Neutral Citation Number: [2019] EWHC 2804 (Comm)

Claim No: CL-2019-000461

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

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

Date: 28/10/2019

Before :

DAVID EDWARDS, QC (SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

PRIYANKA SHIPPING LIMITED	**Claimant**
- and -	
GLORY BULK CARRIERS PTE LIMITED	**Defendant**

- -
- -

James M. Turner, QC (instructed by **Reed Smith LLP**) for the **Claimant**
Timothy Hill, QC and Alex Carless (instructed by **Ince Gordon Dadds LLP**) for the **Defendant**

Hearing dates: 24 September 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

David Edwards QC

DAVID EDWARDS, QC (sitting as a Judge of the High Court) :

1. At the conclusion of the trial on 24 September 2019 I gave my decision on one of the three matters before me, referred to in the interlocutory orders preceding the trial as "the Injunction Counterclaim". I said that detailed reasons for my decision would follow. This judgment contains those reasons.

2. This judgment also contains my decision and my reasons in relation to the other two matters that fell to be determined at the trial, namely "the Damages Declaration" and the "Damages Counterclaims". The meaning of those expressions is explained in the paragraphs below.

The Parties

3. The Defendant ("the Seller") is a Singapore company and is the former owner of the 2002-built Capesize bulk carrier "CSK Glory" ("the Vessel"). Prior to the sale described below, the Vessel was operated by a Shanghai subsidiary of Tai Chong Cheang Steamship Co. (H.K.) Limited ("TCC"), a family-owned shipping company.

4. The Claimant ("the Buyer") is a one-ship company incorporated in Nevis which purchased the Vessel pursuant to the terms of a Memorandum of Agreement concluded on an amended Saleform 1993 form dated 26 April 2019 ("the MOA"). The Buyer's agents for the sale and purchase and for the subsequent chartering of the Vessel were GMS Dubai ("GMS"). Following the delivery of the Vessel to the Buyer she was renamed "Lory".

The Facts

5. The facts that have given rise to the dispute between the parties can be shortly stated. They are, in large part, uncontroversial.

6. On 26 April 2019, as explained in paragraph 4 above, the Buyer purchased the Vessel from the Seller. Clause 1 of the MOA provided that the purchase price of the Vessel was US$458.75 per net long ton light ship weight giving rise to a total purchase price of US$9,623,184.90. The price was paid and the Vessel was delivered to the Buyer on 14 May 2019 at Singapore.

7. Clause 19 of the MOA was in the following terms:

> "19. The vessel is sold for the purpose of demolition only and the Buyers hereby guarantee that they will not trade the Vessel further nor sell the vessel to a third party for any purpose other than demolition and will, on completion of demolition, furnish to the Sellers a certificate stating that the vessel has been totally demolished."

The evidence before me suggested that similar provisions are often, though not invariably, used where vessels are sold for scrap. I was shown clauses in standard BIMCO DEMOLISHCON and RECYCLECON forms.

8. According to the first witness statement of Symeon Dimitriou of GMS, served on behalf of the Buyer, as at the date when the MOA was concluded and up to the time of the

Vessel's delivery on 14 May 2019, the Buyer intended to sell the Vessel for demolition as clause 19 required.

9. By 20 May 2019, however, having had little interest from potential scrap buyers and in circumstances where the market price for tonnage for recycling had dropped but the freight market for Capesize bulk carriers had risen, GMS began to make enquiries about obtaining cargo for the Vessel for a laden voyage.

10. Emily Koo Chih Ya, a Director of TCC, who served a number of witness statements on behalf of the Seller, suggested that the Buyer's decision to trade the Vessel may, in fact, have been taken earlier. For the purposes of the matters I have to determine, this is not an issue that I consider I need to decide; insofar as it matters, on the evidence before me I am not satisfied that the decision was taken any earlier than 20 May 2019.

11. Having decided to investigate the possibility of trading the Vessel, on 20 May 2019 GMS sent an email to the Seller, via the Seller's brokers, Braemar, in the following terms, asking the Seller, in effect, to release the Buyer from the restriction imposed by clause 19:

> "further telcon kindly provide TCD and class status. Buyers would like to look for any opportunity out there to see if any voyage can be undertaken due to the significant fall in the subcont in terms of sentiment and steel prices. Buyers are bound to lose a lot of money thus kindly requesting for this info and for the green light to have the option to trader her to at least be able to speculate on the market and try and minimize the losses as much as possible."

12. Mr Dimitriou's evidence was that, whilst he received no written reply, the verbal answer given by Braemar to this request was "no", i.e., that the terms of clause 19 would not be relaxed. Ms Koo's evidence was that GMS's email was not passed on to her but that she was asked by Braemar if TCC would be prepared to waive clause 19 and she said that it would not.

13. Ms Koo's explanation, both for the presence of clause 19 in the MOA and for her refusal to release the Buyer from its terms, was that since 2016 TCC had pursued a policy of scrapping its older vessels with a view to reducing the oversupply of tonnage in the market which impacted on TCC's revenues through depressed charter rates. A number of TCC-operated Capesize vessels, she said, were fixed on period charters with rates linked to the Baltic Capesize Index (BCI).

14. A BIMCO commentary, exhibited to Ms Koo's first witness statement, reflected a general appreciation in the market at the time of the sale and delivery of the Vessel that overcapacity was indeed a problem. Ms Koo also referred to a 1 May 2019 post by BIMCO's Chief Shipping Analyst which said that:

> "Due to the falling demand for commodities traditionally carried by Capesize ships, limiting fleet growth will become even more important if freight rates are to be profitable."

15. Mr James M. Turner, QC, who appeared on behalf of the Buyer, submitted in a note of "Defendant's Non-Points" that he handed up at the trial that TCC's values and policies were irrelevant to the issues that I had to decide. He made clear in his reply submissions that he was not inviting me to assess or make any finding as to TCC's scrapping policy; he was, thus, not asking me to make a finding that the policy did not exist or was to be criticised in some way.

16. I proceed in these circumstances on the basis that TCC did indeed have a policy in favour of scrapping its older vessels. The existence of the policy would seem to be confirmed by the fact that, as the documents show, prior to the sale of the Vessel to the Buyer, Ms Koo rejected an approach from a broker suggesting that she could sell the Vessel for trading at a premium to its scrap value.

17. Despite the terms of clause 19 of the MOA, and despite the Seller's refusal to waive its terms, in the three months following the delivery of the Vessel the Buyer did, in fact, conclude two trading fixtures.

18. Each fixture was with the same charterer, DHL Project & Chartering Ltd, and each was for the carriage of a cargo of coal. The first ("the First Fixture") was concluded on 31 May 2019 and was for a voyage from Indonesia to India. The second ("the Second Fixture") was concluded on 15 July 2019 and was for a voyage from South Africa to India.

19. There is a dispute about the profitability of the First Fixture and the Second Fixture. The position appears to be that at least one of fixtures was profitable, and that a profit was made overall. The precise position is, however, not a matter that I have to decide at this hearing.

20. In paragraph 15 of its Reply in this action, the Buyer said that:

> "… the [Buyer] may (although it is not certain that it will) continue to trade the Vessel if the Court does not restrain it by injunction from doing so."

Very shortly before the present hearing, and in full knowledge that a hearing was taking place at which I was being asked to grant a final injunction preventing any further trading of the Vessel in breach of clause 19, the Buyer concluded a third fixture. I say more about this later.

The Indian Proceedings

21. On 20 June 2019 Ms Koo learnt about the conclusion of the First Fixture. She sent an email on that date to the Buyer, via its brokers, referring to the fact that the MOA stated that the Vessel had been sold for demolition only and was not to be used for trading, and reserving the right to claim damages.

22. On 17 July 2019 the Seller commenced proceedings against the Vessel and the Buyer in the High Court of Gujarat at Ahmedabad ("the Indian Proceedings"). The Vessel was arrested and released only when security equivalent to approximately US$520,000 was provided.

23. The Buyer says, but the Seller disputes, that the Indian Proceedings included not merely a claim for security but also a claim for substantive relief. The Buyer claims that in these circumstances the Seller was in breach of an exclusive jurisdiction clause contained in clause 16 of the MOA, which provided as follows:

> "16. Arbitration
>
> If any dispute should arise in connection with the interpretation and fulfillment of this Agreement, same shall be exclusively decided by the High Court of Justice of England and Wales in London in accordance with the Laws of England. Both parties undertake to nominate London solicitors authorised to accept service of High Court proceedings and to file an acknowledgment of service in respect thereof."

24. As I explain below, I am not required to determine at this hearing whether the Seller was, in fact, breach of clause 16 or, if it was, whether the Buyer can recover damages (and, if so, what damages) for that breach.

25. Some reliance was, however, placed by the Buyer, in the context of the Seller's application for an injunction enforcing the terms of clause 19, on the nature and content of the claim made in the Indian Proceedings, and it is necessary, therefore, to set out some parts of the "Plaint" filed by the Seller's Indian lawyers.

26. Mr Turner, QC referred me to paragraphs 10, 11, 15 and 27a of the Plaint, the last being the first paragraph of the Prayer. These were in the following terms:

> "10. The Plaintiff has sold the Defendant No. 1 Vessel solely for the purpose of demolition/scrapping and accordingly fixed the price and charged the Defendant No. 1 Vessel to the Defendant No. 2. Had it be [sic] known to the Plaintiff that the Defendant No. 2 would ply the Defendant No. 1 Vessel for trading, the sale price would have been different and higher on the basis of trading. The Plaintiff would have even plied the Defendant No.1 Vessel for its own trading and/or by chartering and the Plaintiff would have earned more.
>
> 11. The Plaintiff therefore made enquiry with the Brokers for the sale price of trading of Defendant No. 1 Vessel. In response to the same the Agents/Brokers by emails informed the Plaintiff that the similar Vessels like the Defendant No. 1 Vessel in terms of the age have been sold for trading purposes at higher prices than the price for which the Defendant No. 1 Vessel has been sold and also sent the sale price of such other Vessels. Copies of the Emails from the brokers are produced herewith. The Plaintiff upon further enquiry from various brokers has obtained a Valuation Certificate dated 17th July 2019 which states the Vessel valuation at USD 12,000,000 as on 26th April 2019 i.e., the date of the MOA. Therefore, if

the Plaintiff takes the lowest price i.e. USD 12,000,000 the Vessel's valuation as indicated by the Brokers in their Valuation Report dated 17th July 2019, as against the sale price of the MOA i.e. USD 9,623,184.90 then also the Plaintiff suffers a loss of sale price of about USD 2,376,815.10. Therefore the difference of sale price of USD 2,376,815.10 is the actual loss or damages suffered by the Plaintiff on account of the breach of Clause 19 by the Defendant No. 2. The Plaintiff further learnt that the Defendant No. 2 has also earned the freight by plying the Defendant No. 1 Vessel. Thus the Plaintiff is at loss on both counts inasmuch as the Plaintiff has sold the Defendant No.1 Vessel at a lower price and meanwhile has also lost earnings by plying of the Defendant No. 1 Vessel. The said Vessel's Valuation Report and the Brokers Emails are produced herewith.

…

15 In response to the aforesaid email, the Plaintiff's FDD Insurer addressed an email to the Brokers on 28th June 2019 stating that the Defendant No. 1 Vessel was sold under Clause 19 of the MOA for the specific purpose of demolition only and the Defendant No. 2 had guaranteed that they would not trade the Defendant No. 1 Vessel further in any manner. The Plaintiff vide the same email served on the Defendant No. 2 final notice before proceeding against them legally and also stated that they had estimated the Voyage earning to be about USD 520,528.39 which the Defendant No. 2 is liable to pay to the Plaintiff along with further costs. A copy of the email dated 28th June 2019 addressed by the Plaintiff's FDD insurer is produced herewith. It may be noted that the Plaintiff has estimated the said loss on the basis of freight earned by the Defendant No. 2 for trading the Defendant No. 1 Vessel instead of demolishing the Vessel and asked for the same in the notices

27. The Plaintiff therefore prays:

a. That the Defendants be ordered and decreed to pay to the Plaintiff for the principal amount of USD 2,376,815.10 (United States Dollars Two Million Three Hundred Seventy Six Thousand and Eight Hundred and Fifteen and Ten Cents only) together with Legal costs & Expenses aggregating to total amount of USD 20,000 with further interest on USD 2,396,815.10 (United States Dollars Two Million Three Hundred Ninety Six Thousand and Eight Hundred and Fifteen and Ten Cents only) at the rate

> of 6% p.a. from the date of suit until payment/realisation as per particulars of claim."

The English Action

27. On 22 July 2019, on the basis of clause 16 of the MOA, the Buyer applied to this court for an interim anti-suit injunction to prohibit and restrain the Seller's prosecution of the Indian Proceedings.

28. The application was heard by Andrew Baker J and initially adjourned. At the resumed hearing on 25 July 2019 at which the Seller was represented Andrew Baker J made an order dismissing the application on the basis of undertakings given by the Seller that, upon provision of security in such amount as might be ordered in the Indian Proceedings, the Seller would consent to the Indian Proceedings being stayed and would pursue its claim for breach of clause 19 of the MOA in the English courts.

29. The order made by Andrew Baker J on 25 July 2019 included two provisions expressed to be "for the avoidance of doubt".

> "For the avoidance of doubt, the [Seller] is not undertaking to refrain from seeking further or alternative security other than in the Gujarat proceedings.
>
> …
>
> For the avoidance of doubt, nothing in this Order is intended to authorise or give permission for the seeking by the [Seller] of further or alternative security."

So, although the order gave the Seller no sort of encouragement or approval, it acknowledged the possibility that the Seller might seek further or alternative security elsewhere.

30. On 7 August 2019, following service of an Acknowledgment of Service indicating an intention to defend the claim, the Buyer served its Particulars of Claim. After reciting the terms of clause 16 of the MOA, and after referring to the First Fixture and the arrest of the Vessel in India, paragraph 6 of the Particulars of Claim said this:

> "6. The [Seller] has not alleged that [it] has (and it has not) suffered any loss and damage that is recoverable as a matter of English law as a result of the First Fixture. It is accordingly entitled to no more than nominal damages.
>
> PARTICULARS
>
> (1) The basis for the [Seller's] claim was sent out in paragraph 10 of its Plaint:
>
> [see the quotation in paragraph 26 above]
>
> (2) In other words, the [Seller's] claim was advanced not for damages that would put it in the position it would

> have been in if the [Buyer] had not breach[ed] clause 19, but the position it would have been in had it made [a] different contract altogether, or no contract at all. No such claim is available to the [Seller] as a matter of English law.
>
> (3) For completeness, the [Seller's] Plaint (at paragraph 15) also hinted at a claim for an account of profit. Such a remedy is likewise unavailable to the [Seller] for a breach of clause 19."

An abbreviated plea to essentially the same effect was made in paragraph 9 of the Particulars of Claim. In paragraph 10 it was said that the Indian Proceedings had been brought in breach of clause 16 because they sought substantive relief and not merely security.

31. The relief sought by the Buyer included a declaration or declarations that the Seller was entitled to no more than nominal damages for breach of clause 19 of the MOA, whether by way of the First Fixture or the Second Fixture or any further fixture of the Vessel for trading, damages for breach of clause 16, interest and costs.

32. On the same day on which the Particulars of Claim were served the Buyer issued an application seeking permission to apply, notwithstanding that the Seller had yet to file its Defence, and applying for summary judgment on its claim for declaratory relief. Directions were sought that time for service of any responsive evidence by the Seller should be abridged to two days.

33. As explained in the first witness of Alexander Andrews of the Buyer's (new) solicitors, Reed Smith LLP, served in support of the application, the reason this abridged timetable was proposed was a fear that the Seller might seek to arrest the Vessel upon its imminent arrival in South Africa to load cargo under the Second Fixture to obtain further security, the possibility recognised by Andrew Baker J's 25 July 2019 order.

34. Paragraph 7 of Mr Andrews' witness statement summarised the position taken by the Buyer in its Particulars of Claim. Whilst it was not disputed that the Buyer was in breach of clause 19, Mr Andrews asserted that there was no arguable basis in law for the Seller's claim to have suffered substantial damages. A declaration by the English court to this effect, it was suggested, would improve the Buyer's prospects in South Africa, either in resisting arrest or in obtaining security for a wrongful arrest claim.

35. There were intermediate applications and interlocutory orders, but ultimately the Buyer's application for summary judgment was disposed of by Teare J in an order made on 14 August 2019.

36. Teare J's 14 August 2019 order referred in its recitals to:

    i) The Seller's stated intention of defending the Buyer's claim, opposing the summary judgment application, and of advancing counterclaims for, amongst other things, a final injunction (referred to as "the Injunction Counterclaim");

ii) Undertakings to be given by the Seller not to arrest the Vessel or any other asset of the Buyer (or in associated ownership) for security for its claim until the determination of the Buyer's claim for declaratory relief and the Injunction Counterclaim;

iii) The parties' agreement that the Buyer's claim for declaratory relief (subsequently referred to as "the Damages Declaration") and the Injunction Counterclaim should be determined on an expedited basis.

37. The body of the order set out a timetable for service of statements of case (Defence and Counterclaim, Reply and Defence to Counterclaim, and Reply to Defence to Counterclaim) and service of evidence in support of or in response to the Damages Declaration and the Injunction Counterclaim. The summary judgment application was adjourned, but an order was made that:

> "6. The [Buyer's] claim for declaratory relief and the Injunction Counterclaim shall be tried together at a hearing to be listed on Tuesday 24 September 2019 with an estimate of 1 day."

38. On 27 August 2019, in accordance with Teare J's order, the Seller served its Defence and Counterclaim.

39. In response to the claim for damages for breach of clause 16, the exclusive jurisdiction clause, the Seller pleaded that the Indian Proceedings did not involve a breach of clause 16 because the only claim made in them was for security; and, further, that, even if there was a claim for substantive relief and thus a breach of clause 16, the Buyer would have incurred the same costs in relation to the claim for security anyway.

40. As for the Buyer's claim for a declaration in relation to the consequences of its breach of clause 19 of the MOA, the Seller denied that it was entitled only to nominal damages. On the contrary, it said that it was entitled to substantial damages in accordance with its counterclaim. It said that, even if that was wrong, the court should, in any event, refuse to make the declaration sought by the Buyer.

41. The Seller's counterclaim, pleaded in paragraphs 16 to 22 of the Defence and Counterclaim, sought:

i) Damages (at common law) for breach of clause 19;

ii) A final injunction enforcing clause 19 and preventing further use of the Vessel for trading;

iii) Equitable damages in an amount to be assessed up to the date when the injunction (if granted) took effect;

iv) Alternatively, damages in lieu of an injunction.

42. The claim for an injunction requires no elaboration. The basis on which the three damages claims were put is, however, of significance.

43. The claim for damages for breach of contract at common law was expressed in this way:

> "19. By reason of Buyers' breaches of Clause 19, Sellers have suffered loss and damage in an amount to be assessed but presently estimated to be US$2,400,000.
>
> Particulars
>
> 19.1 Sellers' losses are appropriately measured by reference to the economic value of the right which has been breached, viz. Sellers' right to restrict the trading of the Vessel (which includes the correlative right to permit the Vessel to be used for trading). Accordingly, Sellers claim damages in an amount to be assessed based on the value of that right.
>
> 19.2 Sellers presently estimate those damages at US$2,400,000, based on the difference between the price paid for the Vessel under the MOA for scrapping (US$9,623,184.90) and the market price for the Vessel had she been sold without the trading restriction in Clause 19 (US$12,000,000)."

The language used in the first of the sub-paragraphs, in particular the phrase "the economic value of the right which has been breached" reflects language used in the recent decision of the Supreme Court in *One Step (Support) Ltd v Morris Garner* [2018] UKSC 20, [2019] AC 649 (*One Step*) and a claim for what is now properly referred to as "negotiating damages". The claim for damages was not put on any other basis.

44. As for the claims for equitable damages in addition to an injunction and damages in lieu of an injunction, these were put as follows:

> "20.2 Further, Sellers claim equitable damages in an amount to be assessed, based on the price which Sellers could reasonably have demanded from Buyers to release them from their undertaking in Clause 19 up until the date on which the abovementioned injunction takes effect. At present, Sellers estimate these damages at about US$849,000, based on 70% of the total gross profits earned by Buyers under the First Fixture and the Second Fixture.
>
> 20.3 Alternatively, Sellers claim damages in lieu of an injunction in an amount to be assessed, based on the price which Sellers could reasonably have demanded from Buyers to release them from their undertaking in Clause 19. At present, Sellers estimate these damages at US$2,400,000, based on the difference in price set out in paragraph 19 above."

45. The Seller also reserved its right in its Defence and Counterclaim to claim damages for another alleged breach of the MOA concerning clause 12, which required the Buyer upon delivery to alter the Vessel's funnel markings.

46. On 6 September 2019 the Buyer served its Reply and Defence to Counterclaim. It resisted the claim for damages, asserting in particular that, in relation to the claim for common law (negotiating) damages, the Seller had mischaracterised the right in question:

> "… which was a personal right against the [Buyer], not a right to restrict the trading of the Vessel. If, for example, the Vessel were sold by the [Buyer] for scrap, but the scrap buyer decided to trade her or resell her for trading, the [Seller] would have no power to prevent such trading or further resale"

and reiterating its case that the Seller was only entitled to nominal damages. The Buyer similarly resisted the claim for an injunction and for damages in addition to or in lieu of an injunction.

47. Pursuant to Teare J's 14 August 2019 order, the parties served factual evidence as follows:

i) On 27 August 2019 the Seller served the first and second witness statements of Ms Koo;

ii) On 6 September 2019 the Buyer served the first witness statement of Mr Dimitriou;

iii) On 13 September 2019 the Seller served a third witness statement from Ms Koo as well as a witness statement from Captain Gongbo Wang, Deputy General Manager in TCC's Marine Safety Division.

Although not provided for by Teare J's order, there was a flurry of further factual evidence served in the week before the hearing: a second witness statement from Mr Dimitriou and a fourth witness statement from Ms Koo.

48. In addition to its factual evidence, the Seller also served on 27 August and 13 September 2019 a first and then a second expert report from Anthony English of ship sale & purchase brokers and ship valuers, English White Shipping Limited. Teare J's order had neither expressly permitted nor expressly precluded expert evidence; it had simply provided for each party to serve "any evidence" in relation to its claims or in response to the claims made by the opposing party. The Buyer, when it received Mr English's first report, could have objected to it or responded to it with expert evidence of its own, but it chose not to do so. In these circumstances, I considered that I was entitled to take Mr English's reports into account.

49. As it happened, however, substantial parts of both the factual and expert evidence concerned issues of quantum, which I was not required to decide; other parts were uncontentious, and much of what remained was irrelevant or of only peripheral relevance to the issues I had to determine. Sensibly in light of these matters, and also

in light of the fact that the trial was listed for a single day, both parties agreed that there should be no cross-examination of each other's witnesses.

50. On 19 September 2019, following an application by the Seller, an order was made by Moulder J supplementing Teare J's 14 August 2019 order by providing that the Seller's counterclaims for damages at common law, or in addition to or in lieu of an injunction (referred to together as "the Damages Counterclaims"), excluding any issues as to quantum, should also be determined at the 24 September 2019 trial.

Issues

51. The issues to be determined at the trial before me were thus:

    i) The Damages Declaration: the Buyer's claim for a declaration that the Seller was entitled only to nominal damages for the previous and any future breaches of clause 19 of the MOA;

    ii) The Injunction Counterclaim: the Seller's claim for a final injunction enforcing the terms of clause 19 and preventing any further use of the Vessel by the Buyer for trading;

    iii) The Damages Counterclaims: the Seller's claims for damages at common law, damages in addition to an injunction or damages in lieu of an injunction (excluding quantum issues).

    Excluded from this hearing were any issues concerning liability or damages for the claimed breaches of clause 12 or clause 16 of the MOA.

52. As will be obvious, the three issues which I am required to address substantially overlap; indeed, subject to my discretion to refuse to make a declaration, resolution of the third issue will effectively determine the first. As for the second issue, one of the matters I have to consider, of course, is whether an injunction should be refused and the Seller confined to whatever remedy it has in damages.

53. I propose to deal with the issues in a slightly different order than that set out above. I will deal first with the Injunction Counterclaim on which, as I explained at the start of this judgment, I announced my decision at the conclusion of the trial.

54. Before I do so, however, I should record a development that occurred right at the start of the trial.

55. I referred in paragraphs 17 and 18 above to the fact that, notwithstanding the terms of clause 19, in May and July 2019 the Vessel had been engaged by the Buyer to perform two fixtures. When Mr James M. Turner, QC came to open the case he told me that he had been informed that his clients had, in fact, recently concluded a third fixture, another fixture with the same charterers for the carriage of a cargo of coal from South Africa to India ("the Third Fixture").

56. At the start of the hearing, when he first mentioned the matter, Mr Turner, QC only had an incomplete copy of the fixing correspondence. A more complete copy was provided to me during the hearing. The position, as it appears from the emails, is that the Vessel was fixed for the Third Fixture on 23 September 2019, the day before the hearing, with

subjects that were to be lifted by the latest by 1400 Dubai time on 24 September 2019. The subjects appear to have been lifted on 24 September 2019 shortly before the hearing before me commenced.

57. This Third Fixture was plainly concluded by the Buyer in the full knowledge that there was to be an imminent hearing at which the Seller would seek a final injunction preventing further trading of the Vessel.

The Injunction Counterclaim

58. I set out the terms of clause 19 of the MOA in paragraph 7 above. It is convenient to set them out again at the start of this section of my judgment.

> "19. The vessel is sold for the purpose of demolition only and the Buyers hereby guarantee that they will not trade the Vessel further nor sell the vessel to a third party for any purpose other than demolition and will, on completion of demolition, furnish to the Sellers a certificate stating that the vessel has been totally demolished."

(i) The parties' submissions

59. The Seller's submissions, advanced by Mr Timothy Hill, QC, who appeared with Mr Alex Carless for the Seller at the hearing, were straightforward:

    i) Clause 19 contained a negative covenant;

    ii) Under English law, there was a strong presumption that such covenants should be enforced by injunction. It was for the Buyer to rebut that presumption;

    iii) It could not do so. This was not one of those exceptional cases where it would be unconscionable or oppressive to grant an injunction and where an injunction should, therefore, be refused.

60. Mr Turner, QC on behalf of the Buyer submitted in response that an injunction should not be granted. He did not dispute that clause 19 contained a negative covenant, but he submitted that, in considering whether to grant an injunction, I should have regard to the adequacy of damages and whether it was just to leave the Seller to its remedy in damages.

61. In that regard, although his submission was that the Seller was entitled only to nominal damages, Mr Turner, QC said in paragraph 41 of his skeleton argument that an injunction should nonetheless be refused because:

    i) The Seller's only interest in clause 19 and in the litigation was financial, but it had no measurable financial interest in restraining the trading of the Vessel;

    ii) The Seller had seen fit to arrest the Vessel, and had threatened its re-arrest, in support of a claim which Mr Turner, QC said had not even been formulated;

iii) The conduct described in i) and ii) above could fairly be characterised as vexatious and oppressive of the Buyer, notwithstanding the Buyer's failure to comply with clause 19.

In his oral submissions, Mr Turner, QC added a further point: the Seller could, he said, have sought an interim injunction precluding the use of the Vessel for trading but had not done so. A submission was also made about the impact of any injunction on the Buyer's obligations under the Third Fixture.

(ii) The law

62. I was taken by the parties to a number of authorities that addressed the approach under English law to the enforcement of negative covenants and, in that context, the relevance of the adequacy of damages, a point on which Mr Turner, QC placed some reliance.

63. I start with *Doherty v Allman* (1878) 3 App. Cas. 709 (*Doherty*). This was a case which involved a leasehold dispute where the court held that there was, in fact, no relevant negative covenant and where an injunction was ultimately refused.

64. Lord Cairns LC's remarks as to the proper approach in a case where there is a negative covenant are, therefore, strictly obiter, but in subsequent cases they have nonetheless been considered authoritative. At pages 719-20 Lord Cairns LC said this:

> "My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said in by covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

While the thrust of Lord Cairns LC's dictum has been accepted, subsequent authorities they make plain that his remark that a court has "no discretion to exercise" goes too far.

65. *Sharp v Harrison* [1922] 1 Ch. 502 (*Sharp*) concerned a covenant in a conveyance of a house that no addition or external alteration was to be made to the property without the claimant seller's consent. The defendant proposed to convert the house into flats and in the course of doing so to install a new window overlooking the claimant's property. The claimant sought an injunction enforcing the covenant.

66. Astbury J reviewed a number of authorities, including *Doherty*, which he said was the leading case on the subject. He referred to the following passage in the then current edition of *Kerr on Injunctions* which, he said, accurately summed up the result of the cases:

> "In exercising the jurisdiction by way of mandatory injunction against acts in violation of a contract, covenant, or agreement, the Court looks to the express stipulation of the agreement, and is not, as in cases of trespass or nuisance, influenced by considerations as to the nature or extent or the damage, or the comparative convenience or inconvenience of granting or withholding the injunction. A man who enters into an agreement is bound in equity to a true and literal performance of it. He cannot be suffered to depart from it at his pleasure, leaving the other party to his remedy by damages at law. There may be cases in which it is so clear that the mischief to arise from a breach of covenant would be inappreciable that a Court may decline to interfere on the ground that a mandatory injunction would be out of all proportion to the requirements of the case, and would operate with extreme harshness on the defendant. But as a general rule, the inconvenience to the defendant will not in such cases be taken into consideration. Nor can the defendant be permitted to set up the inconvenience to the public which would arise from his being compelled to perform his agreement."

67. On the facts, Astbury J held that the case before him was one where an injunction should be refused. The flat had been sold on to a third party; the claimant's surveyor, although objecting to the window, had allowed the building works to proceed; the breach would cause no substantial damage to the claimant of any kind; and the defendant was prepared to give undertakings not to claim any easement in respect of the window and to keep it glazed with frosted glass.

68. *Warner Brothers Pictures, Inc. v Nelson* [1937] 1 KB 209 (*Warner Brothers*) concerned the well-known film actress Bette Davis. An injunction was sought by the studio with which she had contracted to enforce a negative stipulation that she would not work for anyone else without its consent. Ms Davis admitted that she was in breach of the stipulation but argued that, though negative in form, it was affirmative in substance, and that as a covenant to render personal services it should not be enforced.

69. Branson J referred to Lord Cairns LC's statement in *Doherty*, remarking that, though that was not a case which concerned a contract of personal service, the same principle had been applied in the earlier case of *Lumley v Wagner* (1852) 1 De G. M. & G. 604. He summarised the applicable principles in the following way at page 217:

> "The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the Court will enforce those negative covenants; but this is subject to a further consideration. An injunction is a discretionary remedy, and the Court in granting it may limit it to what the Court considers reasonable in all the circumstances of the case."

70. On the facts of the particular case, Branson J said at page 219:

> "The case before me is, therefore, one in which it would be proper to grant an injunction unless to do so would in the circumstances be tantamount to ordering the defendant to perform her contract or remain idle or unless damages would be the more appropriate remedy."

He concluded that enforcement of the covenant would not force Ms Davis to remain idle, that estimating damages would be difficult and that the injury suffered might be out of all proportion to any monetary damages that could be proved or assessed, and he therefore granted an injunction.

71. *Attorney General v Barker* [1990] 3 All ER 257 (*Barker*) was another case concerning a contract of service, this time involving a covenant agreed by a member of the royal household precluding him from disclosing, publishing or revealing any incident, conversation or information concerning a member of the Royal Family learnt during his employment. An interim injunction was sought and granted preventing him publishing a book.

72. At page 260 Lord Donaldson of Lymington MR described the case before him in this way:

> "It is a simple case of someone who has entered into a negative covenant for a consideration where the covenant is not limited territorially and is not limited in time. As Nourse LJ pointed out in argument, in such circumstances the courts habitually enforce the covenant provided only that the covenant itself cannot be attacked for obscurity, illegality or on public policy grounds such as that it is in restraint of trade."

73. I interpose that no suggestion is made by the Buyer in this case that clause 19 of the MOA is unenforceable on any similar ground to those mentioned in *Barker*. An argument pleaded in paragraph 16 (1) (c) of the Reply and Defence to Counterclaim, that clause 19 was in one respect insufficiently precise, was not pursued either in the Buyer's written or oral argument (and was in any event, in my judgment, wrong).

74. The Master of the Rolls in *Barker* went on to explain that the matter before the court concerned an application for an interlocutory injunction, and that, although he thought that it was inevitable that an injunction would be granted at a final hearing, it would be wrong to so rule and that accordingly the court was concerned with the traditional weighing of factors set out in Lord Diplock's judgment in *American Cyanamid*. In that context, at page 260 he said the following about the adequacy of damages:

> "No one suggests or could suggest that damages would be an adequate remedy for the plaintiff, and there may well be difficulties in calculating the damages if the defendant were to succeed. Thus, we are concerned with where the balance of justice lies: 'convenience' is the word used in the report [in *American Cyanamid*] but that may be misleading. Pending a final hearing, the balance of justice clearly dictates that some injunction be granted."

75. The Master of the Rolls held that an appeal against the grant of an injunction in the United Kingdom should be dismissed and a cross-appeal against the refusal to grant an injunction effective worldwide should be allowed. Parker LJ and Nourse LJ gave concurring judgments, Nourse LJ remarked that the question of whether or not an injunction should be granted appeared to be answered by what he referred to as "the authoritative statement of principle" of Lord Cairns LC in *Doherty*.

76. In *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272 (*Insurance Co v Lloyd's Syndicate*) Colman J was concerned with whether a permanent injunction should be granted at trial to restrain the defendant Lloyd's syndicate from disclosing the award and reasons in an arbitration between the syndicate and the claimant insurance company, which was one of the syndicate's excess of loss reinsurers, to other reinsurers in breach of an implied obligation of confidence.

77. Having considered the authorities, which included *Doherty* and *Sharp*, at page 277 of the report Colman J summarised the principles in the following way:

> "The effect of the authorities can be summarized as follows: (1) Express or implied negative covenants will in general be enforced by injunction without proof of damage by the plaintiff. (2) The principle does not depend on whether the plaintiff is a person or a corporation. The ready availability of the remedy is not the consequence of equity's regard for the plaintiff's personal feelings, but of equity's perception that it is unconscionable for the defendant to ignore his bargain. (3) Although absence of damage to the plaintiff is not in general a bar to relief, there may be exceptional cases where the granting of an injunction would be so prejudicial to a defendant and cause him such hardship that it would be unconscionable for the plaintiff to be given injunctive relief if he could not prove damage. In such cases an injunction will be refused and the plaintiff will be awarded nominal damages."

78. *Tye v House* (1998) 76 P. & C.R. 188 concerned a challenge to an *ex parte* interim injunction precluding the defendant from exchanging or completing upon the sale of a golf course in circumstances where the defendant had agreed with the claimant not to negotiate with another purchaser once he had agreed the claimant's offer.

79. In what appears to have been an *ex tempore* judgment, Evans-Lombe J discharged the injunction at the *inter partes* hearing. He was persuaded to do so on the basis that, although the defendant was precluded from negotiating with anyone else, the claimant had no right to insist that the defendant should sell the land to him, and damages were a suitable alternative remedy.

80. *Araci v Fallon* [2011] EWCA Civ 668 (*Araci*) concerned the well-known jockey Kieren Fallon. Mr Fallon had concluded a Rider Retainer Agreement with the claimant under the terms of which he agreed, amongst other things, to ride the claimant's horse Native Khan whenever requested to do so and not to ride another horse where he had been retained to ride Native Khan. Mr Fallon had been asked to ride Native Khan in the 2011 Epsom Derby, but in the week before the race had said that he intended to ride another horse instead.

81. An interim injunction was sought enforcing the negative covenant not to ride another horse. It was refused at first instance in the exercise of the judge's discretion. The plaintiff appealed.

82. Jackson LJ, who gave the principal judgment in the Court of Appeal, referred to four propositions that the first instance judge had derived from *Treitel on the Law of Contract*. The first of these recognised that, where there was a negative stipulation, future breaches might be restrained "as a matter of course". The fourth principle was as follows:

> "4. Fourth, this is all subject to discretion, an injunction being an equitable remedy. Although I emphasise the basic rule that an injunction in the circumstances described will normally be granted as a matter of course. But injunctive relief may be refused if it is oppressive to the defendant or cause him particular hardship, although it would not be oppressive merely because burdensome or little prejudice to the claimant."

83. As Jackson LJ's judgment records, in the Court of Appeal neither counsel challenged the judge's four principles. Counsel for the claimant, however, argued, and Jackson LJ accepted (at [39]), that having regard to *Doherty* and one other case, the fourth principle was subject to the following qualification:

> "Where the defendant is proposing to act in clear breach of a negative covenant, in other words to do something which he has promised not to do, there must be special circumstances (e.g. restraint of trade contrary to public policy) before the court will exercise its discretion to refuse an injunction."

84. The first instance judge had considered in relation to his fourth principle the question of whether damages would be an adequate remedy. Jackson LJ, disagreeing with the judge, considered that an award of damages in lieu of an injunction would not be adequate. He also disagreed that the matters that had been relied upon by the judge were capable of justifying the refusal of relief in the exercise of the court's discretion. As Jackson LJ said at [65]:

> "65. The defendant voluntarily entered into a contract for substantial reward containing both positive and negative obligations. There is nothing special about the world of racing which entitles the major players to act in flagrant breach of contract. The defendant has promised in the context of a commercial agreement that he will not compete against Native Khan in the Derby this afternoon. In my view, that promise should be enforced."

85. Elias LJ gave a short concurring judgment. His judgment is notable principally for the following comment on the relevance of the adequacy of damages:

> "69. […] In a case where the breach of a negative covenant is clear, there is no magic in the fact that the injunction is

> being sought at an interlocutory stage. All questions of balance of convenience are then immaterial, as the Lord Chancellor, Lord Cairns made clear in *Doherty v Allman* (1878) 3 App. Cas. 709, 720 in the passage reproduced by Jackson LJ in his judgment.
>
> 70. So the question becomes whether the injunction should be granted following a trial. There were two reasons relied upon by the judge why it should not. First, he considered that damages would be an adequate remedy. However, that is not generally a relevant consideration when the injunction restrains the breach of a negative covenant. The court is by granting the injunction simply enforcing what the parties have agreed: see the discussion in *Chitty on Contracts*, 30th Edition, para. 27-060. Exceptionally, an injunction may be refused if it would be oppressive to the defendant to grant it, but it can hardly be said to be oppressive to prevent Mr Fallon from acting in cynical disregard of the obligations he has voluntarily undertaken.
>
> 71. In any event, even if the adequacy of damages were a relevant consideration in this context, I would respectfully disagree with the judge's conclusion – which he reached with considerable hesitation – that damages would be an adequate remedy here."

86. The most recent case I was shown concerning the proper approach to an application for injunctive relief to enforce a negative stipulation is the decision of the Court of Appeal in *P v D* [2016] EWCA Civ 87.

87. This case concerned the enforcement of a post-termination restrictive covenant in a contract of employment. At an expedited trial Snowden J granted an injunction. On appeal, there were issues as to the proper construction of the contractual provision, whether it applied on the facts as found, and as to whether an injunction should have been granted as a matter of discretion. It is in relation to the last issue that the decision is relevant here.

88. Sir Colin Rimer gave the only substantive judgment in the Court of Appeal. At [14] of the published report he distinguished the case before the court from that considered by the Supreme Court in *Lawrence v Fen Tigers Ltd* [2014] AC 822 which was concerned with whether damages should be awarded in lieu of an injunction sought in response to the commission of a tort. The case before him, he said, was materially different because it involved a claim in contract to enforce a negative restraint to which the defendant had voluntarily agreed.

89. As to the approach in cases concerning negative covenants at [16] he posed the following rhetorical question:

> "Why, therefore, in circumstances such as these, should the court's approach to the claimant's claim be other than one

> reflecting a firm recognition that the remedy to which it ought prima facie to be entitled is an injunction?"

He referred to Lord Cairns LC's dictum in *Doherty,* quoted above, remarking at [17] that:

> "That statement is bottomed in the recognition of a basic principle of which sight should not readily be lost, namely that contracting parties should ordinarily be held to their bargain".

90. Sir Colin Rimer acknowledged, however, that an injunction, like all equitable remedies, was discretionary and would not be granted as a matter of course. Subject to a reservation about the utility of his reference to "exceptional cases" at [20] he approved the summary of the principles given by Colman J in *Insurance Company v Lloyd's Syndicate*:

> "20. If I may say so, and by reference to Colman J's summary quoted in para 18 above, I have some respectful reservations as to the value of judicial observations to the effect that a particular principle will ordinarily apply save in 'exceptional cases' or 'exceptional circumstances', since it usually leaves open an unhelpfully wide margin for parties in future cases to find themselves at odds as to whether or not their case is 'exceptional'. That said, I consider that Colman J's quoted summary would in fact be just as valuable if he had omitted the word 'exceptional' since he anyway explained the circumstances he had in mind in which it might not be appropriate to grant an injunction. Sir Donald Rattee, in *Dyson Technology Ltd v Strutt* [2005] EWHC 2814 (Ch) endorsed and applied Colman J's guidance and held that the case before him was not the type of exceptional case to which Colman J had referred and that Mr Strutt should be held to his bargain by the grant of an injunction.
>
> 21. I respectfully agree with the approach reflected in the *Insurance Company* and *Strutt* cases, namely that the starting point in the consideration of a claim by an employer to enforce an employee's negative covenant is that the ordinary remedy is an injunction. Given, however, that an injunction is a discretionary remedy, that is not necessarily also the finishing point, although I would be wary of attempting to prescribe with any sort of particularity the types of circumstances in which it might be appropriate to refuse an injunction. The exceptional circumstances referred to by Colman J do, I consider, provide a helpful general explanation as to the types of case in which it may be just to do so. But the categories of circumstances are never closed and every case will turn on its own facts. […]

> 22. There is in my view, therefore, no doubt that the approach to the exercise of the discretion is, as the judge held, not a 'mechanistic' one. Nor in my view, as he also held, is there any doubt that in a case such as the present the burden of showing why an injunction should not be granted is on the covenantor. I reach both these conclusions by reference to the authorities relating to the breach of negative covenants and that pre-dated *Lawrence v Fen Tigers Ltd* [2014] AC 822. The approach is, however, essentially consistent with that to be derived from Lawrence."

91. The principles to be derived from these authorities are, in my judgment, as follows:

i) Negative covenants will ordinarily, although not invariably, be enforced by injunction;

ii) It is not a precondition to enforcement by injunction that the party seeking an injunction should prove that it would otherwise suffer damage;

iii) An injunction is nonetheless an equitable, and therefore a discretionary, remedy (I do not consider that the fact that in clause 19 the Buyer "guaranteed" that the Vessel would not be traded further, a point relied upon by the Seller, changes the position in this regard);

iv) So far as the exercise of discretion is concerned, there may be cases where the circumstances are such that the grant of an injunction would be unconscionable (Colman J in *Insurance Company v Lloyd's Syndicate*) or oppressive (Elias LJ in *Araci*), and in such circumstances an injunction should be refused. Whilst a mechanistic approach should not be followed, inconvenience or hardship to the defendant is, however, not enough;

v) The burden lies on the party bound by the negative covenant to show why the ordinary rule should not apply, i.e., why the covenant should not be enforced by injunction.

92. As I indicated earlier, there was a debate between the parties as to the extent to which an assessment of the adequacy of damages was a relevant part of the exercise of deciding whether a negative covenant should be enforced by injunction. Mr Turner, QC acknowledged that there were a number of authorities that suggested that it was not: *Doherty*, *Araci* (per Elias LJ) and *Lumley v Wagner*. He suggested, however, that the better view, supported by *Warner*, *Barker* and *Tye v House*, was that it was a relevant consideration.

93. Care is required when reading these authorities:

i) In *Warner* Branson J certainly asked himself whether damages would be a more appropriate remedy, but he cited *Doherty* with approval and his judgment is consistent with the proposition that, although the court always has a discretion, negative covenants ought generally to be enforced;

ii) *Barker* concerned an application for an interim injunction, and the reference to the adequacy of damages in the Master of the Rolls judgment appears in the context of the traditional *American Cyanamid* weighing of factors;

iii) *Tye v Hous*e was a brief report in a case which also involved an application for an interim injunction.

94. That said, it is well-established that an injunction will ordinarily not be granted where damages are an adequate remedy: as Lindley LJ said in *London and Blackwall Railway Co. v Cros*s (1886) 31 Ch. D. 354, 369 (a case not cited to me, but which is well-known):

> "The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy."

95. What Lindley LJ stated, however, was the *prima facie* position. There is a strong policy in favour of enforcing contracts, and the authorities support the proposition that a defendant should not, by paying damages, be able to buy the privilege of infringing the claimant's contractual rights.

96. I note, furthermore, that the question Lindley LJ posed was whether damages were "the proper remedy", and the adequacy of damages should, in my judgment, be considered in this sense, i.e., whether it would be just to confine the claimant to his remedy in damages. The answer to that question will, of course, depend upon the circumstances of the particular case, including whether the case involves the breach of a contractually agreed negative covenant.

97. The answer to the question posed, therefore, is in my judgment this: in determining whether it would be unconscionable or oppressive to grant an injunction enforcing a negative covenant, and whether an injunction should be refused in the exercise of the court's discretion, the consequences of the grant or the refusal of an injunction for both parties will be relevant, and that may include consideration of whether damages would be a sufficient and appropriate remedy for the claimant. But that does not detract from the position that ordinarily negative contractual covenants will be enforced by injunction.

98. Although Mr Turner, QC's submission was that any such damages would be nominal, he submitted in his skeleton argument that the present case was the sort of case where, in principle, the court might be minded to award damages in lieu of an injunction under section 50 of the Senior Courts Act 1981, which restates the jurisdiction originally provided for in section 2 of the Chancery Amendment Act 1858, commonly known as Lord Cairns' Act.

99. I was shown in that regard three authorities that concerned the proper approach to the question of whether damages should be awarded in lieu of an injunction.

100. The first was *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch. 287 (*Shelfer*). This involved an electric lighting company which erected engines and carried on other works on land near a public house causing structural damage to the house and annoyance and discomfort to the occupants. The lessee and reversioner of the house

brought separate proceedings against the company in nuisance seeking an injunction and damages.

101. The company denied the nuisance but said that, in any event, because of the public utility of its works, the court should decline an injunction and award only damages. Kekewich J held that the company's acts constituted a nuisance, but he decided that damages were fair compensation and that no injunction should be granted, either to the lessee or to the reversioner.

102. The Court of Appeal disagreed. Lord Halsbury said at page 311 that, although Lord Cairns' Act had conferred upon Courts of Equity a power to award damages in place of an injunction, it had not revolutionised the principles upon which equitable jurisprudence had been administered. There was nothing, he considered, which could justify the court refusing to aid the claimants' legal rights by injunction preventing the continuance of the nuisance. On the contrary, he said:

> "… the effect of such a refusal in a case like the present would necessarily operate to enable a company who could afford it to drive a neighbouring proprietor to sell, whether he would or no, by continuing a nuisance, and simply paying damages for its continuance."

103. Lindley LJ gave a concurring judgment. At pages 316-317 he said this:

> "Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy – as where the acts complained of are already finished – an injunction can properly be refused."

I interject that a number of the instances identified by Lindley LJ of conduct that might justify an award of damages in lieu of an injunction are relied upon by the Buyer in this case: the Buyer suggests that the Seller only wants money and that its conduct in arresting and threatening to re-arrest the Vessel was vexatious.

104. AL Smith LJ also agreed. At pages 322-323 of his concurring judgment he described circumstances where he said "as a good working rule" an award of damages in lieu of an injunction might be appropriate:

> "Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by

> purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed as the case may be.
>
> In such cases the well-known rule is not to accede to the application, but to grant the injunction sought for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction.
>
> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution as authorized by this section.
>
> In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.
>
> In my opinion, it may be stated as a good working rule that –
>
> (1) If the injury to the plaintiff's legal rights is small,
>
> (2) And is one which is capable of being estimated in money,
>
> (3) And is one which can be adequately compensated by a small money payment,
>
> (4) And the cases is one in which it would be oppressive to the defendant to grant an injunction
>
> then damages in substitution for an injunction may be given.
>
> There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction."

105. It will be apparent, both from the numbered paragraphs themselves and from the language that followed, that AL Smith LJ's four criteria were cumulative. His remark about a defendant "hurrying up … so as if possible to avoid an injunction" might be said to have some relevance here given the Buyer's conclusion of the Third Fixture very shortly before and in the knowledge of the present hearing.

106. This passage in AL Smith LJ's judgment in *Shelfer* was considered by the Court of Appeal in *Jaggard v Sawyer* [1995] 1 WLR 269 (*Jaggard*).

107. *Jaggard* concerned the construction of a house in breach of a restrictive covenant in favour of adjacent householders which prevented the use of the relevant land for anything other than a private garden, and a trespass on a private road which those householders shared. An injunction was threatened, but no application for an interim injunction was made. Proceedings for a permanent injunction were only commenced when building work was at an advanced stage. The property had been completed by the time of trial.

108. The trial judge concluded that, in the circumstances, the grant of an injunction would be oppressive to the defendant and he awarded damages in lieu in an amount which reflected the price he considered the defendant might reasonably have been required to pay for release from the covenant and for a right of way. His decision was upheld on appeal.

109. At pages 276 and following Sir Thomas Bingham MR set out the history of and the change effected by Lord Cairns' Act, which gave the Court of Chancery the power to award damages, either for unlawful conduct in the past at the same time as granting an injunction to restrain unlawful conduct in the future, or instead of an injunction to restrain future unlawful conduct.

110. The Master of the Rolls went on to set out AL Smith LJ's "good working rule" and the subsequent cases that had considered it. At page 282 he recorded that the trial judge had held that this was a case where all four of AL Smith LJ's criteria had been satisfied. Most of the argument on appeal, he recorded turned on the fourth criterion - the question of oppression – and the significance of the claimant's failure to seek interlocutory relief.

111. So far as that is concerned, the Master of the Rolls said at page 283 that:

> "It is important to bear in mind that the test is one of oppression, and the court should not slide into the application of a general balance of convenience test. But oppression must be judged as at the date the court is asked to grant and injunction, and (as Brightman J recognised in the *Wrotham Park* case) the court cannot ignore the reality with which it is then confronted."

112. He went on to explain that the fact that the claimant could have sought an interlocutory injunction and the defendant could have sought a declaration of right were relevant, but not decisive, considerations, remarking that:

> "It would weigh against a finding of oppression if the defendants had acted in blatant and calculated disregard of the plaintiff's rights of which they were aware"

He held that the trial judge had been entitled to hold that the grant of an injunction would be oppressive to the defendant and that the appeal should accordingly be dismissed.

113. Kennedy LJ agreed with the Master of the Rolls. Millett LJ gave a separate concurring judgment. At pages 287-288 he said this about the proper approach:

"When the plaintiff claims an injunction and the defendant asks the court to award damages instead, the proper approach for the court to adopt cannot be in doubt. Clearly the plaintiff must first establish a case for equitable relief, not only by proving his legal right and an actual or threatened infringement by the defendant, but also by overcoming all equitable defences such as laches, acquiescence or estoppel. If he succeeds in doing this, he is prima facie entitled to an injunction. The court may nevertheless in its discretion withhold injunctive relief and award damages instead. How is this discretion to be exercised? In a well known passage in *Shelfer v City of London Electric Lighting Co.* [1895] 1 Ch 287, 322-323, A.L. Smith L.J. set out what he described as a 'good working rule' that

[omitted]

Laid down just 100 years ago, A.L. Smith L.J.'s check-list has stood the test of time; but it needs to be remembered that it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction.

Reported cases are merely illustrations of the circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.

The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled? Most of the cases in which the injunction has been refused are cases where the plaintiff has sought a mandatory injunction to pull down a building which infringes his right to light or which has been built in breach of a restrictive covenant. In such cases the court is faced with a fait accompli. The jurisdiction to grant a mandatory injunction in those circumstances cannot be doubted, but to grant it would subject the defendant to a loss out of all proportion to that which would be suffered by the plaintiff if it were refused, and would indeed deliver him to the plaintiff bound hand and foot to be subjected to any extortionate demands the plaintiff might make […]

…

In considering whether the grant of an injunction would be oppressive to the defendant, all the circumstances of the case

> have to be considered. At one extreme, the defendant may have acted openly and in good faith and in ignorance of the plaintiff's rights, and thereby inadvertently placed himself in the position where the grant of an injunction would either force him to yield to the plaintiff's extortionate demands or expose him to substantial loss. At the other extreme, the defendant may have acted with his eyes open and in full knowledge that he was invading the plaintiff's rights, and hurried on his work in the hope that by presenting the court with a fait accompli he could compel the plaintiff to accept monetary compensation. Most cases, like the present, fall somewhere in between."

114. *Shelfer* and *Jaggard* make plain three matters:

i) First, that once the claimant has established his legal right and the actual or threatened infringement, and has overcome any equitable defences, he is *prima facie* entitled to an injunction. It is for the defendant to satisfy the court that, in the exercise of its discretion, it ought not to grant an injunction but should award damages instead;

ii) Secondly, that although AL Smith LJ's good working rule includes other matters, the most important question in any case is likely to be whether the grant of an injunction would be oppressive to the defendant. Insofar as there is a test (recognising that the question is one of discretion which depends upon all the circumstances of the particular case), it is oppression;

iii) Thirdly, even if oppression is made out, there may be circumstances in which an injunction should still be granted. AL Smith LJ contemplated that in the case of a defendant "hurrying up … to avoid an injunction" an award of damages in lieu of an injunction might be refused. Sir Thomas Bingham MR similarly spoke of defendants who had acted "in blatant and calculated disregard of the plaintiff's rights of which they were aware". The passage in Millett LJ's judgment set out above is consistent with both.

115. The correctness of these matters was recently confirmed *HTC Corporation v Nokia Corporation* [2013] EWHC 3778 (Pat), [2014] Bus LR 217 (*HTC*).

116. HTC was a case where the claimant mobile telephone manufacturer was alleged to be using chips that infringed the defendant's patent. The patent was held to be valid and the claimant's conduct to have infringed that patent. On the defendant's application for a final injunction to prevent further infringement, the claimant admitted its intention to continue its infringing acts but said that an injunction should be refused and damages awarded instead.

117. The subject matter of the case, a patent, meant that specific consideration had to be given by Arnold J to Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L157, p 45) ("the Enforcement Directive"). In relation to the general principles set out in *Shelfer* and *Jaggard*, however, at [8]-[9] Arnold J said this:

> "8. *Shelfer's* case establishes that a claimant is prima facie entitled to an injunction to restrain a person from committing an act which invades the claimant's legal right. The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's right on payment of damages assessed by the court. Accordingly, it is only in special circumstances that the court will exercise its discretion to award damages in lieu of an injunction. AL Smith LJ said, at pp 322-323, that it was 'a good working rule' that"
>
> [omitted]
>
> He went on to make it clear that what constituted a 'small money payment' was a relative matter. Subsequent cases have emphasised that AL Smith LJ's good working rule is only that: it is not a statute or a straightjacket.
>
> 9. In *Jaggard's* case [1995] 1 WLR 269, 283 Sir Thomas Bingham MR stated: 'It is important to bear in mind that the test is one of oppression, and the court should not slide into application of a general balance of convenience test.' Similarly, Millett LJ stated, at p 288: "The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled?'

118. Arnold J continued at [11] to explain how consideration of oppression had been addressed in cases concerning real property.

> "11. […] It is clear from this case law that, in considering whether the grant of an injunction would be oppressive, the extent to which the claimant asserted his rights, what knowledge the defendant had of the claimant's rights, when and what the defendant did when faced with the problem are particularly relevant considerations. Whether the claimant sought an interim injunction and whether the defendant sought negative declaratory relief appear to be the relevant factors, but the weight of these factors appears to vary from case to case. A potentially decisive factor is if the claimant makes it clear that all he is really interested in is money. This is illustrated by *Gafford v Graham* (1998) 77 P & CR 73. In that case the plaintiff's solicitors had written a letter making clear that the plaintiff would be prepared to accept a payment of £100,800 in settlement of the dispute. In those circumstances, Nourse LJ said, at pp 85-86:
>
> 'His willingness to settle the dispute on payment of a cash sum can properly be reflected by an award of

> damages. Nor, once that is established, can it be an objection that the amount of damages may be large. The injury to the plaintiff's legal rights must be adequately compensated. In such a case the first and third conditions of the good working rule do not apply. I summarise the position as follows. The essential prerequisite of an award of damages is that it should be oppressive to the defendant to grant an injunction. Here that prerequisite is satisfied. It would be oppressive and therefore unfair to the defendant to allow the judge's injunctions to stand. The plaintiff should receive an award of damages instead.'"

(iii) Application

119. I am concerned in the present case with three obvious and undisputed breaches of the negative covenant contained in clause 19 of the MOA, the third of which concerns a fixture concluded very shortly before the commencement of this trial in the knowledge that a final injunction was being sought.

120. This being so, the ordinary position is that the Seller is entitled to an injunction enforcing clause 19. It is for the Buyer to satisfy me that this is a case where that ordinary position should not apply, where it would be unconscionable or oppressive for an injunction to be granted and where, in the exercise of my discretion, an injunction should be refused. Similarly, if the question is whether I should award damages in lieu of an injunction, it is for the Buyer to satisfy me (quite apart from the other aspects of AL Smith LJ's good working rule) that it would be oppressive not to do so.

121. In my judgment, on the basis of the evidence I have read and the submissions I have received, the Buyer comes nowhere near surmounting this hurdle.

122. First, this is not one of those cases, such as *Jaggard* (see pages 275 and 283 of the report) where the defendant has breached the negative covenant through inadvertence or as a result of reliance upon what turned out to be incorrect legal advice. The terms of clause 19 of the MOA are clear, and there is no suggestion that the Buyer has ever misunderstood their effect. The breaches that have occurred were deliberate; the conclusion of the Third Fixture, very shortly before the hearing, can properly be regarded as cynical.

123. Secondly, the reason for the Buyer's decision to trade the Vessel in breach of clause 19 is avowedly economic, but there is nothing that would justify a conclusion that the financial or other consequences for the Buyer in the event that clause 19 were to be enforced by injunction would be so extraordinary that the granting of an injunction should be regarded as unconscionable or oppressive.

124. The position in this regard appears to be that the Buyer purchased the Vessel when prices for scrap metal were at a peak: see paragraph 15 of Mr English's second report. Prices have since dropped off, and a sale of the Vessel for scrap between May and June 2019 would probably have resulted in the Buyer making a loss of around US$36 per ton or US$760,000 in all (as against a purchase price of some US$9.6 million). All that means, however, is that the Buyer has made what turned out to be a bad bargain. That

is not a good reason for relieving it from the terms of the bargain it has voluntarily made and for allowing it to ignore the terms of clause 19.

125. It is important to note, furthermore, that the options available to the Buyer at the time it took delivery of the Vessel were not simply either an immediate sale of Vessel for scrap at a loss or further trading in breach of clause 19. The Buyer could have chosen to lay the Vessel up and to wait for the market for scrap steel to improve, a course that Mr Dimitriou acknowledged might be taken in paragraph 34 of his first witness statement.

126. Ms Koo's evidence in her third witness statement in that regard, which was unchallenged, was that it would cost around US$20-25,000 for two months if the Vessel was laid up somewhere like Sri Lanka and about US$18,000 per month if it was laid up somewhere more convenient such as Malaysia. I have been provided with no explanation from the Buyer as to why that was not done; the inference I draw is that the Buyer preferred to try to avoid making any loss at all, and potentially to try to make a profit, by taking advantage of the rising freight market for Capesize bulk carriers.

127. In considering whether the grant of an injunction would be unconscionable or oppressive, and whether in the exercise of my discretion an injunction should be refused (and damages granted instead), I have considered, thirdly, whether damages would be a sufficient and appropriate remedy for the Seller, and thus an adequate remedy in the sense that I have described.

128. In my judgment, damages would not be an adequate remedy in this sense:

    i) I will have more to say about the Seller's damages claim in the section below, but the financial consequences for the Seller of the Buyer's breach of clause 19 would inevitably be uncertain and difficult if not impossible to quantify; the provable damages would, I accept, likely to be very limited;

    ii) However, the Seller has a legitimate commercial interest in insisting upon the Buyer adhering to the terms of its bargain by scrapping the Vessel and reducing – if only by one vessel – the accepted oversupply of Capesize tonnage with its impact on freight rates. TCC, the Vessel's operator, has a policy of scrapping its older vessels rather than selling them for future trading, and there is no reason why a term included in the Seller's contract with the Buyer to achieve that end should not be enforced;

    iii) I do not consider that it would be just, in the circumstances, to leave the Seller to its likely limited and difficult remedy in damages.

129. Fourthly, the reasons put forward by the Buyer as to why I should not grant an injunction, and why I should award damages in lieu (which it suggests would be zero), are unpersuasive.

    i) I do not accept that the Seller's interest in clause 19 is simply financial if, by that, it is meant that it is limited to the Seller's measurable, provable financial loss;

ii) The damages claimed in the Plaint in the Indian Proceedings may not, in fact, be recoverable under English law; that will depend upon whether this is an appropriate case for negotiating damages which I consider below, but I do not regard the arrest in India and the threatened arrest for that reason as necessarily vexatious or oppressive.

130. I also reject the point, made by Mr Turner, QC orally in light of his client's conclusion of the Third Fixture, that an injunction should be refused on the ground that, unless it was framed only to take effect once the Third Fixture had concluded, it would cause difficulties to the Buyer in meeting the laycan under the fixture and more generally in performing its contractual obligations to its charterer.

131. This was a bold submission. I do not know what the charterer under the Third Fixture has been told or knows of the current proceedings. But in circumstances where the Buyer chose to conclude the Third Fixture less than a day before the commencement of a hearing at which it knew an injunction preventing further trading was being sought, if any such difficulties arise the Buyer only has itself to blame. It must have been cognisant of the risks involved in concluding the Third Fixture when it did. This is, in my judgment, a case, such as that postulated by AL Smith LJ, where the Buyer has taken action in advance of a hearing in the hope of avoiding or minimising the effect of an injunction.

132. I should make clear that the Vessel has not yet loaded cargo or commenced upon the chartered voyage; had that been the case, additional considerations might have arisen. At the time of the hearing before me, the Vessel was concluding the discharge of cargo in India under the Second Fixture from where she would then have to perform a ballast voyage to load cargo under the Third Fixture. The terms of the injunction I have granted permit the Buyer to conclude the loaded voyage that was underway at the time of the trial, but there is no good reason, in my judgment, why the Buyer should be allowed to load a further cargo and commence performance of another trading fixture.

133. Fifthly and finally, although it is correct that no interim injunction preventing further trading was sought, this is not a case where the Seller has sat on its hands and allowed matters to get to a stage where the grant of an injunction would be inappropriate or oppressive. Ms Koo protested at the trading of the Vessel on 20 June 2019 as soon as she found out about it. The intention to seek a final injunction was flagged in Teare J's 14 August 2019 order, and a claim for an injunction was included in the Defence and Counterclaim when first served. The trial of the Injunction Counterclaim was expedited.

134. For these reasons, and as announced at the end of the trial, I grant the Seller an injunction in the terms sought, with the addition of a further paragraph making clear that it is intended to apply to the Third Fixture. The operative paragraphs of the order already drawn up and sealed by the time these reasons are handed down read as follows:

> "1. Save that the Claimant and the vessel "LORY" ("the Vessel") may complete any loaded voyage being performed at the time this order is made, the Claimant shall forthwith refrain from trading the Vessel and shall not trade the Vessel or re-sell the Vessel for trading at any time in the future."

> 2. For the avoidance of doubt, the injunction in paragraph (1) above restrains the Claimant from using the Vessel to perform the fixture the subject of the fixture recap dated 24 September 2019 at Appendix A hereto."

The Damages Counterclaims

135. In light of my decision, that an injunction should be granted preventing further breaches of clause 19 of the MOA and that damages should not be awarded in lieu of such an injunction, the Damages Counterclaims concern only the claim for damages that in respect of the past breaches, i.e., for the First Fixture and the Second Fixture.

(i) The nature of the claim

136. The claim for damages in respect of those fixtures is advanced on two legal bases:

i) First, as an ordinary claim for damages for breach of contract at common law; and

ii) Secondly, as a claim for damages in addition to an injunction under section 50 of the Senior Courts Act 1981.

137. So far as the measure of damages is concerned, however, both parties agreed at the hearing that it does not matter which of these two bases is adopted as the House of Lords in *Johnson v Agnew* [1980] AC 367 (*Johnson*) made clear that the approach to the assessment of damages in each case should be the same.

138. *Johnson* was a case where sellers of real property obtained an order for specific performance requiring the buyer to complete the purchase but where the buyer failed to do so. The property was subsequently repossessed and sold by mortgagees so that specific performance became impossible. The sellers thereafter sought an order that the buyer should pay the balance of the purchase price and an inquiry as to damages, or alternatively a declaration that they were entitled to treat the contract as repudiated, to forfeit the deposit and an inquiry as to damages.

139. The sellers lost at first instance, but the Court of Appeal held that they were entitled to damages under Lord Cairns' Act and made an order discharging the earlier order for specific performance and ordering an inquiry as to damages, fixing the date for assessment as the date when the order for specific performance was originally made.

140. Lord Wilberforce, who gave the only substantive speech in the House of Lords, acknowledged that the effect of Lord Cairns' Act was to enable a Court of Equity to award damages where the common law could not, most obviously where no breach of duty or damage had yet taken place. Apart from that case, however, Lord Wilberforce said at page 400 that:

> "I find in the Act no warrant for the court awarding damages differently from common law damages."

141. Consistent with this, Mr Turner, QC submitted, and I did not understand Mr Hill, QC to dispute, that where damages were awarded under section 50 of the Senior Courts Act 1981 in addition to an injunction for *past* breaches of covenant, where damages might

be awarded at common law as well, the approach to assessment in each case should be the same. Lord Reed in his judgment in *One Step* at [47] expressed reservations about *Johnson*, but I do not regard these reservations as undermining what Lord Wilberforce said in this particular situation, i.e., where the question concerns damages for past breaches potentially available under each of the two regimes.

142. I set out in paragraphs 43 and 44 above, the basis on which the Seller's damages claims were advanced.

143. At common law (see paragraph 19 of the Defence and Counterclaim) the Seller said that its loss and damage was appropriately measured by reference to the economic value of the right which had been breached. This was estimated to be US$2,400,000 based on the difference between the price paid for the Vessel under the MOA subject to the clause 19 restriction (US$9,623,184.90) and what was said to be the Vessel's market value as at the date of sale without that restriction (US$12,000,000).

144. Mr Hill, QC, however, accepted in argument that a claim in this amount was predicated upon clause 19 not being enforced by injunction and thus on the basis that the Seller had lost the entire value of its rights under that clause. In the event that clause 19 *was* enforced by injunction, albeit only prospectively and after the Vessel had completed the First and Second Fixtures, he said that the common law claim was put on the same basis as that articulated in paragraph 20.2 of the Defence and Counterclaim under section 50 of the Senior Courts Act 1981.

145. Paragraph 20.2, by way of reminder, claimed damages:

> "… based on the price which Sellers could reasonably have demanded from Buyers to release them from their undertaking in Clause 19 up until the date on which the abovementioned injunction takes effect. At present, Sellers estimate these damages as about US$849,000 based on 70% of the total gross profits earned by Buyers under the First Fixture and the Second Fixture."

The damages sought accordingly reflected a notional bargain in which a reasonable release fee was agreed for the relinquishment by the Seller of its clause 19 right.

146. The amount of profit, if any, earned by the Buyer for the First and Second Fixtures is not a matter I am required to determine today, nor is the question of what percentage of that profit might represent the sum that could reasonably have been demanded by the Seller to release the Buyer from the restriction contained in clause 19 to allow it to conclude those two fixtures. I am, however, required to determine whether negotiating damages, which is what this claim represents, are, in principle, available to the Seller in the present circumstances.

147. Mr Hill, QC invited me to go further and, if I held that negotiating damages were, in principle, available, also to decide the basis upon which such damages should be assessed, for example, whether as a percentage share of profits on the two fixtures or on some other basis. Mr Turner, QC objected, saying that I would thereby be going further than had been agreed or ordered by the court, that his submissions had not

addressed that question, and that such a matter was properly for a further hearing. Having considered the matter, I agree.

148. The question for me, accordingly, is whether this is a case where, in principle, the Seller is entitled to recover negotiating damages.

(ii) The availability of negotiating damages – *One Step*

149. There has been a wealth of authority and academic commentary over the last forty or so years in relation to what were previously called Wrotham Park damages, after the decision in *Wrotham Park Estate Co. Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (*Wrotham Park*), and which are now more properly referred to as negotiating damages.

150. The authorities were, however, comprehensively reviewed by the Supreme Court in *One Step* and there is little need now to look any further than that case.

151. *One Step* concerned alleged breaches of non-compete and non-solicitation covenants in the sale of a business which provided supported living services for children leaving care and vulnerable adults. The claimant buyer, One Step, contended that damages in a traditional sense would be difficult to prove and would not be an adequate remedy for the breaches that had taken place. It sought either an account of the defendants' profits or damages in an amount reflecting what would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from the restrictions.

152. The trial judge, Phillips J, held that the circumstances were not sufficiently exceptional to make an account of profits an appropriate remedy, but both he and the Court of Appeal considered that an award of *Wrotham Park* damages was appropriate. An injunction, or damages in lieu of an injunction under section 50 of the Senior Courts Act 1981, was not sought. The amount of the damages awarded was to be dealt with at a separate quantum hearing.

153. The Supreme Court disagreed. It said that the quantum hearing should proceed, but that it should not be, as ordered, an assessment of the amount which would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from their obligations; rather, the judge should measure as accurately as he could the financial loss which the claimant had actually sustained. Whilst the Supreme Court did not preclude evidence in relation to a hypothetical release fee being adduced, it made clear that such fee was not itself the measure of the claimant's loss.

154. The principal judgment in the Supreme Court was given by Lord Reed JSC, with whom Baroness Hale of Richmond PSC, Lord Wilson and Lord Carnwath JJSC agreed. Lord Sumption JSC gave a judgment concurring in the result but for different reasons. Lord Carnwath JSC gave a judgment explaining why he preferred Lord Reed's approach. Lord Reed's reasons therefore represent the reasons of the majority.

155. The issue in *One Step*, as framed by Lord Reed JSC at [1], was: in what circumstances can damages for breach of contract be assessed by reference to the sum that the claimant could hypothetically have received in return for releasing the defendant from the obligation which he failed to perform?

156. Having identified the issue, Lord Reed JSC commented at [2] on the rather loose way in which the term *Wrotham Park* damages had been used in the authorities and his preference for the term negotiating damages instead. In the course of doing so, Lord Reed referred to Lord Walker of Gestingthorpe JSC's judgment in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370, where, Lord Reed said, Lord Walker had spoken of the failure to distinguish between the use of the expression *Wrotham Park* damages:

> "… on the one hand, to describe every type of compensatory damages which exceed the actual financial loss to the claimant, and, on the other hand, damages awarded in lieu of specific performance or injunction under [Lord Cairns' Act]; and, in the latter context, between non-proprietary breaches of contract, and those involving the invasion of a property right."

This distinction between non-proprietary breaches of contract and breaches of contract involving invasion of property rights is a distinction that features later in Lord Reed's judgment.

157. After setting out the facts and the history of proceedings in the courts below, Lord Reed JSC addressed from [24] onwards certain first principles: the basis upon which damages were awarded in tort, including "user damages"; the basis upon which damages were awarded at common law for breach of contract; and damages awarded in equity under Lord Cairns' Act.

158. It is not necessary for me to set out or to attempt to summarise the whole of Lord Reed JSC's treatment of these topics, but in the context of the present case three points merit mention.

159. First, as Lord Reed JSC explained at [24], the award of negotiating damages under Lord Cairns' Act and at common law had been influenced by the award of user damages at common law. His explanation of the nature and rationale for user damages at [30] emphasised that they were a mechanism for awarding damages where there had been an unlawful use of property where the right to control the use of that property could be regarded as a valuable asset:

> "30. In these cases, the courts have treated user damages as providing compensation for loss, albeit not loss of a conventional kind. Where property is damaged, the loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand the unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss. Put shortly, he takes something for nothing, for which the owner was entitled to require payment."

160. The second point is Lord Reed JSC's restatement of the compensatory purpose of awards of damages for breach of contract, and the governing principle according to which damages for breach of contract are assessed. That same governing principle, of course, applies in this case.

161. The well-known passage in Parke B.'s judgment in *Robinson v Harman* (1848) 1 Exch. 850, 855 (*Robinson*) cited by Lord Reed JSC in *One Step* at [32], and referred to by Mr Turner, QC in his skeleton argument, bears repeating:

> "The rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

162. Lord Reed JSC went on to emphasise at [35]-[36] that damages are awarded to compensate the claimant for loss sustained by the wrongdoer's non-performance of its bargain, not (save in exceptional circumstances) to deprive the wrongdoer of his profit, and that proof of loss to the claimant is ordinarily a precondition to an award of damages:

> "35. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance (subject, according to the decision in *Attorney General v Blake*, to a discretion to order an account of profits in exceptional circumstances where the other remedies are inadequate). The damages awarded cannot therefore be affected by whether the breach was deliberate or self-interested.
>
> 36. It follows from the principle in *Robinson v Harman* 1 Exch. 850 that the language of election is not appropriate in a discussion of the quantification of damages for breach of contract. The objective of compensating the claimant for the loss sustained as a result of non-performance (an expression used here in a broad sense, so as to encompass delayed performance and defective performance) makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had

> been performed. Once the loss has been identified, the court then has to quantify it in monetary terms."

163. It is worth pausing for a moment to consider the application of *Robinson* and this passage in Lord Reed JSC's judgment in *One Step* to the facts of the present case.

    i) The Seller is the former owner of the Vessel. It did not, so far as the evidence reveals, own other vessels, although the Vessel was operated by TCC which may have owned and/or operated other vessels as well;

    ii) Once the Vessel had been sold and delivered to the Buyer, the Seller had no proprietary interest in the Vessel, no right or ability to use the Vessel to trade, and no right or ability to profit from the Vessel's use (and equally no responsibility for any costs or liabilities incurred in relation to the Vessel's operation);

    iii) The Seller is entitled to be placed, so far as money can do it, in the same position it would have been in if the Buyer had not breached clause 19 of the MOA. But, in the circumstances described above, it is not obvious how any further trading of the Vessel by the Buyer, albeit in breach of clause 19, could cause the Seller any loss.

164. Ms Koo's statement indicated that, if the Vessel was not scrapped as required, it would continue to contribute to the oversupply of tonnage causing freight rates to be depressed.

165. That may be so. However, as Mr Turner, QC submitted in paragraph 16 of his skeleton argument, it would be unlikely that the removal of one vessel from the world's 1,000+ strong Capesize bulk carrier fleet would have a measurable, provable, or at least a significant, financial impact on TCC. The claim for damages was, in any event, not made by TCC but by the Seller, and it was not clear what loss would be suffered by the Seller at all.

166. It is no doubt for this reason that no claim for damages in a conventional sense was pursued by the Seller. The only pleaded claim was for a hypothetical release fee, i.e., for negotiating damages.

167. The third point concerns Lord Reed JSC's discussion of the jurisdiction to award damages in equity under Lord Cairns' Act and section 50 of the Senior Courts Act 1981 which now reflects it.

168. As Lord Reed JSC explained at [41]-[42], Lord Cairns' Act had been passed, in part, to address a procedural inconvenience, namely that, if a claimant wished to claim damages in addition to equitable relief, it was necessary for the claimant to apply to the common law courts where the recoverable damages were limited to compensation for loss in respect of which there was a cause of action at common law.

169. Lord Cairns' Act did, however, also have a substantive effect in that it enabled the Court of Chancery to award damages *in substitution* for an injunction in circumstances where, because they concerned future wrongs, damages would not be recoverable at common

law. As I have determined that the Seller should be granted an injunction, we are not concerned with that second aspect here.

170. At [48]-[90] Lord Reed JSC addressed negotiating damages, dividing his consideration of the topic into two chronological phases:

i) An initial period in which awards based on a hypothetical release fee were made under Lord Cairns' Act in substitution for an injunction to prevent interferences with property rights and breaches of restrictive covenants over land; and

ii) A later period in which such awards were made at common law on what Lord Reed JSC described as "a wider and less certain" basis.

171. *Wrotham Park* itself was a case of the first type where proceedings were commenced for an injunction to prevent the development of a plot of land in breach of a restrictive covenant but where no application was made for an interim injunction and where Brightman J considered that an injunction requiring the removal of the completed houses should be refused as a matter of discretion.

172. Brightman J was, thus, concerned to determine what damages should be awarded in substitution for an injunction to prevent the continuing breach of the covenant. The effect of the breach of covenant on the value of the claimant's property would result in nil or merely nominal damages, but Brightman J considered that it would be unjust if the claimant received no compensation and the defendant was allowed to enjoy the fruits of its wrongdoing.

173. Referring to the user cases, and to Lord Sumner's observation in *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 870, that damages awarded under Lord Cairns' Act in substitution for an injunction should be designed to be a preferable equivalent for an injunction and therefore an adequate substitute for it, Brightman J concluded (at page 815 of the report) that a just substitute for an injunction would be

> "… such a sum of money as might reasonably have been demanded by the plaintiffs … as a quid pro quo for relaxing the covenant."

He concluded that a figure of 5% of the anticipated profits on the development would be fair.

174. In commenting on Brightman J's decision in *Wrotham Park*, Lord Reed JSC emphasised at [53] the nature of the right there in issue and its status as a right over property:

> "A restrictive covenant over land is enforceable in contract only as between the original parties, but it is enforceable in equity as between their successors in title to the land in question. Its effect is to create an equitable obligation whose benefit and burden run indefinitely with the ownership of each parcel of land, rather like a negative easement. It is for that reason that the benefit of the restrictive covenant is recognised as 'a new kind of property

> right created by equity': *Megarry & Wade, the Law of Real Property*, 8th ed (2012), para 5-026."

In that respect he said (at [54]) *Wrotham Park* resembled the earlier cases in which user damages had been awarded, in that the defendant's conduct infringed a valuable right held by the claimants to control the use of property, a right the benefit of which the claimants were effectively deprived by the refusal of an injunction.

175. After referring to subsequent cases, including *Bracewell v Appleby* [1975] Ch. 408, a case concerning trespass, and *Jaggard*, which involved (as explained above) trespass and breach of covenant, at [62] Lord Reed JSC said this:

> "62. The awards made in the *Wrotham Park* case [1974] 1 WLR 798 itself, and in the cases in which it was followed during the next quarter-century, were made in the exercise of a unique statutory jurisdiction: the award of damages in lieu of an injunction. The purpose of the awards was to provide the claimant with an appropriate monetary substitute for an injunction in the circumstances of the particular case. Every reported case appears to have concerned either a tortious interference with property rights, or the breach of a restrictive covenant over land. Damages were assessed according to the amount which might fairly have been charged for the voluntary relinquishment of the right which the court had declined to enforce, subject to downward adjustment for reasons of fairness.
>
> 63. That measure reflected the fact that the refusal of an injunction had the effect of depriving the claimant of an asset which had an economic value."

176. At [64] – [82], before addressing the second of the two phases in which negotiating damages were awarded, Lord Reed JSC dealt with the decision of the House of Lords in *Attorney General v Blake* [2001] AC 268 (*Blake*) a case concerned with the question of whether the spy, George Blake, could be deprived of the profits earned from a book he had published in breach of a contractual undertaking given at the beginning of his service with the intelligence services.

177. As Lord Reed JSC explained, what *Attorney General v Blake* decided was that, in exceptional cases, an account of profits can be ordered as a remedy for breach of contract. No such claim is made in this case, just as no such claim was made in *One Step*, and it is not therefore necessary to dwell on *Blake* or on Lord Nicholls' discussion of *Wrotham Park* about which Lord Reed JSC expressed certain reservations.

178. One particular point is, however, pertinent. At [72] Lord Reed JSC referred to Lord Nicholls' comment, that the judge in *Wrotham Park* had been right to apply the cases concerning interferences with property rights by way of analogy since, as Lord Nicholls said at page 283 of the report:

> "… it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights".

179. Lord Reed JSC remarked at [76] that:

> "… although it is not clear what Lord Nicholls meant by 'a lesser degree of remedy' … it is not surprising that damages for breach of contract are generally assessed differently from damages for the invasion of a proprietary right, since the rights and obligations in question are generally of a different character. It is only in circumstances where they are analogous that it would be reasonable to expect some consistency of approach. As has been explained, damages for breach of contract are based on the difference to the claimant between the outcome of performance and non-performance. That is not generally the same as the economic value of the right to performance, considered as an asset (which is not to deny that they may be the same, or similar, in some circumstances). This point was made in a different context by Lord Sumption JSC, with whom Lord Neuberger of Abbotsbury PSC, Lord Mance and Lord Clarke of Stone-cum Ebony JJSC agreed in *Bunge SA v Nidera BV (formerly Nidera Handelscompagnie BV)* [2015] Bus LR 987, para 21:
>
> > 'Sections 50 and 51 of the Sale of Goods Act [1979], like the corresponding principles of the common law, are concerned with the price of goods and services which would have been delivered under the contract. They are not concerned with the value of the contract as an article of commerce in itself.'"

Wrotham Park, as Lord Reed JSC went on to observe, was itself concerned with the invasion of a property right.

180. Lord Reed JSC's discussion of the second phase of the history of negotiating damages commenced at [83] with an explanation that, in the period since *Blake*, there had continued to be cases in which damages had been sought in lieu of an injunction and for interference with property rights in which damages had been assessed on the amount payable for a royalty or licence.

181. He also noted that there had been cases where negotiating damages had been treated as available at common law for breach of contract. *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) was identified as an example of such a case. There, confidential information had been misused in breach of both contractual and equitable duties of confidentiality. Damages were effectively awarded based on the commercial value of the information misused.

182. Lord Reed JSC explained at [84] that:

> "These cases can be understood as proceeding on the footing that the result of the breach of contract was that the claimants lost a

> valuable opportunity to exercise their right to control the use of the information."

The cases in Lord Reed's view, thus, did not support the proposition that negotiating damages were available in the case of a breach of *any* contractual right (even though, as Lord Reed later acknowledged, a contractual right is capable of being regarded as an asset or as property); rather, they indicated that negotiating damages could be awarded where the right in question was a right which entitled the claimant to control the use of other property, or something akin to property, in which it had an interest, in the case of *Vercoe* the claimant's confidential information.

183. Lord Reed JSC said at [89] that the decision of the Court of Appeal in *Experience Hendrix LLC v PPX Enterprises, Inc*. [2003] 1 All ER (Comm) 830 (*Experience Hendrix*), a case relied upon by Mr Hill, QC in his submissions, concerning the wrongful exploitation of certain master recordings made by Jimi Hendrix, was less straightforward but could be justified on the same basis:

> "89. Notwithstanding some of the reasoning, the decision in the case can be supported on an orthodox basis. The agreement gave the claimant a valuable right to control the use made of PPX's copyright. When the copyright was wrongfully used, the claimant was prevented from exercising that right, and consequently suffered a loss equivalent to the amount that could have been obtained by exercising it."

184. *Experience Hendrix* was a case where an injunction was granted by the trial judge to prevent future breaches of a settlement agreement of earlier litigation in which Jimi Hendrix challenged the validity of his recording contract with the defendant – a challenge which, if it had been successful, would have limited the defendant's ability to exploit the masters even though the defendant held the copyright in them (see the judgment of Mance LJ at [39]-[41]). The provision in the settlement agreement preventing further exploitation of the defendant's masters was, furthermore, intended to protect the value of Jimi Hendrix's own property, seemingly later recordings which the defendant did not own (see Mance LJ at [36] and Lord Reed JSC in *One Step* at [87]). The question at trial was whether damages could be awarded for past breaches in circumstances where the claimant acknowledged that it would be impossible to show or quantify any financial loss suffered by it as a result.

185. The trial judge was invited to award damages on a *Wrotham Park* basis, or alternatively to assess damages as equivalent to the whole profit made by the wrongdoer. He refused to do either. In relation to the *Wrotham Park* claim, the judge said that he did not consider the case analogous to *Wrotham Park* but, in any event, that no real foundation had been laid for damages to be assessed on the basis of what the market would pay for a release of the claimant's contractual right to restrain exploitation.

186. The Court of Appeal upheld the appeal and decided that damages should be awarded assessed by reference to the royalties that might hypothetically have been demanded. As indicated above, Lord Reed JSC expressed difficulties with certain aspects of the Court of Appeal's reasoning but said that its decision could be justified on what he described as an orthodox basis.

187. Lord Reed JSC's ultimate conclusions as to the availability of negotiating damages are set out in [91]-[95]. It is necessary to set out these important paragraphs in full:

> "91. The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. The imaginary negotiation is merely a tool for arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.
>
> 92. As the foregoing discussion has demonstrated, such circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which Lord Shaw's "second principle" and Nicholls LJ's "user principle" were applied. The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.
>
> 93. It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss.
>
> 94. It is not easy to see how, in circumstances other than those of the kind described in paras 91-93, a hypothetical release fee might be the

measure of the claimant's loss. It would be going too far, however, to say that it is only in those circumstances that evidence of a hypothetical release fee can be relevant to the assessment of damages. If, for example, in other circumstances, the parties had been negotiating the release of an obligation prior to its breach, the valuations which the parties had placed on the release fee, adjusted if need be to reflect any changes in circumstances, might be relevant to support, or to undermine, a subsequent quantification of the losses claimed to have resulted from the breach. It would be a matter for the judge to decide whether, in the particular circumstances, evidence of a hypothetical release fee was relevant and, if so, what weight to place upon it. However, the hypothetical release fee would not itself be a quantification of the loss caused by a breach of contract, other than in circumstances of the kind described in paras 91-93 above.

95. The foregoing discussion leads to the following conclusions:

(1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed "user damages") are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.

(2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.

(3) Damages can be awarded under Lord Cairns' Act in substitution for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.

(4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. The rationale is that, since the withholding of specific relief has the same practical effect as requiring the claimant to permit the

infringement of his rights, his loss can be measured by reference to the economic value of such permission.

(5) That is not, however, the only approach to assessing damages under Lord Cairns' Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction.

(6) Common law damages for breach of contract are intended to compensate the claimant for loss or damage resulting from the non-performance of the obligation in question. They are therefore normally based on the difference between the effect of performance and non-performance upon the claimant's situation.

(7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.

(8) Where the breach of a contractual obligation has caused the claimant to suffer economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence.

(9) Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages.

(10) Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset.

> The defendant has taken something for nothing, for which the claimant was entitled to require payment.
>
> (11) Common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, other than in exceptional circumstances, following *Attorney General v Blake*.
>
> (12) Common law damages for breach of contract are not a matter of discretion. They are claimed as of right, and they are awarded or refused on the basis of legal principle."

(iii) The present case

188. It is not suggested that the Buyer's breach in trading the Vessel in breach of clause 19 of the MOA has caused the Seller to lose profit or to incur additional expenditure. There is no pleaded claim for damages assessed in a conventional way.

189. The critical question in this case is whether the Seller can bring itself within [95(10)] of Lord Reed JSC's judgment in *One Step* and say that this is a case where negotiating damages can be awarded, namely where:

> "… the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset."

190. It is plain from the remainder of the paragraph, however, that such an approach is not available in the case of a breach of *any* contractual right, but only where:

> "… the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed."

The paragraph implicitly regards the relevant asset not as the contractual right itself but as something else, a valuable asset "created or protected by the right". The rationale, as the paragraph goes on to say, is that the claimant has been deprived of an asset – the defendant has taken something for which the claimant was entitled to require payment.

191. The explanation as to what Lord Reed JSC meant in this paragraph, and the distinction that he had in mind, is to be found in [92] and [93], which themselves reflect observations made earlier in his judgment to which I have already drawn attention.

192. The opening sentence of [93] makes clear that negotiating damages do not constitute the measure of a claimant's loss in the case of every breach of a contractual obligation. In [92] and [93] Lord Reed JSC explained, however, that they may be available:

> "92. […] where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the

> breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement"
>
> "93. […] [in the case of] some contractual rights, such as a right to control the use of land, intellectual property or confidential information."

193. The present case is not one which is concerned with breach of a restrictive covenant over land or of a contractual right to control the use of land, or with breach of an intellectual property agreement or a confidentiality agreement. It is not, therefore, concerned with breaches of any of specific types of agreement or covenant that Lord Reed JSC mentioned.

194. Mr Hill, QC, however, rightly points out that in [92] Lord Reed JSC referred to these types of cases simply as examples. His submission, set out in paragraph 110 of his skeleton argument, was that, although not one of these specific types, clause 19 of the MOA could be regarded as analogous to a restrictive covenant on the sale of land, such as that in issue in *Wrotham Park*, to the collateral agreement preventing the development of land in *Lane v O'Brien Homes* [2004] EWHC 303 (QB) (Lane) on which Mr Hill, QC also relied, or to the restriction on exploitation in the settlement agreement in *Experience Hendrix*.

195. I do not agree. Although it is plainly right that Lord Reed JSC only gave examples, what this and earlier passages in his judgment show is that what he had in mind were situations where there was some asset or property (or something analogous to it such as confidential information, arguably not property in the strict sense of the term) distinct from the contractual right itself.

    i) A restrictive covenant will run with the land, and as Lord Reed JSC explained is enforceable by the beneficiary in equity against future owners;

    ii) In the case of a breach of an intellectual property agreement or a confidence agreement, there is intellectual property or information which the terms of agreement exist to protect.

196. That is not the position here. As I indicated in paragraph 163 above, once the Vessel was sold and delivered to the Buyer, the Seller had no proprietary or financial interest in her. The Buyer's use of the Vessel for trading, though in breach of clause 19, did not involve the Buyer taking or using something in which the Seller had an interest, a valuable asset, for which the Seller was entitled to require payment.

197. Mr Hill, QC said at paragraph 112 of his skeleton argument that, by breaching clause 19 of the MOA, the Buyer had:

> "… unilaterally taken from Sellers the right to trade the Vessel".

That, however, is incorrect: once the Seller had sold and delivered the Vessel to the Buyer, it had no right to trade the Vessel itself.

198. Mr Hill, QC's reliance on *Wrotham Park*, *Lane* and *Experience Hendrix* is, in my judgment, similarly misplaced:

i) *Wrotham Park* concerned a restrictive covenant over land; the beneficiary had, through the covenant, an interest in and a right to control the land; cases involving restrictive covenants were one of the specific examples that Lord Reed JSC gave;

ii) *Lane* did not involve a restrictive covenant as such, but a collateral agreement between the seller and the buyer of the land intended to limit the land's future development. As apparent from paragraphs 11 and 21 of the judgment, however, counsel conceded that the fact that there was a collateral contract and not a restrictive covenant made no difference and that a *Wrotham Park* award could be made. Given the concession, the case provides little assistance;

iii) *Experience Hendrix* is not an easy case – that much is plain from Lord Reed JSC's judgment. It is, perhaps, best regarded as at or near the limit of the circumstances in which an award of negotiating damages will be appropriate. As Lord Reed, however, observed, the decision can be justified on an orthodox basis given the circumstances of the settlement described in paragraph 184 above, the impact of the proceedings, if they had continued, on the defendant's ability to exploit the masters in which it held the copyright, and the aim of the relevant provision which was seemingly in part to protect the value of Jimi Hendrix's own property.

199. In my judgment, the nature of the Seller's clause 19 right is, in fact, more analogous to the non-compete obligation in *One Step*, which Lord Reed JSC made clear at [93] and [99] he did not consider fell within the category of cases where negotiating damages were available as a measure of the Seller's loss. My conclusion is that the present case is not a case where negotiating damages are available.

200. In circumstances where the Seller's only pleaded claim for damages, both at common law for breach of contract and under section 50 of the Senior Courts Act 1981, is for negotiating damages, and where I have decided that damages assessed on such a basis are not available, the result is that, for the breaches of clause 19 in respect of the First Fixture and the Second Fixture, the Seller is entitled only to nominal damages.

The Damages Declaration

201. The issue that remains to be dealt with is the Damages Declaration: the Buyer's claim for a declaration that the Seller is entitled to no more than nominal damages for the previous and any future breaches of clause 19 of the MOA.

202. So far as previous breaches are concerned – the breaches in relation to the First Fixture and the Second Fixture – I have determined that the Seller is not entitled to negotiating damages, and in circumstances where no other damages have been pleaded or proved, the Seller is entitled only to nominal damages. I am prepared to make a declaration that this is the position.

203. I am not, however, prepared to declare that the Seller is entitled to no more than nominal damages in respect of any further, future breach that might occur.

204. First, I have no knowledge of the circumstances in which any such breach might take place or the effect that it might have on the Seller. It may be that, as in the case of the

First and Second Fixtures, the Seller is not able to show that it has suffered any damages recoverable on a conventional basis, but I consider that it would be wrong for me to determine that matter now.

205. Secondly, although declaratory relief is statutory and not equitable in nature (see *Snell's Equity* (33rd ed.), paragraph 14-008), the remedy is nonetheless discretionary. It is plain that a declaration is being sought so as to provide comfort to the Buyer in relation to any future breaches of clause 19 that it might be minded to commit. That is a comfort I am not prepared to provide. I do not consider that it is any part of the court's function to assist a party contemplating what would be a deliberate breach of contract in this way.

Conclusion

206. For these reasons:

i) In relation to the Injunction Counterclaim, I grant an injunction in the terms that have already been drawn up and sealed enforcing the terms of clause 19 of the MOA and preventing any further use of the Vessel by the Buyer for trading;

ii) In relation to the Damages Counterclaims, I dismiss the Seller's counterclaim for substantial damages in respect of the breaches of clause 19 of the MOA in respect of the First Fixture and the Second Fixtures; the Seller is entitled only to nominal damages;

iii) In relation to the Damages Declaration, I am prepared to make a declaration that the Seller is only entitled to nominal damages in respect of the breaches of clause 19 of the MOA in respect of the First Fixture and the Second Fixture, but I decline to make any broader declaration.

207. I invite the parties to agree an order reflecting my decision. I will hear submissions in relation to any consequential matters, including costs.