the "C

SPIRIT", "C INNOVATOR" and "C PROGRESS", with the result (subject to issues of costs) that I am only concerned with the parties' disputes relating to the Vessel.

## THE CLAIMS IN MISREPRESENTATION

### The parties' cases

107. The parties advanced very different cases as to the effect of the statements about the Vessel's speed and consumption performance in both the 22 November 2016 Letter and the "recap" documents exchanged in the course of negotiations.

108. Mr Smith QC, for the Owner, submitted that these documents contained no representations as to the Vessel's actual performance at all, but merely statements of the contractual warranties which the Owner was prepared to offer in any concluded fixtures.

109. Mr Phillips QC, for the Defendants, argued that three representations were made in the 22 November 2016 Letter:

    i) that over each 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; or alternatively

    ii) that SK Shipping and/or the Owner believed and/or had reasonable grounds to believe the position was as in i) and/or knew of facts which reasonably justified the statement in i); and

    iii) that SK Shipping and/or the Owner expected the Vessel to achieve substantially the same performance in the future in the event that they were 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 they were chartered.

110. It is also alleged that the representations were repeated in the "full terms recap" sent by Mr Rexer to Mr Konialidis on 24 November 2016, the "final charter party recap" sent by Mr Rexer to Mr Konialidis on 25 November 2016; the "subject recap" emails sent by Mr Rexer to Mr Konialidis on 2, 5 and 6 December 2016 and the "updated recap" sent by Mr Rexer to Mr Konialidis on 6 December 2016.

111. The Defendants allege that those representations were made:

    i) dishonestly, in the sense that SK Shipping and/or the Owner either knew they were untrue or was reckless as to their truth, making the representations without any honest belief in their truth and not caring whether they were true or not; alternatively

    ii) negligently or without reasonable grounds for believing them to be true (for the purposes of s2(1) of the Misrepresentation Act 1967).

### The law relating to actionable misrepresentations

112. The general principles of the law relating to actionable misrepresentation were not substantially in dispute. I have gratefully adopted the following summary of the law from the judgment of Mr Justice Jacobs in Vald, Nielsen Holding A/S v Baldorino [2019] EWHC 1926 (Comm), [131-157], which draws on earlier authority, and which I have supplemented by the further authority cited to me by the parties.

113. First, the defendant must establish that a representation was made:

    i) A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true.

    ii) Determining whether any and if so what representation was made by a statement involves (1) construing the statement in the context in which it was made, and (2) interpreting the statement 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 representation is being made.

    iii) A statement of opinion is not in itself actionable but is invariably regarded as incorporating an assertion that the maker does actually hold that opinion. Further, at least where the facts are not equally well known to both sides, a statement of opinion by one who knows the facts best may carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it.

    iv) Silence by itself cannot found a claim in misrepresentation. But an express statement may impliedly represent something. In relation to implied representations the "court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context" (Toulson J in IFE v Goldman Sachs [2006] EWHC 2887 (Comm), [50]). That involves considering whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged.

    v) In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary "to show that the representor intended his statement to be understood by the representee in the sense in which it was false" (Morritt LJ in Goose v Wilson Sandford & Co [2001] Lloyd's Rep PN 189, [41]).

114. Second, the representation must be false. 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 claimant to enter into the contracts: Rix J in Avon Insurance v Swire Fraser [2000] Lloyd's Rep IR 535, [17].

115. Third, for the statement to have been made fraudulently:

i) One of the two mental states established in Derry v Peek (1889) 14 App Cas 337 must be established: the statement must have been made knowing it is untrue, or recklessly, not caring whether it is true or not.

ii) The requirements for proving that a misrepresentation was made fraudulently must not be watered down into something akin to negligence, however gross. However, the unreasonableness of the grounds of the belief, though not of itself supporting an action for deceit, will be evidence from which fraud may be inferred.

iii) Actionable fraud involves an intention on the part of the representor to induce the representee to act as he did. It is not necessary for the representor to intend to induce the specific action taken by the representee in reliance on the misrepresentation. It is only necessary that there should be an intention that the representation should be acted on.

iv) The standard of proof in a case of fraud is the balance of probabilities.

116. Fourth, the representee must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it, and that, having that understanding, he relied on it. The general principles applicable where a misrepresentation is said to have induced the making of a contract are set out in *Chitty on Contracts* (33rd) paras. 7-036 to 7-042. In this regard, it is important to keep two distinctions well in mind: the distinction between fraudulent and non-fraudulent misrepresentations; and the distinction between what the misrepresentee must establish in order to be in a position to rescind a contract for a pre-contractual misrepresentation and what must be shown in order to be able to recover damages for loss suffered as a result of entering into a contract.

117. The principles are as follows:

i) For rescission, it is not necessary that the misrepresentation should be the sole cause which induced the representee to make the contract. It is sufficient if it can be shown to have been one of the inducing causes.

ii) However, where a party has entered a contract after a misrepresentation has been made to it other than fraudulently, it will not have a remedy unless it would not have entered the contract (or not on the same terms) but for the misrepresentation.

iii) In cases of fraud, however, if the representee seeks to rescind, it is no defence for the representor to show that if the misrepresentation had not been made, the misrepresentee might still have made the contract. It is sufficient if there is evidence to show that he was materially influenced by the misrepresentation in the sense that it had some impact on his thinking, or as it is sometimes put, "was actively present to his mind": BV Nederlandse Industrie van Eidprodukten v Rembrandt Enterprises Inc [2020] QB 551, [32], [44-45].

iv) Once it is proved that a false statement was made which is "material" in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was induced by the statement.

v) The inference is particularly strong where the misrepresentation is fraudulent. In BV Nederlandse Industrie Van Eidprodukten v Rembrandt Enterprises Inc, [43] the Court of Appeal held that in deceit cases "there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent misrepresentation intended to cause him to enter the contract and that the inference will be 'very difficult to rebut' ..."

vi) It is sometimes said that a misrepresentation will not be effective to ground relief in law unless it was material, in the sense that a reasonable person would have been influenced by it in deciding whether to enter into the contract, although there is no clear authority denying relief to a representee who has in fact been influenced by a misrepresentation which would not have influenced a reasonable person. In cases of fraud, the representor is not permitted to argue that it was unforeseeable that the representee would be influenced by the lie.

vii) When a claimant seeks damages, whether for negligent or fraudulent misrepresentation, for loss which it alleges it has suffered by entering into a contract on particular terms as a result of that misrepresentation, the court must find that it would not have entered into the contract on those terms but for the misrepresentation: *Chitty on Contracts* (33rd) paras. 7-039-7-040 and 7-055. To this extent, in fraud cases there is a difference between what must be shown in order to obtain rescission of a contract, and what must be shown to recover damages.

**In what circumstances will an offer to contract on certain terms carry with it an implied representation?**

118. A particular issue which arises in this case is as to the circumstances in which an indication, or statement, by a party of its readiness to contract on certain terms will contain an implicit representation of fact. In Kingscroft Insurance Co Ltd v Nissan Fire & Marine Ins Co Ltd [1999] 1 Lloyd's Rep IR 603, 628, Moore-Bick J noted that in this context it was necessary to distinguish two 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 … 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.."

119. There are cases where the terms of the contract will make it clear that certain matters are both represented and warranted. This was the position in Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd [2002] EWCA 1235. This may be so not only where a contractual provision provides that one party "warrants and represents" a particular matter, but where a representation of fact is implicit in the promise made. In that case, the promise of an *exclusive* licence contained an implicit representation no licence had been granted to anyone else at the date of the contract ([23]).

120. Where a representation is only made in the contract, an issue may arise as to whether a claim is available under s2(1) of the Misrepresentation Act 1967 (given the requirement for the claimant to have entered into a contract "after a misrepresentation has been made to him"). Attempts to circumvent that issue by relying on pre-contractual negotiations may run into the difficulty referred to by Lloyd LJ in Leofelis SA v Lonsdale Sports Ltd [2008] EWCA Civ 640, [141]:

> "Mr MacLean argued that representations are made in the draft of the contract, and that the representee enters into the contract in reliance on, and after, those statements made in draft form. It seems to me that the answer to that is that the draft is no more than a statement that, if and when the contract is entered into by all relevant parties, the particular party will make the statements in question, just as it will undertake obligations set out in the draft."

121. A similar issue was considered in Idemitsu Kosan Co Ltd v Sumitomo Corp [2016] EWHC 1909 (Comm), [14] by Andrew Baker QC, who noted that:

> "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".

122. He accepted at [24] that:

> "Language found in the communication of a negotiating position, or in draft wording for a contract, or in an entire draft contract, passing between the parties during the negotiation of a contract, might amount to or form the content of a pre-contractual representation capable of being actionable under the 1967 Act".

However, the provision of the draft contract wording in that case "communicated, so far as material, no more than a willingness to give a certain set of contractual warranties in a concluded contract" [(30]) and could not give the terms of those warranties "a different character at that stage than it was to have, and in the event did have, when the SPA was duly concluded on the terms of the Execution Copy" ([31]).

**Does an offer of a speed and consumption warranty in a time charterparty involve any representation as to the vessel's performance?**

123. The only decision which has considered this issue in the specific context of speed and consumption warranties is The Larissa in which a pre-contractual communication by the owner's broker to the charterer stated:

> "Performance: Owners to guarantee 14.6 knots in moderate weather but max Beaufort Scale No. 5 which inclusive, consumption of 42 L tons HVF (max 1500 redwood No. 1) plus 2 L Tons D.O".

124. The charterer contended that this was a representation by the owner as to the vessel's actual speed and consumption on which it had relied in entering into the charterparty, and obtained relief from the arbitrator on that basis. Hobhouse J set the award aside. At p.330, he held that the words of the telex were those of obligation rather than representation:

> "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".

125. He also referred (at p.332) to certain difficulties in identifying the precise terms of any representation:

> "The representation cannot be that the vessel consumes exactly 42 long tons. It must on any view be open to the owner to leave himself a margin of error. Indeed, he would be unwise if he does not do so. One of the difficulties in treating the telex as containing a representation is in deciding precisely what the representation is."

126. The reference to the speed and consumption warranty in The Larissa was in clearly promissory terms, and The Larissa was an unusual case. The charter was on the Shelltime 3 form, which gave the owner a financial credit in the form of increased hire for over-performance against the warranted consumption, as well as a financial debit for under-performance. The charterer's complaint was that the owner had under-represented the vessel's performance, and, as a result, obtained benefits by over-performing against the warranted figures. It is in that context that the editors of *Carver on Charterparties* (1st) state at para. 7-781:

> "A question has sometimes arisen as to whether the charterer has any remedy where the vessel's consumption is overstated during the fixture negotiations with the result that the shipowner makes a profit from an application of the speed and consumption provisions. In theory, the charterer would have a cause of action for

> any misrepresentation which induced it to enter into the contract. However, the difficulties confronting such a submission are well illustrated by The Larissa where Hobhouse J held that such a statement was properly to be regarded as an offer to give a contractual undertaking at the stated figure and not a representation as to the vessel's capacity. He also drew attention to the difficulty of ascertaining precisely what representation would have been made, bearing in mind that some margin of error would have to be allowed. On the other hand, the charterparty may expressly provide that statements as to the vessel's speed and consumption are representations, in which case the charterer would have an independent cause of action in respect of any actionable misrepresentation".

127. As explained below, the issue of whether the offer of a speed and consumption warranty generally involves a representation as to the vessel's current or recent performance is a key issue when undertaking the counterfactual enquiry which arises as part of the Charterer's misrepresentation case. Mr Phillips QC argued either that The Larissa can be distinguished, or that it is wrong, and that an owner who offers a speed and consumption warranty impliedly represents that the figures are an accurate reflection of the vessel's actual consumption.

128. I accept that The Larissa concerned an alleged deliberate over-statement of a vessel's actual consumption, but I do not accept that this provides any basis for limiting the decision's application to cases where the reason why any representation of accuracy would be untrue is that the actual consumption was lower, rather than higher. The representation for which the Defendants contend here is effectively that argued for before Hobhouse J ("a representation as to the vessel's actual bunker consumption"), and it failed because of the promissory nature of the communication.

129. I would have been reluctant to depart from The Larissa on this issue. The decision has stood for 37 years without criticism, and was cited with approval in Kingscroft. In any event, I have concluded that there are good reasons why the mere offer of a speed and consumption warranty, and in particular of a continuing warranty as in this case, should not of itself be held to involve an implicit representation as to the vessel's 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"

(Bariş 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.

130. It might be argued that this does not offer complete protection to the charterer when a vessel which is in fact incapable of achieving the warranted performance is delivered under the charterparty, with the charterer facing the burden of speed and consumption claims from the outset, and the risks of under-compensation through the contractual mechanism. If an owner does "over-promise" a vessel's speed and consumption performance, it will face deductions from hire in accordance with the contractual provisions. The warranty is an innominate term of the contract (Kenny, Bakers, Kimball and Belknap, *Time Charters* (7th) para. 3.77) such that a sufficiently serious breach will give the charterer the right to terminate. If the vessel's speed or consumption has the effect that it cannot perform the intended service, the breach of the charterparty will be repudiatory (as was the case in Dolphin Hellas Shipping SA v Itemslot Ltd (The Aegean Dolphin) [1992] 2 Lloyd's Rep 178). A charterer who wishes further protection can always insist on the provision of recent or historic data as a condition of contracting.

131. I should also record that I do not regard the evidence in this case, on which Mr Phillips QC relied in this context, as providing a sufficient basis for reaching a different conclusion to that reached by Hobhouse J in The Larissa. Reliance was placed on Ms Richards' evidence in cross-examination that "the expectation is that the numbers which the owner provides will reflect the vessel's performance in service" and that the numbers provided by the owner are "usually indicating the performance the owner thinks the vessel will achieve … over the duration of the charter". I have

referred to the issues which arise in relation to this evidence at [26-29] above. In any event I would note that it was Ms Richards' evidence that the figures put forward would be what an owner was "aiming to achieve" over the duration of the charterparty, in order to avoid speed and consumption claims. Her evidence in her report drew a firm distinction between the offer of warranties, and the provision of actual data (which would only be provided on request): for example in paragraphs 3.20 and 3.22 of her first report and paragraph 5.1 of her supplemental report. Mr Clements (in his supplemental report) gave evidence that "the *expectation* is that the warranted figures in the time charter will match the vessel's real abilities" (emphasis added). However he too acknowledged the difference between the provision of historic data, and the offer of a warranty (for example in paragraph 13 of the Joint Memorandum). The issue of whether a charterer provided only with warranties would understand the owner to be telling the charterer that this reflected the recent actual consumption even when no historic data was requested or provided, or whether this was merely something which the charterer might assume, was not something the experts were asked to or did address. However, if market evidence had been admissible on this issue, this distinction could have been crucial. As Hobhouse J noted in The Larissa, p.331:

> "The arbitrator seems to have approached the matter by considering what a person might reasonably suppose to be the state of affairs having received the telex rather than considering whether or not this telex contains a representation."

132. Mr Phillips QC also relied upon the evidence of Mr Konialidis that it was his understanding that any offer of a speed and consumption warranty had embedded within it a representation as to the vessel's actual performance. Certainly Mr Konialidis' evidence included statements to that effect, but the position is more complex:

    i) It is clear that he had no real experience of chartering vessels in, as opposed to chartering them out. The basis of his evidence was that a charterer would *assume* there was a relationship between warranted and actual figures because, in his experience, that is what how an owner generally arrived at the speed and consumption figures it was willing to offer. He stated that "the assumption is the warranted data is the actuals rounded up which is what other owners commonly do".

    ii) Even within those limits, his evidence as to the assumptions which a charterer would make from the offer of a warranted speed and consumption was at times much less categoric. He said that "in common practice the warranties tend to be in line with actuals" and that "I think the understanding for most charters is whatever is warranted is either the actuals or based on the actuals". However, his evidence was not consistent. At one stage he stated that if SK Shipping "had sent an email saying 'this has been the consumption' and not specify they were actuals, we would have to assume they were warranties", and on another, that "in the absence of actual data, the only number we can enter is the warranted data".

133. Even if evidence of market practice had been admissible on the issue of whether the offer of a speed and consumption warranty involved an implied representation as to its actual performance, I would not have felt able to rely on Mr Konialidis' evidence

as supporting such a practice, both because he was not sufficiently experienced as a charterer, and because his evidence did not really go much further than saying that because Capital Maritime arrived at the warranties it was willing to offer by rounding up its actual performance, and other owners "commonly" did this, when acting as a charterer he assumed that the figures provided to him had been arrived at on the same basis.

134. Finally, at times Mr Phillips QC appeared to be arguing for a further implied representation based on Moore-Bick J's formulation in Kingscroft, namely that the Owner honestly intended to perform in accordance with the speed and consumption warranty included in the Charterparty and believed that it was or would be in a position to do so. In so far as that case might differ from Mr Phillips QC's third "expectation" representation (which I deal with at [148-150] below), it was not pleaded, and I do not regard it as open to the Defendants. As Mr Justice Moore-Bick noted in Kingscroft, a representation of this type is essentially one of honesty based on the defendant's understanding of the contractual obligations it was assuming. The issue of Mr Im's and Mr Ray Kim's understanding of the contractual obligations being assumed was not explored, and would depend on their understanding of matters such as whether the contract involved a promise to achieve a particular level of performance, or merely to reduce the hire if that level was not achieved, as to the operation of clause 24 of the Shelltime 4 form, the extent to which the averaging of performance over time might impact the net result, the ability of the masters to improve the Vessel's performance over time by adjusting the RPMs in periods of good weather or favourable currents and the impact of hull cleaning or drydocking during the charter period.

135. In any event, while I can see that a representation of the type contemplated by Moore-Bick J is likely to be appropriate in relation to an obligation on a contracting party's part to act or refrain from acting in a certain way (to pay the bill when ordering a meal in a restaurant for example), I am not persuaded that such a representation is inherent in offering a warranty as to a particular state of affairs (as is the case with a speed and consumption warranty), where the warranty is essentially concerned with the allocation as between the owner and the charterer of responsibility for the costs of bunkers in particular circumstances. Such a representation would appear to me to be inconsistent with the way in which speed and consumption clauses are negotiated (as set out at [129(iii)] above). For what it is worth, it is also inconsistent with the evidence of Mr Konialidis, as set out at [196(iii)] below.

**Did the 22 November 2016 Letter contain any representations at all, and, if so, by whom and to whom?**

136. The Defendants' misrepresentation case relies principally on the 22 November 2016 Letter sent by Poten to CMTC. That letter essentially repeated the data set out in the November 2016 Circular, and was clearly data which SK Shipping had put into circulation, and authorised Poten to provide to prospective charterers. Poten circulated that data in the form in which they had received it, with the accompanying text which SK Shipping had supplied. To the extent that the speed and consumption data contained any representations, there can be no suggestion Poten was not authorised to communicate those representations to potential charterers. The facts fall within the statement of the law in Abu Dhabi Investment v Clarkson [2008] EWCA Civ 699, [33] on which Mr Phillips QC relied:

> "The judge accepted that a cause of action in deceit may lie even where the misrepresentation was not made to the claimant directly. A representation made to a third party with the intention that it would be passed on to the claimant to be acted on and relied on by him will suffice, if it is passed on and acted and relied on. What must be shown is an actual intention to deceive the claimant. The precise identity of the claimant need not be known when the false representation is made, provided that he belongs to a class of persons within the contemplation of the defendant as likely and intended to be deceived by the misrepresentation. I consider this to be a correct formulation of the relevant law."

137. I do not accept Mr Smith QC's submission that the speed and consumption data in the 22 November 2016 Letter should have been understood solely as a statement of the warranties which SK Shipping was willing to offer, and not as a representation relating to the actual performance of the VLCCs. In particular, the statement that the data was "based on average of last 3 voys" was representational in nature, indicating that the data reflected or was consistent with the recent historical performance of the VLCCs. Not only was this language not promissory in nature (in contrast to the language in The Larissa) but it was language of a kind which would not have been appropriate in a purely promissory statement: if speed and consumption performances of this kind were being warranted, it would not matter for the purposes of any promise whether the data was the average of the last three voyages of the VLCCs or not.

138. I accept that other language which accompanied the speed and consumption data was language which was more appropriate to a promise rather than a representation – in particular the words "0.5 knot required on the C/P" and "speed and consumption basis normal weather and wind force up to and including Beaufort scale 4". However, that reflected the fact that SK Shipping was providing data said to reflect or be consistent with the recent past-performance of the VLCCs, and in that context explaining the warranties it was prepared to offer as to future performance.

139. I now turn to consider the three representations for which Mr Phillips QC contends.

140. The first two I can take together:

i) that over each 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; or alternatively

ii) that SK Shipping and/or the Owner believed and/or had reasonable grounds to believe the position was as in i) and/or knew of facts which reasonably justified the statement in i).

141. It would have been clear to a reasonable reader of the 22 November 2016 Letter (who would be someone active in the tanker time charterparty market) that it was highly improbable that the "C INNOVATOR" and the Vessel had proceeded at every one of the 11 ballast and 12 laden speeds, in weather Beaufort 4 or below, over the course of their last three voyages. I find that this was also clear to Mr Konialidis, who accepted that anyone familiar with the VLCC trade would know that "it would have been very difficult to have accurate and reliable actual data for all these 21 settings", and there is no reason to conclude that Mr Marinakis would have had any different understanding.

This would have been all the more obvious if the data had to be sourced *exclusively* from three recent voyages.

142. It would also have been clear that the figures might not have been exclusively the product of actual consumption figures from:

i) the use of composite figures for two VLCCs which would almost certainly have had different recent trading histories; and

ii) the giving of ballast and laden figures for both VLCCs, taken from three voyages (making it even more unlikely that each VLCC would have sailed at all 11/12 speeds in good weather in both ballast and laden conditions over those last three voyages).

143. For these reasons, I conclude that a reasonable reader of the 22 November 2016 Letter would have been aware that the figures presented were likely to involve some form of extrapolation rather than exclusively measured historical data over the last three voyages, and that was also apparent to CMTC. Accordingly, I am unable to accept Mr Konialidis' evidence that he understood each figure in the table to constitute, as he put it, "actual data", or that a reasonable charterer would have so understood the table.

144. In those circumstances, the statement that the data was based on an average of the last 3 voyages ("The 3 Voyage Average Statement") cannot be interpreted as meaning that the *sole* source of data was those last three voyages. Further, on the evidence before me, a common approach to providing speed and consumption data in the market is to take the vessel's sea trials and shop data (which will generally cover a range of speeds and loading conditions in good weather) and update that data in the light of subsequent performance and I find that a reasonable reader of the 22 November 2016 Letter would have read it with the understanding that that might have happened.

145. The next issue is the effect of the words "and might be different depends on the seasonal ocean currents and weather conditions". Mr Smith QC suggested that those words made it clear, as he put it, that the data was provided "without guarantee". I disagree. Whether these words are read as part of a single sentence with the words which preceded them, or considered as a sentence on their own, far from making it clear that the data offered did not involve any representation related to the Vessel's actual consumption, those words served to reinforce that impression, effectively saying "this data is reasonably representative of the Vessel's consumption over the three most recent voyages but consumption might be different in currents or weather not experienced on those voyages".

146. The reference to the "last 3 voyages" raises a number of complications.

i) There is the question of how those words are to be understood in a context in which a single set of figures was presented for both the Vessel and the "C INNOVATOR". Mr Phillips QC's explanation of how the phrase was to be interpreted was as follows:

> "It could be interpreted as meaning two voyages of one vessel and one of the other. It could be interpreted as being three voyages of one of those two

vessels. It could be interpreted as being actually based upon the last three voyages of each of these vessels".

Mr Konialidis said that he understood the statement in the third sense. In circumstances in which SK Shipping was not offering the "C INNOVATOR" and the Vessel as a "package deal" only, I have concluded that the statement would reasonably have been understood as representing that the data was reasonably consistent with the recent performance of each vessel, while allowing for some ambiguity as to the number and type of voyages for any particular vessel which had been relied on.

ii) There is the further difficulty of what a "voyage" meant in this context – it was suggested in the course of the evidence that a single voyage might be understood as constituting a combined ballast and laden voyage, or as one or other.

iii) Mr Ray Kim did the exercise on 4/5 November 2016, it was circulated into the market on 7 November 2016, and the data was reflected in Poten's email to CMTC on 22 November 2016. A reasonable reader of the email would understand from it that:

a) the data had been checked by reference to three recent voyages when the exercise was conducted, involving one or the other or both of those VLCCs;

b) on a basis which might have involved either of the two interpretations of the word "voyage" considered in ii) above, and

c) that the data was being sent out when it was still "recent" (it is not necessary to determine how long a period would need to elapse before the data would cease to satisfy that description).

iv) The conclusion in a) would have been reinforced by the fact that the figures were given to the decimal point, although I would not regard that factor on its own as capable of giving rise to a representation that the figures were actual figures, as opposed to a promised performance.

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, which might reasonably have involved any of the approaches in [146(i)-(iii)] above. I am also satisfied that Mr Konialidis understood the 3 Voyage Average Statement in substantially these terms, and this his discussions with Mr Marinakis reflected such an understanding.

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 they were 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 they were 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

150. I should note that a misrepresentation case on this basis would have failed on the grounds of inducement as well. Mr Konialidis was adamant that it was only SK Shipping's willingness to warrant the performance, rather than the provision of the data with the 3 Voyage Average Statement, which led him to conclude that SK Shipping was telling him how the Vessel would perform in the future:

> "Q Did you also understand that SK was representing to you that this is how the vessels would in fact perform in the future?
>
> A From, the moment that we asked them to warrant that – that performance and they were prepared to do so, yes.
>
> Q Just because of the warranty, you thought because of the warranty in the charter, they were implicitly representing that the vessels would perform like this in the future: is that your evidence?
>
> A Well, yes".

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.

153. Those representations were clearly made to CMTC, but it is not CMTC which seeks to rescind the Charterparty. As noted above, the Charterparty identified the charterer as "TBN Company, which shall be guaranteed by Capital Maritime & Trading Corp". The Charterer was only incorporated after the Charterparty was concluded, and the Charterer became a party to the Charterparty by reason of CMTC's nomination. In

these circumstances, Mr Smith QC contends that no representations were made to the Charterer.

154. In Woodstock Shipping Co v Compania Naviera SA (The Wave) [1981] 1 Lloyd's Rep 521, 528, a fixture was concluded with "Coastal States Co to be nominated". Mustill J held that a binding contract came into existence in these circumstances "on behalf of a wholly owned subsidiary to be nominated". I can see no reason why representations made to the party who concluded the contract "on behalf of" another company to be nominated are not to be treated in the same way as representations made to an agent negotiating a contract on behalf of an unnamed or undisclosed principal, even if the identity of the principal was not only not known, but not knowable at the date the contract was concluded. In General Accident Fire and Life Assurance Corp v Tanter (The Zephyr) [1984] 1 Lloyd's Rep 58, Hobhouse J had to consider the appropriate legal analysis when a broker collected reinsurance subscriptions for a marine risk, before placing the underlying cover (and therefore at a point when the identity of its principal for the purpose of placing the reinsurance was not yet known). At p.72 he noted:

> "Where as in the present case, there is a clear intent to create legal relations and the transaction or transactions are clearly of a commercial character, English law is perfectly ready to recognize the contractual relations that the parties actions so clearly intend and will not frustrate them on account of some difficulty of analysis. Decisions illustrating this include Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256, The Satanita, [1897] A.C. 59, and New Zealand Shipping Co. Ltd. v. Satterthwaite, [1974] 1 Lloyd's Rep 534; [1975] A.C. 154.
>
> … The Satterthwaite case demonstrates that a contract between A and B can bind B to third parties who at the time of the making of the contract were unknown and unascertainable. The judgment of Lord Wilberforce in that case at pp. 539 and 167 stresses the need to adopt a practical approach and to give legal effect to inherently contractual situations".

155. It is well-established that, for the purposes of the duty of making a fair presentation, the broker deals with the reinsurers on behalf of the reinsured in this situation, even though its identity is not yet known (SAIL v Farex [1995] LRLR 116, 122-123). While these cases are concerned with the issue of whether a principal who has yet to be identified can be fixed with misrepresentations made by the agent in obtaining the contract to which the principal later becomes party (which is effectively the position of the Owner as SK Shipping's nominee), I see no reason why the same approach should not also apply where it is the identity of the representee's principal which is not known at the date of the representation. I prefer that analysis to an approach in which the representations continue until the point of nomination, because that would run contrary to the usual expectations of contracting parties that representations made in pre-contractual negotiations become "spent" when the contract is concluded, with any changes in the state of affairs or the misrepresentor's knowledge after that point being of no moment so far as pre-contractual claims are concerned.

156. Nor is it any bar to this analysis that the Charterer had not been incorporated when the Charterparty was concluded. In Kingscroft v Nissan, p.621, Moore-Bick J observed of a similar argument:

> "Although, as I have acknowledged, that may present difficulties for an analysis which depends on agency, I do not regard that as an insuperable objection. In The Eurymedon, as Lord Wilberforce pointed out, the precise identity of the stevedore was unknown when the bill of lading was issued. If, as he appears to have accepted, the 'open offer' analysis to be found in Carlill v Carbolic Smoke Ball Co could equally well be adopted, I can see no reason in principle why the result should have been different if the company had been incorporated after the bill of lading had been issued and before the ship reached the port of discharge since the promise or offer contained in the bill of lading was necessarily communicated to the stevedore before the goods were discharged".

157. For these reasons, I am satisfied that the representations made in the 22 November 2016 Letter are to be treated as made by or on behalf of the Owner, to CMTC acting on behalf of the Charterer.

***Were any representations made in the other communications pleaded by the Defendants?***

158. I can deal with the remaining communications relied upon by the Defendants relatively briefly, and by reference to the documents specifically referred to in the Amended Defence. All of these repeated the presentation of the speed and consumption data in the form in which it was first forwarded by Poten to SK Shipping when setting out CMTC's offer on 23 November 2016 (when the data was presented in the form of the warranty which CMTC required):

    i) This was clear from the context of the 23 November 2016 communication itself, which was introduced as "the below proposal from Capital Maritime" and described as "Time Charter Offer".

    ii) It was also clear from the modifications made to the language surrounding the data: the deletion of the words "above data is based on average of last three voyages", the attempt to change the weather conditions in which the warranty would operate (up to Beaufort 5) and the deletion of the 0.5 knot margin.

159. Thereafter the only changes made to that language – SK Shipping rejecting the proposed amendment to Beaufort 5 and re-inserting the 0.5 knot margin – were in the nature of a contractual negotiation. The language originally formulated in the offer made on behalf of CMTC appeared in the further communications as a proposed term of the agreement which was being negotiated. This did not, in my view, constitute a repetition of the representations made in the 22 November 2016 Letter, but merely a statement of the contractual commitments being sought, offered and ultimately agreed as to the warranted speed and consumption during the Charterparty. Applying the language in Idemitsu Kosan Co Ltd v Sumitomo Corp, these statements "communicated, so far as material, no more than a willingness to give a certain set of contractual warranties in a concluded contract" [(30]) and could not give the terms of those warranties "a different character at that stage than it was to have, and in the event did have, when the [Charterparty] was duly concluded" ([31]).

**Were the representations made in the 22 November 2016 Letter true?**

***The 3 Voyage Average Statement***

160. The mere fact that the source of the data in the 22 November 2016 Letter was the sea trials data of the two VLCCs adjusted for performance after six months and one year did not of itself render the 3 Voyage Average Statement untrue. If the Table 2 data had been checked against the performance of the two VLCCs over three recent voyages in one of the senses I have described at [146] above, and was reasonably interpreted as being consistent with that performance, the 3 Voyage Average Statement would have been true. However, there are two further respects in which it is said that the 3 Voyage Average Statement was untrue.

161. The first is that the exercise which Mr Ray Kim had done did not involve checking Table 2 with the two VLCCs' three most recent voyages, but the third to sixth most recent voyages. I have concluded that this statement was substantially true, in that the difference between this statement, and the actual position that (at least in the case of the Vessel), the fourth to sixth most recent voyages had been reviewed, would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts. Indeed, given the number of possible meanings of these words, as set out in [146(i)-(iii)] above, the difference between the exercise performed by Mr Ray Kim, and the range of exercises which the reasonable reader of the statement would have understood might have been conducted, was not material.

162. The second is that the data given was not reasonably consistent with the most recent performance of the Vessel, whether assessed by reference to average performance over the three most recent voyages, or the four to sixth most recent voyages. I am satisfied that this representation was untrue.

163. First, I have concluded that the exercise which Mr Ray Kim performed to compare the Table 2 data with the noon reports was inadequate and that a more careful consideration of the data which Mr Ray Kim extracted from the noon reports would have shown that the Vessel was consuming significantly more than the figures in Table 2, and that for some reference speeds no data was available, such that the Table 2 data could not be said to be reasonably consistent with the consumption of the Vessel over its most recent voyages, and this was the case even if a 0.5 knot tolerance was allowed for:

    i) There were a large number of cases when the noon reports were substantially out of line with the Table 2 data – not simply the two which Mr Ray Kim identified, but five in total (and six including the data for 10 knots in ballast, for which a consumption figure had never been given in Table 2).

    ii) There was no data for 2 speeds, and very few data points for others. However, no attempt was made to allow for the number of data points available for each speed, so as to form a view of how far the data was sufficient to provide a reasonably reliable verification, and whether it would be more appropriate to use a proximate speed for which more data was available.

    iii) A more thorough review of the data would have revealed that some of the information which Mr Ray Kim regarded as validating the Table 2 entries was likely to be unreliable because it was inconsistent with other data for speeds marginally above and below the speed in question.

iv) No consideration was given to the rpms on the relevant voyages, which on the expert evidence is what consumption depends on. This is something the Ship Management Team would have appreciated, if asked to perform the exercise.

v) In considering whether the noon reports validated the figures in Table 2, Mr Ray Kim allowed a 0.5 knot margin, without which the data derived from the noon report analysis would have been higher than that in Table 2 for 17 of the 21 speeds. However, the data was permitted to be circulated in the market in terms which did not indicate that, but suggested that a 0.5 knot margin was something being sought in the charterparty in relation to the future warranted performance rather than as something which qualified the actual data.

164. Second, on the Vessel's first ballast voyage, from 9 February to 16 February 2017, the Vessel over-consumed by 46.38mt in good weather, and nearly 50mt overall, and on her first laden voyage, from José Terminal to Yingkou from 26 February to 15 April 2017, over-consumed by approximately 499mt in good weather and 527mt in total when compared to the warranted performance. In the absence of some significant intervening event, the degree of over-consumption on those voyages, while some months after the 22 November 2016 Letter, is inconsistent with the truth of the representation which I have found was made. While Mr Smith QC suggested that a 10-day idle period at José Terminal might explain some element of the over-consumption on the laden voyage, the Vessel was already over-consuming before it arrived at José. Further, the suggestion that a 10 day stay at José might have led to substantial hull fouling was inconsistent with the Owner's own case in cross-examination of Mr Salt as to the length of stay in port required for significant hull fouling to occur and the evidence of Mr H Y Son that the paint applied to the Vessel in October 2015 prevented fouling when the Vessel was idle for periods of up to 21 days. In any event the degree of over-consumption far exceeded anything which 10 days idle in José might explain, and none of the internal communications within SK Shipping suggested that the stay at José was the reason for the over-consumption on the first voyage. The following ballast voyage, when over-consumption was much less, only lasted 20 days, and was followed by a further voyage with over-consumption of 98.52mt in good weather.

165. Third, reports produced after the event for the Vessel's voyages over the period June to September 2016 (obtained from GeoStorm) showed very significant over-consumption even allowing for the minor differences between the actual and reference speeds. I have taken the following figures from Figure 2 of Mr Salt's report, but, where available, used the Table 2 figures closest to the actual sailing speeds:

| | Speed | Rep'd consmpn | Actual consmpn |
|---|---|---|---|
| Ballast | | | |
| June | 15.77 | 81.2 (15 knots) | 99.07mt |
| August | 13.65 | 58.7 (13.5 knots) | 66.61mt |
| September | 13.34 | 58.7 (13.5 knots) | 62.31mt |
| October | 9.98 | 32.3 (10.5 knots) | 39.59mt |

| | | | |
|---|---|---|---|
| Laden | | | |
| July | 14.13 | 79.4 (14 knots) | 89.72mt |
| October | 12.2 | 53.1 (12 knots) | 54.35mt |
| November | 11.33 | 42.7 (11 knots) | 59.55mt. |

166. Finally, and perhaps most tellingly, as set out at [68-69] and [72-73] above, the reaction within the Ship Management Team, and from the masters of the VLCCs, who were best placed to know the actual levels of consumption of the VLCCs, was that the Table 2 data under-stated the level of the VLCCs actual consumption. The reaction internally was not that the Vessel's consumption was unexpectedly high, but rather that the level of warranty offered was unrealistically low.

167. Had I been satisfied that the speed and consumption data provided was reasonably consistent with the average performance of the Vessel over its last three voyages, I would have held that the No Reasons Representation had not been shown to be untrue. The Defendants' complaint was not that SK Shipping was or ought to have been aware of a significant deterioration in the Vessel's performance in the period after the voyages which Mr Ray Kim had looked at, but that the data put forward was not reasonably consistent with the Vessel's performance on those voyages. However it necessarily follows from my finding that the 3 Voyage Average Statement was untrue that the No Reasons Representations was also untrue.

***Did Mr Ray Kim, Mr Im or anyone else in SK Shipping know that the 3 Voyage Average Statement was untrue or were they reckless as to the truth of the 3 Voyage Average Statement?***

168. I have found that neither Mr H Y Son nor the Ship Management Team were aware of the speed and consumption warranties which had been offered to potential charterers before the Charterparty was concluded, for the reasons I gave at paragraphs [68-70] and [76] above. It is also clear, in my view, that none of those persons were aware not only that warranties were being offered which could not be fulfilled, but that representations of fact were being made which were untrue.

169. While I accept that members of the Tanker Operations Team were aware of the exercise which Mr Im had asked Mr Ray Kim to perform, none of those individuals were closely involved in the details of the verification exercise, nor in determining what data would be presented to the market and in what terms. If the Defendants are to make out their case in deceit, they must establish dishonesty on the part of Mr Im or Mr Kim, and Mr Phillips QC very properly put his case in closing on that basis.

170. I accept that both Mr Im and Mr Kim were aware that the data sent out to the market was being presented not simply as the terms on which the Owner was willing to contract, but in a manner which involved a representation that they were reasonably consistent with the recent performance of the VLCCs. The issue which arises is whether they knew that that representation, in the form in which they understood it was being made, was untrue, or whether they were reckless as to its truth. Mr Phillips QC accepted in closing that the evidence of Mr Im and Mr Ray Kim was "for the most part, free, fair and honest". However, he submitted nonetheless that "the

conclusion that those representations are not to be regarded as fraudulent in law is not, in truth, one which is properly open".

171. I will take the position of Mr Im first. As I have found, he was not involved in the detail of this matter, and essentially relied on Mr Ray Kim's report to him that the Table 2 data remained appropriate to circulate to the market. My findings as to Mr Im's state of mind are as follows:

i) Mr Im did not know which noon reports Mr Ray Kim had accessed for the purpose of the exercise he had performed. His understanding was that the Table 2 data had been checked against recent voyages, and that the language used – which only appeared in English – was an appropriate way of communicating that fact.

ii) He did not focus on the significance of the terms in which the 0.5 knot margin was expressed, but simply derived the general understanding that the data was appropriate to use with the benefit of what was an acceptable margin of error, which is what he understood the reference to the 0.5 knot margin to communicate to recipients of the data. On that basis, he felt that "within the allowable range … the figures were accurate and that is why the figures were sent out in the market".

iii) Based on what he was told, Mr Im believed that the Table 2 data in the format in which it was made available to the market was substantially accurate - that is to say it was accurate within what the market would regard as an acceptable margin of error (i.e. 0.5 knot), subject to one or two exceptions among the 21 data points which he did not understand to be representative or to render Table 2 substantially inaccurate if considered as a whole.

iv) I also find that that was an honest belief, in that Mr Im did care whether or not the data circulated to the market was or was not substantially accurate (as demonstrated by his decision to instruct Mr Ray Kim to carry out the validation exercise and his attempt to assist Mr Ray Kim in getting help from the Ship Management Team). So far as the fact that the Owner would pay for any over-consumption is concerned, I accept his evidence as to his approach which was as follows:

> "We understood that if there was overconsumption, SKS would be responsible for that, but our thinking was not that if there is overconsumption, we can take responsibility later on, therefore it is all right to send out the data when the data is inaccurate. That was not our thinking at all".

In particular, Mr Im would not have wanted to expose SK Shipping to the inevitable over-consumption claims which would have resulted from any deliberate overstatement of the figures. I reject any suggestion that it should be inferred that Mr Im did not enquire into the detail of Mr Ray Kim's work because he did not care (in the Derry v Peek sense) whether any statements made to potential charterers were true or not. Rather, it reflected the fact that he has asked a subordinate, who he trusted, to do the job, and as a busy executive he was content to rely on the exercise which Mr Ray Kim had done.

172. So far as Mr Ray Kim is concerned, he was aware that he had not looked at the three most recent voyages but at "the recent ones that I could find at the moment". However, I do not accept that Mr Ray Kim was consciously making an untrue statement, or a statement as to whose truth or falsehood he was indifferent, when attaching the 3 Voyage Average Statement to the data:

    i) That wording had been obtained from discussions with those with more familiarity with the chartering market, and Mr Ray Kim understood it to be a form of standard market language which it was appropriate to use.

    ii) The wording was also obtained (as is apparent from its appearance on some of the Additional Tabs circulated under cover of an email of 4 November 2016) before Mr Ray Kim had undertaken the noon report exercise over the weekend of 5 and 6 November 2016.

    iii) It seems likely that Mr Ray Kim intended to perform that exercise by reference to the most recent voyages he could obtain. However, when working over the weekend of 5 and 6 November, the reports he was able to lay his hands on were those for the third to sixth most recent voyages.

    iv) Mr Ray Kim did not then revisit that wording – either to reflect the fact that he had looked at four voyages rather than three, or that they included only one of the three most recent voyages. The significance of that statement, in the light of the work which he had been able to do over the weekend, was simply overlooked.

173. So far as the Table 2 data was concerned, Mr Phillips QC relied very heavily on an answer given by Mr Ray Kim when questioned about paragraph 18 of his witness statement. That paragraph stated:

> "Considering that a margin of 0.5 knots is generally taken into account in underperformance claims, I applied the margin when comparing the data retrieved from the noon reports with table 2. When considering that margin, I was confident that table 2 was still valid".

The cross-examination was as follows:

> "Q What you're essentially saying is that inaccurate data was going to be provided to potential charterers because they weren't going to get the data that were relevant to actual speeds, they were going to get the data that was relevant to actual speeds minus half a knot?
>
> A Yes, correct".

174. That question was asked and answered without the benefit of interpretation, because Mr Ray Kim had sought to give evidence in English to the extent he could. When Mr Phillips QC referred to that answer later in the cross-examination, in a passage of evidence which was interpreted, there was the following exchange:

> "Q You've already accepted that without the application of the 0.5 knot margin the data in table 2 is inaccurate as regards the consumption of the Challenger?
>
> A I don't understand what you mean by I have already accepted.
>
> Q Well we can look back at the transcript and see."

In re-examination, in another interpreted answer, Mr Ray Kim explained that he used half a knot because:

> "a margin is allowed for the consumption and that is because the vessel is out at sea and you ought to have put various consideration various operational variables such as the weather or currents, *and this principle of applying or allowing such a margin is known by charterers and owners*"

(emphasis added).

175. When Mr Ray Kim gave the first answer it did not, to me at least, have the feeling of a "gotcha" moment. But in any event, in assessing Mr Ray Kim's state of mind, it is important not to take a single answer in isolation (particularly one answered by someone in a second language), but to have regard to the totality of the evidence given, together with the contemporary documents. Mr Ray Kim consciously took the 0.5 knot tolerance into account when determining whether the Table 2 data remained accurate. He was also aware that, at two reported speeds, the noon data showed significantly higher figures even with the benefit of that margin (although I reject the suggestion that he was aware of other significant discrepancies, for the reasons given at [48] above), just as there were four speeds where more favourable consumptions might be found in the noon reports. However, I am satisfied that Mr Ray Kim nonetheless believed, as a result of the exercise which he had performed, that the Table 2 data in the form in which he presented it was substantially accurate, and that those to whom the data was provided would understand that it was being said to be substantially accurate, but no more. The answer relied on by Mr Phillips QC went no further than that.

176. In particular, I find that Mr Ray Kim was not alive to the legal distinction between a statement of actual performance, to form the basis of a promised performance with a 0.5 knot margin, and the presentation of data said to be accurate within a 0.5 knot margin. Indeed, as I have noted at [51] above, it is not clear on the evidence that he was aware at the time of the precise terms in which the 0.5 knot margin issue was communicated to the market when the data was sent out. His understanding was that data of this kind was presented in this market within certain "allowed" tolerances, and that the data would be presented as being accurate within the 0.5 knot margin. He had clearly persuaded himself, as a result of the exercise he did, that the Table 2 data, with the benefit of that tolerance, remained broadly accurate, looking at it in general (or, as he put it, "holistic") terms, and that sufficed to make it accurate in the context in which it was being put forward. He was clearly surprised by the internal criticism he received when the Ship Management Team became aware of the warranties offered on the basis of his work.

177. I also find that Mr Ray Kim's belief was an honest one, and that Mr Ray Kim did care whether any information communicated to the market was accurate or not. This is evidenced by his efforts to obtain input and data from the masters of the VLCCs and the Ship Operations Team, the exercise he did with the noon reports when no other means of checking the Table 2 data were apparent to him and his readiness to highlight in red for Mr Im the two significant discrepancies he did identify on his approach.

178. It was suggested that Mr Ray Kim did not care whether the data provided to the market was substantially accurate because he understood that if the data proved to be inaccurate, the Owner would be liable under the speed and consumption warranty. There were places in his evidence in which he agreed with Mr Phillips QC's suggestion that, for this reason, he did not think it mattered if the data was inaccurate. It is clear that Mr Ray Kim did know that the Owners would be liable if the Vessel failed to meet the warranty, but I do not accept that when he informed Mr Im that the Table 2 figures could be provided to the market, he did not care whether they were substantially accurate or not for that reason. That was not a justification which Mr Ray Kim advanced in any of his internal emails when he came under criticism for the warranties which had been offered – rather the sense of the emails was that he had done his best, without any help from others better placed to assist him, to ensure that the description of the VLCCs' performance was substantially accurate. Looking at his evidence as a whole, I am satisfied that his approach to this aspect of the matter is accurately set out in the following passages:

i) His statement in cross-examination:

> "When I was conducting the review I did not think there was a big difference. I did not feel that information was inaccurate and this information would be provided to the market and as the owner, we would be responsible for this number …. If I felt that there was a big difference, and if I felt it was inaccurate, this information would not have been provided."

ii) His evidence in his witness statement as follows:

> "I had sufficient data to perform a general cross-check on the accuracy of the Table 2 data. Further my understanding was that any potential charterers would be interested in the performance being warranted by SK Shipping. As SK Shipping would be providing warranties in respect of the Vessels' consumption it would be SK Shipping and not the charterer who would stand to lose if, *contrary to my belief*, the Table 2 data proved not to be accurate".

(emphasis added).

**Did the Owner have reasonable grounds for believing that the 3 Voyage Average Statement was true?**

179. It is quite clear that the Owner did not have reasonable grounds for believing that the representation which I have found to be contained in the 3 Voyage Average Statement was true.

180. First, there are the deficiencies in the exercise performed by Mr Ray Kim, which I have set out in [163] above. If a more thorough exercise, carried out with the care appropriate for figures to be circulated to potential charterers, had been undertaken, it would have revealed that the noon performance exercise, for all its limitations, was sufficient to show that the Table 2 data was likely to materially over-state the Vessel's consumption, and certainly that it could not be said that the Table 2 data was reasonably consistent with the Vessel's recent performance.

181. Second, Mr Ray Kim had neither the experience nor access to the relevant information properly to perform the exercise he was asked to undertake. That exercise should have been undertaken by (or at least submitted for the approval of) the Ship Management Team, who, if consulted, would clearly not have felt able to support the exercise or the circulation of the Table 2 data to the market, as is clear from its reaction when it became aware of the terms on which the VLCCs had been chartered out.

182. Third, if the Table 2 data was to be used, on the basis that it was all that was available, it was clear that a significant margin should have been added to the data first, and the figures appropriately caveated before circulation.

**Were CMTC and/or the Charterer induced to enter into the Charterparty by the misrepresentation I have found?**

***Materiality***

183. To the extent that there is a requirement of materiality, in the sense that a reasonable person would have been influenced by the statement in deciding whether to enter into the contract, I find that the misrepresentation was material. While the principal protection for a time charterer in relation to a vessel's speed and consumption performance is the warranty provided under the time charter, the 3 Voyage Average Statement served to reassure potential charterers that the Vessel's recent performance was broadly in line with the figures given. That was material, because a warranty would not provide a charterer with complete protection against over-consumption. In particular:

    i) Consumption would be relevant to how frequently or in what quantities a vessel would have to bunker, and thereby have the potential to influence operational decisions.

    ii) The bringing of speed and consumption claims would involve some limited loss of the time value of money (with hire overpaid having to be recovered), and the inconvenience, management time and cost of formulating, bringing and resolving such claims.

    iii) The warranty provisions in the charter would be subject to inherent limitations of proof, of working out how to translate under-performance in good weather to the vessel's performance in bad weather, and would only provide a remedy to the extent of under-performance exceeding the 0.5 knot allowance.

184. While I have concluded that the Defendants have over-stated the significance of these issues to them, it cannot be said that they are immaterial.

***Inducement: what is the appropriate counterfactual?***

185. In testing the issue of inducement, the relevant question is not what the representee would have done if it had known the true position, but what it would have done if the representation had not been made at all. The law on this issue was comprehensively reviewed by Christopher Clarke J in Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [174-180]. He concluded at [180]:

> "Mr Zacaroli submitted that a claim for misrepresentation requires consideration of what the representee would have done if no representation had been made to him. That is, in my judgment, generally speaking, correct because the claimant must establish the causative impact of the representation on his decision. His essential complaint must be that he entered into the contact on the terms on which he did as a result of what he was told, i.e. that, had he not been told what he was told, he would not have done so. If he would have entered into the relevant contract even if the representation had not been made, he has no valid complaint … "

186. The correctness of that approach has been confirmed subsequently: for example in Leni Gas & Oil Investments Limited v Malta Oil Pty Ltd [2014] EWHC 893 (Comm), [17] (Males J); Avonwick Holdings Limited v Azitio Holdings Limited [2020] EWHC 1844, [189] (Picken J); Marme Inversiones 2007 SL v Natwest Markets Plc [2019] EWHC 366 (Comm), [294] (Picken J) and Cassa di Risparmio della Republica di San Marino SpA v Barclays Bank Plc [2011] EWHC 484 (Comm) (Hamblen J). While these are all first instance decisions, there are statements of the law by the Court of Appeal to similar effect. In Downs v Chappell [1997] 1 WLR 426, 433, the trial judge had found that the purchaser would not have entered into the contract without verified turnover figures provided by the seller. At p.433, Hobhouse LJ held that the hypothetical enquiry as to what the purchaser would have done if provided with accurate and verified figures was irrelevant:

> "The plaintiffs have proved what they need to prove by way of the commission of the tort of deceit and causation. They have proved that they were induced to enter into the contract with Mr. Chappell by his fraudulent representations. The judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful; they induced the plaintiffs to act to their detriment and contract with Mr. Chappell. The judge should have concluded that the plaintiffs had proved their case on causation and that the only remaining question was what loss the plaintiffs had suffered as a result of entering into the contract with Mr. Chappell to buy his business and shop."

187. Similarly, in Dadourian International Group Inc v Simms [2009] EWCA Civ 169, [107], Arden LJ stated:

> "… it is irrelevant how the representee would have acted if told the truth. Mr Samek correctly submitted that, once it is found that a misrepresentation was made, was intended to be relied upon and was relied upon by the representee in deciding to enter into the transaction in question, any speculation as to what the representee would or might have done if he had known the truth is immaterial".

188. There will be cases where a claimant can establish (as Mr and Mrs Downs did) that he or she would not have been willing to proceed with a transaction if a particular statement about the subject-matter of the contract had not been made, or that, absent such a statement, an enquiry would have been made which would have elicited the true position (as was contended in Leni Gas). However, there will be other cases in which, if no representation had been made at all, the claimant would have remained ignorant of something which, had it become aware of it, would or might have influenced its decision to contract. In such cases, it might at first sight seem surprising that such a claimant would not have a misrepresentation claim. This reflects the fact that the actionable wrong is the making of a false statement, not the failure to make disclosure (something which is actionable in English private law only in special and limited cases). While it is sometimes said that someone who makes a false statement comes under a duty to correct it, that merely means that a statement which is not actionable when first made may become actionable subsequently if not corrected. Save in this limited sense, the making of a misrepresentation does not of itself place an independent legal duty on the misrepresentor to disclose the true position.

***What would the CMTC/the Charterer have done if the misrepresentation had not been made?***

189. As I have found that the misrepresentation made was material, the Charterer benefits from a "fair inference of fact", all other things being equal, that it was influenced by the misrepresentation. However, as the case in fraud has failed, the Charterer does not benefit from the heightened presumption of inducement which applies in such cases. My findings on inducement have been approached within that framework.

190. If SK Shipping had not been willing to offer a speed and consumption warranty at all, I am sure that the Charterparty would not have been concluded – the contrary is not seriously arguable. But that is not to consider the position if the representation had not been made, but the position if a promise had not been offered. If the 3 Voyage Average Statement had been true, but SK Shipping had been unwilling to offer a warranty, I am equally sure that the Charterparty would not have been concluded. An owner who wishes to time charter a tanker must, as a matter of commercial necessity, be prepared to offer some form of speed and consumption warranty.

191. If SK Shipping had offered the same warranty, but made no representation as to the Vessel's historic or recent performance, I am satisfied that the Charterparty would have been concluded on the same terms as it was concluded.

    i) Mr Konialidis gave evidence in his witness statement that if Mr Rexer had not sent actual speed and consumption data through, he would have asked for it. However, the only example of previous conduct provided by Mr Konialidis to support that assertion appears to have been a request for the speed and consumption warranty to be offered ("can you provide s&c?") rather than a request for historic performance data. The response (which would have made it clear whether what was in fact provided was actual performance data or the warranty offered) was not produced. Nor was there any evidence from Mr Marinakis to support a case that the provision of actual data was a pre-requisite to the Charterer's decision to contract.

ii) The data for other ships with which Mr Rexer compared the VLCCs in the 22 November 2016 Letter appeared to be the figures offered by way of warranty rather than actual consumption data – as Mr Konialidis accepted.

iii) Mr Konialidis accepted that actual data was "not normally" provided, and that when companies in the Capital Maritime group entered into time charters as owner, they had not provided data "but only warranted consumption". In those circumstances, I think it unlikely that Mr Konialidis would have insisted on the provision of actual data from SK Shipping before it entered into the Charterparty, when this was neither normal market practice (as he understood it) nor Capital Maritime's own practice.

iv) If the provision of actual data had really been a commercial pre-requisite to Mr Konialidis' or CMTC's willingness to consider or conclude a charterparty, I would have expected the data – and in particular quite what it represented – to have been the subject of much closer enquiry by or on behalf of CMTC. However none of the obvious questions – for example as to what the Three Voyage Average Statement meant, and what the consumption of the "C INNOVATOR" and the Vessel were individually, considering that at one stage it was in prospect that CMTC would take one vessel on charter but not the other – were raised by Mr Konialidis. His own evidence was that he had spent very little time looking at the data:

> "To be perfectly honest I didn't spend too much time thinking about how they reached the data. It was presented to us as actual".

v) Finally, Mr Smith QC asked Mr Konialidis directly:

> "If in this case you had warranted consumption rather than actual data, you still would have been happy to enter the charters wouldn't you?

Mr Konialidis' answer was:

> "Most probably".

That answer was consistent with the evidence which I have summarised in the preceding sub-paragraphs, and I accept that it reflects what would have happened if SK Shipping had offered a warranty, but made no representation as to actual data. In his absence, there is no basis for supposing that Mr Marinakis' evidence would have been any different.

192. In re-examination (but which the Defendants submitted was "none the worse for that"), Mr Phillips QC understandably re-visited that answer in the following passage of evidence:

"Q. Now, you were asked by my learned friend what difference it would have made if these numbers were stated differently. I want you to make an assumption, please, for the purposes of my question. Can you assume that all the speeds are out by half a knot –

A. Yes.

Q. -- so that the consumption shown for 15 knots, 81.2, is actually the consumption for 14.5, and so on throughout the table, so that everything is out by one row. Do you understand the assumption that I'm asking you to make.

A. Yes. To the charterers' disadvantage?

Q. To the charterers' disadvantage. Now, if the numbers had been, as it were, shifted in that way, what exercise would you have conducted with regard to these data when you received them and before you sent an offer to Mr Rexer to be relayed on to SKS?

A. I would have run the estimates with the higher number.

Q. And if you'd known that of those higher numbers six of those figures were even higher, what exercise would you then have run?

A. Used a higher number. The highest highest.

Q. And what effect would that have had in whatever discussion you had with Mr Marinakis about entering into these charters, do you think?

A. I think it would have killed the deal from the outset".

193. However, that question assumed a counterfactual of the true position having been communicated, rather than the misrepresentation not having been made, and it is not clear what assumptions Mr Konialidis was making as to the warranted consumption in his answers.

194. The Defendants' case on inducement ultimately depended on the assertion that a representation as to the true position is necessarily "embedded" in any offer of a speed and consumption warranty, such that a counterfactual in which no representation is made as to the actual speed and consumption performance is necessarily one in which no speed and consumption warranty is offered. I have given my conclusions for rejecting that argument at [129-133] above. In any event, it would clearly have been possible for SK Shipping to state that it was offering speed and consumption warranties, but that it was not representing that those were consistent with the Vessel's recent consumption. While on the conclusions I have reached, that is not a relevant enquiry, I set out below my findings as to what would have happened on that hypothesis in case the matter should go further.

**The position if the Defendants had known the true position**

195. It is not altogether easy to test the alternative counterfactual of what would have happened if the Defendants had known the true position, not least because of the difficulty in determining what the true position actually was. Reconstructing the true position in relation to the matters which were the subject of the 3 Voyage Average Statement would have involved working out what an adjusted Table 2 would have looked like if made consistent with the average performance in particular speeds and conditions, and in good weather, of the "C INNOVATOR" and the Vessel over some reasonable combination of their last three voyages. Understandably no one attempted that exercise for the purposes of the trial, and I do not think SK Shipping would have

been able to do it contemporaneously in a manner consistent with the commercial urgency of the charter negotiations for both participants. One obvious benefit of what I have held to be the appropriate counterfactual enquiry – what would the Defendants have done if this misrepresentation had not been made – is that it avoids complicated hypothetical enquiries of this kind.

196. In my view, the best way to test what would have happened if the Defendants had been told the true position is to consider what would have happened if they would have been told that it was likely that the recent actual consumption of the Vessel was materially higher than the Table 2 data, even allowing for the 0.5 knot tolerance, but that SK Shipping was nonetheless willing to warrant the Table 2 data with a 0.5 knot tolerance. I do not accept that in these circumstances the Charterer would have decided not to charter the Vessel at all:

i) First, there were a number of aspects of the deal on offer for the Vessel which were particularly attractive to CMTC: the agreement to carry various costs related to war risks, piracy and security costs, the delivery of the Vessel in West Africa (sparing CMTC the usual 25 day re-positioning voyage from Singapore), the high rate of address commission and the ability to effect re-delivery anywhere in the world. These reflected what Mr Konialidis acknowledged was SK Shipping's "unusual" flexibility on the deal. The result was charter terms which the Defendants, in their quantum submissions, described as "as attractive as it was realistically possible for charter terms to be".

ii) Second, Mr Konialidis' reaction when learning of the apparent over-consumption on the "C SPIRIT" in early December is noteworthy. He informed Mr Rexer "Oh dear, we're going to have to hire a guy just for performance claims", and then checked the recap telex for the Vessel and the "C PROGRESS" to ensure that the speed and consumption warranty was there. There was no attempt to seek confirmation or clarification of the actual consumption. Indeed Mr Konialidis does not appear to have read the response to the "C SPIRIT" over-consumption query before the Charterparty was concluded, asking Mr Rexer whether there had been a reply on 13 December 2016, at which point Mr Rexer sent the response through again.

iii) Third, it is clear that CMTC was not averse to using the speed and consumption warranty as a mechanism to reduce the effective rate of hire. This was evident in its attempts to extend the definition of "good weather" to Beaufort 5, and remove the 0.5 knot tolerance. It was also clear from the evidence of Mr Konialidis, when he suggested that he had formed the view that SK Shipping had, at least to a degree, been imprudent and over-warranted the Vessel, but that that was a matter for SK Shipping and not Capital Maritime:

> "It won't affect the tradability. It's about profitability – and how SK – what risk SK are prepared to take with regards to their exposure to speed and consumption clams".

iv) Fourth, in March 2017, by which time significant over-consumption had been experienced and the Charterer had raised the issue of re-negotiating the hire

rate, the explanation offered for that request – "they feel they are financing Owner" – was addressed only to the time it would take to effect the deductions from hire, something which Mr Konialidis accepted was a relatively trifling financial consequence for the Charterer.

v) Fifth, the Charterer did not at trial adduce any evidence that the market rate for the Vessel if its actual consumption was known, but with the benefit of the warranties in fact offered, was any different from the Charterparty rate, and indeed was content for all damages claims and the calculation of any allowances following rescission to be conducted on the basis that there was no such difference.

vi) Finally, the person with the final say on the issue of "deal or no deal" was Mr Marinakis, who was not called to give evidence, for no satisfactory reason.

197. I accept, however, that if the Defendants had been made aware in the course of negotiations that it was likely that the recent actual consumption of the Vessel was materially higher than the Table 2 data, even allowing for the 0.5 knot tolerance, the Defendants would have sought to leverage that fact to improve the terms offered in what was a tough negotiation. I accept Mr Konialidis' evidence that the speed and consumption warranty would not have been regarded by the Defendants as a complete answer to the consequences of over-consumption, broadly for the reasons Mr Konialidis gave at paragraph 14 of his witness statement, although those points were much less significant for CMTC than Mr Konialidis suggested.

198. The parties' room for manoeuvre so far as the negotiation of the hire rates is concerned was relatively limited because SK Shipping was intent on receiving a daily hire rate which began with a 3 (i.e. $30,000 plus), and would have insisted on a time charter period of at least two years, given that the VLCCs were being chartered out in anticipation of a market downturn. I accept that there was some room for negotiation on the first issue. By contrast, if CMTC had stood its ground on the second issue, the deal would have failed, which is something which it would not have wanted.

199. In these circumstances, I think the most likely outcome of a negotiation between SK Shipping and CMTC arising out of the disclosure of the Vessel's likely under-performance against the warranted figures is that CMTC would have sought to reduce the headline hire rate, and the parties would have compromised on a rate of $30,000 a day. Given that:

i) ships do not sail every single day during the period of service under a time charterparty;

ii) even if the Vessel's consumption at the date of the 22 November 2016 Letter had been consistent with that represented, performance would have deteriorated over the first year of the Charterparty; and

iii) by contrast, the completion of the Vessel's drydocking and special survey half-way through the Charterparty would have been expected to improve the actual consumption during the second half of the Charterparty back to levels at or around the warranted figures;

I am satisfied that a reduction of $500 a day over the entire two-year period, together with the speed and consumption warranty, would have been regarded by CMTC as sufficient to justify going ahead with what it regarded as a favourable deal overall.

200. These findings address a hypothetical in which SK Shipping offered the same speed and consumption warranty as was in fact included in the Charterparty, but informed CMTC that it was likely that the recent actual consumption of the Vessel was materially higher than the Table 2 data, even allowing for the 0.5 knot tolerance. It can fairly be observed that that might be an unlikely hypothetical because, if those negotiating the Charterparty on SK Shipping's behalf had been aware of the level of the Vessel's actual performance, they might have offered a lower speed and consumption warranty. That illustrates the difficulties in adopting a counterfactual enquiry which involves considering anything other than what would have happened if the misrepresentation had not been made. There was no real evidence before me as to the alternative consumption warranty which might have been offered in these circumstances, or what CMTC's reaction to it would have been. Any attempt on my part to seek to reconstruct this entirely hypothetical bargain would have been a wholly speculative exercise uninformed by evidence or submission.

## Did the Charterer affirm the Charterparty?

### *The applicable legal principles*

201. Affirmation following a representation, like affirmation following a repudiatory breach of contract, is a species of waiver by election. In Kosmar Villa Holidays Plc v Trustees of Syndicate 1243 [2008] EWCA Civ 147, [38], Rix LJ noted:

> "Election is the exercise of a right to choose between inconsistent remedies. It generally requires knowledge of the facts giving rise to the choice on the part of the party electing, and knowledge of the choice having been made on the part of the other party."

202. So far as the question of knowledge is concerned:

i) It is clear that for a party to elect, it must be aware both of the facts giving rise to the inconsistent rights, and of the legal rights to which those facts give rise: Peyman v Lanjani [1985] Ch 457.

ii) There must be knowledge, not simply suspicion (Insurance Corporation of the Channel Islands Ltd v McHugh and Royal Hotel Ltd (No 1) [1997] LRLR 94, 129; Central Railway of Venezuela v Kisch (1867) LR 2 HL, 99, 112). It is suggested in *Treitel on the Law of Contract* (15th) para. 9-125 that "if the representee knows all the facts from which a reasonable person would deduce the truth, it may be taken to know it". While that might well provide the basis for drawing an inference of knowledge, however, it is clear in the present context that the means of discovering knowledge is not the same as knowledge.

iii) As Mance J noted in Insurance Corporation of the Channel Islands v the Royal Hotel Limited and others (No 2) [1998] Lloyd's Rep IR 151, 162, the issue of knowledge is "essentially a jury question". He rejected the argument that

knowledge of a fact was to be equated with having sufficient material to plead a fact, but observed:

> "At the other extreme, knowledge is not to be equated with absolute certainty, itself an ultimately elusive concept. The impossibility of doubt which Descartes found only in the maxim 'I think, therefore I exist' is not the criterion of legal knowledge. For practical purposes, knowledge pre-supposes the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning. The element of regression or circularity involved in this description indicates why knowledge is a jury question".

iv) The fact that the misrepresentor is denying any misrepresentation is a relevant, but not a decisive, consideration when considering the state of the misrepresentee's knowledge: Insurance Corporation of the Channel Islands v the Royal Hotel Limited and others (No 2), 171-172.

v) It has been noted that the need to prove that the misrepresentee had knowledge of the legal right to avoid is "difficult to justify in principle" but "mitigated … by a presumption that a party which had a legal adviser at the relevant time received appropriate advice" which "can only be rebutted by waiving privilege and proving otherwise": Involnert Management Inc v Aprilgrange Limited [2015] EWHC 2225 (Comm), [160], and Moore Large & Co Ltd v Hermes Credit & Guarantee plc [2003] Lloyd's Rep 315, [92-100].

203. So far as the question of communication is concerned:

i) Election may be communicated expressly or impliedly (for example by conduct), but the communication must unequivocally communicate the decision to exercise (or not to exercise) the right: Garside v Black Horse Ltd [2010] EWHC 190 (QB), [28].

ii) The test is objective: a party will be treated as having elected to affirm and thereby lost the right to rescind if it speaks or acts in a way which would reasonably be understood as consistent only with that party having made an informed choice to treat the contract as valid (whatever its subjective intention): Peyman v Lanjani, 488. While there are statements in some cases suggesting that the misrepresentor must subjectively understand that the other party is electing to affirm, the better view is that the test is objective (Insurance Corporation of the Channel Islands v Royal Hotel Ltd (No 2), 162 and Spriggs v Wessington Court School Ltd [2004] EWHC 1432 (QB), [22]) albeit the understanding of the misrepresentor may be of some assistance to the court in answering that question (e.g. Stocznia Gdanska v Latvian Shipping SA (No 2) [2002] EWCA Civ 889, [90]).

iii) An election can result from the communication of a choice to exercise one right as much as from the communication of a choice not to exercise the other. As Lord Diplock noted in Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850, 882-83:

> "If he has knowledge of the facts which give rise in law to these alternative rights *and acts in a manner which is consistent only with his having chosen to rely on one of them*, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did".

(emphasis added).

iv) Conduct may be sufficiently unequivocal to communicate the making of a choice as between inconsistent rights of one kind, but not another. In Kosmar Villa Holidays plc v Trustees of Syndicate 1243, [69], Rix LJ noted:

> "I am not dealing with the question whether an insurer's exercise of rights under his policy, for instance to conduct a claim in the name of the insured, is consistent with or pre-empts his right of election to avoid his policy, as for non-disclosure. Thus the exercise of a right under a policy to conduct an insured's defence might be unequivocally inconsistent with a right to avoid the policy, but only a merely equivocal alternative (to not conducting the defence) so far as concerns any alleged representation to the effect that the insured is accepting liability to indemnify the insured for a claim".

v) Because an election once made is final and irrevocable, the party making the election is entitled to a reasonable time to make a decision, the length of which will depend on the particular circumstances: McCormick v National Motor & Accident Ins Union (1934) 49 Ll L Rep 361, 365 (Scrutton LJ). This is so even if, during that period, the party with the right of election is exercising rights under the contract (in that case the liability insurer's right to conduct the insured's defence).

vi) Nor does mere lapse of time of itself amount to an election unless it is of such a length of time as to demonstrate an unequivocal decision to elect: Scandinavian Tanker Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) [1981] 2 Lloyd's Rep 425, 430.

vii) It has been suggested that an election is less likely to be spelled out from the misrepresentee performing its own obligations under a contract, than from the misrepresentee claiming and/or enjoying the benefit of the misrepresentor's performance: e.g. Coastal Estates Pty Ltd v Melevende [1965] VR 433 and K R Handley, *Estoppel by Conduct and Election*, 2nd edn (London: Sweet & Maxwell, 2016) para. 14-015. However, even where contractual rights are positively asserted, this may be less significant in those cases where rescission cannot be effected without the co-operation of the misrepresentor, such that the misrepresentee is, in effect, trapped in the contract (*Chitty on Contracts* 33rd para. 7-133 citing Kupchak v Dayson Holdings Ltd (1965) 53 D.L.R. (2d) 482).

viii) The exercise of a contractual right is less likely to constitute the communication of affirmation where the right is exercised for the purpose of acquiring information in relation to the subject-matter or consequences of the misrepresentation. The decision of the Privy Council in Senanayke v Cheng

> [1966] AC 63, on which Mr Phillips QC relied, was a case of this kind. In Involnert Management Inc v Aprilgrange Limited (which I discuss further below, when addressing the significance of a reservation of rights), Leggatt J held that exercise of such a right is capable of communicating an election to affirm a contract, if not performed under a reservation of rights ([171-178]), distinguishing in this respect the analysis of Colman J in Strive Shipping v Hellenic Mutual War Risks Association (The Grecia Express) [2002] Lloyd's Rep IR 669, [509-510] and following Iron Trades Mutual Insurance Co Ltd v Companhia de Seguros Imperio [1999] 1 Re LR 213. However, as discussed below, the nature and purpose of the right exercised may nonetheless be relevant in considering the efficacy of a reservation of rights.

204. Ordinarily, the effect of delay in communicating a decision on the misrepresentor or a third party will be relevant to the question of whether the misrepresentee is estopped from exercising the right, or whether rescission should be refused as a matter of discretion. However, it can also be relevant in determining whether there been an election. *Chitty on Contracts* (33rd) states at para.7-133:

> "Each case is decided on its own facts, and the courts pay particular attention to the nature of the contract, to any lapse of time which may have occurred, and to the question whether the representor has changed his position in reliance on the absence of a protest by the representee, or whether third parties have been affected by this."

The authority cited for that proposition is Clough v L & N W Ry (1871) LR 7 Ex 26, 34, where the court observed:

> "We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind."

It is not entirely clear to me whether, in this passage, the court is addressing affirmation or some other bars to rescission. Nonetheless, one can see that delay in exercising a right of rescission in a context in which the misrepresentor, and/or third parties, are acting in the meantime on the basis that the contract continues to subsist may well have a less equivocal quality than similar delay in a different context.

***Affirmation in the context of rescission and termination compared***

205. The legal doctrine in play when considering affirmation of a contract following a misrepresentation which has induced a contract, and affirmation of a contract following a repudiatory breach, is the same – the law relating to the election between inconsistent rights. However, the practical consequences of delay in exercising the right to rescind a contract may be very different from delay in exercising the right to terminate:

i) Delay in exercising a right to terminate a contract for repudiatory breach will, to a degree, have a self-correcting quality. Any termination will take effect only from the moment of eventual acceptance, with the contract remaining in

force up to that point. In addition, keeping the contract alive during the period of delay is not a "one way bet" for the innocent party. As Rix LJ noted in Stocznia Gdanska SA v Latvian Shipping Co (No 2), [87]:

> "As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing 'writ in water' until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract — such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract."

ii) A party who delays exercising a right to terminate for repudiatory breach may do so in order to allow a last opportunity for the other party to perform its contractual obligation and thereby "cure" the breach (Yukong Line v Rendsburg [1996] 2 Lloyd's 604, 608). If that opportunity is not taken and the breach continues, the innocent party will still be able to rely on the breaches which had occurred up to that point, when the court comes to assess the significance of the totality of the conduct of the party in breach (Moschi v Lep Air Services Ltd [1973] AC 331, 349).

iii) By contrast, absent affirmation, the passage of time while a party decides whether or not to exercise a right of rescind involves the parties continuing to act on the basis that the contract continues even though it may subsequently be set aside, and, for that reason, does not expose the party who delays rescinding the contract to any risk other than that of losing the right to do so.

iv) Nor are events occurring during the period of delay capable of curing the fact that the contract was induced by misrepresentation (albeit they might alleviate the consequences of the misrepresentation), nor is any conduct by the misrepresentor during the period of delay capable of being accumulated with the matters which gave rise to the right to rescind so as to enhance the latter right. Those matters are necessarily fixed when the contract is concluded.

206. For these reasons, while the legal principles applicable in determining whether a contract has been affirmed are the same in both situations, the practical application of those principles may differ, and, in particular, it should not be assumed that acts held not to constitute affirmation in the termination context would necessarily have the same effect in the rescission context. In particular, the considerations identified in [205] above may weigh more significantly in cases where the choice is between keeping the contract alive or setting it aside *ab initio.* For the same reason, the effect of an express reservation of rights may not necessarily be the same in both contexts.

***The effect of a reservation of rights***

207. A party who has a right of election may qualify its interactions or conduct with the other contracting party by stating that it is acting under a reservation of rights. There does not appear to have been any extensive consideration of the effects of such a communication, and the juridical basis of it, and it is possible to find differing approaches in the authorities.

208. It might be said that a reservation of rights deprives any communications or conduct on the part of the party with the right of the necessary quality of unequivocality to constitute an election. However, in the landlord and tenant field, there is a line of authority that otherwise affirmatory conduct by a landlord (accepting rent when there is a right of forfeiture of the lease) does not cease to be so simply because the rent is received under a reservation of rights. In Matthews v Smallwood [1910] 1 Ch 777, 786-7, for example, Parker J said

> "It is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.'"

209. The same approach was adopted in Central Estates (Belgravia) Ltd v Woolgar (No 2) [1972] 1 WLR 1048, 1053-1054. However, the rule may reflect particular features of the landlord and tenant relationship (Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd [2000] Ch 12, 30) and there are numerous decisions, many of them concerned with insurance contracts, which have held outside that context that steps which might otherwise amount to affirmation will not have this effect if taken under a reservation of rights. In addition to the cases concerned with the exercise of inspection rights (Involnert Management Inc v Aprilgrange Limited and Iron Trades Mutual Insurance Co Ltd v Companhia de Seguros Imperio discussed at [203(viii)] above), the same approach has been adopted when considering the effect of an insurer making a payment under a reservation of rights (Svenska Handelsbanken v Sun Alliance and London Insurance plc [1996] 1 Lloyd's Rep 519, 568-69 and Callaghan v Thompson [2000] 1 Lloyd's Rep 125, 133). It has also been noted that a reservation of rights can preserve the position when there is delay in exercising a right (Rix LJ noting in Kosmar Villa Holidays, [80] that "what a reservation of rights does is expressly to preserve a situation where otherwise it might be held that something unequivocal had occurred.") In this regard, English insurance law adopts a different approach to that adopted by New York law as set out in McNaught v Equitable Life Insurance 136 App Div 774, 777 (NY App Div, 1910), in which Carr J observed that "the legal effect of the payment [of premium] is determined by legal rules and not by one-sided declarations or understanding". Commenting on the two lines of English authority, O'Sullivan *et al*, *The Law of Rescission* (2nd, 2014) state at para. 23.88:

> "It is suggested that the principles applied to voidable insurances are to be preferred over those that regulate a landlord's right of re-entry following forfeiture, and that a party entitled to rescind should always be able to protect himself against the risk of unintentional affirmation by expressly reserving the right to rescind".

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, 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).

***The Defendants' knowledge***

212. It is clear that the Defendants were suspicious that the VLCCs' consumption had been mis-described from an early stage, having been alerted to a potential issue on 1/2 December 2016 when receiving noon reports for the "C INNOVATOR" ([67]), and that a close-eye was kept on the VLCCs' noon reports. Thereafter:

    i) When over-consumption was raised with the master of the "C SPIRIT" on 31 January 2017, the response received was "it seems that the data on the T/C description is different to actual consumption" ([72]).

    ii) On 7 February 2017, Capital Maritime provided an analysis showing over-consumption on the "C INNOVATOR" ([73]).

    iii) On 10 and 13 February 2017, the master of the Vessel made it clear that, given its actual consumption, the Vessel could not complete the intended voyage without stemming additional bunkers, even though this should have been possible on its warranted consumption, a communication which the Defendants correctly classified as a second instance when a master had admitted that a VLCC's actual consumption was higher than warranted ([73]). In their opening submissions, the Defendants described this event as "the icing on the cake".

    iv) By February 2017, the Defendants were aware that there was over-consumption on all four VLCCs "by a significant margin", and reports confirming over-consumption were received from Accuritas thereafter ([74]).

v) Over-consumption was raised at meetings in February and March 2017 (the Defendants saying at the latter meeting that "actual experienced consumptions [are] well in excess of the TCP descriptions"). I accept that SK Shipping did not admit that the consumption of the VLCCs had been misdescribed, but essentially prevaricated. However, I do not believe that the Defendants were taken in.

213. By 24 March 2017, the Defendants had clearly considered the position by reference to the data, and had drawn the conclusion that the consumption had been misrepresented. They set out their position in the email of that date quoted at [79] above. I am satisfied that at this stage the Defendants did not merely suspect, but adopting Mance J's terminology in McHugh (No 2), had a firm belief in the fact that the consumption had been misdescribed, and sufficient justification for that belief in terms of (a) the performance of all four VLCCs (which was itself highly suggestive of a mis-description rather than issues arising in performance); (b) the fact that Accuritas was confirming its own analysis and (c) the effective admissions by two of the masters. The Defendants' 24 March 2017 letter was sent "without prejudice" which, in the circumstances, I find bore the meaning "without prejudice to the Defendants' rights". However the Defendants were clearly entitled to a reasonable time to consider the position and to give SK Shipping an opportunity to respond before reaching any decision in relation to the exercise of their rights.

214. Accuritas continued to confirm significant over-consumption thereafter – for example on 9 April 2017 by all the VLCCs, but most pronounced on the Vessel, and by the Vessel on 20 May 2017. Thereafter, the incident with the Vessel's turbocharger and the issue of oil major approvals became the dominant topics in the parties' exchanges, but there was nothing forthcoming from SK Shipping which would have caused the Defendants to modify their belief in relation to the over-consumption position, or which could have led the Defendants to believe that there was any meaningful possibility of SK Shipping being able to rebut the mis-description claims. On 9 June 2017, in a letter which bears strong hallmarks of legal input, the Charterer referred to various complaints but not the mis-description issue, and reserved all its rights. On 14 June 2017, copies of the Accuritas reports were circulated within Capital Maritime, under an email which said that "speed & consumption … are misdescribed on all 4 Vlccs resulting to extraordinary over-consumptions". It is clear that Capital Maritime was reviewing the speed and consumption data at around this time, Mr Iliou asking for a "list of voyages with dates speed consumptions ever delivered to us" and "available consolidated noon reports", presumably as part of the decision to stop paying hire. The latest report for the Vessel arrived from Accuritas that day. By 16 June 2017, Reed Smith LLP were corresponding on the Charterer's behalf. There were numerous communications thereafter which did not specifically refer to the speed and consumption issue, but which did reserve the Charterer's rights.

215. It is fair to say that during this period, Mr Mavrelos was engaged in some work to investigate the cause of the over-consumption, and whether it resulted from a problem with the Vessel's engine, hull fouling or simply an inherent incapacity to consume at the warranted levels. Whatever the cause was, however, the Charterer knew that the actual consumption of the Vessel in November 2016 must have been significantly higher than the data presented to the Charterer before the Charterparty was concluded. It is noteworthy that the Defendants have felt able to advance a fraud case at trial

without suggesting that it depended on establishing the cause of the under-performance (and indeed without advancing a clear case as to what the cause of the over-consumption was).

216. By 13 July 2017, I find the position was as follows:

i) The Charterer believed, and was aware that it had a sufficient justification for believing, that the consumption of the VLCCs had been mis-described. In short, it had moved beyond suspicion to a state of knowledge.

ii) Applying the presumption referred to by Leggatt J in Involnert, I find that it was aware of its legal rights in relation to that misdescription (and was therefore aware both of the facts giving rise to the inconsistent rights, and of the legal rights to which those facts gave rise).

iii) It knew that the SK Shipping had failed to come back with any explanation for the over-consumption, despite ample opportunity to do so.

iv) It knew that SK Shipping was denying any misrepresentation, but this did not cause it to doubt the actual position. As Mr Ventouris states, "I would be surprised if SK in a message of this type came forward and said: we are guilty, yes, sorry. I find it very normal to start off by saying there's no underperformance, there's nothing to discuss".

v) It had reserved its rights generally.

While I accept that the Charterer, during and after this period, was seeking documents from the Owner, I find that this was not for the purpose of reaching a decision whether the Vessel's actual consumption had been mis-described or not, but to strengthen its case in relation to the mis-description it was convinced that SK Shipping had made.

217. The position in the preceding paragraph is confirmed by the contents of the email the Charterer sent SK Shipping on 20 July 2017. In an email clearly drafted with legal advice and copied to Reed Smith LLP, it accused SK Shipping and the Owner of having fraudulently misrepresented the speed and consumption of the Charterparty, as well as various breaches of the due diligence and oil major obligations, and stated that if these matters were not resolved within 7 days, the various charterparties would be rescinded and/or terminated. That allegation of deceit would not have been made lightly, and I find that there had been no material change in the Charterer's knowledge between 13 and 20 July. The Charterer's message of 30 July 2017 stated that "the Vessels' actual consumption is so substantially different from that represented and guaranteed that no further analysis is required to evidence the fact of misrepresentation", a statement which I find also represented the Charterer's state of mind as at 13 July 2020. Notwithstanding the Owner's denial on 26 July 2017, the Charterer repeated the allegations of rescission and an entitlement to rescind on 30 July, 1 August and 11 August 2017, and reserved the Charterer's rights.

218. I find Charterer's knowledge did not materially change thereafter. In particular, there is nothing to suggest that the decision to rescind on 19 October 2017 resulted from any analysis of technical or other information obtained by the Charterer after 13 July,

nor any revelation resulting from the performance on the voyage to Tanjung Pelepas (which it was known reflected the deterioration of the Vessel for a month at Antifer, as discussed between Mr Konialidis and Mr Rexer on 5 September 2017).

219. However, there were clearly negotiations with the Owner, including at a meeting in Greece on 24 August 2017, at which the speed and consumption issue was discussed, at which at least one of the proposals discussed (floated by Poten) was an increase in the warranted consumption and a reduction in the hire rate. Those negotiations did not result in a concluded agreement, and I heard no evidence about them although, as I explain below, Mr Phillips QC relied upon the fact of the negotiations in support of the argument that there had (objectively) been no unequivocal communication of a decision to keep the Charterparty alive.

***Did the Charterer unequivocally communicate an election to affirm the Charterparty?***

220. As noted above, this is an objective question. It is not suggested that there was an express communication of such an election, but rather that the Charterer acted in such a way as to be consistent in law only with an unequivocal decision to maintain the Charterparty rather than rescind it.

221. Looking at the position as at 13 July 2017, by that date, the Charterer had had ample time to consider what position to adopt in response to the misdescription of the Vessel's speed and consumption. With the knowledge it had, and the benefit of the time for reflection it had enjoyed, the Charterer fixed the Vessel on the Trafigura fixture for the voyage to Tanjung Pelepas, and ordered the Owner to perform that voyage. That involved committing the Vessel to a long fixture, re-positioning it from Europe to South East Asia, and a host of interactions with third parties and exposure to risk as it loaded, carried and discharged the cargo. It also involved the Owner being brought into contractual relations with third parties, through the issue of bills of lading, under which the Owner would be liable to those parties for cargo claims. Clause 13 of the Shelltime 4 obliged the master of the Vessel to sign bills as presented by the Charterer or its agent (which would include Trafigura), in return for a promise by the Charterer to indemnify the Owner against the consequences of signing the bills. There are various terms of the Charterparty which would affect the relationship of the owner and the bill of lading holder – including clauses regulating the terms of the bills which could be presented; entitling the Charterer to order discharge of the cargo without production of bills of lading against an indemnity; giving the Owner a lien over cargos for sums due under the Charterparty; and providing for certain exceptions to liability.

222. Putting the reservation of rights on one side for the moment, I have concluded that the Trafigura fixture, and the resultant voyage instructions given by the Charterer to the Owner under the Charterparty, were consistent only with the Charterer electing to maintain the Charterparty, rather than reserving the entitlement to set it aside *ab initio* for the misrepresentation about which the Charterer had complained two months' before:

    i) It involved the Charterer calling for significant and prolonged performance of the central obligation of the Owner under the Charterparty.

ii) It was performance sought not to provide the Charterer with additional information as to its rights but to make a profit from operating the Vessel.

iii) The Charterer's conduct necessarily impacted on both the Owner and third parties in the respects set out in paragraph [221], in a context in which any attempt subsequently to set aside the Charterparty *ab initio* (as opposed to terminating it *de futuro* without affecting accrued rights) would have given rise to a number of significant difficulties.

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. First, I would note that the reservations of rights were not set out in communications addressing the misrepresentation which the Charterers had first put forward on 24 March 2017, and, in context, appear to be more directed to issues of breach of contract. However, more significantly, 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*. I consider the implications of this finding, in the context of my conclusions on s2(2) of the Misrepresentation Act 1967 at [245] below.

224. The effect of my conclusions in [216-217] and [221-222] above is that the Charterer had knowledge of the right to rescind, and had demonstrated by its conduct an unequivocal choice to keep the contract alive. However, there is authority which suggests that while those matters are necessary to establish affirmation, they are not sufficient. In Insurance Company of the Channel Islands v Royal Hotel (No 2), 162, Mance J held as follows:

> "Is it sufficient for affirmation that there is knowledge and a communication (by words or conduct) which, assuming such knowledge, demonstrates an unequivocal choice? Or must the communication itself or the surrounding circumstances demonstrate such knowledge to the other party? In principle, it seems to me that the latter approach is correct in the context of affirmation. The communication itself or the circumstances must demonstrate objectively or unequivocally that the party affirming is making an informed choice."

225. That statement of the law was approved by Steel J in Callaghan v Thompson, 134-135. However, it is not without its difficulties. As the Honourable Ken Handley notes of those cases in which landlords have been held to have affirmed leases by accepting rent, "the landlord's acceptance of rent does not evidence his knowledge either of the facts entitling him to forfeit, or his rights, or his intention to elect" (*Estoppel by Conduct and Election* (2nd, 2014) para. 14-037 to 14-038). Further, as Rix LJ noted of this passage in Mance J's judgment in McHugh, "there will be some circumstances where, even in the absence of an actual election, the party with the choice created by relevant knowledge, actual or obviously available, will be regarded as having exercised it after a reasonable time", which he said was "part of the rationale of a doctrine which seeks to give a pragmatic response to parties in contractual relations who need to know where they stand" (Kosmar Villa Holidays, [74]). If this is true of delay, then it can be argued that it ought equally to be true where the affirmatory act in question is demanding a significant and inherently consequential act of contractual

performance from the other party, where the need for the parties "to know where they stand" applies with equal force.

226. In the end, I have not found it necessary to resolve this issue. In this case, it would have been apparent to a reasonable person in the position of the Owner that the Charterer believed that the Vessel's speed and consumption had been misrepresented (from the 24 March 2017 email), that it was in receipt of legal advice (from the various exchanges in June) and that included advice as to its entitlement to rescind (from the 20 July email). In those circumstances, the objective effect of the Charterer's decision to order the Vessel on the Tanjung Pelepas voyage, and thereafter to give sailing and discharge instructions for that voyage, was to communicate a decision on the Charterer's part to continue with the Charterparty, addressing the speed and consumption issue using such rights as it had under the Charterparty. In circumstances in which there was no apparent or suggested development between 13 and 20 July 2017, I do not think the position is changed merely because the initial voyage instruction preceded the 20 July letter with its reference to rescission. If a reasonable person in the position of the Owner had looked at all the circumstances as they prevailed at or around 20 July, it would have concluded that by sending the Vessel on that voyage, the Charterer had decided to stick with the Charterparty rather than set it aside *ab initio*.

227. If, I am wrong in my conclusion that it is the objective position which matters, and not the Owner's subjective understanding, then the issue is more complicated. The evidence of Mr Ray Kim was as follows:

> "A I rather felt that Capital was aware of the consumption issue, but it seems to me that they were trying to take advantage of this in order to reduce the hire … They were trying to use this as a negotiation method, maintaining the contract but reducing the hire.
>
> Q Nothing they said or did or wrote to you led you to believe that they were just going to go on with the charterparties, if the consumption figures for the vessels had been misrepresented to them at the outset?
>
> A From the documents what you are saying might be right, but as the person in charge who attended all of the meetings from both sides … I can say this on behalf of Capital and SK, and the atmosphere or what I felt was that they were maintain the contract and they were intending to maintain the contract but they were trying to use this as leverage to reduce the rate.
>
> Q Even if that were right, Mr Kim, nothing they said or did caused you to believe that they would just carry on with the contracts at the original hire rate if these vessels were overconsuming.
>
> A Yes, that's correct, and then they did terminate at the end and because we did not accept the reduction on the hire".

228. This evidence addressed the position from the 24 August 2017 meeting onwards, and the negotiations between the parties. The answer does not address the position when the Vessel was ordered on the Tanjung Pelepas voyage, nor does it distinguish between the issue of whether it was understood the Charterer was reserving a right to

avoid the Charterparty as from the start, or merely a right to terminate it going forward. The closest Mr Ray Kim came to addressing those questions was the following answer in re-examination:

> "Q … Take it from me, an allegation of misrepresentation was first made in March 2017. Now Capital, until they terminated the charter in October, what, if anything, did they do to indicate that they decided they were going to bring the charter to an end on account of that misrepresentation?
>
> A They did not make such indications in the beginning *because they were marketing – they were marketing it out as spot charter*".

(emphasis added).

229. On the basis of this evidence, I do not accept that it was Mr Ray Kim's subjective understanding that, when ordering the Vessel on the Tanjung Pelepas voyage, the Charterer was reserving a right to set the Charterparty aside from inception because of the misrepresentations alleged in the 24 March 2017 letter. On the contrary, I am satisfied that he subjectively understood the giving of voyage orders as inconsistent with bringing the charterparty to an end "on account of that misrepresentation".

230. So far as the position as at mid-September is concerned, there is a preliminary matter to address: the argument that the "without prejudice" negotiations between the Charterer and the Owner at and following the 23 August meeting, and the possibility of a resolution in that context of the issues arising in relation to speed and consumption, mean that any conduct of the Charterer could not reasonably have been understood as affirming the Charterparty while such negotiations continued. However, I know little to nothing about the content of the negotiations, what proposals were under discussion, which of the VLCCs they extended to and how far the negotiations were directed at an arrangement which differed significantly from the terms of the Charterparty. Against that background, I find the suggestion that the fact of "without prejudice" negotiations can be relied upon as a reason why there has been no unequivocal affirmation of a contract, albeit the same discussions could not be relied upon to establish an affirmation, unattractive. With very limited exceptions, "without prejudice" negotiations run on a parallel track to the parties' open dealings, with the significance and legal consequences of the latter falling to be assessed on their own terms. Were this not to be the case, such negotiations would be capable of prejudicing the parties' rights and obligations.

231. However, I do not need to reach a final conclusion on this question because I have concluded that, considered on their own, and if there had been no affirmation up to that point, the Charterer's conduct after the end of the Tanjung Pelepas voyage would not have amounted to affirmation:

> i) The consistent line which the Charterer took in its communications from September 2017 onwards was to call on the Owner to take steps to bring the Vessel's actual consumption up to its warranted consumption, by complying with what were said to be its maintenance obligations under the Charterparty, and to demonstrate that compliance to its reasonable satisfaction as it was contended the Charterparty required. That was the approach adopted in a series

of communications, including those on 5, 12, 15, 18 and 19 September and 17 October 2017.

ii) These communications were clearly aimed at addressing the consequences of the misrepresentation and to that extent, any commitment to the continuation of the Charterparty was inherently conditional, and could not have been understood as affirming the Charterparty notwithstanding the Charterer's misrepresentation claim if the Owners did not take these steps.

iii) The nature of the Charterer's conduct and communications in this period were of a kind which could take place under the protection of a reservation of rights. They were aimed at seeking redress for the Charterer's complaints, and did not have the far-reaching consequences of the voyage orders to which I have referred at [221-222] above.

## Remedies for misrepresentation

### *Rescission or damages in lieu?*

232. S2(2) of the Misrepresentation Act 1967 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".

233. My findings that there was no inducement ([191]) and that in any event, the Charterer affirmed the Charterparty ([226-228]) mean that the issue of whether the court should exercise its discretion to declare the contract subsisting, and award damages in lieu, does not arise for decision (the finding of affirmation on its own precluding the operation of s2(2): Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745). However, as the point was argued, and given the possibility that my earlier findings may be taken further given the matters in [194] and [223] above, I have decided I should consider the issue of whether, had I found that the Charterer was entitled to rescind the Charterparty, I would have exercised my discretion to declare the contact as subsisting.

234. Subject to one issue which I will address in a moment, this would have been a clear case for the exercise of the court's power to declare the contract as subsisting:

i) The misrepresentation, while not trivial, was not one which could be said to strike "to the root of the bargain" (in Mr Justice Mustill's language in Atlantic Lines & Navigation Inc v Hallam Ltd (The Lucy) [1983] 1 Lloyd's Rep 188, 202). In particular, the speed and consumption warranty in the Charterparty provided substantial, albeit as I have found not complete, protection to the Charterer with regard to the subject-matter of the misrepresentation.

ii) While the misrepresentation was made without reasonable grounds for believing in its truth, Mr Im and (in particular) Mr Ray Kim were doing their best in difficult circumstances.

iii) There was a substantial fall in the tanker charterparty market in the period between the date when the Charterparty was concluded and the date of the purported rescission. Mustill J's observations in The Lucy that "the damage to the [Owner] which would ensue from having [the Vessel] returned on a collapsing spot market would be great" is equally appliable here. It is no answer that the Owner earned the market spot rate from the date of re-delivery, because the effect would be to visit on the Owner the risk it had contracted to avoid, namely that of an adverse market movement from late 2016 onwards.

iv) The Charterer does not contend that it paid more under the Charterparty than the market value of what it received, and its claim for damages for misrepresentation claims no wider or different loss than that recoverable in contract under the Charterparty.

v) I have found that the impact of disclosing the true position on the contractual terms agreed would have been limited to a relatively small reduction in the hire rate.

vi) The Charterer has accepted, through its own calculation of damages for misrepresentation, that even if it had not entered into the Charterparty, it would have entered into a charterparty with another owner at or around the same rate, and been exposed to the same market fall.

235. The difficulty which does arise is that the Charterer purported to rescind the Charterparty in October 2017, and acted on that purported rescission by returning the Vessel then, so that, subject to the Charterer's own case of repudiatory breach which I addressed below, the effect of declaring the Charterparty subsisting will be that the Charterer was in repudiatory breach of it, and will be liable in damages accordingly. Is this a relevant consideration?

236. It is noteworthy that s2(2) does not expressly provide that the court is to consider the effect of declaring the contract subsisting on the party entitled to rescission when assessing damages, but the effect of the misrepresentation ("it") on the misrepresentee if the court declares the contract to be subsisting. There are indications in the Parliamentary history of the Misrepresentation Act 1967 that, at least at some points and in some quarters, damages under s2(2) were intended to be the monetary equivalent of rescission. There may be debate in a higher court as to how far, if at all, those materials can pass through the Pepper v Hart [1993] AC 593 gateway (albeit the experience of those who have trawled Hansard for guidance as to the meaning of the 1967 Act has not been a wholly happy one). It can also be said that damages "in lieu" of equitable remedies under the Chancery Amendment Act 1858 (Lord Cairns' Act and now s50 of the Senior Courts Act 1981), which were an analogy which the drafters of s2(2) drew on, were intended to be a "monetary substitute" for the equitable remedy in lieu of which they were awarded (Leeds Industrial Co-operative Society v Slack [1924] AC 851, 859).

237. However, I am satisfied that I should approach the issue on the basis that damages under s2(2) are not intended to constitute the monetary equivalent of rescission:

i) There is authority in the Court of Appeal, which although not binding is highly persuasive, and which ought in my view to be followed at first instance, that s2(2) is not concerned with awarding the monetary equivalent of rescission: William Sindall plc v Cambridgeshire CC [1994] 1 WLR 1016:

a) At pp1037-8 Hoffmann LJ stated:

> "The Law Reform Committee report makes it clear that section 2(2) was enacted because it was thought that it might be a hardship to the representor to be deprived of the whole benefit of the bargain on account of a minor misrepresentation. It could not possibly have intended the damages in lieu to be assessed on a principle which would invariably have the same effect."

Hoffmann LJ expressly rejected the analogy of Lord Cairns Act damages: p1037.

b) It is clear that Evans LJ shared the same view, from his conclusion at pp1044-1045 that damages under s2(2) should not include the consequences of the fall in value of the land sold in that case, even though the effect of rescission would have been that the claimant would have escaped that loss. As he noted:

> "The starting point for the application of the sub-section is the situation where a plaintiff has established a right to rescind the contract on grounds of innocent misrepresentation: its object is to ameliorate for the innocent misrepresentor the harsh consequences of rescission for a wholly innocent (meaning, non-negligent as well as non-fraudulent) misrepresentor, in a case where it is fairer to uphold the contract and award damages against him".

c) Russell LJ agreed with both judgments.

ii) There are also *obiter* at first instance which assume that it is relevant to the court's discretion to declare the contract subsisting that allowing rescission would visit the consequences of a subsequent fall in the market which occurred independently of the misrepresentation on the misrepresentor: The Lucy, p202.

iii) As noted above, s2(2) asks the court to consider the effect of rescission *on the misrepresentor*, but expressly addresses the issue of loss to the misrepresentee resulting from the refusal of rescission only by reference to loss caused by the misrepresentation, not that which will follow from the refusal of rescission.

iv) Approached purposively, the Court of Appeal's conclusion in William Sindall, seems (with respect) intrinsically right. As both Hoffmann LJ and Evans LJ noted, if the discretion exists because, in many cases, the remedy of rescission will have disproportionate consequences, it would seem wrong in principle for

damages in lieu to be assessed on a basis which seeks to replicate those disproportionate consequences of rescission in monetary terms.

v) On any view, it is difficult to spell out of s2(2) a suggestion that the court *cannot* take into account, when considering whether to declare a contract subsisting, that one party is relying on a relatively minor innocent misrepresentation to escape the consequences of a bad bargain, with rescission on this basis having a disproportionate effect on the misrepresentor. I am wary of the suggestion that merely because the drafters of the 1967 Act regarded Lord Cairns' Act as an analogy for a statutory power to award damages as an alternative to an equitable remedy, they intended the award of damages under s2(2) to be circumscribed by the principles for awarding damages under the 1858 Act, particularly when (i) the 1967 Act was removing bars to the remedy of rescission, thereby considerably expanding the circumstances in which the equitable remedy might be claimed; (ii) there is no express reference in s2(2) to the analogy of the 1858 Act in the way there is in s2(1) to common law liability for fraud and (iii) the language of s2(2) does not mirror that of the 1858 Act (which gives a power to award damages "in addition to or in substitution for such Injunction or specific Performance"), and itself identifies the three principal matters to which the court should have regard in awarding damages, which the 1858 Act does not.

238. What of the fact that here the Charterer has been conducting itself since 19 October 2017 on the basis that the Charterparty has been rescinded? S2(2) applies not only when the claimant seeks rescission from the court, but where it is alleged that the contact "has been rescinded" (i.e. a self-help rescission had been effected without the need for the court's assistance). Nonetheless, as Mustill J noted in The Lucy, p202, "there are some formidable difficulties in the practical application of this discretion to a case where the court is not asked to order rescission as a direct and immediate remedy, but is invited to validate a rescission which has already been effected as a measure of self-help". In that case, Mustill J made it clear that he would have exercised the power to declare the contract as subsisting, something made easier "because the performance of the contract did not cease at the moment of the purported rescission, but was kept in being [under] a 'without-prejudice agreement'".

239. The equivalent of the Misrepresentation Act 1967 in some other common law jurisdictions expressly addresses the issue of what is to happen in these circumstances. For example, s.7(5) of the (South Australia) Misrepresentation Act 1972 provides that "where a contract has been rescinded but is subsequently declared to be subsisting under section (3), the respective rights and liabilities of the contracting parties will be determined in all respects as if the contract had never been rescinded". There is no equivalent provision in the English Act but the position is less acute, because unlike the South Australian legislation, s2(2) of the 1967 Act does not apply to fraudulent misrepresentations.

240. There has been some debate as to whether any form of rescission is properly to be classified as a self-help remedy (the issue is discussed in Janet O'Sullivan, "Rescission as a self-help remedy: a critical analysis" (2000) 59 CLJ 509). However, it is clear that the categories of rescission which can be exercised by the act of the party alone, rather than requiring a party to seek discretionary relief from the court, are relatively limited. A party's right of rescission at common law is largely limited to

cases of fraud (specifically exempted from the operation of s2(2) of the 1967 Act), avoidance of insurance contracts (where, as a matter of policy, the discretion under s2(2) is extremely unlikely to be exercised: Highlands Insurance Co v Continental Insurance Co [1987] 1 Lloyd's Rep 109, 118) or similar cases of conscious wrongdoing such as bribery to which the 1967 Act does not apply. To the extent that the assistance of the court is required to effect rescission for fraudulent misrepresentation, that too falls outside s2(2). Outside these categories, a claim for rescission is a claim for a discretionary equitable remedy from the court. Although retrospective in its effect when granted, a party who requires the court's support before any rescission becomes effective acts at its peril if it irrevocably commits itself in anticipation of that exercise.

241. While this remains a hotly debated issue, it seems to me that the better view is that equitable rescission is effected by the order of the court, rather than the court confirming the efficacy of a prior rescission by one of the parties. This explains why the right to rescind may be lost by subsequent events, including delay on the claimant's part in seeking relief or the intervention of third party rights, and why the court looks at all the circumstances up to the date of judgment in deciding whether to grant rescission. It also explains why the court may make an order for rescission conditional on the rescinding party returning certain benefits obtained under the contract (with the transaction continuing to subsist unless and until those conditions are complied with). There is a vast body of case law on this issue, much of it inconsistent, discussed in O'Sullivan *et al*, *The Law of Rescission* paras. 11.56 to 11.108. Those authors conclude at para. 11.108:

> "Perhaps the best reconciliation of the authorities is that, where a transaction is not voidable at law, it is only in cases of fraud that an election to disaffirm leads to rescission in any sense. This conclusion fits most of the rival authorities, and is explicable as a matter of principle as an instance of equity assisting or following the common law".

242. This is also the view of the editors of *Snell's Equity* (34th) paras. 15-010 to 15-012, the editors concluding :

> "In equity, a contract or other transaction is only rescinded in accordance with the terms of a court order. The innocent party's equity to rescind is an entitlement to apply to the court for such an order. The contract remains in force until the order takes effect".

However, the contrary view is adopted in Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th) para. 4-19.

243. Whichever view is adopted – but *a fortiori* if the "order of the court" view is correct – in ceasing performance on 19 October 2017, the Charterer took the risk that the court would not in due course make an order for rescission, whether by reason of events which occurred between 19 October 2017 and trial, or because the court chose to exercise its discretion under s2(2) to declare the Charterparty subsisting.

244. Further, as I have set out at [237] above, one of the purposes of s2(2) is to prevent rescission from operating in a disproportionate manner. If the court's discretion to declare the contract subsisting in such a case could be ousted by the representee

ceasing to perform in anticipation of an order for rescission being made, or in such a case the court's award of damages had to visit on the representor the same disproportionate consequences which rescission would have given rise to, but in the form of damages, that purpose would be substantially undermined. There are some contexts in which fortune favours the brave, but any suggestion that in The Lucy the misrepresentee would have been in a different (and better) position if it had refused to continue performing the charterparty under a "without prejudice" agreement is an approach which would offer a considerable advantage to those prepared to disrupt, rather than preserve, the *status quo* pending a judicial determination.

245. This finding makes it necessary to give further consideration to my finding that sending the Vessel on the Tanjung Pelepas voyage under a reservation of rights involved a decision to affirm the Charterparty. It might be said that, in circumstances in which a charterer who purports to rescind a charterparty risks liability in damages if the court later declares the contract as subsisting, the charterer who believes it has a right to rescind should be permitted to utilise the vessel under the charterparty to avoid the risk of being found to have repudiated the charterparty if the court later decides to exercise its power under s2(2) of the 1967 Act. In particular, it might be suggested that there is little difference in substance between a charterer with a right to rescind a charterparty who continues utilising the vessel while reserving that right, and the position in The Lucy where the charterer purported to rescind the charterparty, but having done so, continued to operate the vessel under a "without prejudice" agreement pending a judicial determination as to its entitlement to rescind. I do not find the distinction altogether satisfactory, but in my view it is meaningful. In the former case, the charterer has purported to keep the original contract in being, asserted an entitlement to enjoy the benefit of the rights acquired thereunder and has not rescinded the charterparty. In the latter case, the charterer has exercised the right of rescission, but if its entitlement to do so is disputed by the owner, offers an interim arrangement which would involve a separate and subsequent agreement while the dispute is resolved.

246. For these reasons, when I am otherwise satisfied that it would be appropriate to declare the Charterparty subsisting, I would not have regarded the fact that the Charterer has conducted itself in anticipation of rescission being granted as a reason not to follow that course.

***The amount of any damages under s.2(2) of the Misrepresentation Act 1967***

247. The proper approach to the assessment of damages under s2(2) was considered by the Court of Appeal in William Sindall plc v Cambridgeshire CC, albeit on an *obiter* basis. In summary:

i) The damages awarded are not those necessary to put the claimant in the same position as if rescission had been granted: see [237] above.

ii) The court is concerned not with damage caused by entering into the contract (the province of s2(1)) but damage caused by the fact that the subject-matter of the contract was not what it was being represented to be. For that reason, compensation will not embrace the loss which the claimant suffers from having entered into a bargain which was "bad" for reasons operating

independently of the misrepresentation (Hoffmann LJ, p1037, Evans LJ p1045).

iii) Damages under s2(2) should "never exceed the sum which would have been awarded as damages for breach of contract if the representation had been a warranty", although there might be circumstances in which the damages would be less (Hoffmann LJ, p1038). Evans LJ at pp1045-1046 also supports the contractual measure, but without referring to it as a cap.

iv) The measure of damages may be "the cost of remedying the defect" or "the reduced market value attributable to the defect" ("the defect" being synonymous here for the misrepresented state of affairs): Evans LJ, p1044.

248. The decision in William Sindall has attracted critical commentary, for example in *Chitty on Contracts* (33rd) paras. 7-108 to 7-110. It is also criticised in *McGregor on Damages* (20th) paras. 49-074-49-080, where the reasoning is described as "dangerously faulty". The editors of *McGregor* give the following example at para 49-077:

> "Envisage a case where a buyer has made an excellent bargain, having bought for £50,000 an item of property which, if the representation had been true, would have been worth £75,000; in fact in its faulty condition it is worth only £40,000. Were the misrepresentation fraudulent or negligent then at common law or under s.2(1) respectively, utilising the tort measure and abjuring the contractual, recovery is of £10,000, namely price paid less value as is. Can it be that with an innocent misrepresentation, where the damages cannot surely be greater and are likely to be smaller, the buyer can claim the benefit of his bargain—the contractual measure banished from s.2(1) claims only after a struggle —and recover £35,000, namely value as represented less value as is?"

249. This particular difficulty can be avoided if the contractual measure is treated (in the way in which Hoffmann LJ appears to have treated it) as operating as a "cap" rather than an independent measure of damages in own right. The editors of *Chitty* suggest that this too is unsatisfactory (para. 7-110), albeit for reasons which are not clear.

250. In the present case, there is no reason to suppose that there is any difference between the contractual measure, and the conventional reliance measure of the difference between the value transferred and the value received. As to the latter, the Charterer accepted in closing that:

> "There is limited evidence as to the benefits received by the [Charterer], but it does not allege that it suffered a net loss in respect of the period prior to rescission".

251. The Charterer's pleaded case embraced three possible counterfactuals:

i) It would not have chartered the Vessel, but would have chartered an equivalent vessel at the same hire which would not have experienced the same consumption issues. On that basis the loss claimed was limited to:

a) The contractual under-performance in fact experienced on the Vessel or which would have been experienced during the remainder of the Charterparty (for which the Charterer had or would have had a claim under clause 24 of the Shelltime 4 form in any event); and

b) US$68,425 reflecting the liability incurred to Trafigura under the Tanjung Pelepas fixture due to the delay experienced at that port.

ii) It would have chartered the Vessel for one-year only, on which basis the damages claimed are as set out in i), but for the first year of the Charterparty only.

iii) It would have contracted at a different rate, on which basis the damages claimed are the difference in hire

252. In opening submissions, the Charterer submitted:

> "In theory, Charterers and [CMTC] have further claims for damages in the event that the Court were to find that they would still have entered into their contracts if the relevant representations had not been made. In that event, it would have been necessary to determinate what rate of hire and what charter period would have been agreed instead of those actually agreed, and to the extent to which their liability would thereby be reduced: see Defendants' Further Information ¶3 and 6. That is an unlikely hypothesis, however, because if no consumption data had been provided there would have been no charter at all, see Konialidis ¶47 … In practice, this issue can probably be ignored".

253. While, for understandable reasons, the Defendants sought to marginalise any case other than the "no transaction" case, they did not abandon any such case (and it featured in their closing). I have rejected the "no transaction" case on the evidence, and for the purposes of doing so, have had cause to consider and make findings as to what the position would have been had the warranties been offered but on a basis which expressly disclaimed any representation as to the Vessel's actual consumption on recent voyages. In these circumstances, I do not accept that the appropriate award of damages in lieu of rescission is zero (which s2(2) permits: UCB Corporate Services Ltd v Thomason [2005] 1 All E.R. (Comm) 601, [36-37]). My finding as to the effect of disclosure of the true position on the hire rate negotiated represents the best guide I have to the commercial significance of the matters misrepresented. An award of damages calculated on that basis is consistent with the views of O'Sullivan *et al*, *Rescission* para. 28.21:

> "Where absent the misrepresentation the claimant would still have entered the contract but at a different price or on different terms, the measure of damages under s2(2) should usually be the extent or value of this difference".

254. An award on that basis would not engage the various concerns which the discussion in William Sindall and the associated commentary have highlighted, such as protecting the Charterer from a bad bargain or later downturn in the market or awarding as damages compensation of a kind which could not have been obtained by way of relief ancillary to rescission (such as consequential damages) and there is no evidence that it would place the Charterer in a better position than if the representation had been true.

255. Accordingly, had I concluded that the Charterer was entitled to rescind the Charterparty, but decided to award damages in lieu of rescission, I would have awarded damages calculated by reference to the reduction in the hire payable by the Charterer of $500 per day.

256. A further issue which then arises is whether the Charterer can also recover loss under s2(2), in the form of the US$68,425 incurred by reason of the delay at Tanjung Pelepas. The issue of whether consequential losses are recoverable under s2(2) has been the subject of academic debate, with the rival views summarised at O'Sullivan, paras. 28-27 to 28-29. I accept that the amount of US$68,425 is not a liability which the Charterer was required to incur either as a term, or necessary consequence, of the Charterparty, and it would not, therefore, have been recoverable pursuant to an indemnity consequential on rescission. However, that alone does not appear to me to be a sufficient reason to hold that such losses cannot be compensated under s2(2), which created a new and *sui generis* statutory discretion. There is some (albeit slender) authority for the recovery of some additional losses under s 2(2) (Evans LJ in William Sindall,1044 and Cemp Properties (UK) v Dentsply Research & Development (No 2) [1991] 2 EGLR 197). In this case, the liability to Trafigura is directly connected with the subject-matter of the misrepresentation, and I have concluded that it would have been recoverable under s2(2).

257. Finally, the Charterer submitted that any claim for damages in lieu of rescission should extend to any liability it might be found to have to the Owner in respect of the period after the purported rescission. However, that is a loss suffered not by reason of the misrepresentation, but by reason of the court's decision to award damages in lieu, and was a risk which, as I have set out above, the Charterer assumed by ceasing performance in advance of obtaining an order for rescission. An award of such damages would not have been appropriate for the reasons set out at [243-244] above.

258. Further, I am satisfied that the Charterer would in any event have ceased performing the Charterparty, even if there had been no prospect of rescission in the offing, in reliance on the alleged repudiatory breach, which I address below. The Charterer had not paid any hire for the Vessel since May 2017. It had been exploring its options for terminating for breach of clause 61 of the Charterparty in June and July 2017, and was not exploring any fixtures for the Vessel in September and October 2017. The reality was that it had decided that it was going to bring the Charterparty to an early end come what may.

***Liability under s.2(1) of the Misrepresentation Act 1967***

259. The Charterer's claim under s2(1) Misrepresentation Act 1967 does not arise in view of my conclusion on inducement, but, once again, I have decided that it would be appropriate to set out my findings for the reasons given above.

260. S2(1) of the Misrepresentation Act 1967 provides:

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made

fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true".

261. The use of the drafting device that the representor will be "so liable" (viz "liable to damages") if the representor would have been liable "had the misrepresentation been made fraudulently" has been held to justify awarding the fraud measure of damages (Royscot Trust Ltd v Rogerson [1991] 2 QB 297). That decision has been questioned (e.g. Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB), [196-207]) and disapproved, on an *obiter* basis in Singapore (RBC Properties v Defu Furnitures [2014] SGCA 62, [80-85]), although a respectable argument for the application of the deceit measure can be made on the basis of the Act's legislative history. However, Royscot is binding on me, and in any event the issues it raises are not engaged in this case on the factual findings I have made (unless it were to be suggested that, absent Royscot, the Charterer would have been limited to damages reflecting the difference between the market value of the Vessel as represented and the hire rate – the case having been conducted before me on the basis that there was no such difference). I would note, however, that it is the rules relating to liability *for damages* for fraud, rather than those relating to rescission for fraudulent misrepresentation, which (on the reasoning in Royscot) are to be applied to claims for damages under s2(1). These include the requirement of "but for" causation: [117(vii)].

262. If I am wrong to conclude that the Charterer would have entered into the Charterparty on the same terms even if no misrepresentation had been made, then the loss which the Charterer has suffered would depend on the correct counter-factual. If the correct counter-factual is one in which the Owner had offered a speed and consumption warranty, but expressly corrected any implicit representation which (on this hypothesis) it is to be assumed was inherent in such an offer ([194] above), then the loss suffered is that resulting from the fact that, in those circumstances, the amount payable by the Charterer would have been $500 a day less (Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd [2001] QB 488): i.e. the same loss as I would have awarded under s2(2) of the Act, had it been engaged. Further, there can be no obstacle to recovering consequential loss under s2(1), which would include the $68,425 incurred due to the delay at Tanjung Pelepas. That amount would be recoverable whether the assessment of damages is approached on the negligence or fraud basis, being loss of a kind which was a foreseeable consequence of the Vessel's consumption being under-stated.

263. If the correct counter-factual is that for which the Charterer contended (i.e. one in which no speed and consumption warranty had been offered at all) then the Charterparty would not have been concluded on any terms. I have summarised the Charterer's case as to the loss it suffered, calculated on this basis at [251(i)] above. The deductions for over-consumption in the period before termination of the Charterparty are agreed. The position, had the Charterparty continued for another year, is considered below.

**The misrepresentation claim by CMTC**

264. CMTC has also advanced a misrepresentation claim in respect of its liability under the Guarantee. I can deal with the issues raised by that claim more briefly.

265. So far as question of misrepresentation is concerned, CMTC relies on exactly the same communications and context as the Charterer, and my conclusions in relation to the Charterer's misrepresentation case apply equally to CMTC.

266. So far as the issue of inducement is concerned, the provision of a guarantee by CMTC was inherent in the decision to charter given its desire to use an SPV as a chartering vehicle, and in those circumstances it would be artificial to distinguish between matters inducing the Guarantee, and those inducing the Charterparty. My conclusions on inducement necessarily apply equally to both. It follows:

    i) that I am satisfied that, if no misrepresentation had been made, the Guarantee would have been concluded on the same terms; and

    ii) if I am wrong in my conclusion that it would have been possible for SK Shipping to offer a speed and consumption warranty without thereby making a representation as to the Vessel's actual consumption at that time, then if SK Shipping had made it clear that the Vessel was likely to consume materially in excess of the warranted figure, this would have led to a reduction in the Charterparty hire rate to $30,000 and the Guarantee would have been provided for the Charterparty in that form.

267. So far as the issue of affirmation is concerned, in opening CMTC suggested that there was no pleaded case of affirmation of the Guarantee. However, the Reply did not accept that there had been any attempted rescission of the Guarantee, and if there had been, reserved the right to contend that there had been affirmation. It was clearly part of the Owner's case at trial that there had been such affirmation, and the Charterer did not suggest that the point was not open. I am satisfied the issue of affirmation was sufficiently canvassed, with both parties having a fair opportunity to advance their case.

268. I am satisfied that the knowledge of the Charterer and the knowledge of CMTC was the same so far as the misdescription of the Vessel was concerned. There was no evidence from the Defendants that the knowledge of those dealing with the Charterparty on behalf of the Charterer was not equally available to CMTC which had negotiated and guaranteed all four charters. CMTC argues that it cannot have been aware of any right to rescind the Guarantee, because it was "of the view from the outset that no guarantee was ever entered into at all". However I am unable to accept this argument:

    i) CMTC's pleaded case was that that the Charterparty only contained an agreement to provide a guarantee in the future, and that any agreement by Mr Marinakis to provide a guarantee was entered into without authority. That case was supported by evidence from Mr Ventouris.

    ii) That case was thoroughly uncommercial and unrealistic. As to the first issue, it would have the effect that the Owner had agreed to accept an SPV as the Charterer only if its obligations were guaranteed by CMTC, yet concluded and commenced performance of the Charterparty without any such agreement having been concluded, and without any efforts for most of 2017 to agree a guarantee. As the Court of Appeal noted in Golden Ocean Group Ltd v

Salgaocar Mining Industries Pvt Ltd (The Golden Ocean) [2012] 1 WLR 3674, [30] of a similar argument:

> "But the guarantee was an integral part of the charterparty and was contained within its terms as summarised in the recap. It is not sensible to contemplate that the charterparty should become binding on the parties thereto in the absence of a guarantee enforceable by the owners against the guarantor. No-one would suggest that the charterparty did not here become binding when the details of the MOA were finally agreed… To hold that the owners and charterers were not bound until the execution of a formal charterparty would frustrate their expectations. The proposed guarantor could if it so wished stipulate that it was not to be bound until execution of a formal document, whether charterparty or separate letter, but it did not do so here. Had it done so the owners would have had the opportunity of stipulating that they too were not to be bound until execution of a formal document, either incorporating the guarantee or concluded only after its separate issue."

iii) The argument that the beneficial owner of CMTC, who had negotiated the charterparties on its behalf on the basis that CMTC had the right to nominate the charterer, had authority to give that commitment but not to give the guarantee required as a condition of the right to nominate, was equally hopeless.

iv) The obvious unreality of those submissions was recognised by the Defendants in abandoning these arguments in opening, but they had been supported by the evidence of Mr Ventouris. In circumstances in which the Defendants did not feel able to rely on that evidence to advance those arguments, I am unable to place any reliance on Mr Ventouris' evidence that CMTC never understood that a guarantee had been given. It is instructive in this context to consider Mr Ventouris' response to an email from Poten on 30 November 2017 asking for "confirmation for guarantors to countersign the charterparties". It was not that CMTC did not know what guarantees were being talked about because "no guarantee was ever entered into at all" but rather:

> "Noted and will discuss and get back to you. Know from legal that they are against doing this but let me try to get to the bottom of this and see if it is 'legal inflexibility' or something of essence".

v) On the contrary, I am satisfied that CMTC knew and understood at all times that it had given the Guarantee, and it understood that the misrepresentation claims relating to the Charterparty applied equally to the Guarantee. However, as I explain below, CMTC became aware in the course of 2017 of a potential argument that the Guarantee was unenforceable under the Statute of Frauds.

269. As to the communication of an election:

i) In circumstances in which the Charterparty was concluded with a company to be nominated and guaranteed by CMTC, it would in my view 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

contrary argument – by which, with nothing being said by CMTC, the Charterparty continued, but without the benefit of CMTC's guarantee - would be wholly uncommercial.

ii) In these circumstances, I am satisfied that the communications from the "Capital side" in relation to the Charterparty are properly to be interpreted as extending to the Guarantee, absent some clear statement from the "Capital side" that this was not the case (of which there was none).

iii) Assuming it was open to CMTC to rescind the Guarantee in circumstances in which the Charterer had not rescinded the Charterparty (a proposition about which I have considerable doubts on the facts of this case), in circumstances in which (as I have found), the Charterer elected to continue the Charterparty notwithstanding its knowledge that the consumption of the Vessel had been misrepresented, with liabilities being incurred and hire accruing, CMTC's failure to exercise any right it may have had to avoid the Guarantee was itself an election to maintain the Guarantee. I would note that, unless the reservations of rights by the Charterer are to be taken as extending to CMTC (which would simply reinforce the point made in the previous sub-paragraph), there was no attempt by CMTC to avoid the Guarantee or reserve its rights until rescission was claimed in the Defence served on 25 January 2019. It may well be that, at least for part of this period, the failure to reserve rights was intended to avoid communications which might satisfy s4 of the Statute of Frauds 1677, although the period from November 2017 onwards contains communications by CMTC without signature.

270. So far as the issue of relief under s2(2) is concerned, I am once again satisfied that if CMTC had had a right to claim rescission at trial, it would have been appropriate to exercise my discretion to declare the Guarantee subsisting:

i) The misrepresentation related only to the rights and liabilities under the principal contract, rather than the Guarantee itself, and its consequences, so far as CMTC was concerned, would have been adequately addressed by the relief granted in respect of the misrepresentations inducing the Charterparty.

ii) In these circumstances, rescinding the Guarantee would have had wholly disproportionate consequences. It would have the effect that none of the Charterer's liabilities would be guaranteed, even if (as I have concluded) it would have been appropriate to declare the Charterparty subsisting, and nor would those liabilities which the Charterer would have had even if the Charterparty had been rescinded (including, for example, those arising from the Charterer's use of the Vessel without payment in the period from June 2017 onwards and any indemnity obligations arising from the trading of the Vessel in the period up to 19 October 2017).

iii) The damages award under s2(2) to the Charterer would have sufficiently protected CMTC's position in relation to the consequences of the misrepresentation, such that no further award of compensation would have been required (because the effect of that damages award would be to reduce the amount recoverable under the Guarantee by the same amount).

iv) In these circumstances, the appropriate amount of any s2(2) award would have been zero.

271. So far as the claim under s2(1) is concerned, any award of damages to the Charterer, which would have the effect of reducing its net liability to the Owner, would necessarily extinguish any loss suffered by the Guarantor in entering into the Guarantee such that no further award of damages would have been appropriate.

272. The result is that CMTC is in no better, or different, position under the Guarantee than the Charterer under the Charterparty. In circumstances in which this was, in effect, a single transaction involving two companies in the same group on the chartering side, an SPV as the charterer, and another company as guarantor of the liabilities of its SPV, any other outcome would have been extremely surprising.

## DID THE OWNER REPUDIATE THE CHARTERPARTY?

### The Charterer's case in summary

273. The Charterer says that it was entitled to terminate the Charterparty in view of:

i) breaches of obligations as to the condition of the Vessel on delivery;

ii) breaches of the duty to maintain the Vessel in the condition required pursuant to clause 3(a) of the Charterparty (and in particular, the alleged breach in relation to hull fouling, the turbocharger incident and other failings in maintaining the engine);

iii) the persistent breach of the consumption warranty in clause 24 of the Charterparty;

iv) breaches of clauses 1(l), 2(b), 12 and 23 in failing to co-operate with Mr Mavrelos' inspection of the Vessel following the turbocharger breakdown; and

v) the Owner's service of unjustified demands for payment of hire and refusal to acknowledge or comply with the Charterer's rights under clauses 3(b) and 9(iii) of the Charterparty in relation to deductions from hire and off hire periods.

### The relevant contractual provisions

274. Clause 1(c) of the Charterparty provides that on delivery:

"(c) she shall be tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment (including but not limited to hull stress calculator, radar, computers and computer systems) in a good and efficient state".

275. Clause 1(c) imposes an absolute obligation, but one which is an innominate term (*Time Charters* paras. 3.19 and 37.5).

276. Clause 3(a) provides:

> "Throughout the charter service Owners shall, whenever any event (whether or not coming within Clause 27 hereof) requires steps to be taken to maintain or restore the conditions stipulated in Clauses 1 and 2(a), exercise due diligence so to maintain or restore the vessel".

Clause 3(a) imposes an obligation of due diligence in respect of defects arising *after delivery* (*Time Charters* para. 37.24; International Fina Services AG v Katrina Shipping Ltd (The Fina Samco) [1994] 1 Lloyd's Rep 153, 158 and Poseidon Schiffaht GmbH v Nomadic Navigation Ltd (The Trade Nomad) [1998] 1 Lloyd's Rep 57; [1999] 1 Lloyd's Rep 723). The issue is what could reasonably have been expected of a reasonably prudent ship owner (Bocimar v Anders Wilhelmsen (The Ensor, Permeke and Versalius), unreported, 30 March 1993 (Tuckey J)). Once again it is an innominate term (*Time Charters* paras. 11.12 *et seq*).

## The condition of the Vessel on delivery

277. The Charterer makes a number of complaints about the condition of the Vessel on delivery.

### *The condition of class*

278. The Vessel was initially to be delivered in West Africa between 13 and 23 January 2017. However, a fault in one of the Vessel's emergency generators led its classification society (DNV) to impose a condition of class. This led to the Vessel's rejection for two fixtures out of West Africa, the first by Total and the second by Chevron. The Charterer threatened to cancel the Charterparty. The Owner maintained that the generator could be fixed at Cape Town, and after some negotiation it was eventually agreed that the Vessel would be delivered "'as is/where is' sailing in the direction of the Caribbean or EC Mexico (3,513 nautical miles) from departing Cape Town". On 27 January, the Charterer narrowed the laycan to 9 February 2017. However, on 31 January, it emerged that the condition of class had not in fact been removed in Cape Town. It is the Owner's case that the Vessel could be delivered with the condition of class in place, and that the Vessel was delivered on 9 February 2017, on route to José Terminal. The Defendants say that the Vessel was not in fact delivered until 16 February, when the condition of class was removed at José Terminal. This dispute not only impacts the question of whether there was a breach of clause 1 on delivery, but also when the Charterer became obliged to pay hire.

279. The Charterer's pleaded case is that, on the proper construction of clause 1(a), the Vessel cannot be delivered when subject to a condition of class. I do not accept this argument. Clause 1 of Charterparty required that, on delivery, the Vessel was to be "classed by a Classification Society". In contrast to certain ship sale forms, (clause 11 of Saleform 2012 for example), it does not expressly address the position where class is maintained, but subject to a condition that a particular issue is addressed to the classification society's satisfaction within a specified period. I have concluded that clause 1(a) is not to be read as requiring the vessel not merely to be classed, but to be classed unconditionally. It should be noted that the effect of the other sub-clauses of clause 1 is to create delivery conditions that the vessel is "in every way fit to carry crude petroleum and/or its products" and "tight, staunch, strong, in good order and condition and in every way fit for the service". If the subject-matter of the condition

of class does not preclude compliance with the other elements of clause 1, its impact on the charterer is likely to be limited.

280. The Charterer's case advanced in opening and closing submissions was that the condition of class placed the Owner in breach of the Charterparty because the Vessel could not have been fixed with an oil major until it was rectified. I accept that this was the effect of this condition of class, and, accordingly, it had the effect that the Vessel was not "in every way fit to carry crude petroleum and/or its products" and "in every way fit for service" for so long as it continued. I also accept that it led to a breach of clause 61 of the Charterparty.

281. However, I have concluded that the agreement between the Owner and the Charterer when the issue of the condition of class arose was one which required the condition to be removed before the Vessel could be delivered, the Charterer assuming, on the basis of the Owner's clear assurances, that this would happen at Cape Town. The Owner informed the Charterer that the repair would be effected and condition of class removed at Cape Town in an email of 13 January 2017, and it was on that basis that the Owner and Charterer agreed on 27 January that the Vessel would come on-hire 3,513 nautical miles "'as is/where is' sailing in the direction of the Caribbean or EC Mexico (3,513 nautical miles) from departing Cape Town". It was only on 31 January 2017 that the Owner told the Charterer that it had not been possible to effect the repair at Cape Town.

282. I therefore accept that the Charterer's submission that it was not required to pay hire until 16 February 2017, but reject its argument that there was a breach of clause 1 on delivery, because the condition of class had been removed before delivery took place. The agreement between the Owner and the Charterer to deal with the consequences of the condition of class fully resolved that dispute as between the parties. Its effect was to allow the Charterer to lock in a longer fixture, which proved more profitable overall than the Total or Chevron fixtures, something which Mr Konialidis confirmed was only possible because "we negotiated with SK the delivery in the Caribbean".

***Other complaints as to the Vessel's condition on delivery***

283. There are various other complaints as to the Vessel's condition on delivery with which I can deal more briefly:

    i) It is said that the Vessel had a fouled hull and propeller. I accept that the Vessel had a fouled hull and propeller on delivery – and, as I explain below, that was the principal cause of the over-consumption. As the Vessel was 10 months off her special survey, and the work in October 2015 had not involved a complete recoating of the hull, that is not particularly surprising. While I would not accept that any degree of bottom fouling is sufficient to give rise to a breach of clause 1(c), the fouling here was sufficient to constitute the principal cause of the over-consumption against the warranted figures, and was, therefore, a breach of clause 1(c). In this case, the consequence of the hull fouling was the over-consumption against the warranted figure, and I will consider it further in that context.

    ii) It is said that there were "likely" deficiencies in the Vessel's main engine and machinery. I do not accept that this breach is made out on the evidence. Mr

Salt relied on matters observed during the Vessel's drydock between 22 December 2017 and 6 January 2018 (i.e. some time after delivery), and even then was unable to say more than that they "may have affected main engine performance". Mr Masters' evidence, which I accept, was that these "were all minor … and would have had minimal effect on the Vessel's performance".

iii) It is said that the Vessel had a poorly maintained and damaged turbocharger. This allegation is advanced largely by reference to the failure of the turbocharger on 5 June 2017. I deal with this allegation of failure to maintain below, but there is no evidence of the turbocharger being defective on delivery. I would note that Mr Salt's criticisms of the maintenance of the turbocharger largely centred on the failure to carry out an overhaul before 30,000 running hours had passed, rather than a defect on delivery.

## Failure to maintain the Vessel

### *Hull cleaning*

284. The Charterer alleges that the Owner did not exercise due diligence to maintain the hull or to restore it to a proper condition so as to allow the Vessel to meet the speed and consumption warranties. In particular, it alleges that no steps were taken to do anything about the hull until September 2017, and that the steps then taken were inadequate.

285. I find that the Owner failed to exercise due diligence so far as cleaning the hull and polishing the propeller are concerned in the period up to the Vessel's arrival in Singapore. It was accepted by Mr Masters that that where a vessel is overconsuming (as this one was) and it is likely to be due to hull fouling, a prudent owner would arrange for hull cleaning as soon as possible, and certainly before the Vessel's hull was actually cleaned in Singapore in September 2017. The Charterer points to a number of locations when this might have been done, including Cape Town prior to delivery, José Terminal prior to the first voyage, Yingkou at the end of the first voyage, Ras Tanura prior to the second voyage, or in Northern France. The Owner's answer is that it did not consider that the hull needed cleaning before the long stay at Antifer, and that it was not possible to clean the hull there. In particular, the Owner alleges that it conducted an underwater investigation in Venezuela and concluded that no cleaning was required. However, it was clearly acknowledged within SK Shipping by the time the Vessel was delivered that the Vessel was over-consuming, and they ought to have realised that fouling was a likely cause. The photographs of the hull at Venezuela are at best inconclusive as to its condition. In particular, I find that some attempt ought to have been made to clean the hull by the time the Vessel reached Antifer, even if it was necessary to move the Vessel to a nearby port to do so. The Owner adduced no sufficient evidence to support the argument that this would not have been possible. Leaving the matter until mid-August – when the Owner informed the Charterer of the intention to clean the hull at Singapore – was too late.

286. However, I find that the cleaning of the Vessel at Singapore was a sufficiently diligent response at that time (albeit overdue). It was Mr Masters' evidence that the Singapore cleaning was "effective", and Mr Salt accepted that the marine growth had been effectively removed, although the anti-fouling coating had been scrubbed off in places. The efficacy of the clean is supported by the Vessel's consumption after the

cleaning and before drydocking, which according to the table in Mr Salt's report was within the warranted figures on the ballast voyage, and only just outside on the laden voyage allowing for the 0.5 knot margin. The Charterer has challenged the efficacy of the Singapore work, pointing to further cleaning performed on 21 October 2017, after termination. However, the dispute between the Owner and the Charterer had left the Vessel idle for a long period, and some new hull fouling was inevitable. The report of 21 October records either no signs of fouling, or "new growth" and "light slime" easily brushed off, and describes the hull paint work as "in generally good condition".

287. I do not accept the Charterer's case that due diligence required the Owner to dry dock the Vessel in September 2017, rather than to organise under-water cleaning as was done. The experts agreed that the paint coating applied when the Vessel was last in dry dock in October 2015 was a 30 month system, and the Vessel's special survey (which would include dry-docking the Vessel) was due by the end of the year. The Owner wanted to perform one further voyage after Singapore before dry-docking the Vessel. I have concluded that a diligent owner would have performed one last voyage before dry-docking the Vessel. While Jotun had envisaged an October 2017 dry-dock when applying the paint in October 2015, I do not accept that the statement to this effect in its report was intended to signal a need to drydock the Vessel before the special survey due by the end of 2017.

***Investigation of the over-consumption***

288. I also accept the Charterer's case that the Owner did not do enough to investigate the cause of the over-consumption. While Mr H Y Son suggested that there had been an investigation of engine performance data, no documents have been produced relating to any such investigation, and I find that it is unlikely to have been more than superficial. No witness was called from the Tanker Operations Team (who are said to have been responsible for this work) to explain any analysis done. However, the evidence does not suggest that over-consumption was the result of some fault in the Vessel's engines, which required only minor repairs during the special survey (see [282(ii)] above).

***Failure to maintain the turbocharger***

289. The Charterer also alleges that the Owner failed to exercise due diligence in maintaining the turbochargers, which it is said caused the turbocharger breakdown on 5 June. The Charterer's case relied principally on the fact that the manufacturer of the turbo chargers, MAN Turbo, recommended overhauling after 24,000 to 30,000 running hours, whereas the running hours at the date of the breakdown were 30,019, without any such overhaul having taken place. Documents from disclosure show that MAN Prime Serve, a Korean company which services MAN turbo-chargers and had entered into a service contract with SK Shipping, planned to overhaul the turbocharger after 32,000 running hours. I accept that the Owner's approach to maintenance involved pushing the edge of the envelope. On the basis of the expert evidence, I accept that a prudent owner would have undertaken the overhaul within 30,000 running hours, and that there was a breach of the due diligence obligation in not doing so. I am satisfied that the Owner did intend to conduct the overhaul within 32,000 running hours. The breach was, therefore, of relatively limited scope.

290. However, I am not satisfied that any failure to overhaul the turbocharger was the cause in law of the breakdown on 5 June 2017. MAN inspected and overhauled the turbocharger and carried out a full investigation into the causes of its failure. It reported on the results of that investigation on 5 February 2018. MAN concluded that the "wrong turbine blade material contrary to MAN specification was used by STX 1 for this turbocharger/ MAN is convinced that this damage would have been prevented by using the correct turbine blade material". Unlike the expert witnesses who had to work from documents and photographs, MAN inspected the turbocharger itself. MAN's conclusions were supported by Mr Masters, whose evidence on this issue I prefer given its consistency with the contemporary assessment. Nor am I satisfied that the fact that – by 5 June – the running hours of turbocharger no. 1 were 19 hours over the manufacturer's recommended overhaul interval had any role to play in the turbocharger failure.

**Breach of the consumption warranty**

291. The consumption warranty is an innominate term (*Time Charters* para. 3.77) for which the Charterparty provided its own (non-exclusive) remedy. I accept that there will be some cases where the consequences of the breach of a speed and consumption warranty are so serious as to give rise to a right to terminate the charterparty. The editors of *Time Charters* give the example of a charter "where speed is obviously an essential attribute for the service contemplated by the parties as, for example, where the ship is being chartered expressly to perform a particular service".

292. In this case, the level of over-consumption was significant, but the consequences were largely addressed by the right to effect deductions from hire under clause 24, and, with one exception, they did not prevent or impair the performance of the service required and contemplated under the Charterparty. That exception was the Tanjung Pelepas voyage, in which the Vessel's arrival at berth was delayed due to the need to stem bunkers in Singapore. However:

    i) I accept the Owner's case, which was supported by the experts, that the over-consumption on that voyage is likely to have been significantly exacerbated by the lengthy period when the Vessel was idle at Antifer, while repairs were performed on the turbocharger. This was effectively acknowledged in an instant messenger exchange between Mr Konialidis and Mr Poten.

    ii) In the event, the consequences of the over-consumption on that voyage were far less serious than at first feared, leading to some $68,425 of demurrage.

293. Further, I have found that effective cleaning of the Vessel took place in Singapore in September 2017 (see [286]), and it is clear that the Vessel was to be dry-docked, with a full hull recoating and engine overhaul, after one more voyage. I accept that that is likely to have brought the Vessel back to the level of performance in Table 2 (which reflected performance one year after delivery) once the benefit of the 0.5 knot allowance is brought into account, and therefore within the warranted performance.

**Alleged breaches of clauses 1(l), 2(b), 12 and 23**

294. There are a number of complaints relating to Mr Mavrelos' inspection of the Vessel after the turbocharger failure. I have set out my findings on this issue at [91-92]

above. In short, the master of the Vessel was initially over-restrictive in the physical and documentary access he was willing to offer, and Mr Mavrelos over-extensive as to the access he demanded. Most of the issues were resolved after the exchange of legal correspondence, and I find that there had been substantial, albeit not complete, compliance by the time Mr Mavrelos left the Vessel.

295. It is also alleged that there were breaches of the customary assistance obligation in clause 2(b) due to delays in providing Q88 forms. I accept that this was an initial source of irritation for the Charterer, however matters improved, and no evidence was adduced of any fixtures lost as a result of any delays. This is equally true of the failure to provide notification of the rejection of the Vessel by oil majors under clause 3(d) of the Charterparty. In any event, on the evidence I find that the Charterer soon became aware of any such rejections from its own sources.

296. These relatively minor complaints, canvassed in only the briefest of terms at trial, are of no real assistance to the Charterer's case that it was entitled to terminate the Charterparty for repudiatory breach.

**Alleged renunciatory conduct**

297. It is alleged that the Owner "refused to acknowledge Charterers' rights in relation to hire, and instead threatened to terminate the charter or suspend the service unless hire was paid", and in particular, refused to acknowledge the Charterer's right to make deductions from hire in respect of the Vessel's underperformance, and that no further hire was payable in respect of the period after 13 September 2017.

298. Clause 9(iii) of the Charterparty gave the Charterer the right to deduct from hire:

> "any amounts due or reasonably estimated to become due to Charterers under Clause 3 (c) or 24 hereof, Charterers shall not deduct any monies from hire/earnings without Owners' written confirmation and shall remit all hires/monies earned as per Owners' invoice/hire statements without any deduction of bank transfer etc. expenses,
>
> any such adjustments to be made at the due date for the next monthly payment after the facts have been ascertained in concert with Owners".

299. I accept that the reference to clause 3(c) is a typographical error, and that clause 9(iii) is to be read as referring to clause 3(b), which allows the Charterer to reduce hire "to the extent necessary to indemnify [the Charterer] for any failure to comply with breaches of clause 1, 2(a) or 10". In respect of the period for which I have found hire to be payable, this would (subject to the terms of clause 9(iii)) have allowed the Charterer to make deductions from hire to indemnify it against the consequences of hull fouling under clause 1, namely any loss due to over-consumption of bunkers which had been suffered at the date the hire fell to be paid. I have concluded that where there is a breach of clause 1, there is an immediate right of deduction in respect of over-consumed bunkers, in addition to the right under clause 9(iii) to deduct amounts calculated under the clause 24 regime (which required a calculation at 6-month intervals). This made clear by the closing sentence of clause 3(b):

> "Any reduction of hire under this sub-Clause (b) shall be without prejudice to any other remedy available to Charterers, but where such reduction of hire is in respect of time lost, such time shall be excluded from any calculation under Clause 24."

300. In this case, clause 9(iii) was amended to provide "Charterers shall not deduct any monies from hire/earnings without Owners' written confirmation". I accept the Charterer's argument that this created a contractual discretion which had to be exercised by the Owner for a contractually appropriate purpose (viz a genuine dispute as the amount of any deduction) and rationally. In this case, I find that it would not have been rational for the Owner to withhold its written confirmation to reasonably calculated deductions from hire. There is an extensive debate in caselaw and commentary as to whether the effect of a non-contractual withholding of consent to an act which the counterparty requires consent to take is to deem consent to have been provided, or merely to provide a remedy in damages. It is not necessary to determine which is the correct approach in this case. If the former, the result is that the actual deductions from hire on account of over-consumption were legitimate. If the latter, in circumstances in which the Charterer proceeded to exercise its right of deduction, in the face of fairly token resistance from the Owner, the effect is that the breach has caused no loss. On no view, however, could the Owner's refusal to consent to deductions in this case be said to be renunciatory. It is trite law that not every breach or threatened breach of contract amounts to a renunciation. What the Charterer must show is not merely a failure by the Owner to do what it has promised to do, but an absolute refusal to perform its side of the contract (Aktion Maritime Corp of Liberia v S Kasmas & Brothers Ltd [1987] 1 Lloyd's Rep. 283, 306; Torvald Klaveness A/S v Arni Maritime Corp [1994] 1 WLR 1465, 1476.) Where one party evinces an intention to perform only part of its obligations, the right to treat the contract as discharged depends on whether non-performance amounts or would amount to a repudiatory breach of the contract. That is not even arguably the case here.

301. The Charterer alleges a further breach in relation to the hire payable after 27 July 2017, or 13 September 2017. It claims that it was entitled under clause 3(c) to give the Owner 7-days' notice requiring it to demonstrate that it had exercised due diligence to maintain or restore the Vessel, with the Vessel being off-hire from the expiry of notice until due diligence has been demonstrated.

302. The suggestion that the Vessel was off-hire under clause 3(c) from 27 July 2017, and therefore throughout the period it was performing the Tanjung Pelepas voyage on the Charterer's instructions, is one which I am unable to accept. For so long as the Vessel was performing a carrying voyage on the Charterer's orders, I do not think the Owner can be said to have failed to demonstrate due diligence to the Charterer by not doing something which would have interfered with the performance of the required service. It is not necessary to decide the further issue of whether clause 3(c) requires the charterer actually to put the vessel off-hire (and therefore not require any service of the vessel during that period), or whether it gives rise to a deemed "off-hire" event even when the vessel is providing the service the charterer immediately requires of it.

303. So far as the position after the completion of the Tanjung Pelepas voyage is concerned, I have found that the cleaning performed at Singapore was appropriate and effective, and the fact of such cleaning was sufficient to demonstrate that "due diligence was being exercised" to the Charterer's reasonable satisfaction (which is all

that clause 3(c) requires). It was not necessary for the Owner also to trial the Vessel at Singapore after the cleaning had taken place. Copies of the underwater divers' report and photographs were sent to the Charterer on 14 and 15 September 2017. Further, no fresh clause 3(c) seven-day notice was served after July 2017. Accordingly, the clause 3(c) argument in relation to the period after 13 September 2017 fails on the facts and on the terms of clause 3(c).

304. In any event, the alleged renunciatory conduct here comprises (i) the Owner's refusal to accept the legitimacy of the Charterer's refusal to pay hire or make deductions from hire, (ii) the fact that the Owner sent messages demanding payment of hire, wrongly asserting that the Charterer was in breach and (iii) the service of two anti-technicality notices. I do not accept (i) and (ii) were renunciatory, as they did not involve a refusal to perform the Owner's obligations under the Charterparty. So far as (iii) is concerned, notices were served on 10 and 18 August 2017, during the Tanjung Pelepas voyage, but were not acted on prior to the completion of that voyage. The final notice was served on 18 October 2017. It did not suspend the Charterparty service, but asserted an entitlement to do so, and in any event it was the Charterer's position at that time that no service was required of the Vessel which was off-hire. Looking at the position on 19 October 2017, when the Charterer sought to bring the Charterparty to an end, I do not accept that these communications can be said to have amounted to a renunciation by the Owner of the Charterparty, whether considered individually or collectively.

## The legal principles

305. It is accepted that the terms of the Charterparty which are said to have been breached were innominate terms. However, it is clear that a series of non-repudiatory breaches may cumulatively amount to a renunciation or repudiation of a contract (see Force India Formula One Team Ltd v Etihad Airways PJSC [2011] ETMR 10, [87]). This is more likely to be the case when the breaches are linked in their effect, or when they reflect the pursuit by the defendant of an overriding strategy (as was the case in Force India). However, it is still necessary to establish that the cumulative effect of the various breaches, taken together, amounts to a repudiation. For that purpose, Diplock LJ's formulation of the relevant issue in Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 260 remains highly pertinent:

> "Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"

306. The issue is sometimes approached by asking whether the breaches, cumulatively, "go to the root of the contract". As Arden LJ noted in Valilas v Januzaj [2013] EWCA Civ 436, [59-60]:

> *"*The expression 'going to the root of the contract' conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar expressions. I do not myself criticise the vagueness of these expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field.

> Whether the victim is deprived of substantially the whole of the benefit of the contract is a question to be determined by evaluating all the relevant circumstances. It is not a question of discretion. It is fact-sensitive."

307. This was a two-year charterparty, with the Vessel delivered into the Charterer's service on 16 February 2017. The Charterer purported to terminate it after eight months. In my view, it cannot be said that the breaches I have found at [285], [288-289] and [292] above, taken cumulatively, deprived the Charterer of substantially the whole benefit which it was intended to obtain under the Charterparty for the payment of hire, or "go to the root" of the Charterparty, and the position is no different if the matters at [278-282] are treated as a breach. The most significant breach – the over-consumption, whether approached through clause 1, clause 3 or clause 24 – was the subject of a contractual mechanism to reduce the hire payable, and in any event by September 2017, steps had been taken to address the problem, and it was clear more steps would be taken before the end of the year. The issue with the emergency generator had been resolved to the Charterer's commercial advantage before the Vessel embarked upon the chartered service, and the failure to exercise due diligence in relation to the maintenance of the turbocharger caused no loss.

308. It is helpful to contrast this case with the facts of Hongkong Fir. In that case the ship was delivered in good condition but, due to an inadequate engine room staff, there were a series of breakdowns, lengthy delays and expense on repairs. On its first eight week voyage, the vessel was off hire for about five weeks. On arrival it required a further 15 weeks to make it seaworthy. However, those matters were not sufficient to frustrate the commercial purpose of the charterparty. The same conclusion was reached in Nitrate Corporation of Chile Ltd v Marine Transportation Co Ltd (The Hermosa) [1980] 1 Lloyd's Rep 638, in which there had been "a total of eight months delay causing real disruption" to the charter, but 16 months of the charterparty left to run.

309. This is not to under-estimate the Charterer's frustration with the Owner, or to deny that there were legitimate grounds for that frustration. The Owner's failure to acknowledge the consumption problems with the VLCCs and constant prevarication were an unhelpful and unrealistic response, as was its initial reaction to the turbocharger breakdown and its impact on the Vessel's ability to trade. But, however frustrating the Owner's conduct was in the conventional sense, it was not frustrating in a legal sense.

310. In these circumstances, I do not propose to lengthen an already long judgment by addressing the Owner's argument that, if there had been a repudiatory breach, the Charterer nonetheless affirmed the Charterparty.

## THE OWNER'S CLAIM FOR DEBT AND FOR DAMAGES FOR REPUDIATORY BEACH

311. There is no dispute that if the Charterer was not entitled to rescind or terminate the Charterparty, then its communication of 19 October 2017 was itself a renunciation of the Charterparty which the Owner accepted. In these circumstances, the Owner is entitled to recover damages representing the loss it suffered by reason of the early termination of the Charterparty.

312. That leaves a number of issues of quantification.

## The debt claim

313. In relation to the Owner's unpaid hire claim, I have already decided that the Vessel was delivered on 16 February 2017, was off-hire from 7 to 9 September 2017, and was on hire after 13 September 2017 until the Owner terminated the charter on 20 October 2017. From this amount, it is necessary to make deductions under clause 24 for over-consumed bunkers (the value of which has been agreed) and also the sum of $68,425, representing damage suffered by the Charterer as a result of the Owner's failure to exercise due diligence in respect of the fouling of Vessel's hull. The parties are asked to submit an agreed figure.

## The damages claim

314. There are two live issues in relation to the damages claim. First, whether there was an available market for the vessel at or around 20 October 2017 for the period up until 26 November 2018 which was the earliest the Charterer could have redelivered the Vessel under the Charterparty. The second is what, if any, credits the Owner must give when calculating its net loss.

### *Was there an available market?*

315. The legal principles as to the existence of an available market are not in dispute:

i) What is required is evidence that there are sufficient owners and charterers potentially in touch with one another to evidence a market in which the Owner could have re-chartered the Vessel for the 13 month period remaining on corresponding terms. Where there is no available market for the full length of the unexpired term, there is no available market. This is because a time charter for a particular period reflects the appetite for risk which the owner and charterer are willing to take for that period (Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2015] EWHC 718 (Comm); [2015] 2 Lloyd's Rep. 407, [221-222]). For that reason, I do not feel able to place reliance on the significantly shorter charters (3 to 6 months) referred to by Mr Clements.

ii) Similarly, it is important to ascertain the available market by postulating a charter which corresponds closely to the actual charter. In Golden Strait Corp v Nippon Kusen Kubishka Kaisha (The Golden Victory) [2007] UKHL 12, [67] Lord Carswell said that the available market was based on an assumption that there would be corresponding terms to the original charterparty, including, in that case, the cancellation provision in clause 33 (see also Lord Brown [82]).

iii) In Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare) [2010] EWHC 903 (Comm); [2011] 2 Lloyd's Rep. 360, [57] David Steel J held that "in order to categorise the replacement fixture as a market substitute, the trading limits should broadly correspond with the existing fixture".

iv) However, the fact that fixture negotiations may take some time to initiate and conclude, such that the vessel will not proceed immediately into its next employment, does not mean that there is no available market. In The Wave, 532, Mustill J said it was necessary to consider the hire received on "a kindred fixture on *or shortly after* the date when the contract was repudiated … because in practice it would not have been possible to obtain a replacement fixture immediately after the repudiation took place". In that case, he assessed damages by reference to a charterparty repudiated on or shortly after 2 August 1979 by reference to the market rate in early September. It is important to note, however, that this involves allowing a reasonable time to conclude a fixture in a market in which buyers and sellers are already active, not a wait until an available market which does not currently exist comes into being.

316. The evidence as to the existence of an available market was given by Ms Richards and Mr Clements, principally through their expert reports and the joint memorandum. I accept both experts had experience of the VLCC market, but as a broker still active in the market, Mr Clements had access to more complete information, and was able to identify a number of potential VLCC fixtures which Ms Richards had not been able to locate. The experts disagreed as to whether there was an available market at or around 20 October 2017. Mr Clements was able to point to brokers' reports which were providing indicative market rates during this period, but both experts accepted that the best evidence of an available market was the conclusion of similar fixtures at the relevant time. Four fixtures were relied on in this context.

317. The first, which the experts agreed was the closest reported fixture, was for the "Trikwong Venture", one of the "hottest candidates" with which the VLCCs were originally compared by Mr Rexer in the 22 November 2016 Letter. The fixture, at $27,500 a day for a 12-month charter, was reported on 1 November 2017 by Castor (Mr Clements' company), on 6 November 2017 by Clarksons and 22 November 2017 by Drewry. The reports provided conflicting dates for delivery at Singapore of 15 November and 1 December 2017 but the latter (given by Drewry on 22 November 2017, the date closest to the vessel's arrival in Singapore) appears to be the most accurate and was accepted by the experts. So far as this fixture is concerned:

i) The experts' estimates of the time it would have taken to negotiate the fixture ranged from as short a period as 14 days to as long as 3 months. As the VLCC market is stronger in October than at any other time of the year, and spot rates had been rising sharply in October against a background in which time charter rates were holding firm, I have concluded that the "Trikwong Venture" fixture is likely to have been negotiated on a more expedited timetable, and been under negotiation from around 20 October or so. That accords with the expert evidence – Ms Richards accepted that "there was a possibility to fix business similar to 'Trikwong Venture'".

ii) While the "Trikwong Venture" was not delivered until 1 December 2017, in my view this is likely to have been due to the fact that the vessel was completing an existing voyage from West Africa to China, and had the Vessel been free earlier, it would have been delivered earlier. Against the background of the strong market and rising spot rates, the fact that Clarksons' 12 month time charter estimate was not showing any falloff between late October and November, and given that the winter is the period of greatest demand for

VLCCs, I can see no reason why the charterer would have wanted to delay the vessel's entry into service for its own reasons.

318. The second fixture relied on is the "DHT Jaguar" reported by Castor on 13 November 2017. This was not reported by Clarksons (who generally report after the conclusion of negotiations), and it is not therefore clear that the fixture went ahead, but it is provides some evidence of a market in which there were active owners and charterers:

    i) This was a modern eco-vessel, and the reported rate of $29,000 needs to be adjusted downwards. The experts did not agree on the relevant adjustment, and, doing the best I can in the light of their evidence, I have concluded that a $3,000 adjustment is appropriate producing a rate of $26,000.

    ii) I accept that the date of conclusion of any final fixture is likely to have been later than the date the fixture was reported by Castor.

    iii) It is not clear to me if/when the vessel entered into time charter service, but if it did, it will have been some time after 13 November 2017.

319. The third fixture relied on is the "Eagle Vancouver" reported by Castor on 15 November 2017, but the rate is not known. It is not clear to me whether this fixture was finalised, and, if so, when the vessel entered into service under the charterparty, although once again it provides some evidence of a market in which there were active owners and charterers.

320. The final fixture I was asked to consider is the "Olympic Target", reported by Castor on 15 November 2017 at $27,500 per day and by Clarksons on 6 December 2017 for delivery on 10 December 2017:

    i) That fixture was for 12 months with a further 12 month option, I accept that this is comparable, in length, to the balance of the Charterparty, under which the Charterer had the option to extend by 12 months.

    ii) This fixture was reported by Castor on 15 November 2017, and I think it unlikely it was concluded any earlier than that.

321. I accept Mr Clements' evidence that, in addition to the reported fixtures, there are likely to have been further fixtures "conducted privately 'off market'". I also accept Mr Clements' evidence that his own firm's contemporaneous broker assessment of the rate for 12 month VLCC time charterparties in October 2017 was $25,750 (his estimate in his report being $26,000 to $27,000).

322. I have seen no real evidence of any attempt by the Owner to market the Vessel on a 12-month time charter on and from 20 October 2017 (evidence which, if such efforts had been fruitless, would have been persuasive evidence of the lack of an available market). Rather, a spot fixture had been concluded by 22 October 2017.

323. One final issue raised by Mr Smith QC in closing argument was that the Vessel could not have been fixed on a 12 month time charterparty in October 2017 because of the need to drydock the Vessel by February 2018. However, this issue was not canvassed in the expert evidence, the Charterer had no opportunity to consider whether the

drydock could have been completed prior to delivery into the fixture (c.f. the "Trikwong Venture" in [317] above) and it is not a factor which I feel able to take into account in those circumstances.

324. On the basis of this evidence, I have reached the following conclusions:

i) There was an available market for 12-month time charters for the period from 20 October 2017 onwards.

ii) It would have taken until 15 November to fix and deliver the Vessel under a substitute time charterparty (with the result that the damages calculation will need to reflect the fact that the Vessel would have been idle from 21 October to 14 November).

iii) The appropriate rate is $26,000 per day.

***What credit is due?***

325. It is accepted that the Owner must give credit for the fact that the Vessel would have been drydocked during the course of the Charterparty and that the appropriate deduction is $752,821.50.

326. There is, however, an issue as to whether credit should have been given on the basis that the net hire payable under the remainder of the Charterparty term would have fallen to be reduced by reason of claims under the speed and consumption warranty. I accept the Owner's submission that no such credit is required. In the October and November 2017 voyages, the Vessel's consumption was within the warranted figures (see [286]). The Vessel was then dry-docked, the hull cleaned and re-coated and its engine overhauled. I accept that this would have ensured compliance within the limits of the warranty for the remaining period of the Charterparty, as demonstrated by the consumption reports on the post-drydock voyages. The fact that the Vessel was offered to the market in 2018 with a higher consumption than that in the Charterparty does not justify a different conclusion – it may well have been a reaction to the protracted dispute with the Defendants.

327. The parties are asked to agree the final damages figure reflecting my findings.

## IS CMTC'S PROMISE TO GUARANTEE THE CHARTERER'S OBLIGATIONS UNDER THE CHARTERPARTY UNENFORCEABLE?

### The legal principles

328. S4 of the Statute of Frauds 1677 provides:

> "[N]o action shall be brought … whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person … unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

329. In this case, it is not suggested that CMTC signed the Charterparty. The issue is whether "some memorandum or note" of the Guarantee was signed by someone authorised by CMTC to sign it.

330. The relevant principles are as follows:

i) Neither the relevant contract of guarantee nor any memorandum thereof needs to be in just one or even a limited number of documents (The Golden Ocean, [22], [28-9]).

ii) Thus in Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone) [1987] 1 Lloyd's Rep 546, 556, a communication by the alleged guarantor which responded to a communication from the beneficiary referring to the guarantee, and which in turn referred to the terms of guarantee required, was held to be sufficient (on the basis that "the last was signed by [the guarantor] and references can be traced back to each of the others").

iii) A document acknowledging the existence of a contract but repudiating liability under it may amount to a sufficient memorandum (Dewar v Mintoft [1912] 2 KB 373).

iv) As regards the requirement of a signature, this can be satisfied by an electronic signature, and a first name or initials will suffice (The Golden Ocean, [31-32]). By putting their name on the relevant document, the relevant individual must be indicating that the message comes with his/her authority and he/she takes responsibility for the contents.

v) Where the relevant memorandum is signed by an agent, that agent does not have to have authority to conclude the guarantee or even to sign a note or memorandum of the guarantee as such. The agent only has to have authority to forward the documents in question. If the agent has such authority, then the same legal consequences will follow as if the guarantor had forwarded the documents itself and signed the letter enclosing them (Daniels v Trefusis [1914] 1 Ch 788, The Golden Ocean, [38]).

331. In this case, among other arguments, the Owner relies upon documents signed by Poten as satisfying the s4 requirement. If Poten was acting as the agent for CMTC in these exchanges, then there is no dispute that a memorandum or note of the guarantee signed by Poten would satisfy the requirements of s4, and similarly there is no dispute that if Poten was acting as the Owner's agent, its signature would not suffice. What, however, is the position if Poten acted as an intermediate broker?

332. In The Golden Ocean, the same firm of brokers (Hogg Robinson) acted for both the owner and the charterer, albeit it would appear that different teams within Hogg Robinson were acting for each side ([7] quoting from [8] and [12] of the first instance judgment). Tomlinson LJ at [38] stated:

> "It seems to me clear that authority from [the guarantor] to send an authenticated email containing the information set out in the final email at B106 will be sufficient to satisfy the Statute, irrespective of the intention with which Mr

> Hindley put his name on that document *and without the need for any further enquiry as to the capacity in which he did so*".

(emphasis added).

333. I respectfully adopt that reasoning, which is consistent with long-standing authority (Daniels v Trefusis, 799). If, therefore, someone has the guarantor's authority to send a communication whose content is capable of satisfying s4, then the signature of that person on that communication will suffice.

334. There is surprisingly little authority on the issue of on whose behalf an intermediate broker is acting when sending and receiving communications. Consideration of this issue is often wrapped up with the legally different issues of whether such an agent has ostensible authority to contract or vary the contract, or to receive information on behalf of one of the principals. However, such authority as there is suggests that an intermediate broker who passes on an offer made by one party to the other acts for the party making the offer in doing so:

i) In Hanjin Shipping Co v Zenith Chartering Corporation (The Mercedes Envoy) [1995] 2 Lloyd's Rep 559, 560, in a case principally concerned with the ostensible authority of an intermediate broker, Mance J stated as follows:

> "It seems to me that Howard Houlder were pure intermediaries, that is to say their only role and authority on behalf of either party was to transmit the communications of the one to the other. Mr Gault for the plaintiffs suggested that Howard Houlder might still be clothed with apparent or ostensible authority by each party so that either party would be entitled to treat any actual messages received from Howard Houlder which purported to come from the other party as having actually come from the other party even if they did not do so or did not do so accurately. I do not consider this to be correct. Howard Houlder's only actual authority was to transmit accurately actual messages which they had received".

My reading of this paragraph is that Mance J is treating the intermediary as having the actual authority of the party sending a message to transmit that message accurately to the other party, rather than the authority of the party for whom the message is intended to on-transmit the message to that party (not least because it is not natural to speak of an agent as exercising "authority" when communicating with its own principal).

ii) In Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1, 17, Staughton J stated:

> "But equally it happens that there is one independent intermediary between the parties. In such circumstances he is what I would describe as a true broker, authorised by each party in turn to do on its behalf what that party requires him to do. Thus he may be given an offer by the shipowner, and is the shipowner's agent to transmit it; and then be given a counteroffer by the charterer to transmit on his behalf to the shipowner".

335. A different approach has been suggested in an article to which CMTC referred me by Matthew McGhee, entitled "Dual Capacity Brokers, Seen Through the Prism of Man-in-the Middle Frauds" [2017] LMCLQ 436, 440. When considering the position when a fraudster contacts an intermediate broker and purports to change the payment details for sums due under a charterparty, Mr McGhee argues that outgoing messages from an intermediary broker are sent on behalf of the recipient of those messages. However, the approach of Mance J and Staughton J accords more naturally with the communications which were exchanged in this case (which I address below), and I have concluded that it is the correct analysis. That does not mean that an intermediate broker has ostensible authority to "pass on" a message which purports to come from one of the principals which that principal has not in fact sent.

**What was Poten's role?**

336. The Owner's case is that Poten was meant to be an intermediate broker, but in fact assumed the role of the Defendants' broker. The Defendants contend that Poten was the Owner's broker. Poten itself, in a letter from its solicitors sent after the commencement of the proceedings, stated that it had acted as an intermediate broker throughout.

337. Taking the Defendants' case first:

i) I accept that it was SK Shipping who first approached Poten and asked Potent to locate potential charterers of the VLCCs, and that this happened before Poten learned of CMTC's desire to take vessels on charter at the COSCO party. However, the issue of which of two principals first approaches a broker cannot of itself be decisive. It will almost invariably be the case that a broker acting in an intermediary capacity will have been approached first with an expression of interest by one of the principals. The terms in which Poten followed up on that initial contact are only consistent, in my view, with Poten acting as an intermediary broker rather than as SK Shipping's exclusive broker. While the 22 November 2016 Letter certainly promoted SK Shipping's vessels, it also put forward other potential candidates for CMTC to charter , offering "initial commercial ideas" on the "Trikwong Venture" and describing it as a "t/c candidate". Similarly, while the negotiations were ongoing on 28 November 2016, Poten offered CMTC the "Trikwong Venture", the "Dalian Venture" and the "Hong Kong Spirit".

ii) The Defendants point to the fact that Poten's commission was paid by SK Shipping. However, as Mr Konialidis confirmed, commission under a time charterparty is almost always paid by the owner, even to the charterer's own broker and certainly to an intermediate broker.

iii) It is said that Poten must have been SK Shipping's broker because CMTC had its own broker, Curzon. However, Curzon was only introduced into the negotiations part way through, and it is not realistic to suggest that the capacity in which Poten was acting changed at that point. In any event, the role of Curzon in the negotiations was very far from a conventional charterer's broker, as I have explained at [12]: Curzon did not receive any commission on the Charterparty, took a number of decisions without referring back to CMTC, and acted in many ways as CMTC's charterparty manager.

iv) It is said that it is clear from SK Shipping's own documents that it understood Poten to be its exclusive broker and Curzon to be CMTC's broker. I do not agree. Mr Park Sang-Hyun informed Mr Si-Hyeon Lee on 27 November 2016 that "regarding the broking channel although it is Poten & Partners – Curzon, since Curzon is In-House Broking Shop of Capital Maritime, effectively it is one which is Poten & Partners". While SK Shipping criticised Poten, this was not on the basis that Poten was its exclusive agent, but rather than it was solely pursuing the Defendants' interests notwithstanding its "role in-between us" (i.e. as an intermediate broker).

338. Further, there were a number of matters which point against the suggestion that Poten was acting as SK Shipping's exclusive broker with Curzon acting as CMTC's broker:

i) There were numerous direct dealings between CMTC and Poten – what Mr Konialidis accepted was "a parallel dialogue between Mr Rexer and Mr Marinakis" - which would have been unthinkable if Poten had been acting exclusively as SK Shipping's broker, and Curzon as CMTC's broker.

ii) Poten sent fixture recaps directly to both principals, and a record of the March 2017 meeting to both principals, activities more consistent with an intermediary status.

iii) The terms in which Poten communicated with Curzon would have been wholly inappropriate if Poten had been acting as SK Shipping's exclusive broker. For example, when the Defendants decided to charter the VLCCs through SPVs, Mr Rexer asked Mr Konialidis if CMTC would offer a guarantee *if* SK Shipping asked for it, rather than requesting one on SK Shipping's behalf, and then communicated the request to SK Shipping to change the identity of the charterer in terms which sought to minimise its significance ("a fairly minor amendment to the signatory in the recap"). Poten offered views to Mr Konialidis on which terms would best serve CMTC's interests (although I reject the suggestion that it deliberately changed terms in one draft to make them more favourable to the Defendants, the only changes which were identified being changes necessary to give effect to prior discussions).

iv) Mr Rexer of Poten felt able to make repeated criticism of SK Shipping to Mr Konialidis: raising the issue of whether the Charterer should cancel the Charterparty (17 January 2017); suggesting the Owner was not complying with the main terms of the Charterparty (1 February 2017); suggesting the Vessel be put off-hire (7/8 June 2017); advising the Charterer to cancel the Charterparty and as to the timing of any cancellation (9 June 2017); advising the Charterer how to put itself in a position to have a right of cancellation under clause 61 of the Charterparty (9 June 2017); to redeliver the Vessel (9 July 2017) or raising the issue of termination (18 October 2017). Poten would not have engaged in communications of this kind if it had been acting as SK Shipping's exclusive broker, and Mr Konialidis would not have communicated with Mr Rexer in the way he did if he had understood Poten to be so acting.

339. I reject, however, SK Shipping's suggestion that Poten became the Defendants' exclusive broker. Poten also provided advice to SK Shipping on a number of occasions, and effectively played the role of "everyone's friend". While the

difficulties experienced over the life of the Charterparty led Poten to express sympathy and support for the Charterer's position, this did not lead to any change in its status. It began the process as an intermediary broker, and that remained the position.

**Was there a s4 signature by Poten?**

340. CMTC accepted that "the requirement of 'writing' is satisfied insofar as the guarantee was recorded in the recaps prepared by Mr Rexer, but there was never any signature, except of course, as author of the relevant materials". I have concluded that Poten acted as an intermediate broker, and, as such, was authorised by CMTC accurately to pass on its communications to the Owner. In these circumstances, the requirement of s4 is satisfied.

341. In particular, among many such documents:

i) On 29 November 2016, Poten (in an email signed "best regards, Rob") informed SK Shipping "ref our discussions with CAPITAL MARITIME, we are pleased to present you with the below offer" for the Vessel, expressly on the same terms "as per previously agreed charter of the (C SPIRIT) between (SK Shipping Co Ltd) and (TBN Company which shall be guaranteed by [CMTC])" and identified the charterer's signatory as "TBN Company, which shall be guaranteed by [CMTC]".

ii) The recap sent by Mr Rexer to SK Shipping on 2 December 2016, which contained the same references to the Guarantee.

iii) The "reply from CAPITAL MARITIME" sent by Mr Rexer to SK Shipping on 5 December 2016 which contained the same references to the Guarantee.

iv) The email of 6 December 2016 confirming that the Vessel was "fully fixed" which contained the same references to the Guarantee.

v) The email of 8 December 2016 confirming that the Charterer was exercising its option over the "C PROGRESS" (an option which was one of the terms of the Charterparty for the Vessel) which referred to the "fully fixed" charterparty for the Vessel and contained the same references to the Guarantee when setting out the terms on which the Vessel had been fixed.

vi) The email from Ms Murray of Poten of 19 December 2016 referring to "Charterer's signatories for each C/P below" which, for the Vessel, stated "Capital VLCC 3 Corp which shall be guaranteed by [CMTC]".

342. I would note that even if the view is taken that an intermediate broker is only acting for the principal it is sending a message to (c.f. [335] above), then I would have been satisfied that the following documents (among many similar examples) satisfied the requirements of s4 of the Statute of Frauds:

i) On 6 December 2016, Mr Rexer sent Mr Konialidis an email signed "best regards, Rob" confirming the Vessel was "fully fixed" and which included the same language referring to the Guarantee as that set out in [341(i)] above.

ii) On 12 December 2016, Ms Murray of Poten sent Curzon an email signed "best regards, Sarah", which stated that it had "attached the updated C/P documents with Charterer's nominated company", which attached documents recorded the terms of the Guarantee.

iii) On 4 January 2017, Ms Murray sent a signed email to Mr Konialidis which enclosed a copy of the documents recording the Charterparty, including the Guarantee.

**Is there a s4 note or memorandum signed by Curzon or CMTC?**

343. There are very few documents emanating from either Curzon or CMTC which have any form of signature on them. Nonetheless, Mr Smith QC submits that there are a number of signed documents which themselves are sufficient to satisfy the requirement of s4, regardless of the status of documents signed by Poten. I can consider these briefly,

i) There is an email from Mr Konialidis of 31 January 2017 attaching a proposed addendum to the Charterparty. However the email is unsigned.

ii) There are various emails from Mr Ventouris which include a signature. However, while Mr Ventouris was an officer of CMTC, he did not purport to sign any of the emails relied upon in that capacity, and they appear to have been sent on behalf of the Charterer. While *a guarantor* who signs a note or memorandum when purporting to act in another capacity will satisfy the requirements of s4 (Elpis Maritime Co Ltd v Marti Chartering Co Inc [1992] 1 AC 21), I do not accept that that submission has the effect that the signature by a natural person acting in one capacity can satisfy s4 merely because that same individual is also an officer of the guarantor, albeit not purporting to sign in that capacity. In that situation the essential requirement – a signature on behalf of the guarantor, even if the guarantor is signing in a representative capacity – is missing.

iii) An email from Mr Ventouris of 30 November 2017, signed "Gerry", responding to a request for "your confirmation for guarantors to counter-sign the C/Ps". There is room for more debate in relation to this email, but I have concluded that Mr Ventouris' response ("Will discuss and get back to you. Know from legal that they are against doing this but let me try to get to the bottom of it and see if it is `legal inflexibility' or something of essence") cannot be read as an express or implicit recognition that a guarantee had already been entered into.

**Should I infer that the Defendants have not disclosed documents which satisfy s4?**

344. Finally, Mr Smith QC asked me to find that the Defendants had failed to disclose documents which satisfied the requirements of s4. It is right to note that not only were documents were disclosed by the Defendants, but documents were also produced by Poten. Where, therefore, the documents which it is said have not been produced were exchanged with Poten, the Owner's case requires that such documents were withheld not only by the Defendants, but by Poten as well.

345. If documents signed by Poten cannot satisfy s4, then documents which might be capable of doing so are:

i) Documents sent by Curzon to Poten.

ii) Documents exchanged between Curzon and CMTC.

iii) Documents internal to CMTC.

346. As to the first category:

i) Poten's emails to SK Shipping recording initial offers and counter-offers for the VLCCs are long and detailed, and I found the suggestion that there was no incoming email from Curzon setting out the terms of the offer which Poten was being asked to pass on surprising. However, no such documents have been produced by Poten either, and I am therefore prepared to accept Mr Konialidis' evidence that he was dealing with Poten at this stage by telephone because he was on the road. In any event, the earlier and more detailed emails related to the "C INNOVATOR" and the "C SPIRIT". The position so far as the Vessel is concerned is that Poten was being asked to use the same template as the fixture agreed on the other two VLCCs, with limited adjustments. I do not find it as surprising that an instruction to Poten to pass on the offer for the Vessel was given orally rather than in writing.

ii) There is no email from Curzon to Poten lifting the "subjects" on the Charterparty. I think it unlikely that there is no email recording this instruction, given how significant the lifting of "subjects" is (Mr Konialidis suggested that "I do not think there is any more important email"). Poten, but not Curzon, produced an email lifting the "subjects" on the "C SPIRIT" and the "C PROGRESS". In these circumstances, I have concluded that Curzon is likely to have sent such an email to Poten which has not been produced by either party. I am not persuaded, however, that any non-production was deliberate. I note that the email which was produced in relation to the "C INNOVATOR" and "C SPIRIT" was not signed by Curzon, and I see no reason to infer that the equivalent email relating to the Vessel would have been signed.

iii) I accept that it is likely that Curzon sent emails to Poten setting out its detailed comments on the wording for the Charterparty, even though no documents of this kind have been disclosed. The detailed comments in Mr Rexer's email to the Owner of 6 December 2016 are likely to have reached Mr Rexer in writing. Further, Ms Murray sent Mr Konialidis documents by email for Curzon's review on 4 January 2017, and a further email of 9 January 2017 chasing "your review/edits once available". On 9 January 2017, in the course of an instant messenger exchange with Mr Rexer, Mr Konialidis stated that he had just sent Mr Rexer two emails, which I think are likely to be the outstanding responses on the detailed terms. But whether that is the case, or whether the reference in the instant messenger exchange was to emails with some other subject, Curzon's comments on the detailed documents had clearly reached Poten by 11 January 2017, when the documents were sent by Poten to the Owner. It is clear from Mr Rexer's email of 4 January 2017 that the intention had always

been to obtain the Defendants' comments before the documents were sent to the Owner. It seems to me unlikely that detailed comments of this kind would have been passed otherwise than by email, and I find the absence of such a communication in the documents produced by both the Defendants and Poten surprising.

347. As to the second category:

i) On 25 and 28 November 2016, Mr Konialidis or another Curzon employee forwarded to CMTC without comment or signature various documents concerning the "C INNOVATOR" and "C SPIRIT" charterparties.

ii) On 1 December 2016, Mr Konialidis forwarded draft charterparty documents relating to those vessels to CMTC, again without comment or signature.

iii) Similarly, on 2 December 2016, Mr Konialidis forwarded without comment or signature an email from Poten with an update on the fixture of the Vessel.

iv) However, no emails have been disclosed by which Mr Konialidis forwarded:

a) the recap email received from Poten on 2 December (Mr Ventouris' evidence being that it was standard practice to forward recaps);

b) the email he received from Poten on 6 December 2016 advising that the Vessel was "fully fixed";

c) the email he received from Ms Murray of Poten on 12 December 2016 attaching updated charterparty documents which reflected the nominated chartering entities; and

d) the email he receives from Ms Murray of Poten on 4 January 2017 with detailed documents for his review.

Those omissions are surprising, and I accept that the likelihood is that these emails were forwarded, and that the emails doing so have not been disclosed.

v) There are no emails between the Defendants and Curzon relating to the exercise of the option for the "C PROGRESS". I think it is likely that this important decision would have been communicated or confirmed by email.

vi) There are no emails between Curzon and the Defendants commenting on the detailed terms of the Charterparty, even though a review of detail of this kind will almost certainly have been reflected in writing.

348. As to the third category:

i) The decision by CMTC to provide a guarantee for a 2 year time charterparty, chartered as one of four VLCCs from the same owning group, was clearly a significant one. It was the evidence of Mr Konialidis, which I accept, that this issue was discussed with the Capital Maritime group's external legal advisers on two occasions, with Mr Marinakis and with Mr Kalogiratos (CMTC's CFO). In these circumstances, I am unable to accept Mr Ventouris' evidence in

his witness statement that neither he, Mr Marinakis nor anyone at CMTC ever thought that guarantees had been given. Further, CMTC must have realised that lifting the "subjects" on the Charterparty involved lifting the subjects on the Guarantee, it making no commercial sense at all for the former to become binding without the latter, for the reasons given in The Golden Ocean, [30]. In my view, Mr Ventouris was too experienced and savvy a figure to have thought the Charterparty had become binding as against the SPV nominated by CMTC, but that no guarantee had been given by CMTC.

ii) In these circumstances, the absence of any documents within CMTC referring to the Guarantee is particularly surprising. While Mr Ventouris suggested that "we are a Greek shipping company: we're not overall well known for keeping the best of records", this is not how the Capital Maritime group appears to have been run. The Capital Maritime group had 150 on-shore personnel, "state of the art IT Architecture" and an in-house legal capacity. In this case, the Charterparty was subject to CMTC board approval, and Mr Ventouris confirmed that this was a standard "subject" for long term charterparties. He explained the usual process for satisfying this "subject":

> "A We have a quick telephone conference normally, approve everything. And then we have a legal counsel for Capital Maritime in-house, Mrs Kokoretsi; she will prepare minutes and circulate them when we're all available in the office, confirming what we have orally discussed.
>
> Q Fine. So whenever board of director approval is granted there will be an internal minute subsequently which confirms that: correct?
>
> A That's how it should – should be. In some cases, - sorry. I think the expression is `fall between the cracks'. But let's say 90% of the cases, yes".
>
> Q Well we have not seen such minutes for the C Spirit, C Innovator or C Challenger charterers, Mr Ventouris, where do you think they are?
>
> A I do not remember having seen them. That doesn't mean that they were not prepared ... But I assume that they have been signed, and they will be somewhere in the Capital files".

iii) That relatively formal process described by Mr Ventouris is, in my view, even more likely to have been followed given Mr Konialidis' evidence that the issue of CMTC giving a guarantee was discussed with external lawyers. Further, Mr Ventouris gave evidence in his witness statement that no offer of a guarantee could have been made "without the final approval of the board including me". Taking that evidence at face value, and as it is clear that CMTC did authorise the offer of a guarantee, that strongly suggests that there was approval at board level.

iv) In this case, CMTC's solicitors stated on instructions that there are no relevant board minutes. However, Mr Ventouris, who signed the Disclosure Statement, was much less categoric. In addition to the passage of evidence I have set out

above, he gave the following further evidence in response to questions from the court:

> "I think most probably there might have been one but I cannot be sure …".

v) Further, this is an issue on which Mr Marinakis could have assisted the court, and on which I have concluded it is appropriate to draw an adverse inference against CMTC in the absence of any explanation for his failure to give evidence at trial.

349. Where does that leave matters?

i) In respect of communications between Poten and Curzon, I am satisfied that there are some missing documents. However, I do not accept that these documents were deliberately withheld, which would require Poten, faced with an application for third party disclosure, and advised by lawyers, to have adopted a deliberately selective approach to production in order to assist CMTC. In my view, that is inherently unlikely.

ii) I am also satisfied that there are a number of documents sent by Curzon to CMTC which have not been disclosed. The reason for the absence of these documents is not clear. However, absent some further insight into the search terms and parameters which were ordered, I am not willing to find that these documents were deliberately withheld from disclosure.

iii) In respect of missing documents in i) and ii), I am in any event not willing to infer that they included documents signed by Mr Konialidis, and therefore capable of satisfying s4. The documents produced suggest that Mr Konialidis very rarely signed emails.

iv) However, I am persuaded that there are likely to have been documents produced within CMTC in connection with the approval of the Charterparty which have not been produced and which, given the likely formality of such documents, are likely to have satisfied the s4 requirement.

**Conclusion**

350. For these reasons, CMTC's reliance on s4 of the Statute of Frauds 1677 fails.

**DOES THE GUARANTEE COVER THE CHARTERER'S LIABILITY IN COSTS?**

351. As noted above, the Charterparty identified the charterer as:

> "TBN Company, which shall be guaranteed by [CMTC]".

352. The issue which arises is whether the Guarantee is limited to amounts payable under the Charterparty, or whether it extends to any costs orders made against the Charterer in proceedings brought to enforce the Charterparty.

353. As noted in Andrews & Millett, *The Law of Guarantees* (7th) para. 6-011:

> "whether the surety is liable for the costs incurred by the creditor in enforcing the principal transaction will turn on the true construction of the guarantee, and of the principal contract".

354. I accept that a guarantee of obligations owed under a contract will not ordinarily extend to costs orders made in the course of attempts to enforce those obligations if there is no contractual obligation to pay these costs. In Hoole UDC v Fidelity and Deposit Co of Maryland [1916] 1 KB 25, a surety had guaranteed the principal's liability under a building contract. Bailhache J held:

> "Now the condition of the bond is that the contractor shall perform, fulfil, and keep all the terms, conditions, and stipulations of the contract. The question, therefore, is whether the failure by the contractor to pay the costs was a breach of his contract. As a rule when costs are to be paid as the result of an action or of proceedings before an arbitrator they fall to be paid by reason of the judgment given in the action or of the arbitrator's award, and not by reason of a stipulation in the contract out of which the dispute arose which formed the subject-matter of the action or reference. I have looked carefully through this contract and have been unable to find any contractual undertaking by Mr. Owen to pay any costs which might be awarded against him. Under those circumstances I have come to the conclusion that I cannot add the costs to the amount of the damages that were awarded and make the defendants pay the costs under their bond."

355. However, some guarantees extend to all liabilities of the guaranteed party, which would include liabilities for costs. In In the matter of Lockey (A Lunatic) (1845) 1 Phillip 509, it was held that a guarantee extended to a costs order because "the sureties are liable for everything that the committee was liable for".

356. This raises two issues:

i) Is the Guarantee here limited to a guarantee of the performance of obligations arising under charterparty?

ii) If so, is the liability for costs such an obligation?

357. In this case, the Guarantee was entered into as a condition of CMTC's right to nominate the charterer. Given the unconstrained nature of that choice, I have concluded that the natural scope of the Guarantee is that it extends to any liabilities of a kind which CMTC would have come under to the Owner if it had not exercised any right of nomination but been the charterer itself. That would, in my determination, extend to any costs order made in proceedings brought by the Owner to enforce the Charterparty.

358. In these circumstances, it is not strictly necessary to address the second issue (which was not the subject of argument). The only basis upon which it might be said that the obligation to pay costs is one arising under the Charterparty is by way of analogy with the decision in Compania Sudamericana de Fletes SA v African Continental Bank Ltd (The Rosarino) [1973] 1 Lloyd's Rep 21. In that case, a guarantee provided:

> ". . . we guarantee as Surety and Guarantor for [E. Line] the due fulfilment of any obligation and the full and total payment without discount up to an amount not

> exceeding £13,200 sterling . . . on Delivery due to . . . [the plaintiffs]. Furthermore, we promise to fulfil and pay as Surety up to the amount stated above in accordance with any arbitration award rendered in London according to Clauses 23 and 24 of the above Time Charter".

359. An issue arose as to whether the guarantee extended to the costs of an arbitration brought by the owner against the charterer to recover outstanding hire. In addition to the express reference to the arbitration award, Mocatta J held that it was an implied term of the charterparty that the parties would agree to honour any award made pursuant to the arbitration clause in the charterparty (applying Bremer Poelstransport GmbH v Drewry [1933] 1 KB 753), and that the guarantee extended to that obligation.

360. The suggestion that a choice of dispute resolution clause in the principal contract can enlarge the scope of liability of a guarantee to include the costs of enforcement is not a particularly attractive one, and I note that the decision in The Rosarino has been criticised on this point (Ards Broigh Council v Northern Bank Ltd [1994] NI 121). Taken to its logical conclusion, it would make the determination of the principal debtor's liabilities in an arbitration award binding on the guarantor under the guise of the argument that it had guaranteed performance of the principal debtor's implied promise to honour the award, whereas it has long been clear that, absent an express term, the guarantor is not so bound (Bruns v Colocotronis (The Vasso) [1979] 2 Lloyd's Rep 412, 418).

361. In the present case, the charterparty provided for disputes of $200,000 or less to be arbitrated, and those above that figure to be "subject to the jurisdiction of the High Court". While fresh actions on a judgment have historically been rationalised under English law as actions brought to enforce an implied promise to pay the judgment, that promise is entirely notional, and it is the judgment (rather than an implied term in any antecedent contract) which is said to give rise to it (Grant v Easton (1883) 13 QBD 302). While I do not find drawing a distinction between arbitration and litigation in the present context at all attractive, and reserve the correctness of the decision in The Rosarino for an occasion when it arises, I have concluded that the Charterer's costs liability is not an obligation arising under the Charterparty, the jurisdiction clause notwithstanding.

## CONCLUSION

362. For these reasons:

i) The Charterer's claim to rescind the Charterparty fails.

ii) CMTC's claim to rescind the Guarantee fails.

iii) The Charterer's and CMTC's claims for damages in deceit or under s2(1) of the Misrepresentation Act 1967 fail.

iv) The Charterer was in repudiatory breach of the Charterparty.

v) The Owner is entitled to recover from the Charterer an amount calculated on the basis set out at [313] above in debt, and damages calculated on the basis set out in [324-326] above.

vi) CMTC is liable under the Guarantee in respect of the amount of the Charterer's liability in v) and also for any costs order made against the Charterer.