JUDGMENT : THE HONOURABLE MR JUSTICE COOKE : Commercial Div : High Court : 11th May 2004

Introduction

1. The Defendant (the Sellers) had, until 2002, a controlling and beneficial interest in a fleet of 11 LPG Carriers constituting the Tarquin Fleet, which is the subject matter of these proceedings. Each tanker was owned by one or other of a number of ship owning companies which were either financing companies or were directly owned by the Sellers themselves. An affiliated company, Tarquin Gas Carriers Limited, operated and managed the fleet. All the vessels were classed with the French Classification Society Bureau Veritas (BV).

2. The Sellers decided to dispose of their LPG Fleet and entered into negotiations with various potential Purchasers. Each signed a confidentiality agreement and, in order not to reveal to the world that a potential sale was in the offing, none was permitted to inspect the vessels prior to entering into a binding Sale and Purchase Agreement.

3. On 3rd April 2002 the Sellers entered into such a Sale and Purchase Agreement (the SPA) with the three Claimant companies (the Purchasers) who were given access to the vessels' Class Records as at December 2001. The SPA was a master agreement under which the Sellers undertook to procure the sale of each of the vessels by the owning companies and the Purchasers undertook to procure a nominated Purchaser for each of the vessels. The total consideration for the sale of the Fleet was US$ 161M and the price allocated to each vessel was set out in a Schedule to the SPA. The actual contracts for the sale of each vessel were to be effected by means of individual Memoranda of Agreement (MOA) on a modified Norwegian Sale Form 1993 which were to be executed by 15th May 2002, or such later date as the parties might agree in writing (the Contract Execution date). As it transpired, each of the MOAs was executed on 23rd May 2002.

4. The final delivery date was to be three months after the Contract Execution date of the MOAs. Under clause 5 of the SPA, following its signature, arrangements were to be made for inspection of the vessels by the Purchasers, without opening up. Clause 3 contained provisions as to a potential adjustment in the purchase price for each vessel should it appear on inspection that the condition of the relevant ship was not consistent with its age and description, taking into account the Class Records made available to the Purchasers prior to the SPA. The detailed terms of that clause are set out later in this Judgment, being the crucial clause upon which the current dispute centres. In essence it provided for an expert determination of the price adjustment to be final and binding between the parties.

5. Very limited liability was assumed under the agreement by the Sellers for the condition of the ships, clause 2.9 excluding all liability, save that which was expressly set out in the agreement itself. Clause 18.1 constituted an "entire agreement clause" and provided that the agreement should not be varied otherwise than by an instrument in writing executed by the parties or their duly authorised representatives. There were two written Amendment letters, dated 10th and 20th May 2002 which did vary the SPA, the terms of which give rise to issues between the parties.

The Applications

6. Both the Purchasers and the Sellers have issued Applications for Summary Judgment against each other pursuant to CPR Rule 24.2(a) and (b). The Purchasers claim payment of specific sums on 3 of the 11 vessels where an expert, purportedly appointed under the terms of clause 3 of the SPA, has found that there should be a downward adjustment of the purchase price which had been fully paid on delivery. In addition the Purchasers seek Summary Judgment against the Sellers in respect of a number of identified issues relating to the expert's determination of an adjustment to the purchase price on these vessels and 5 further vessels. The Sellers in turn seek reverse Summary Judgment against the Purchasers on all the claims set out by the Purchasers in their Particulars of Claim, and in particular on one specific issue, namely whether the expert should have assessed the condition and costs of repairs of each ship as at the date of the Purchasers' inspection. The Purchasers equally seek reverse Summary Judgment against the Sellers on the latter's Counterclaims for breach of confidentiality and breach of good faith duties.

7. The Amended Particulars of Claim state that the tankers were inspected by the Purchasers between 3rd April and 10th May 2002 and that, as it then appeared to them that the condition of each ship was not consistent with its age and description in such a way that its value was affected, they referred the question of adjustment of price to an expert to be appointed by the Chairman of BV, as required by clause 3 of the SPA. The Particulars of Claim also allege that the Purchasers supplied details of the specific matters affecting each

tanker in accordance with the SPA and the Amendment letters, and that in due course the expert appointed by the Chairman of BV, having inspected the vessels himself and received written submissions from both Sellers and Purchasers, published final reports dated 19th March 2003 containing his findings and conclusions in relation to the adjustment of the purchase price for each of the LPG tankers.

8. The price adjustments which he determined, in respect of 8 ships, amount to US$ 2,966,500 and, by letter of 11th April 2003, the Purchasers demanded repayment of those sums, which the Sellers have refused to pay.

9. The Sellers' position is that there was no valid reference made to the expert in the time allowed in the SPA, that the expert acted outside the mandate given to him, that he conducted the reference unfairly and without regard for the agreed procedure, made findings without giving the Sellers an adequate opportunity to make submissions to him and failed properly to take into account such submissions as they did make.

10. In determining applications under CPR 24.2, the Court may give Summary Judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that the party has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at trial. In order to defeat the application for Summary Judgment, the respondent must show that it has realistic prospects of success, as set out in the Notes to the Rule and **Swain v Hillman** [2001] 1 AER 91 and **Three Rivers District Council v Bank of England (No 3)** [2001] 2 AER 513. In this case there are cross applications by both parties but the starting point must be the existence of an expert determination, purportedly pursuant to clause 3 of the SPA, which the Sellers must challenge in order to succeed on all of the applications, save for those made by the Purchasers in relation to the Sellers' Counterclaims.

The time bar point

11. The Sellers seek Summary Judgment on all of the Purchasers' claims on the grounds that the Purchasers did not make references "to the expert" within the period provided by clause 3.3 of the SPA, nor identify "to the expert" within the time prescribed by clause 3.4 of the SPA, as varied by the Amendment letter of 20th May 2002, "the specific matters alleged to affect the value of the ship and the amount of any reduction claimed". These points, the Sellers say, are to be determined solely on the basis of construction of the SPA and the Amendment letters. The Purchasers seek Summary Judgment in relation to three vessels and of necessity therefore seek the Court's determination on the self same issues too, in so far as they affect those ships. Both parties agree that the Court should decide these issues at this stage of the proceedings. No waiver or estoppel or acceptance of any variation of the SPA by conduct have been pleaded and the parties have chosen to argue this point on construction alone.

12. The SPA provided, in so far as relevant, as follows:

"1.1. "Expert" means an independent marine surveyor with experience in the survey of ships similar to the Ships to be nominated by the Chairman for the time being of Bureau Veritas". (BV)

"3.3 In the event that, following inspection of any of the Ship[s] in accordance with Clause 5.2, the Purchasers are of the opinion that the condition of the relevant Ship is not consistent with the age and description of the Ship (taking into account the Class Records as made available in December 2001) and is such as to reduce the value of the Ship, the Purchasers shall be entitled within 7 days of the completion of such inspection to refer the matter to the Expert to determine whether any adjustment should be made to the Purchase Price attributable to the relevant Ship. If no reference is made to the Expert within 7 days of completion of the inspection of the relevant Ship, the Purchasers shall be deemed to have accepted the relevant Ship at its agreed Purchase Price.

3.4 Within 14 days after making any reference to the Expert, the Purchasers shall identify in writing to the Expert, with a copy to Nile, the specific matters alleged to affect the value of the Ship and the amount of any reduction claimed. Nile shall be entitled to respond in writing to the Expert with a copy to the Purchasers, to the matters raised in the Purchaser's reference and may offer a sum in settlement of the amount claimed. The Expert may, if in his discretion he considers it necessary, visit the relevant Ship himself, in which case (i) the parties will co-operate to arrange such inspection at the earliest convenient opportunity and (ii) both parties shall be entitled, at their own expense, to have representatives on board the Ship with the Expert.

3.5 The sole criteria on which the Expert shall make a decision shall be to what extent, if any, the relevant Ship has a value which is less than would be reasonably expected taking into account her age and Class Records as referred to in clause 3.3. Where a Ship has suffered damage at the time the relevant Ship is referred to the Expert and which damage is covered by Nile's, a Nile Ship Owner's or Lessee's insurance, the Expert shall take account of the availability of such insurance, so that the relevant Ship shall be ascribed a value which includes the benefit of any insurance claim provided that the benefit of the insurance claims is assigned or otherwise made available to the Purchasers. The Expert shall not take into account any matters relating to market value or design (except where the design has been wrongly described). Where any matter complained of is capable of repair, the Expert shall take into

account the estimated cost of such repair and the likely loss of time, if any, taking into account good seamanship and normal commercial practice. The Expert's decision shall be final and binding on the parties.

3.6 No adjustment shall be made to the Purchase Price of any Ship where the Expert decides that the value of the matters complained of in relation to that Ship is less than 0.5% of the Purchase Price attributable to that Ship."

13. Seven ships were inspected in April (the April ships) (no reduction being award for two ships, the Tarquin Dell and the Tarquin Loch because the amount involved fell below the minimum to which the SPA referred), with clause 3.3 dates as follows:-

Ship	Date Inspected	Clause 3.3 Date	
Tarquin Crest ("Crest")	18 April 2002	25 April 2002	
Tarquin Pride ("Pride")	20 April 2002	27 April 2002	
Tarquin Dell ("Dell")	21 April 2002	28 April 2002	No Reduction
Tarquin Loch ("Loch)	22 April 2002	29 April 2002	No Reduction
Tarquin Forth ("Forth")	24 April 2002	1 May 2002	
Tarquin Moor ("Moor")	28 April 2002	5 May 2002	
Tarquin Brae ("Brae")	30 April 2002	7 May 2002	.

14. Whilst there is an issue whether the Purchasers served the documents upon which they rely upon the Sellers and the Chairman of BV by, in each case, the relevant clause 3.3 date, I find on the facts that the Chairman of BV did receive the faxes sent by the Purchasers, on the dates when they sent them, addressed, as they were, to the Chairman of BV at the BV fax number which they had. Equally the sellers received the documents in question on the dates sent. Thus there is no remaining issue of fact about receipt of those documents by the persons to whom they were sent, but the Sellers maintain that these did not constitute reference to the expert within the prescribed period.

15. By the two letter Amendments of 10th May 2002 and 20th May 2002, the clause 3.3 date in respect of the remaining four ships which had not by then been inspected was extended first to 20th May and then to 7th June 2002, but the latter was subject to a proviso in the 20th May Amendment letter, with which the Purchasers had to comply. The Sellers say that there was no such compliance, so that the clause 3.3 time limit was 20th May. These four ships (the May Ships) are:

Ship	Date Inspected	Clause 3.3 Date	
Tarquin Ranger ("Ranger")	4 May 2002	20 May or 7 June 2002	
Tarquin Vale ("Vale")	5 May 2002	20 May or 7 June 2002	No Reduction
Tarquin Mariner ("Mariner")	10 May 2002	20 May or 7 June 2002	
Tarquin Trader ("Trader")	10 May 2002	20 May or 7 June 2002	

The reduction of the price on the Vale fell below the maximum which the expert could award under the SPA.

16. If there was no valid reference to the expert within the time set out in clause 3.3, the terms of that clause provide that the Purchasers shall be deemed to have accepted the relevant ship at its agreed purchase price.

17. There is little or no argument as to what actually occurred. The Purchasers seek Summary Judgment in relation to the Tarquin Crest, the Tarquin Forth and the Tarquin Brae which are all April Ships but it is accepted that the letters and documents exchanged took essentially the same form in relation to each April Ship.

    i) Thus in the case of the Tarquin Crest, on 24th April 2002, one day prior to the expiry of the clause 3.3 date, the Purchasers' Solicitors Holman Fenwick & Willan (HFW) wrote to the Chairman of BV stating that they acted on behalf of the Purchasers who had entered into the SPA for the purchase of 11 ships which were

all classed with BV. The letter referred to the terms of the SPA and the right of the Purchasers under clause 3.3 to refer the question of reduction in value of a ship to an expert to be nominated by the Chairman for the time being of Bureau Veritas.

ii) The letter attached a copy of clause 3 of the SPA and a copy of a letter written to the Sellers and their lawyers.

iii) The letter asked the Chairman of BV to accept the letter as the Purchasers' request to appoint an expert under the terms of the SPA to settle the issues referred to in the attached letter to the Sellers and referred to the accompanying letter to the Sellers as one which asked them to accept it as the Purchasers' reference of the matters set out in it to the expert.

iv) On the same day HFW wrote to the Sellers and their lawyers referring to the inspection on 18th April. The letter continued:- *"At that inspection certain matters became apparent that the purchasers consider not to be consistent with the age and description of the ship (taking into account the Class Records as made available in December 2001) and the effect of which are likely to reduce the value of the ship. Those matters include ….. [there then followed a list of alleged defects]".*

v) The letter also included the following:- *"Clause 3.3 of the Sale and Purchase Agreement allows the purchaser within seven days of inspection to refer the condition of the Ship to the Expert (defined as "an independent marine surveyor with experience in the survey of ships similar to the Ships to be nominated by the Chairman for the time being of BV"). While we have written to the Chairman of BV and attach a copy of that letter, we would ask that you accept this letter, which is being copied to BV as the Purchaser's reference of the above matters/condition of the Ship to the Expert. Our clients have of course a further 14 days to identify the specific matters complained of and the amount of any reduction in the value of the Ship attributable thereto, which time limit they will comply with if not extended. They believe however, that it may be more practicable to deal with these issues by direct discussion, with time to run with regard to the reference to the Expert only if the issues are not amicably dealt with".*

vi) The letter to the Sellers enclosed a copy of the letter to the Chairman of BV.

18. The point at issue under clause 3.3. is, in essence, a short one. The Sellers contend that for a valid reference to be made to the expert under clause 3.3, the expert must already have been identified so that the matter can be referred to him directly by the Purchasers. Here the expert was not nominated by the Chairman of BV until 10th June 2002, did not accept his appointment until 24th June 2002 and did not see any of the documents that had been addressed to the BV Chairman until the latter date, well after the relevant clause 3.3 dates listed earlier in this Judgment. The terms of the expert's engagement were not concluded until July 18th, it appears. The Sellers say that, within the clause 3.3 date, the expert had to be nominated by the BV Chairman so that the matter could be referred to him and that a direct reference to him had to occur within that time.

19. By the 10th May amendment letter, the clause 3.3 date was extended for the May ships to 20th May 2002 (the May ships being those which had not already been inspected by the Purchasers prior to 2nd May 2002). The date by which the Purchasers had to comply with clause 3.4 for all the ships was also extended to 20th May 2002, whilst the Sellers agreed to exercise best endeavours to try to reach agreement on adjustments on the purchase price before 22nd May 2002 with a meeting on 16th May to discuss outstanding issues, but without prejudice to the parties' rights. That meeting bore no fruit.

20. By the amendment letter of 20th May 2002 the parties agreed as follows:-

"We refer to discussions between ourselves and now confirm our agreement as follows:

"1. the last date on which a reference to the Expert, following an inspection of any of the Ships (other than those Ships already inspected by the Purchaser prior to 2nd May 2002) may be made in accordance with Clause 3.3 shall, subject to paragraphs 3 and 4 below, be amended from 20th May 2002 to such date as we may notify to you by not less than seven days notice and the Agreement amended accordingly.

2. the last date on which the Purchasers are bound to "identify in writing to the Expert, with a copy to Nile, the specific matters alleged to affect the value of the Ship and the amount of any reduction claimed" in accordance with Clause 3.4 shall, subject to paragraphs 3 and 4 below, be amended from 20th May 2002 to such date as we may notify to you by not less than seven days notice and the Agreement amended accordingly.

provided that,

3. no later than close of business on Monday 20th May 2002, the Purchasers shall identify in writing to us, any specific matters alleged to affect the value of each of the Ships and the maximum amount of any reduction claimed that might be the subject of an Expert reference in accordance with clause 3.4; and

4. any subsequent reference to the Expert shall be limited to such matters as shall have been notified to us by close of business on Monday 20th May 2002 and any reduction shall be limited in each case to the maximum reduction so notified. ……"

21. Thus, by the 20th May amendment letter, the time for compliance with clause 3.3 and clause 3.4 by the Purchasers was extended, as it turned out, to 7th June 2002 (the Sellers serving a 7 day notice on 31st May), provided that by close of business on Monday, 20th May 2002, the Purchasers had identified in writing to the Sellers any specific matters alleged to affect the value of each of the Ships and the maximum amount of any reduction claimed. The Sellers say that the Purchasers did not do so, with the result that the clause 3.3 date for the May Ships remained as 20th May 2002 in accordance with the 10th May Amendment letter.

22. So far as the May Ships are concerned, the letters and documents again followed a similar form to each other.

i) On 7th June 2002 HFW wrote separate letters for each May Ship to the Sellers referring to the inspection which had taken place. The letter to the Sellers referred to matters apparent at that inspection which the Purchasers considered not to be consistent with the age and description of the Ship and the effect of which was likely to reduce the value of the Ship. The letter went on:- *"Clause 3.3 of the Sale and Purchase Agreement as extended allows the Purchaser within seven days of inspection to refer the condition of the Ship to the Expert (defined as "an independent marine surveyor with experience in the survey of ships similar to Ships to be nominated by the Chairman for the time being of BV"). That time has since been extended for vessels inspected after 2nd May 2002. We have written to the Chairman of BV, and attach a copy of that letter and hereby advise that the Purchaser has referred the condition of this Ship to the Expert."*

ii) On the same date HFW wrote to the Chairman of BV in virtually identical terms to the letters in respect of the April Ships, enclosing a copy of each letter to the Sellers to which they referred as *"asking them to accept that letter as the Purchasers' reference to the Expert"*. The letter then concluded: *"We would be grateful if you could take this letter as our clients' request to appoint an Expert under the terms of the Sale and Purchase Agreement. Details of the specific matters affecting the vessel have already been provided to Nile and are set out in a further letter to be sent on behalf of our clients under Clause 3.4 of the Agreement today."*

23. It is common ground between the parties that the initial notices purportedly served by the Purchasers under clause 3.4, on 10th May when it was unclear whether the 10th May Amendment letter would be agreed, were, by agreement between the parties, to be treated as never having been served. In consequence, all the clause 3.4 notices had to be served by 7th June 2002, if there was compliance by the Purchasers with the proviso of the 20th May Amendment letter, or by different dates in May if there was not.

24. The Sellers contend that the terms of clause 3.4 of the SPA and of paragraph 3 of the 20th May amendment letter required the Purchasers to set out not only the specific matters alleged to affect the value of the ship but the maximum amount of any reduction claimed in respect of each of those matters. In the case of clause 3.4, that information had to be supplied to the expert: in the case of the 20th May Amendment letter, it had to be supplied to the Sellers. The Purchasers contend that, in either case, it is sufficient if the specific matters alleged to affect the value of the ship were set out, with the maximum amount of any reduction claimed in the value of the ship as a whole, as opposed to the reduction claimed in respect of each defect, and that clause 3.4 notifications sent to the Chairman of BV for onward transmission to the expert, when appointed, suffice.

The construction of clauses 3.3 and 3.4

25. The Sellers and the Purchasers sought to pray in aid in support of their chosen construction not only the words used but the commercial purpose underlying the SPA and the practicalities of achieving that purpose. Each relied on the matrix of fact of the SPA and the Amendment letters but rightly denied the admissibility of the parties' performance of their obligations as an aid to construction.

26. The commercial object of clauses 3.3 and 3.4 is self-evident. The SPA was executed on 3rd April 2002 with a view to the relevant companies signing individual contracts for the sale of each ship on about 15th May 2002 and for delivery to follow within three months after that. Under clause 5.1, inspection of the Class Records was to follow immediately after execution of the SPA. The Purchasers were to confirm acceptance of the

records as soon as reasonably practicable but not later than the Contract Execution date. Furthermore, following signature of the SPA, the Sellers were to keep the Purchasers advised of the movement of the ships so that arrangements could be made for inspection of the Ships as soon as reasonably practicable, and in any event by the Contract Execution date. The Sellers were to take all reasonable steps to facilitate inspection by the Purchasers whilst the Purchasers undertook to carry out inspections without undue delay to the ships.

27. It is plain that what the parties had in mind was that there should, following inspection prior to the execution of the individual sale contracts for each ship, be a relatively speedy determination of issues between the parties which affected the purchase price on the basis set out in clause 3.5, namely, the extent to which the relevant ship had a value which was less than would reasonably be expected, taking into account the age and Class Records of the particular vessel. The purchase price was to be paid on delivery of each ship, following payment of the deposit on the execution of the sale agreement for each ship. Clause 3.8 envisaged the possibility that the expert determination would not be concluded by the delivery date for a given vessel, in which case the full purchase price for the ship would be payable, less any amount of adjustment offered by the Sellers, without prejudice to the expert's determination of the proper adjustment to be made. Nonetheless the process envisaged was plainly intended to be relatively speedy and, so far as practicable, concluded by the date of delivery of each vessel, namely within a period of about 3 months. The 7 day and 14 day time limits in clauses 3.3 and 3.4 were included to inject some immediacy into the process, although there were no prescribed limits for the date of its conclusion.

28. No inspection had been allowed prior to conclusion of the SPA and, by clauses 2.9 and 11.1, the Sellers assumed only limited liabilities to the Purchasers in respect of the condition of the vessels. The price adjustment clause, together with the warranty in clause 11.1g that all material matters and incidents capable of affecting class had been notified to class (together with class warranties in the individual Ship MOAs between the actual Owners and the actual new Owners), represented the extent of the departure in the SPA from sales in the "as is" condition. In practice, the execution date for each of the sale contracts for the individual vessels was 23rd May and the Purchasers' inspections all took place before then as set out earlier in this Judgment. The Price adjustment clause therefore gave the Purchasers one of the few significant rights they had in relation to the condition of the vessel. The Purchasers had however some familiarity with the vessels by virtue of their participation in a pool which had made use of some of them in the past.

29. The Sellers contend that the words of clause 3.3 are clear in requiring the Purchasers to refer to the expert the question of determination of any adjustment to the purchase price for a ship. It is said that such a reference, in accordance with the ordinary and natural meaning of the words, must involve the submission to an identified nominated expert of the issue of a price reduction by reason of the condition of the ship. A request to the Chairman of BV to appoint such an expert is not, say the Sellers, a reference to the expert. Nor is a letter from the Purchasers to the Sellers such a reference either.

30. It is here that the Purchasers say that the Court must adopt a commercial and business like approach to construction. The Purchasers rely upon Lord Hoffman's speech in **ICS v West Bromwich Building Society [**1998] 1 WLR 896, at pages 912 – 913, and the need to construe the agreement in a manner which makes the agreed machinery workable. The Purchasers say that it cannot have been intended that the right of the Purchasers to a reduction in the purchase price, by virtue of the determination of an expert, should depend upon the action of a third party, namely the Chairman of BV, in appointing an expert in sufficient time to enable the Purchasers to submit matters directly to him. The Purchasers draw attention to the definition of the expert as *"an independent marine surveyor …… to be nominated by the Chairman for the time being of BV"* and argue that a reference to such an expert to be nominated must mean that it is sufficient to set in train the process envisaged for expert determination and to notify the Sellers accordingly. Thus, a request to the Chairman of BV to appoint an expert to determine the issue, with notice to the Sellers of that, is sufficient to constitute a reference to the expert to be nominated by the Chairman. They point to the limited period of 7 days following inspection for such a reference to be made and the practical difficulties in adhering to such a short time limit after inspection of a vessel in a far flung part of the globe, when the condition of the ship has to be evaluated and the BV Chairman approached to make the appointment.

31. The Sellers say however that there is nothing whatever to prevent the Purchasers from so organising affairs to achieve a nomination by the BV Chairman in 7 days following inspection. Alternatively they say that, if there

really is difficulty in this, then arrangements should be made so that, by the time that inspection takes place, an expert has already been nominated by the Chairman of BV. Then, within the seven days following inspection, reference of the issue could be made to that expert. This latter point seems to me to be entirely unreal. Until inspection, the Purchasers will not know whether they wish to take points about the condition of the relevant ship and seek any adjustment in the purchase price. The SPA cannot have envisaged that the Purchasers would contact the Chairman of BV in advance of knowing that there were any points which required determination to set up a machinery which might never be used. The SPA must therefore have envisaged that whatever had to be done would be done in the seven days following inspection.

32. In these circumstances, it is said by the Purchasers that the validity of the reference cannot depend upon whether or not the Chairman of BV makes the appointment of an expert within seven days. This is a matter which lies outside the control of the parties and they cannot have intended that the Purchasers' entitlement to have the issue resolved should depend on that. For example the Chairman of BV might be away on holiday for 2 weeks at the material time. In the circumstances, giving a commercial and business like construction to these words, they must be taken to mean that it is sufficient for the Purchasers to refer the question to the Chairman of BV for him to nominate an expert and to inform the Sellers of that reference. If the Purchasers do this, they are then referring the matter to the expert to be nominated by the Chairman, within the meaning of clause 3.3.

33. In construing the SPA, I ignore the parties' purported performance under it and the parties' attitude towards such performance, in the absence of any plea of waiver or estoppel. The Purchasers say that the words "to the expert" mean "to the expert to be nominated by the Chairman of BV" and that the effect of reading the definition of clause 1 into clause 3.3 and clause 3.4 is that it is possible to read the words in those clauses as relating to a reference, or identification of matters, to someone who has not yet been appointed. It is said that it would be harsh to deprive the Purchasers of their right to have the issues determined where the nomination of the expert depends upon the Chairman of BV acting with alacrity. The problem with this construction is that the word "expert" appears in many different places in clause 3 and, in most, it plainly refers to an expert who has already been appointed. Reading in the definition is of no assistance therefore since that deals with who the expert is to be and not the procedure to be followed in clause 3.3 or clause 3.4.

34. What does it take to *"refer"* a matter to an expert or *"make a reference to an expert"*? Is it enough for one party to tell the other that a reference is being made and/or to set in process the means by which the expert will determine the reference. As soon as the point is expressed in these terms, the distinction between *"referring"* or *"making a reference"* on the one hand and telling others of it or seeking appointment of the expert to whom the reference is to be made on the other, is apparent.

35. Notwithstanding the Purchasers' reference in argument to Section 14(5) of the 1996 Arbitration Act, neither the Sellers nor the Purchasers drew any analogy between the position for referring a matter to an expert and making a reference to arbitration, but the comparison is, to my mind, not unhelpful in highlighting the distinction between a reference to the expert and a notification to the Sellers of such a reference. Here, in clause 3.3 the words appear *"refer the matter to the Expert"* and *"if no reference is made to the Expert"*, both of which connote dealings between the Purchasers and the expert and not dealings between the Purchasers and the Sellers, nor between the Purchasers and the individual responsible for appointing the expert. Moreover to say "I am referring this matter to an expert" is not the same as actually doing it.

36. Whereas it might be possible, if clause 3.3 existed in isolation, to read the words *"refer the matter to the Expert"* as including any intimation to the Sellers of an actual or intended reference to such an expert, when regard is had to the rest of clause 3, and in particular clause 3.4, such a loose construction is difficult.

    i) The ordinary and natural meaning of the words *"refer the matter to the Expert to determine"* and *"if no reference is made to the Expert within seven days"* is that the matter should be put to the expert himself. If an individual tells another that he is referring a dispute to his solicitors, or will refer such a dispute to his solicitors (for them to take appropriate action), this in itself does not amount to an actual reference to them, since that requires him to contact the solicitors concerned.

    ii) Clause 3.4 requires the Purchasers to identify in writing to the expert the specific matters alleged to affect the value of the ship so that he can make his determination under clause 3.5. This material plainly has to reach the expert and the clause provides that it should do so within a specific time limit. It is hard to see

how this can mean anything other than the submission directly to the expert or his agent of the material referred to.

iii) A request to the Chairman of BV to appoint an expert is plainly not referring the matter to an agent of the expert, even though the enclosed letter to the Sellers referred to the issues that the expert was to determine. The letter did not suggest that the Chairman of BV should accept the letter as a reference to the expert he was asked to nominate and there was no agency which would allow him to act for a future, as yet unidentified, independent expert, as a recipient of the reference.

iv) Equally, a letter to the Sellers, asking them to accept the letter as the Purchasers' reference of those matters to the expert, in circumstances where the Sellers do not agree to accept the letter as such a reference, is likewise not a reference to the expert himself, nor to anyone who could be considered his agent. The intimation of a current intention to refer the matter to an expert, with a request to the appointor to nominate the expert to whom the reference will be made, cannot actually be that reference.

v) Nor does it help the Purchasers to say that the 2 letters of the same date should be read together, because their combined effect still does not achieve a direct reference to an expert.

vi) If regard is had to the different wording of the 7th June letters to the Sellers which refer to a reference already made to the expert, this is still of no assistance to the Purchasers. Their repeated request to the Chairman of BV to appoint an expert on 31st May, following what amounted to a pause in the proceedings as a result of the Sellers' email of 3rd May and the Amendment letters, and the 7 day notice given by the Sellers on 31st May, did not amount to a reference, and the letters to the Sellers and Chairman of BV in June, whether taken on their own or in combination with each other and what had previously passed between them all, did not achieve a reference to an expert.

37. The expert was to be independently nominated by the Chairman of BV which could be done in short order, immediately followed by notification of this to the parties and the Purchasers' submission to that expert of much the same material as they submitted to the Chairman of BV and/or the Sellers, upon which they now rely as constituting the reference itself. Even after the repeated request to the Chairman of BV for appointment of an expert on 31st May, no appointment was made, although this ought to have been possible and the reference made to him before 7th June.

38. The Purchasers cannot therefore establish the unworkability of the clause on the Sellers' construction. Although difficulties could in theory arise should the Chairman of BV be on holiday for two weeks, his functions would be taken over by someone in his absence and it is hard to believe that no-one at BV would have his authority to act to make the nomination of an expert if he was not present. Once the unworkability argument is put to one side, in my judgment, there is no reason to depart from the ordinary and natural meaning of the words as they appear in clause 3.3 or to give the words *"to the expert"* or *"the expert"* any different meaning from those which appear in clause 3.4 or the rest of clause 3.

39. This is an entirely technical point since it appears that the Sellers had no desire for the matter to move at any great speed, despite the time limits set in clauses 3.3 and 3.4, as appears from the correspondence, the attempts to reach settlement and the email of 3rd May from the Sellers' solicitors to BV. Moreover the Sellers knew what they needed to know on receiving each letter to them with a copy of the letter to the Chairman of BV. This is however no reason to give the words a different meaning from those which appear on their face, although there may well be arguments available to the Purchasers on issues of waiver or estoppel arising out of the conduct of the parties. It is noticeable that the letter to the Sellers asked them to treat that letter as the Purchasers' reference to the expert and there may be argument available to the Purchasers to the effect that the Sellers did so. There is however a difference between a reference to an expert on the one hand and asking someone other than the expert who receives a letter, to treat the receipt of that letter, as if it were a reference to the expert.

40. The Purchasers pointed out that the provisions in the 20th May Amendment letter extending the time for clause 3.4 notices were a "waste of breath" if there were no valid references for the April ships. That is true and it was argued that I should construe the SPA by reference to the Amendment letters. This I did not consider I could do. In construing the SPA I did not take into account later performance, nor later

amendments, although I could and did take into account, when construing the Amendment letters, the events which preceded them as the commercial matrix, including the SPA which they amended.

41. There is no express recognition of the validity of the references for the April ships in the Amendment letters and it was not argued that the effect of them was, as a matter of contract, to turn an otherwise invalid attempt at a reference into a valid one. For these reasons, I find that, on the proper construction of the SPA and the Amendment letters, there was no reference to the expert until, at the earliest 10th June 2002 when he was appointed, which is a date considerably after the clause 3.3 dates for the April Ships and 3 days after the clause 3.3 date for the May Ships, if there was compliance with the 20th May Amendment proviso.

Compliance with the 20th May Amendment proviso.

42. The opening sentence of clause 3.4 requires the Purchasers to identify in writing to the expert, with a copy to the Sellers, "the specific matters alleged to affect the value of the ship and the amount of any reduction claimed". The words "the amount of any reduction claimed" could, as a matter of grammar, refer either to the reduction in "the value of the ship" or the "specific matters" alleged to affect that value. The meaning of those words must be judged in the light of the rest of clause 3.4 and the clause as a whole, including clause 3.3.

i) Clause 3.1 of the SPA sets out the total consideration payable for all the ships as US$ 161M with an apportionment of that price between the various ships, as set out in Schedule 2.

ii) Clause 3.3 is specifically concerned with the adjustment to be made to the purchase price attributable to the condition of the relevant ship. It is the condition of the individual ship and its consistency with its age and description, taking into account the Class Records, which is relevant in considering the value of the ship, upon which the Purchasers had to form their opinion and upon which the expert has to make a determination under clause 3.5.

iii) Clause 3.3 refers to the Purchasers' opinion that the condition of the relevant ship is "such as to reduce the value of the ship", and it is this which is referred to the expert for him to determine any adjustment in the purchase price. When clause 3.3 is examined, it is seen that it is the condition of the relevant ship, the reduction in value of the ship and the adjustment of the purchase price attributable to that ship which is in issue.

iv) Equally, when regard is had to clause 3.5, the "sole criteria" on which the expert is to make his decision is the value of the relevant ship, by reference to condition, age, description and Class Records.

v) Nor does Clause 3.6 indicate otherwise. The limit on the adjustment that the Expert can make is fixed by the percentage of the total value of the matters complained of as compared with the purchase price of the relevant ship.

43. Because it is the question of any reduction in the value of each ship that is referred to the expert under clause 3.3 for adjustment of the price for that ship, the natural expectation would be that the Purchasers should specify the amount of reduction which they claim in respect of that value. In my judgment this is exactly what clause 3.4 provides. Clause 3.4 itself provides that the Sellers are entitled to respond in writing to the expert (to the matters raised in the Purchasers' reference) and may offer a sum in settlement of "the amount claimed". The *"amount claimed"*, expressed in the singular, must refer to *"the amount of any reduction claimed"* in the first sentence of clause 3.4, and both must refer to a reduction in the value of the ship, since this is the context of Clause 3 as a whole, in which those words appear.

44. I conclude therefore that the whole of this clause is concerned with the value of the ship and the reduction in the price of the ship and that therefore *"the amount of any reduction"* claimed refers to the reduction in the price of the ship. The specific matters which are detailed are those which are alleged to affect the value of the ship, but the value of the ship may be affected by a defect in a particular item where the cost of remedying that defect may or may not represent the difference in value of the ship. The expert is bound by the terms of clause 3.5 to take the cost of repair into account, if the item is capable of repair, together with the loss of time involved, when assessing the ship's lesser value, but the cost does not of itself necessarily represent that value. A series of defects may give rise to a diminution in value which exceeds the cost of the necessary repairs. Where the cost of remedying each defect individually amounts to specific identified sums, there may be an overall loss of value which exceeds that total or, because of the possibility of repairs at the same time, there may be a lesser total remedial cost and a lesser loss in value. In my judgment therefore it is quite sufficient for

the Purchasers to set out the matters which affect the value of the ship and the amount of reduction in the value of the entire ship in order to comply with the terms of clause 3.4. It is not necessary to set out the reduction in value attributed by the Purchasers to each and every item affecting the ships' value as a whole.

45. The parties agree that the construction of Clause 3.4 and the 20th May Amendment letter are likely to be the same. I hold that, on its proper construction, against the background of the SPA, the meaning of that letter is the same as that already set out and that this is reinforced by the specific wording of the letter. Under paragraph 3 of that Amendment letter, the Purchasers were to identify *"any specific matters alleged to affect the value of each of the ships and the maximum amount of any reduction claimed that might be the subject of an Expert reference in accordance with clause 3.4"*. The reduction claimed is still the reduction in the price of the ship and since the expert reference was to determine whether any adjustment should be made to the purchase price attributable to the relevant ship, once again the "reduction claimed" cannot refer to each individual defect. Similarly in paragraph 4 of the letter, although the reference to the expert is limited to the matters which have been notified as affecting the value of the ship in question, the words *"any reduction shall be limited in each case to the maximum reduction so notified"* must refer to the reduction in value on each ship, as fortified by the use of the words *"in each case"*, which relate to "each of the ships" in paragraph 3.

46. A number of reasons were put forward for saying that the commercial purpose of the provision meant that the figure for each defect should be specified but I found none of these convincing, not least because the contemporary documents indicated that it was the overall figure for each ship that was of interest to the Sellers and because the Sellers were in a position, with knowledge of the ships, to assess the value of each of the matters alleged. If the matters were identified which allegedly gave rise to the loss in value of the ship, both the Sellers and the expert could form their own views on the effect of each and did not need to know how the Purchasers assessed the individual impact of each. Whether in the context of potential settlement or expert determination, both of which are envisaged by clause 3.4, it was enough for the Purchasers to specify the total claimed reduction in the price. Whilst the effect of listing some matters with figures which the expert rejected as affecting the ship's value, had the effect of increasing the latitude of the expert on diminution in value in respect of those matters which he did accept, this is not a compelling reason for the Sellers' construction, when the structure of the clause is examined which focuses on the value of the ship as an item.

47. The effect therefore of clause 3 of the SPA and the Amendment Letters is that the Purchasers must set out each of the matters which they say affect the value of each ship and must specify the amount of reduction in value which they claim as an appropriate adjustment to the purchase price. There is no need to set out the amount attributable to each matter listed as affecting the value of each ship. The Purchasers are therefore correct in the construction which they have advanced and I summarily determine this point in their favour.

48. In these circumstances, it matters not that, on 20th May, the Purchasers identified to the Sellers the matters affecting the value of the Ships, but only the total reduction claimed for each ship, and not the figure for each defect. Compliant notices to the Sellers were given under paragraph 3 of the 20th May Amendment letter which had the effect of extending the time for the clause 3.3 references for the May ships to 7th June and the time for all the clause 3. 4 notifications to the Expert to the same date. For the reasons given earlier, however, no such reference was made by that date, so that, on the proper construction of the SPA and the Amendment letters, the Purchasers are deemed to have accepted the ships at their agreed purchase price.

49. The clause 3.4 notifications to the expert had also to be submitted by 7th June and this also could not be done, in the absence of a nominated expert, although there is no provision for the consequences of this in the clause, so that a breach would appear to sound in damages and not prevent pursuit of the claimed reduction (if there had been valid timeous references to the expert under clause 3.3), albeit that the expert would not be bound to consider material supplied outside the time limit.

The Jurisdiction Issue- award of sums in excess of those allowed

50. Although I have held that there was no need for the Purchasers to specify, in relation to any particular matter the amount of reduction in value attributable to it, the Purchasers did so in their clause 3.4 notification letters of 7th June 2002. The Sellers seek Summary Judgment on the basis that, in specific cases, the expert exceeded his jurisdiction in making price reductions which he had no power to make. It is common ground that, in relation to seven identified vessels, the expert awarded more in respect of one of the listed matters affecting the value of the vessel than the Purchasers set out as the sum attributable to that matter (namely the tank

saddle wooden chocks). The amount claimed in respect of those items on the 8 ships was approximately £1.6m, (leaving out of account the general expenses and the like, which were attributed to all the repairs combined and which added, on occasions, approximately another $100,000 per ship) as compared with the expert's determination of $2.5m for those items on those ships.

51. The limits on the ambit of the Expert's determination as set out in clause 3 are as follows:

i) The assessment is to be made of the extent to which the relevant ship has a value which is less than would reasonably be expected taking into account her age and Class records as at December 2001- clause 3.5, by reference to clause 3.3. The issue of the operative date for the assessment is in dispute and I determine that later in this judgment.

ii) The expert is to receive the Purchasers' written identification of the matters alleged to affect the value of the ship and the Sellers' response, if any, within the time limits set out – clause 3.4.

iii) The expert may, but need not, inspect the ship, but if he does so, he must allow the parties' representatives to be on board with him- clause 3.4.

iv) The expert is to take into account the estimated cost of repair and the likely loss of time, in the light of good seamanship and normal commercial practice, where there is any matter which is capable of repair- clause 3.5.

v) The expert is to take account of the benefit of any insurance claim available where there is insurance which covers damage suffered by the ship- clause 3.5.

vi) The expert is to ignore matters relating to market value or design, unless there is a wrong description of the design – clause 3.5.

vii) The Expert cannot adjust the purchase price of a ship, where, on his assessment, the value of the matters of which the Purchasers complain, amount in total to less than 0.5% of the price of that ship- clause 3.6.

52. Clause 3.5 does not set out any limit as to the amount to be found by the expert whether by reference to the amount claimed by the Purchasers or otherwise, and whether in relation to the total reduction claimed for each ship or any item affecting its value. Clause 3.6 does however provide that no adjustment is to be made by the expert where he decides that the value of the matters complained of in relation to that ship is less than 0.5% of the purchase price of that ship. That refers however to the value, as assessed by the expert, of the matters identified by the Purchasers as affecting the value of the ship.

53. As appears later in this judgement, an expert determination (as opposed to a judicial determination) is not limited by the submissions made, or evidence adduced, by the parties unless the contract and the terms of the reference to him so require. It follows from what I have already held in relation to the meaning of the words "the amount of any reduction claimed", in clause 3.4 and the 20th May Amendment letter, that paragraph 4 of that letter limits the amount of reduction in the value of each ship to the amount claimed for that ship. None of the above restrictions on the expert determination, as set out in the contract, affect this issue. There can therefore be no excess of jurisdiction by the expert in making any finding as to the effect of any individual matter upon the overall value of the ship, even if it exceeds the amount claimed on that item in the 7th June clause 3.4 letters, as long as the overall price reduction on each ship is less than that claimed by the Purchasers.

54. Additionally, however, the Sellers contended that the expert's price adjustment exceeded the amount put forward by the Purchasers as the reduction in value for certain ships as a whole.

55. The basis upon which this allegation is made is that, following submission by the Purchasers to the Sellers of the total figures on 20th May, various areas of complaint were dropped by the Sellers. It is said that the reduction in price found by the expert in respect of the "Crest", the "Forth", the "Brae" and the "Mariner" all exceeded the reduced figures which result from the withdrawal by the Purchasers of some of these areas of complaint, as against the figure originally claimed on 20th May.

56. This point has no force for two reasons:-

i) Nowhere in clause 3 is the expert restricted to making a finding which corresponds to the amount claimed by the Purchasers. The sole criteria upon which the expert is to make his decision are set out in clause 3.5 and do not include the amount claimed by the Purchasers as a defining qualification. Clause 3.6 provides

that no adjustment shall be made to the purchase price where the expert decides that the value of the matters complained of in relation to that ship is less than 0.5% of that price but this refers to his assessment of the value of the matters complained of, not to the reduction in value as claimed by the Purchasers.

ii) Paragraphs 3 and 4 of the 20th May Amendment letter provide for the Purchasers to identify the maximum amount of any reduction claimed no later than close of business on 20th May 2002 and restrict the reference to the expert by stating that any reduction which he finds should be limited to the maximum reduction so notified. It is therefore only the amount of reduction claimed on 20th May 2002 which constitutes a limit to the amount which the expert could find. It is accepted that none of the amounts which he found for any ship exceeded those notified figures.

57. It was suggested that this made no commercial sense and that the withdrawal of any head of damage must automatically bring down the sum notified on 20th May 2002. There is however no basis for implying such a term into paragraphs 3 and 4 of the 20th May Amendment letter and the construction of the words used is clear.

58. It is worth noting that, in the letters of 7th June, the Purchasers included figures for each item said to affect the ship's value but added a sum to the total of those figures to represent Buyers' estimated "costs of gas- freeing, gassing up, lost time, deviation to the shipyard, general shipyard expenses etc". Thus, in order to make any point good as to the amount awarded in respect of any one item, it would in any event be necessary to take this element of the 7th June letters into account insofar as it represented part of the loss in value attributable to the item in question. It is fair to say that the expert does not appear to have made much, if any, allowance for this element, since he regarded the repairs to the wooden chocks as being capable of being effected at the next dry-docking of the vessel.

59. In these circumstances, the expert did not exceed his powers, where his finding on individual matters exceeded the claim figure specified for that matter, since the sums found by him did not exceed the claim made by the Purchasers in respect of any individual ship.

Departure from Instructions - the Valuation Timing Issue

60. The Sellers contend that on a true construction of clause 3 of the SPA, the expert was required to determine whether any adjustment should be made to the purchase price attributable to the condition of the ships at the time of the Purchasers' inspection and not at the time of delivery of the ship in question, the inspection by the expert or at any other time. The Sellers seek a declaration that the SPA required the expert to assess the condition and cost of repairs of each ship as at the date of the Purchasers' prior inspection. I have already found that the expert is not concerned with the cost of repairs of each ship as such, but with the reduction in value of the ship as the result of its relevant condition, so that the declaration, in the form in which it is sought by the Sellers is inappropriate. There is however an issue, on the proper construction of the SPA, as to the date when the value of the ship fell to be assessed by the expert, whether at the time of inspection by the purchasers, the delivery date or the date of inspection by the expert himself, if before delivery.

61. There is no express provision in clause 3.3 – 3.8, by way of instruction to the expert, to inform him of the date at which the ships' value has to be assessed by him. On a proper construction of the contract in my judgment, there are only two possibilities, namely the date of inspection by the Purchasers or the date of delivery of the vessels, although the Purchasers argued for the date of delivery of the vessels or the date of the inspection by the expert, whichever was the earlier.

i) Clause 5.2 of the SPA provides for the Purchasers to carry out an inspection following signature of the SPA and clause 3.3 provides that, within 7 days of the completion of such inspection, the Purchasers are entitled to refer the matter to the expert to determine whether any adjustment should be made to the purchase price of the ship inspected.

ii) The Purchasers have under clause 3.4 of the SPA to identify the matters alleged by them to affect the value of the ship, which have emerged from their inspection, and the Sellers have the opportunity to respond on those matters.

iii) As outlined earlier in this Judgment, the SPA envisages that the expert should make his determination by the delivery date for the vessel in question if possible, although clause 3.8 makes provision for the position if the determination has not been made by then. The expectation was however that any inspection which

the expert chose to make, which by clause 3.4 was a matter for his discretion, would take place earlier than the final delivery date which was anticipated to be 15th August 2002. The time lapse between any inspection by the Purchasers, any inspection by the expert, the final delivery date and the final determination by the expert was not expected to be significant.

iv) Clause 2.9 of the SPA limited any liability of the Sellers in respect of the condition of the ship to the express warranties and representations in the SPA.

v) Clause 11.1(g) was a warranty by the Sellers that all matters capable of affecting the class status of the ships which were required to be notified to class had been so notified.

vi) The form of the MOA for each individual ship, between related parties, to which clause 2 of the SPA referred, provided in clause 11 that the vessel was to be at the Sellers' risk and expense until delivery but, subject to the terms of the MOA, the vessel was to be delivered and taken over as she was at the time of inspection by the Purchasers, fair wear and tear excepted.

vii) The clause also provided, in accordance with the standard Norwegian Sale Form MOA, for the vessel to be in class.

viii) Clause 11(d) of the MOA provided that, if the vessel was not as she was at the time of inspection, fair wear and tear excepted, the Purchasers were entitled to notify the Sellers prior to delivery and the matter was to be remedied at the Sellers' expenses as soon as reasonably practicable following delivery, provided that the cost of remedy exceeded US$ 5,000 in aggregate.

62. The Purchasers contended that there were two considerations which militated against the Sellers' argument that the date of the Purchasers' inspection was the date for assessment of value. The first consideration was that the expert could never know the condition of the ship at that time since he himself would not have inspected it then. The second consideration was that the expert might, if the Sellers were correct, be obliged to make an assessment of loss of value in respect of matters which had been rectified between the date of the Purchasers' inspection and the date of delivery of the vessel.

63. Neither of these points carry any weight in my judgment.

i) With regard to the first consideration, the expectation was that there would be little delay between the inspection by the Purchasers and the inspection by the expert, although this was not in fact the case as matters transpired for these vessels. The expert would make an assessment of the condition as at the date of the Purchasers' inspection, based on his own inspection, his own expertise and knowledge of the type of defects found and their causation and development, with the benefit, if any, of the submissions of the parties.

ii) As to the second consideration, the expectation was that the condition of the vessel on inspection would be the same as at delivery which was set to occur within three/four months.

a) In essence, what the expert was required to determine by clause 3.5 was the extent to which there were any defects as a result of lack of maintenance of the vessel, as opposed to fair wear and tear, which affected its value. That was the basis upon which the relevant ship would have a value which was less than that which would be reasonably expected, taking into account the vessel's age and Class Records.

b) The expert was to take account of insurance matters and the cost of repair where the matters of complaint were capable of such repair.

c) The Sellers were not bound to effect repairs post inspection, save insofar as the MOAs bound the actual Owners of the ships to deliver them with class maintained free of condition or recommendation and free of average damage affecting class. Repairs for accidents were required, as the exception to fair wear and tear. Otherwise the Purchasers were to take over the vessels in the condition in which they were in at the time of their inspection, subject to the right to claim under clause 11 of the MOA in the event of matters occurring which did not constitute fair wear and tear between inspection and delivery.

d) The parties to the SPA did not envisage therefore that the Sellers would carry out repairs in the relevant period and provided for the costs of any repairs resulting from a change in condition between the Purchasers' inspection and delivery in the MOA.

64. It is clear therefore that the SPA and clause 11 of the MOAs interlink so that the expert is obliged by the SPA to assess the value of the ships as at the date of the Purchasers' inspection in order to ascertain whether a reduction in the purchase price is required because of a failure to maintain prior to that date, whilst clause 11 of the MOAs provides for what is to occur in the event of an alteration in the vessels' condition between the date of the Purchasers' inspection and delivery, if that is not due to fair wear and tear or a class matter.

65. The expert was not bound to carry out any inspection, since clause 3.4 made that a matter for his discretion. In circumstances where the matters referred to the expert were the matters discovered by the Purchasers on their inspection, which were to be identified to the expert by the Purchasers and to be the subject of a response by the Sellers, it can only be the condition of the vessel on such inspection which is to be the subject of the expert valuation. In my judgment, this position is clear under the SPA and the Sellers are entitled to a declaration to that effect.

66. The Sellers say that the expert did not assess the diminished value of the vessel as at the date of the Purchasers' inspection but did so as at the date of his own inspection or at the date of delivery of the vessel itself. It is acknowledged by the Purchasers that there is nothing in any of the reports of the expert on any of the ships to indicate that he took into account any change in the condition of the vessel between the date of the Purchasers' inspection and the date of delivery. There are indications in the reports that he based his judgment on his own inspection which occurred, in the case of each vessel, after delivery of the vessel to the Purchasers, but took into account the possibility of a variation of the vessel's condition between the date of earlier delivery and the date when he carried out his own inspection. On the material before me however, although it appears that the expert may have made the assessment as at the date of delivery, it is not possible to determine whether or not he actually did so and thereby assessed the value of the vessel at the wrong date. If this matter has to be decided, it can only be determined at a trial rather than on a Summary Judgment application, because of the issues of fact which arise.

67. The Purchasers say however that there is no need for any such investigation because, if the expert made a mistake in this respect, it is not the kind of mistake which could vitiate the expert determination. The Purchasers say that the authorities draw a clear distinction between mistakes by the expert in carrying out his functions on the one hand and failures by the expert to carry out his instructions on the other. The former is part of the risk run by the parties in agreeing to be bound by the expert's decision whereas the latter gives rise to an uncontractual determination which is not binding on the parties because the expert has failed to adhere to the requirements of the contract and has therefore not carried out the functions required of him.

68. It is clear that such a distinction exists in the authorities. I was referred to a number of authorities on this issue. The law is clear that where a contract provides for the decision of an expert to be final and binding, it does bind the parties even if there is an admitted mistake as long as there is no fraud, collusion, bias or a material departure by the expert from his instructions. There was little issue between the parties about this so that I need do no more than refer to the authorities, which make it plain: **Toepfer v Continental Grain** [1974] 1 LLR 11(CA), **Campbell v Edwards** [1976] 1 WLR 403, **Jones v Sherwood** [1992] 1 WLR 277 (CA), **Nikko Hotels v MEPC** [1996] 1 LLR 370, and **Morgan Sindall v Sawston Farms** [1998] EGCS 177.

69. The Purchasers contended that in circumstances where the contract did not expressly instruct the expert as to the date to which his valuation and assessment were to refer, the point was left to him to determine as part of the expert reference so that any mistake which he might have made in that respect, whether or not it was a question of law, was a mistake in the reference, rather than a failure to follow instructions.

70. The authorities show there are two steps in the reasoning process to be applied by the Court in assessing where the line is to be drawn for the purposes of this distinction. The first is to ascertain what the parties have agreed to remit to the expert, whilst the second is to ascertain the nature of the mistake made – what has the expert done and why did he do it? Did the expert do what he was appointed to do, albeit in a mistaken manner, or did he carry out a different task as a result of his mistake?

71. The SPA sets out the bounds and subject matter of the expert's determination unless there is some alteration, by agreement, between the parties as to the function that he was to perform. There is no suggestion that there was any agreement between the parties to alter this. There are suggestions about agreed procedures in other

respects, going beyond the terms of the contract, but I will examine those later in this Judgment in relation to the topics where they arise.

72. If the expert made a mistake here as to the date at which his assessment was to operate, it does not seem to me that this is capable of being characterised as a mistake made by him whilst carrying out his contractual functions. As was pointed out by the Sellers, the major complaint made by the Purchasers in respect of the cargo tank wooden blocks was a defect which could materialise in a short space of time. The point of time to which the assessment related was therefore capable of being a matter of real importance. It was not left to the expert's discretion to set the date at which the assessment had to be made; nor was it part of the expert's function to determine, on the proper construction of the contract, the date in question. The contractual requirement was that he should assess the condition of the vessel at the date of the Purchasers' inspection and, if he failed to do so, he did not do what the contract required. If he assessed the condition of the vessel and its value at a different date, he did not fulfil the task which he was entrusted to carry out but performed a different task. In those circumstances, if he did make an assessment at the date of delivery, or the date of his own inspection, as opposed to the date of the Purchasers' inspection, this was a departure from instructions and, if material, would invalidate his determination.

73. It was common ground between the parties, after examination of the authorities, that the test as to whether or not a departure from instructions was material is that which is set out in **Veba Oil v Petrotrade** [2002] 1 LLR 295 (CA) where the majority decided that *"any departure is material unless it can be characterised as trivial or de minimis"*. Whether or not a departure from instructions is trivial or de minimis may involve questions of fact. There may be no significance at all in a valuation at one date rather than another, depending upon the difference between the date of actual assessment and the correct date of assessment and the nature of the complaints raised and the possibility of variation in the vessel's condition during that period. It does not appear that any complaint was made by the Purchasers under clause 11(d) of the MOAs, so that it is possible that an inference might arise that there was no change in condition between the date of the Purchasers' inspection and the date of delivery, but this also raises issue of fact which are incapable of determination at this stage of the proceedings.

74. It is not therefore possible for me at this stage to determine whether or not the expert did depart from his instructions or, if he did so, whether he did so in a material way which is not trivial or de minimis.

Other departures from instructions.

75. The Sellers argued that there were a number of other areas in which the expert had departed from his instructions in making his determination. They contended that he had failed to afford the Sellers the opportunity to respond in writing on issues which they wished to address including in particular causation and quantum, contrary to the terms of clause 3.4 and contrary to the procedure which had been agreed or understood to operate. They further argued that the expert had awarded sums on a different basis from those claimed and that, contrary to clause 3.5, he had taken into account matters relating to design. Finally, they submitted that he had transposed findings from one ship to another and had therefore not carried out an assessment of each individual ship.

Failure to afford the Sellers an adequate opportunity to respond in accordance with clause 3.4 and/or an agreed or understood procedure

76. The Sellers complain that the expert failed to follow an agreed or understood procedure and did not give them the opportunity to make Response submissions in writing on issues of causation and quantum. The Sellers point to their entitlement under clause 3.4 of the SPA to respond in writing to the Purchasers' identification to the expert of the matters alleged to affect the value of any ship.

77. The Sellers maintain that there was a procedure to be followed which was set out in Mr Wilson's e-mail of 9th December 2002. In this e-mail to the expert and to the Purchasers' Solicitor, Mr Wilson for the Sellers stated that he understood the expert's intention to be to send a report to both parties of his factual findings resulting from the inspection of each of the vessels. This would identify which, if any, of the matters raised by the Purchasers were not to be categorised as "*fair wear and tear*". The e-mail went on:-

"Following on from your initial reports it seems that there are a number of other issues that need to be addressed before any final decision can be made. These include the nature of any possible repairs and their costs. However it will also be necessary to decide whether there is any compelling evidence that defects apparent during your inspection were in existence some months previously and to what extent any defect has been caused or exacerbated by the Purchasers' actions or inactions since delivery……..

We believe that it is important to look closely at the development of the Purchasers' claims during the period following their inspection of the ships and the extent to which these were compared and standardised some weeks after the inspections, regardless of the conditions found on individual vessels. We will address this in our comments which we will submit shortly.

Our understanding is that you will address this after you have given your initial reports which will focus on the condition of the vessels as you found them during your inspection. We would, however, be grateful for your confirmation."

78. The Sellers maintain that they understood that there was to be a two-stage process. They relied on the earlier history of the expert reference when the expert suggested that he would produce a report within a week of seeing each vessel which set out his findings on inspection. They relied upon the statement of Mr Wilson that he had a conversation on 6th September 2002 with the expert in which the expert then told him that there would be no initial reports until after the inspection of the last vessel. The Sellers thought that they would be given an opportunity to deal with the expert's findings of fact in initial reports and to address questions of causation of the damage which he found, if any, and questions of remedy or cost and reduction in value of the ships in further submissions. According to the Sellers' pleading, supported by a Statement of Truth, the expert told two representatives of the Sellers, after the 9th December e-mail, that he would follow the procedure set out in it.

79. Whether or not the Sellers considered, and the expert indicated, that he would produce initial reports, following which there would be opportunity for the Sellers to make further comments, there is no evidence of any agreed procedure between the Sellers and the Purchasers. There was no response in writing from the expert either and there is no direct evidence from the Sellers as to any sort of agreement by the expert to accord with the pleaded position.

80. The e-mail itself also shows that the Sellers intended to submit comments shortly, both in relation to the vessels which had been inspected over the past few months and on the development of the Purchasers' claims since the original inspections. They felt free to make submissions at all stages throughout the course of the expert reference. It is plain that the Sellers were not restricted in any way in making any submissions which they wanted to make to the expert. Paragraph 45 of the Purchasers' Skeleton Argument lists the various submissions which were made including Mr Wilson's annotated versions of the clause 3.4 notifications in respect of the *"Forth"*, *"Loch"*, *"Pride"* and "*Crest"* in July 2002, his spreadsheet analysing the Purchasers' claims for all 11 vessels dated 8th July 2002 and the individual submissions on each vessel sent between 23rd July 2002 and 3rd February 2003. Following the 9th December e-mail, on 10th January such submissions covered the *"Brae"*, *"Forth"*, *"Crest"* and *"Pride"* whilst between 21st January and 14th February, their submissions covered the *"Dell"*, *"Trader"*, *"Loch"*, *"Vale"* and *"Mariner"*.

81. In each of the submissions made in January and February, there were some common elements. First, each was headed "Sellers' initial response". Secondly, the Purchasers said it would be helpful to the process and save further detailed work if the expert could indicate whether, in the case of each item put forward by the Purchasers, he agreed that it could be dismissed entirely or not. In the latter case, the Sellers said that they would wish to address the issue in more detail including issues of quantum and that those issues would need to take into account any repairs made by the Sellers subsequent to the Purchasers' inspection and any settlement made between the parties. The submissions concluded as follows:- *"As stated above we would like the opportunity to comment in more detail, particularly on quantum, in the event the Expert were to consider any of the allegations might give rise to a claim for a reduction within his remit. We would also wish to comment further on why design issues are excluded from the expert's reference and why this must also exclude damage caused by a design issue."*

82. On 14th February 2003 the expert sent an e-mail to both parties which reads:- *"You will find herein enclosed resumé of our reports. ……. Before to finalise and send you the full reports, I wish to receive your comments if any about this resumé. I wish to say again that all correspondence sent to me must also be sent to all the parties involved."*

Attached to this e-mail were 33 pages setting out findings which the expert proposed to make in relation to each vessel. They included questions of cost and estimated reduction in value of each ship.

83. On 17th February, the Sellers replied in an e-mail which purported to terminate the Sellers' consent to the expert's appointment, reserving all their rights against the expert and his employers. To this the expert replied on 17th February referring to his previous resumé and stating that he would issue final reports for each vessel in the "coming days".

84. On 18th February the Sellers told the expert that he should immediately send them his draft reports as they stood on 17th February when his remit had been terminated by them. They said that they expected those reports to reflect the terms of Mr Wilson's e-mail of 9th December 2002 and suggested that there had been agreement by the Purchasers to the procedure set out in it. The letter went on "*your failure to conduct the reference in accordance with the terms of my e-mail of 9th December explains, at least in part Nile's decision yesterday. Nile's conduct of the reference, including the content of its initial responses, has been based upon this understanding of how the reference was to proceed. Your e-mail of 14th February makes continuance of the reference impossible, because you have pre-judged issues on which you have not received Nile's submissions*." The letter went on to say that there were issues which the expert had misunderstood and misinterpreted with regard to his remit which were matters which the Sellers would have addressed if the 9th December procedure had been followed but that it was now too late.

85. On 18th and 20th February, the Purchasers stated that if there were points arising from the expert's resumé of his findings, the proper response was for the Sellers to address them as they had been invited to do. If there were any substantive points, they were free to make them but not to walk away from the process because the expert's determination was disadvantageous to them. Nonetheless, the Purchasers' representatives suggested that a timetable for the conclusion of the reference should be put in place with a deadline for the parties to comment upon the expert's resumé and a deadline for publication of the final determination.

86. The expert appears to have agreed with this suggestion because, on 24th February, he gave the Sellers until close of business on 28th February to make any comments which they wished upon his resumé and allowed the Purchasers a further seven days thereafter to respond whilst he proposed to issue his final determination on 14th March.

87. On being questioned as to what he had or had not done, the expert said in an e-mail of 26th February 2002 that he had sent a resumé of the conclusions of his reports in order to receive the comments of the parties on it. He had decided to do it in this way rather than having a final meeting in which he would have presented the results of the complete study. He had decided on this because it was difficult to hold a meeting and sending a resumé for the parties' comments one month before the final reports was an adequate substitute. The Sellers maintained in response that if he had already reached his conclusions it was irrelevant what comments they chose to make, to which the expert replied that he believed that both parties could comment in order to get explanations of his opinion or to correct a very big mistake or misunderstanding. Since the Sellers did not wish to make comments, he proposed to issue his reports with the agreement of both parties. That agreement was not forthcoming but in due course the expert did make his determinations and published them in the form of a report on each vessel.

88. The overall position is, in my judgment, clear. First there was no alteration agreed between the Sellers and the Purchasers as to the procedure set out in the SPA for the reference. Clauses 3.4 and 3.5 of the SPA contained provisions as to the form which the reference should or could follow. The Purchasers were to identify in writing to the expert the matters which they alleged to affect the value of the ship and the amount of any reduction claimed whilst the Sellers were entitled to respond in writing to the expert with a copy to the Purchasers on the matters raised by the Purchasers, if they so wished. The expert was entitled to, but did not have to, inspect the ships and the basis upon which his decision was to be taken was set out in clause 3.5. There was no other agreed procedure and the expert was therefore free to conduct the matter in the way that he thought fit within the bounds set in the SPA. It cannot be said that the expert failed to allow the Sellers the opportunity to respond in writing to him in respect of the matters raised by the Purchasers. Nor can it be said that they did not do so. As set out earlier, there were extensive submissions made by the Sellers. They were free to comment on the defects allegedly found, on causation and on quantum if they chose to do so, at any point up to the publication of the final expert determinations.

89. Without any agreement with the Purchasers to a variation of the procedure set out in the SPA, it is not open to the Sellers to say that the expert acted outside the scope of the agreed procedure. If there was any agreement or understanding between the Sellers and the expert, this was a matter between the Sellers and the expert and not a matter of agreement with the Purchasers. As appears elsewhere in this Judgment, there are matters which occur in the course of expert references which may give rise to a claim by the aggrieved party against the expert but which do not vitiate the expert determination. Provided that the expert determination is carried out in accordance with the agreement, without bias, fraud or collusion, it is binding upon the parties.

90. Whatever the position agreed or understood between the Sellers and the expert, every opportunity was given before the final determination was made for the Sellers to make any point they wanted on causation or quantum. When the expert sent the parties his resumé of findings, he specifically invited the comments of the parties so that they could say anything they wished. It cannot therefore be said that there was a failure by the expert to allow the Sellers the scope to respond under clause 3.4 or to make submissions on causation and quantum prior to his final determination. The Sellers were expressly given that opportunity and chose not to take it up and instead chose to attempt to terminate the reference altogether.

91. The expert did not therefore depart from his instructions, nor in fact did he prevent the Sellers from making submissions in accordance with clause 3.4 or at all.

Bias and Unfair Procedure

92. The Sellers, drawing attention to the fact that the expert was to be appointed by the Chairman of BV, argued that where an expert is to be independent of the parties and is required by the contract and/or the parties to determine a dispute which has already arisen, and to receive and consider rival contentions as to condition and value, that expert acts in a quasi judicial capacity. In this context they said that there was no universal rule about the limitation of duties in expert determinations and that the use of the word "expert" was not conclusive. There was here, on the facts of this case, a duty on the expert to act fairly and impartially and, holding the balance between them, and to give each a proper opportunity to make the submissions that they wished to make.

93. The Sellers referred to **Arenson v Casson Beckman Rutley & Co** [1977] AC 405 at page 424 (per Lord Simon) and page 441-2 (per Lord Fraser). They also relied on **Sutcliffe v Thackrah** [1974] AC 727 at page 737-738A (per Lord Reid) where the duty of a valuer of shares or an architect was spelt out as one which included holding the balance fairly between the parties. Reference was also made to Kendall's Expert Determination, Third Edition at paragraphs 15.6.1 – 15.6.5 and 15.5.2. The Sellers maintained that *"natural justice"* had to be observed if not "*due process"*.

94. The citations of the speeches of these Law Lords do not advance the Sellers' cause. Each was given in the context of consideration of the possibility of a suit by a disaffected party against the expert and the potential immunity which such an expert might have. The lack of immunity for experts, where they act negligently, was made clear by these authorities but this has nothing whatever to do with the validity or invalidity of the determination made by the expert as between the parties. The determination will be binding between them unless it can be challenged on the basis of fraud, collusion, bias or material departure from instructions, but if there has been negligence on the part of the expert, the damaged party may sue the expert in respect of any loss suffered.

95. There is an essential distinction between judicial decisions and expert decisions, although the reason for the distinction has been variously expressed. There is no useful purpose in phraseology such as "*quasi judicial*" or "*quasi arbitral*" as Lord Simon made plain in **Arenson** and although the use of the word "*expert*" is not conclusive, the historic phrase "*acting as an expert and not as an arbitrator"* connotes a concept which is clear in its effect. A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves. Although, contrary to what is said in some of the authorities, there are many expert determinations of matters where disputes have already arisen between the parties, there is a difference in the nature of the decision made and as Kendall points out in paragraph 1.2, 15.6.1. and 16.9.1. the distinction is drawn and the effect spelt out, namely that there is no requirement for the rules of

natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties.

96. If an expert is guilty of actual bias, then his determination could be set aside. The Sellers maintained however that it was possible to resist enforcement of a determination if there was apparent bias on the part of the expert. They relied upon **Kemp v Rose** 1 Giff 260 as cited in Hudson's Building and Engineering Contracts 11th Edition at page 6. 102 and **Concorde Graphics Limited v Andrometer Investments SA** [1983] 1 EGLR 53. They pointed also to Lord Goff's speech in **R v Gough** [1993] 646 at page 659 where he said that a person may in good faith believe that he is acting impartially but his mind may unconsciously be affected by bias.

97. There is no suggestion here of conscious bias on the part of the expert. It is said however that there might be apparent bias or unconscious bias. Bias for these purposes is "the unfair regard, with favour or disfavour of the case of a party to the issue under consideration." The Sellers wished the Court to embark upon the question as to whether or not the circumstances of this expert determination "would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger that the expert was biased."

98. This point is however concluded against the Sellers by the decision of Robert Walker J (as he then was) in **Macro & Others v Thompson & Others (No 3)** [1977] 2 BCLC 36. At page 64 – 5, in the context of determining the issue of the partiality of the expert, he referred to the duty of the expert in issuing a valuation of shares to act fairly and impartially (citing **Sutcliffe v Thackrah** and **Arenson v Casson Beckman Rutley)**. He then referred to the run of decisions commencing with **Campbell and Edwards** and said the following:- *"It is actual partiality, rather than the appearance of partiality that is the crucial test. Otherwise auditors (like architects and actuaries) who have a long standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality."*

99. Given the latitude which is accorded to experts in making their determinations and the inapplicability of any criterion of apparent bias, the acceptance by the Sellers of the lack of actual bias effectively concludes this aspect of the matter against them. There is no suggestion that the expert was not an independent third party appointed by the Chairman of BV nor that there is any external indication of any reason why he should unfairly regard or disregard the Sellers' case. The complaints made in relation to unconscious or apparent bias cover essentially the same ground as the complaints of unfairness and the complaint that the expert strayed outside his mandate and departed from the instructions given to him, whether in the contract or elsewhere.

100. There are however one or two additional points raised in this context. Looking at these additional matters upon which I have not already made a determination, I find the following:

i) The expert did not conduct the reference in a manner which was manifestly unfair to the Sellers, whether by reference to the matters which I have already determined or any others.

ii) The expert did not disregard the Sellers' contractual entitlement to have representatives present during his inspections nor mislead them as to the need to be present. On every occasion when he inspected the vessels he gave due notice to both parties and, where any inspection occurred in the absence of the Sellers' representatives, that arose because the Sellers agreed that it should occur. The timing of the inspections was difficult but was always arranged jointly with both parties.

iii) The expert may or may not have reached his conclusions on the basis of material to which the Sellers did not have access in as much as he may have considered Class Records disclosed by the Purchasers in relation to periods after delivery of the ships. As expert, he was entitled to do this, as part of his remit, and this did not offend the contractual regime for the references. The Sellers had every opportunity to inspect the ship, both when it was under their own control, prior to delivery, and with the expert himself and were given every opportunity to comment upon its condition and upon the resumé of the expert's findings before they were finalised.

iv) There is no evidence that the expert ignored or failed to consider the Sellers' written submissions or the Sellers' evidence. The inferences which the Sellers seek to draw in this respect are unfounded.

v) Whether or not the expert reached conclusions favourable to the Purchasers in relation to matters where he had not made a sufficient inspection or had insufficient evidence, no inference of bias can be drawn from this.

vi) All the other matters to which the Sellers draw attention in paragraph 43A of their Amended Defence are in truth at most allegations of mistakes made by the expert within the framework of the reference and are not matters which evidence bias or a material departure from his mandate.

101. On the evidence before me the Sellers have no realistic prospect of establishing there was apparent or unconscious bias or unfairness of any kind whether or not, as a matter of law, these points would be of assistance to them. However, I hold that, as a matter of law, they are of no assistance in the absence of actual bias, fraud, collusion, or material departure from instructions.

Determination on a different basis from that claimed

102. The Sellers referred to three areas of findings by the expert which, they said, were findings on matters which had not been raised in the clause 3.4 notices and therefore fell outside the remit of the expert.

i) The expert determined that there should be an adjustment of the purchase price by a figure which appears to be US$ 100,000 in respect of the "Brae", the "Ranger" and the "Mariner" by reason of repair work needed for insulation in way of the tank cradle keys. It is said that there was no complaint raised by the Purchasers in their clause 3.4 notices about this. When the clause 3.4 notices are examined however it is clear that there is reference to damage to insulation under the heading of the condition of the wooden blocks. It is clear that the damage to the insulation was allegedly caused by the deterioration of the wooden blocks. Whilst a separate head of cost was not set out by the Purchasers for this, it was part of the complaint raised in relation to the wooden blocks, for which a sum was claimed. This was within the expert's remit.

ii) The Sellers say that the expert exceeded his remit on the "Brae", the "Crest" and the "Forth" by determining that a reduction in the price was justified by the condition of the anti-flotation chocks without this matter being referred to him in the clause 3.4 notices. Once again however this formed part of the complaint about the wooden blocks and was part therefore of his remit, for the same reasons as given in respect of the insulation.

iii) The Sellers complain about the determination of the expert, in relation to the "Crest", that there should be a reduction in purchase price attributable to defective PV valves. Much the same issue arises here as on the two previous items. Although there was no express claim in respect of the PV valves, there was a claim in respect of undue leakages into the hold spaces which the expert then determined as requiring remedial work to the PV valves. This was again within his remit.

The Sellers may or may not have a point as to whether or not the expert was mistaken in the views to which he came, but in respect of all these items, he did not depart from his instructions nor stray outside the matters as identified to him in the clause 3.4 notices.

Design

103. In relation to the complaint about insulation, the Sellers also say that part of the reduction in price determined by the expert related to design, in as much as he drew attention to the slope which was present on part of the insulation. On examination of the expert's reports however, there is no criticism of the design feature but a finding that damage has been caused to the insulation which results in a need to restore clearances in relation to the slope of the insulation. Once again, the expert has not exceeded his mandate.

Transposition of findings from one ship to another

104. The Sellers point to identical phraseology in a number of the reports in circumstances where some of that phraseology appears inappropriate to particular ships in the light of the expert's previous comments as to the extent of his inspections, his findings of fact or his analysis. There is however no doubt that he issued a report in relation to each vessel and made findings in relation to each vessel. Whether or not he came to conclusions about one vessel based in part upon what he had seen on another vessel, and copied over part of his findings on one vessel into his report on another, he cannot be said to have strayed outside the terms of his mandate in doing so. He was asked to make findings as to the appropriate reduction in the price for each ship and he did so. Whether he did so on adequate grounds does not affect the validity of his determination since the parties chose to abide by his decision, as an expert, and he was required only to make his determinations in accordance with the criteria set out in the SPA.

The Sellers' Counterclaims

105. The Sellers had two Counterclaims upon which the Purchasers sought reverse Summary Judgment. The first of these Counterclaims related to an alleged breach of the duty of confidentiality. The second related to a breach of the duty of good faith.

Breach of Confidentiality

106. The Sellers allege that the Purchasers acted in breach of their duty of confidentiality which arose from the SPA. The general obligation of mutual confidentiality is accepted by the Purchasers. The Sellers complain that the Purchasers disclosed to BV, prior to delivery of the ships, the matters of which they complained as giving rise to a diminution in valuation of the vessels. This caused BV to take action in relation to the ships which caused disruption and loss to the Sellers.

107. Whatever the proper construction of the SPA, the Sellers say that there was no possible basis for informing BV of these confidential matters. A request to the Chairman of BV to appoint an expert for the purposes of clause 3.3 did not involve the need to set out the Purchasers' complaints. Nor was there any reason to do so under clause 3.4 since these were matters which were plainly intended to be put in front of the expert for his determination, as opposed to anyone else.

108. The Purchasers maintained that given the terms of the SPA, it was contemplated that there would be communication to the Chairman of BV as the person responsible for nominating the expert and that this would inevitably include the fact that the Purchasers considered there to be aspects of the condition of the vessels which affected their value and which had not been accounted for in the Class Records up to December 2001. Any implied term of confidentiality would have to be consistent with the contractually agreed machinery so that there could not be any breach, if that machinery was observed.

109. The Purchasers also said that, if there were matters which affected class, the Sellers themselves were under a duty to bring such information to the attention of BV and that the Sellers could not therefore sustain a claim that this information, which the Purchasers passed to BV, should be kept from BV.

110. Whatever the proper construction of the SPA, it does not appear to me that this claim is one upon which it could be said that the Sellers have no realistic prospects of success. Whether or not clause 3.3 was complied with in the present case, there was no need for any details of dispute in the form of a particularised case to be given to BV and clause 3.4 certainly did not envisage the matters being drawn to the attention of BV as opposed to the expert.

111. There are therefore plainly matters which are arguable which cannot be dealt with on a Summary Judgment application.

Breach of the duty of good faith

112. The Sellers say that a number of the matters raised by the Purchasers were abandoned and that many heads of complaint were not made in good faith, by which they mean that the Purchasers had no honest belief in their validity. Alternatively, the Sellers argued that the individuals representing the Purchasers did not use reasonable endeavours to ascertain the true facts before making and pursuing references and this was contrary to clause 18.6 of the SPA. Such matters, involving the state of mind of the Purchasers' representatives were not, in the Sellers' submission, susceptible to Summary determination.

113. The Purchasers maintained however that the claim was unsustainable as a matter of law as there could be no duty of good faith of the kind alleged. Under English law there is no general duty to act in good faith – see Chitty on Contracts at paragraph 1-109 and **Walford V Miles** [1992] 2 AC 128 per Lord Ackner at page 138. Any attempt to imply a term into the SPA would not succeed because it would be inconsistent with the express terms which set out the parties' mutual obligations and such a term would not be a necessary implication or one which arose as a matter of business efficacy. Clause 18.6 which was relied on by the Sellers could have no bearing at all on these issues since it provided for each of the parties *"to use its reasonable endeavours"* to do and perform such ….. acts …. in order to establish, maintain and protect the rights and remedies …. of the other party …. and *"to carry out the intent and effect of this agreement"*. Whatever the ambit of that clause, it was a best endeavours clause and not a good faith clause.

114. In my judgement the Purchasers' submissions on this are correct and there is no room at all for an implied obligation of good faith of the kind suggested by the Sellers. There is of course the duty to act honestly and not to misrepresent facts but there is nothing to support the Sellers' contentions on this aspect of the case.

Conclusion

115. I will listen to submission from the parties on the form of order to be made as a result of this judgment, but it appears to me that:-

i) As the Sellers are correct in their contention that, on the proper construction of clause 3.3 of the SPA, there were no valid references made to the expert in the time limit provided in that clause, they are entitled to a declaration accordingly.

ii) As the Sellers are also correct in their contention that, on the proper construction of clause 3 of the SPA, the expert's assessment of the reduction in price for the vessels was to be based on their condition as at the date of the Purchasers' inspection, they are entitled to a declaration accordingly.

iii) The Purchasers are entitled to declarations

a) That they complied with paragraph 3 of the 20th May Amendment letter- see paragraph 1(a)(i) of their Application notice.

b) That the expert's determinations are unchallengeable on the basis of allegations that he was guilty of bias or apparent bias, that he conducted the references unfairly or failed to allow the Sellers to make submissions on causation or quantum or in accordance with clause 3.4 of the SPA, that he awarded more than the SPA allowed, or more than the Purchasers claimed or on a different basis from that claimed or that he awarded a sum in respect of design – see paragraphs 1(a) (ii), (iv) and (v) of that Notice.

iv) The Purchasers are entitled to summary judgment on the counterclaim for breach of the duty of good faith.

v) There are issues as to whether or not I should grant summary judgment to the Sellers in relation to all the claims, on the basis of the failure to refer the matters to the expert in time, because of the Purchasers' expressed intention to amend to plead waiver and/or estoppel in relation to the validity of the references.

vi) That the Sellers have essentially won on the most significant points of argument, but that an order for costs ought to reflect the comparative degree of success or failure by each party on the applications.

vii) Short skeleton arguments on the outstanding points would be helpful before the handing down of this judgment, which is being delivered to counsel and solicitors in draft in accordance with normal practice, so that full consideration can be given to matters yet to be decided.

Mr Graham Dunning, Q.C. and Mr Stephen Houseman (instructed by Holman Fenwick & Willan) for Bernhard Schulte GMBH & Co KG & Others

Mr Nicholas Hamblen, Q.C. and Mr Michael Ashcroft (instructed by Ince & Co) for Nile Holdings Ltd