CA on appeal from Commercial Court (Mr Justice Tomlinson) before Potter LJ; Clarke LJ; Sir Martin Nourse. 8th June 2001.

**LORD JUSTICE POTTER:**

**INTRODUCTION**

1. This is an appeal from the judgment of Tomlinson J given on 17 November 2000 pursuant to permission to appeal given by the judge. In that judgment he set aside an award dated 14 September 2000 made by an arbitration tribunal comprising Sir Anthony Evans, Professor John Uff QC and Mr Michael Ferryman. The arbitration concerned a shipbuilding contract, the parties to which were Harland and Wolff Shipbuilding and Heavy Industries Limited ("the builder"), the appellants in this appeal, and BMBF (No. 12) Limited ("the owner") which, by a novation agreement was substituted as buyer under the shipbuilding contract and is the respondent in this appeal. Following delays in the completion and delivery of the vessel, the owner purported to exercise its right under Clause 15.2(ii) of the contract, in the event of the builder's default, to take possession of the vessel in its unfinished state and complete it elsewhere in accordance with the contract and the specifications. In the ensuing arbitration, by the Arbitrators' Second Award of 14 September 2000, they made a provisional award in favour of the builder that the owner should pay to the builder US$27,000,000 and £3,300,000 within fourteen days. The award was made following the resolution by the arbitrators in the builder's favour of a disputed point of construction, namely, whether or not, if the owner had validly exercised its rights under Clause 15.2(ii), it was obliged to pay the builder the outstanding instalment which was payable by the owner on delivery of the vessel, less the owner's costs in completing it.

**THE RELEVANT TERMS OF THE CONRACT.**

2. By a shipbuilding contract dated 28 March 1998 ("the contract") the builder agreed to build a drill-ship to the owner's design (Hull 1740). The total cost of the vessel, which was a sophisticated 'state of the art' drilling rig, was approximately US$260,000,000. Of that sum, approximately US$154,000.000 represented work to be done by the builder and US$106,000,000 represented Owner Furnished Equipment ("OFE"), being specialised drilling building equipment bought and paid for by the owner for incorporation into the vessel as its construction proceeded. Under a parallel contract in largely similar terms, the builder constructed for the owner a similar vessel (Hull 1739), reference to which appeared in the contract in particular in Clause 15.1.6 (see paragraph 13 below). Hull 1739 was delivered to the owner in March 2000 and has apparently operated successfully since.

3. The Preamble to the contract provided that: *The Builder will construct, complete and deliver to the Owner the Vessel described herein and the Owner shall duly pay the Builder therefore all in accordance with the following clauses in this contract.*

4. Clause 2.1 provided in respect of the OFE that the builder was: *To install same and provide the necessary foundations, wiring, piping and successfully tested and commissioned interface connections to ensure the Owner Furnished Equipment functions as complete operational systems.*

5. Clause 8 (Price and Terms of Payment) reflected the distinction between construction of the vessel and installation of the OFE. Clause 8.1 provided:

   *The total cost for Drill-Ship No. 1740 shall be [US$ 260,068,234] comprised as follows:*

   *A. [US$ 153,859,234] (the "Contract Price") for detailed design, procurement (exclusive of OFE, see below), construction, installation of all equipment, commissioning and setting to work of the total drill-ship, all according to this Contract.*

   *B. [US$ 106,209,000] for OFE. Unless otherwise mutually agreed the Owner shall be responsible for all payments due in respect of OFE to Owner Suppliers and Owner Sub-contractors.*

6. Clause 8.2 stated:

   *Builder shall provide the Parent Company Guarantee and the Letter of Credit [in forms Schedule 2 of the Contract] to Owner at the date of signature of this Contract. Further … with reference to the Letter of Credit the 'First Letter') issued by Builder to Owner in conjunction with the Shipbuilding Contract relating to Hull No: 1739, Builder hereby agrees to:*

   (i) amend said First Letter to refer to and also apply to this Contract; and

   (ii) extend the Expiry Date of the first Letter to 10 August 2000.

7. Clause 8.3 provided that, provided that the owner had received the Parent Company Guarantee and the Letter of Credit and the Amended First Letter last referred to, payment of the price should be by instalments of 20%, payable on (1) signature of the Contract, (2) the start of continuous cutting of steel, (3) keel laying, (4) flotation of the vessel and (5) delivery. In relation to delivery, the amount due was defined as follows:

   *8.3.5 Twenty per cent (20%) of the Contract Price, plus or minus any increases or decreases occasioned in accordance with the provisions of this Contract or any Amendment thereof which have not previously been accounted for by adjustment of this or any earlier instalments, at Delivery of the Vessel, estimated to be February 10, 2000.*

   [Clause 8.3.5 was subsequently amended by the Novation Agreement later referred to, but such amendments are not relevant for the purposes of this appeal].

8. Clause 8.8 stated: *"Any amounts for bonuses or liquidated damages under Clause 12 shall be calculated and determined on or before Delivery of the vessel and shall be payable on the Delivery Date, and Owner shall be entitled*

*to net-off such amount(s) against the instalment referred to in Clause 8.3.5 above." [i.e. the instalment payable on Delivery]*

9. Clause 9 (Property and Jurisdiction) provided by Clause 9.1 that, upon payment of the first instalment of the price (i.e. on signature of the contract): *… the Vessel, as it is constructed, and all machinery, equipment and materials … from time to time appropriated or intended for it … shall become and remain the absolute property of the Owner … but the Builder shall at all times have a lien thereon for any part of the Contract Price which is unpaid ... provided that such lien shall not continue or be enforceable by or on behalf of the Builder in any of the circumstances described in clauses 15.1 or 15.2.*

10. Clause 11 (Trials and Performance) provided for trials before delivery to and acceptance by the Owner.

11. Clause 12 (Delivery) provided that:

12.1 The Vessel shall be delivered to the Owner by the Builder at the Builder's Yard on or before the Contract Delivery Date.

12.2 Provided that:

(i) the Vessel is in compliance with the requirements of the contract and the Specifications; and

(ii) all the Certificates referred to below are tendered

then Delivery of the Vessel shall be forthwith effected by the concurrent signature by the Owner and the Builder of a Certificate of Delivery acknowledging delivery of the Vessel by the builder and acceptance by the Owner.

Upon Delivery of the Vessel the Builder shall hand to the Owner, the Builder's Certificate, the Certificate of the Classification Society, all other Certificates required to enable the Owner to operate the Vessel and all other Certificates, Provisional Certificates and Protocols … .

12.4 Upon Delivery of the Vessel, the following shall occur:

12.4.1 If Delivery occurs on or before fifteen (15) days prior to the Contract Delivery Date, Owner shall pay to Builder the sum of United States Dollars Three Million (USD $3,000,000) as a bonus for early delivery;

12.4.2 If Delivery occurs between the period of fourteen (14) days prior to Contract Delivery Date and fifteen (15)days after Contract Delivery Date, the bonus referred to in Section 12.5.1, above, shall be reduced by the sum of United States Dollars One Hundred Thousand (USD $100,000) per day such that no bonus may be earned by the Builder after the expiry of such thirty (30) days.

12.4.3 There shall be a grace period of fifteen (15) days from the sixteenth (16th ) through the thirtieth (30th ) day after the Contract Delivery Date where no bonus may be earned by the Builder and no liquidated damages shall become due and payable to the Owner.

12.4.4 If Delivery occurs on or after the thirty-first day after the Contract Delivery Date, Builder shall pay to the Owner as liquidated damages, but not as a penalty, the sum of United States Dollars Fifty Thousand (USD $50,000) per day for a period not to exceed fifteen (15) days.

12.4.5 If Delivery occurs on or after the forty-sixth day after the Contract Delivery Date, Builder shall pay to the Owner as liquidated damages, but not as a penalty, the sum of United States Dollars Seventy Five Thousand (USD $75,000) per day for a period not to exceed fifteen (15) days.

12.4.6 If Delivery occurs on or after the sixty-first (61st) day after the Contract Delivery Date, Builder shall pay to Owner as liquidated damages, but not as a penalty, the sum of United States Dollars One Hundred Thousand (USD $100,000) per day for a period not to exceed thirty (30) days.

12.4.7 If Delivery has not occurred within the period of ninety (90) days after the Contact Delivery Date, no further or other liquidated damages shall be payable by Builder and Builder's liability to pay liquidated damages under this Clause 12.5 shall be limited to the aggregate amount of United States Dollars, Four Million, Eight Hundred Seventy Five Hundred Thousand (USD $4,875,000), payable under clauses 12.4.4, 12.4.5, and 12.4.6, respectively, the liquidated damages payable thereunder being, for the avoidance of doubt, cumulative. In this event, Owner shall be entitled to exercise the rights and remedies available to it under Clause 15.

[Clause 12.4 was amended by Contract Amendment No 2 dated 5 October 1998 but that amendment is immaterial to the construction of the contract.]

12.5 If any items on the Vessel are incomplete when the Vessel is otherwise ready for Delivery and the Owner and the Builder agree that such items:

(i) do not materially affect the operation of the Vessel;

(ii) are not likely to cause damage or deterioration; and

(iii) do not constitute such a number that whilst not individually giving rise to such material effect, nor likely to cause damage or deterioration, are in aggregate material to the condition of the Vessel;

then the Owner will take Delivery of the Vessel. Owner shall in any event have such items completed in a manner to be mutually agreed upon between the Builder and the Owner. Dispatch to the Vessel by sea freight, or if practicable by air freight in the case of emergency, of items completed and/or received at the Builder's Yard

subsequent to departure of the Vessel therefrom shall be at the expense of the Builder excepting items of Owner Furnished Equipment the cost of dispatch of which shall be at the expense of the Owner.

12. The Contract Delivery Date was defined in Clause 1.1.11 as follows:

Contract Delivery Date shall mean 10th February 2000 as from time to time extended pursuant to this Contract by Permissible Delay.

It is not necessary to refer to the definition of Permissible Delay.

13. Clause 15 (Default of the Builder) provided for the remedies available to the buyer following certain events stated to place the builder in default. It is to be noted that the first two such events in fact involve no default, in the sense of any breach of contract, by the builder, and by clause 13.4, the terms of Clause 15 also applied to any period of Force Majeure as defined in Clause 13.1 and lasting more than 45 consecutive days or 60 days in aggregate. It is necessary to quote Clause 15 at length as it lies at the heart of the construction issue.

15.1 Upon the occurrence of any of the following events the Builder shall be in default:

15.1.1 the Vessel becomes a total loss in accordance with Clause 10.4; or

15.1.2 the Vessel is requisitioned by the British Government; or

15.1.3 the Builder without just cause refuses to proceed with the construction of the Vessel; or

15.1.4 an order is made or an effective resolution is passed for the winding up of the Builder (otherwise than a members' voluntary winding up for the purposes of amalgamation or reconstruction) or a receiver or administrator is appointed of the whole or any part of the undertaking of the Builder; or

15.1.5 if at any time during this Contract, following receipt of request to do so from Owner, the Builder, utilising the Primavera level 3 critical path project schedule, is unable to demonstrate to the Owner's satisfaction that it has sufficient additional capacity, including sub-contracted labour, and/or materials, and/or has developed a recovery plan that would enable him to deliver the Vessel within ninety (90) days following the Contract Delivery Date and that the Builder is implementing such plan and/or utilizing such additional capacity and exercising all necessary due diligence to achieve Delivery within such period; or

15.1.6 if at any time during this Contract, the Builder is placed into default under the "Shipbuilding Contract relating to Hull No:1739.

For the avoidance of doubt, the Builder will not be placed into default under the provisions of Clause 15.1.5 where there is a dispute regarding the Contract Delivery Date which arises out of Clause 6.11.

15.2 In circumstances of Builder's default as described in Clause 15.1 or in the circumstances set out in Clauses 12.4.6 or 13.4, the Owner, without prejudice to its rights under the Parent Company Guarantee, shall be entitled by Notice to the Builder EITHER:

(i) to cancel this Contract in which event Builder shall forthwith refund to the Owner (a) the aggregate amount of all sums paid pursuant to Clause 8, (b) any amount reasonably and properly paid by Owner to any Owner Subcontractors and (c) any and all amounts reasonably and properly paid by Owner for Owner Furnished Equipment which has been incorporated in the Vessel, all together with interest thereon at the rate of two (2%) percent over one-month LIBOR from time to time for the particular currency, calculated in each case from the date of payment by Owner to the date such refund is made.

However, the proceeds of any insurance claim previously received by Owner shall be deducted from the amount to be refunded under this sub-clause (i). Upon such refund as aforesaid being made in full, all the obligations, duties and liabilities of each of the parties hereto to the other under this Contract shall forthwith be completely discharged and title to the Vessel shall be vested in Builder;

OR

(ii) to take possession of the Vessel in its unfinished state and complete the Vessel in accordance with this Contract and the Specifications either at the Builder's Yard or elsewhere, at Owner's sole option. In the event that Owner decides to complete the Vessel at Builder's Yard, Owner and its agents or Owner Subcontractors shall be entitled to use Builder's Yard, building, plant, machinery, tools and implements and all materials appropriated to or ordered for the Vessel and shall not be liable for breakage or damage thereto. In this case, in the event that the cost of completing the Vessel is more than the amount of the outstanding instalments, Builder shall pay to Owner on demand an amount equal to the amount of such excess from the time of demand with interest thereon at two (2) % per cent over one month LIBOR from time to time for the particular currency calculated from the date of demand until the date of refund.

15.3 In the circumstances set out in Clause 15.2:

(i) Owner shall be entitled, in the event that it elects to cancel this Contract pursuant to Clause 15.2(i) above, and no refund is made in full by Builder within five (5) days of receipt of Notice of such cancellation, to make demand under the Letter of Credit and/or the Parent Company Guarantee, in Owner's sole option; and

(ii) Owner shall be entitled, in the event that it elects to take possession pursuant to Clause 15.2(ii), then or at any time thereafter to make demand under the Letter of Credit for the full amount thereof and to utilise the same for the purposes of completing the Vessel (in accordance with the terms of this Contract and the Specifications) and

shall account to Builder for any unutilised amounts following such completion, and/or to make demand under the Parent Company Guarantee and to utilise all sums from time to time received thereunder for the purposes of completing the Vessel (in accordance with the terms of this Contract and the Specifications).

15.4 Subject always to the provisions of Clause 15.2(ii), 15.3 and 15.5, in the event of the cancellation, rescission or termination of this Contract by the Owner, the property in the Vessel and all its materials, machinery and equipment shall, following receipt by the Owner of the full amount of all instalments paid up to the date of such cancellation, rescission or termination of the Contract and all other amounts payable by the Builder to the Owner hereunder, be transferred to and vest in the Builder.

15.5 In the event that the Owner elects to take possession of the Vessel pursuant to Clause 15.2(ii), the Builder shall assign (or procure the assignment of) the Subcontracts, Supplier contracts and/or any rights arising thereunder to the Owner and shall do and execute such assurances, acts and documentation required or desirable for vesting the Subcontracts and/or any rights arising thereunder in the Owner.

15.6 All items of Owner's Furnished Equipment not incorporated in the Vessel shall be made available to Owner

15.7 In the event that Owner elects to take possession of the Vessel pursuant to Clause 15.2(ii), any sums due from Builder to Owner by way of liquidated damages already incurred at the date of Notice shall be set off against any remaining instalments due from Owner to Builder.

14. Clause 15 (Guarantee) provided:

16.1 the Builder for the whole of the Guarantee Period guarantees the Works against all defects which are due to defective design .., defective material, poor workmanship and/or the Works not having been performed in accordance with the Contract the Guarantee Period shall be for a period of twelve (12) months from Delivery of the Vessel provided always that, in respect of any repairs or replacements or such additional works as are referred to in Clause 16.6, the Guarantee Period shall be twelve (12) months after completion of such repairs, replacements and additional works. The Guarantee Period shall not in any event exceed twenty-four (24) months in total Delivery.

…..

16.6 the Builder shall remedy at his own expense any defect arising during the guarantee Period against which the Works are guaranteed under this Contract and which is Notified by Owner to Builder in accordance with Clause 16.2, by making all necessary repairs and replacements by performing such additional works as may be required to remedy such defect …

….

16.9 the guarantees and remedies contained in this Clause 16 concerning the defects which are covered by this Clause 16 are the sole and exclusive guarantees and remedies in favor of the Owner concerning such matters. All guarantees and remedies concerning such matters which would otherwise be implied by law (whether under the Sale of Goods Act or otherwise) and all remedies in tort, (including but not limited to negligence), are expressly excluded …

**THE BACKGROUND AND HISTORY OF THE DISPUTE**

15. The background and relevant history may best be set out by quotation of the following paragraphs of the arbitrators' award:

"Contract Amendment No 3 dated 19 November 1999.

11. Hull No. 1740 was the second of two, effectively identical, Vessels which the Builder agreed to build for the Owner. By November 1999, disputes had arisen between them with regard to both Vessels. The Builder alleged, but the Owner denied, that substantial extra cost and delays had been and were being incurred by reason of changes to the design and specification, for which the Owner was responsible. The Owner believed that the Builder was inefficient and was not entitled to any additional payment or extension of time, so far as Hull No. 1740 was concerned, under the Modifications and Change Orders provisions of Clause 6. In the background was what the Owner saw as the parlous financial condition of the Builder, whom it believed might be forced into liquidation. The Builder is and was a subsidiary of Harland and Wolff Holdings Ltd, which is owned or majority owned by a Norwegian company, Fred Olsen Energy ASA.

12. The commercial pressures by November 1999 were very great and the stakes were high. The situation as it was then is described in the third Recital to Contract Amendment No 3

"(C) The Builder has made claims in excess of £130 million under the Shipbuilding Contract and the equivalent contract for Hull No. 1739 in respect of (i) certain alleged breaches by the Owner and the Owner of Hull 1739, (ii) the costs associated with alleged changes to the Specifications to the Shipbuilding Contract and the equivalent contract for Hull No. 1739, and (iii) increases in the steel weight of the Vessel and Hull No. 1739, all of which claims are denied by the Owner, the owner of Hull 1739 and GMIDC [the "Old Owner" as it had then become]".

13. Amendment No 3 to the Shipbuilding Contract was accompanied by the FOE Agreement, to which Fred Olsen Energy ASA ("FOE") and the Owner were parties, the latter on its own behalf and on behalf of the Claimants as the "New Owner" of Hull No 1740.

14. The overall effect of these November agreements can be stated briefly as follows. The Owner agreed to pay £28 million on account of the Builder's claims in respect of Hull No. 1740. An arbitration was to follow pursuant to clause 20 of the Shipbuilding Contract. That amount was to be taken into account in a final settlement of accounts following the arbitration Award. The Owner agreed to make a further payment not exceeding £8 million, which was to be matched by an equivalent payment by FOE. The Owner also agreed to release a Letter of Credit in the sum of $40 million which the Builder had procured pursuant to clause 8.2 of the Contract, as amended. This allowed the Builder to acquire the use of funds which it had provided as security for the Credit. Further, Contract Amendment No 3 included the following undertakings by the Owner-

2.4 The Owner agrees:

(a) that there shall be no further requests for adjustments or variations to the Specifications or changes in the scope of works remaining to be undertaken in respect of the Vessel;

(b) not to exercise its rights under Clause 15.2 of the Shipbuilding Contract unless

(i) FOE is in breach of its obligations under the FOE Agreement; and/or

(ii) Delivery of the Vessel has not taken place by 31st July 2000 as such date shall be extended by all periods of Permissible Delay or Owner's default under the Shipbuilding Contract arising after the date of this Agreement, such circumstance being deemed to be a Builder's default under Clause 15.1 (it being understood that this provision shall not alter the Contract Delivery Date under the Shipbuilding Contract), and

(c) that the delivery instalment for (sic) the Contract Price for the Vessel shall be paid in full in accordance with the Contract and without deduction in respect of liquidated damages for late delivery (but without prejudice to the Owner's right to bring the Builder's liability for liquidated damages into account in arbitration proceedings)."

**Recent History**

16. Sea trials took place by mid-July 2000. After their completion, the Builder contended that the vessel was ready for delivery, or alternatively was ready apart from OFE items for which the Owner was responsible. The Owner denied this and produced a 'punch list' of items which it said needed rectification by the Builder before the vessel could be in a deliverable state in accordance with the Shipbuilding Contract. On and after 24 July, until 1 August 2000, the Builder tendered Delivery under the Contract, but the tenders were refused.

17. On 27 July 2000, according to the Owner's evidence, the Builder refused access to the vessel to all Owner's personnel and made it clear that no further work of any type would be permitted on the vessel until the Owner took Delivery (first statement of Robert Dawson, dated 2 August 2000).

18. On 1 August 2000 the Owner gave notice to the Builder under clause 15.2 (ii) to take possession of the vessel in what the Owner alleged was its unfinished state. On the same day, the Owner applied to the Commercial Court in London for an interim mandatory injunction entitling it to take possession against the provision of security. On 11 August, following a two-day hearing at which both parties were represented, the Deputy Judge made an Order substantially in the terms sought by the Owner. The Order included, however, an undertaking by the Owner to permit the Builder to place up to three observers on the vessel (undertaking (d)), and in paragraph 4 it stated "This Order may be varied in whole or in part by the Arbitrators".

19. The Owner took possession of the vessel immediately and caused it to proceed, first to the Clyde, and then across the Atlantic towards Galveston, Texas, where arrangements were made for further work to be done to prepare it for delivery to Exxon under a three-year time charter. It is contemplated that delivery to Exxon will take place in October.

20. When the hearing took place before us on 5-7 September 2000, the vessel was nearing the end of its trans-Atlantic voyage but it had not reached U.S. coastal waters.

**This application**

21. The Commercial Court's Order (by undertaking (e)) foreshadowed an application to the arbitration Tribunal by the Builder on 5 September. By letter dated 14 August the Builder's solicitors called upon the Owner to pay sums totalling about $36 million against invoices already sent, which they alleged were due because the vessel was in a deliverable state under the Shipbuilding Contract, or alternatively would become due *"at latest on completion of the vessel"*. The Letter then indicated, without prejudice to the Builder's principal position, that they would accept payment of all sums due "*save for $2,000,000"*, which their client was willing to have paid into an escrow account *"pending final resolution by the arbitrators"*.

22. No payment was forthcoming and by letter dated 16 August 2000 the Builder's solicitors gave notice of an application for (sic) the Tribunal "for an Order requesting your clients to pay the delivery instalment" (a reference to clause 8.3.5 of the shipbuilding contract, as amended). The letter added:- *"In the event that this issue cannot be resolved in the time available....then please note that our clients will be requesting the tribunal to exercise their rights pursuant to section 39 of the Arbitration Act 1996 to grant provisional relief and provide for payment"*.

23. Further correspondence between the solicitors failed to achieve agreement as to the scope of the hearing - which in our view was regrettable - and in the event Leading Counsel made oral submissions and on the final day produced written formulations of the issues they asked the Tribunal to decide.

**The issues**

24. In truth, there was little if any difference between the parties as to what the issues were, which we are asked to decide. The Builder sought payment of the delivery instalment and other sums which it alleged were due, following the Owner's taking possession of the vessel (as authorised by the Court Order), but without prejudice to its underlying submission that the vessel was in a deliverable state and the Owner was wrong to refuse delivery under the shipbuilding contract, as it had done before 31 July. The Owner denied this and contended that it was entitled to exercise its right to take possession by notice under clause 15.2 (ii), as it had done pursuant to the Court Order, and that no sum was payable under the terms of the Shipbuilding Contract or should be ordered to be paid by way of interim relief.

25. The central issue we were called upon to consider, therefore, was the legal consequences of the Owner's exercise or purported exercise of the right to take possession of the vessel under clause 15.2 (ii). It was common ground between the parties that we could not hear evidence to decide whether the vessel was, in fact, in a deliverable state on or before 31 July and therefore whether the Owner had been entitled to refuse delivery then.

26. Mr Hunter QC, for the Builders, raised one issue of fact (strictly, mixed fact and law) which he invited us to decide. He submitted that the Owner was not entitled to exercise the clause 15.2(ii) right to take possession of the vessel on 1 August when it had done so, because clause 2.4.(b) of the Contract Amendment No 3, by which the Owner agreed not to exercise the right until after 31 July, was itself liable to be extended "by all periods of Permissible Delay or Owner's default under the Shipbuilding Contract arising after the date of this agreement". Clearly, he submitted, the Builder will succeed in obtaining at least one day's extension when the matter is considered in due course, whether for Permissible Delay as defined or by reason of force majeure (clause 13). Therefore, the Owner's purported exercise of its clause 15.2 (ii) right was certainly premature.

27. Mr Popplewell QC for the Owner responded that the notice was repeated daily until 11 August. The latest notice was only premature if the Builder was entitled to at least 10 days' extension of the time limit, and he submitted that the arbitrators could not decide this without hearing evidence, which we could not do at this hearing.

28. We do not make any finding on this issue. We proceed on the basis suggested by Mr Popplewell, namely, that the Owner is arguably correct in contending that the time limit imposed by clause 2.4 (b) of Contract Amendment No 3 expired before, at latest, 11 August and that it was entitled to give the clause 15.2 (ii) notice on that day, if not earlier. Naturally, the Builder retains the right to argue that all the notices were premature. Our present concern is to consider the legal consequences of the exercise of the Owner's assumed right to take possession under the clause.

16. Thus the unresolved issues, against the background of which the arbitrators determined the question of construction, were as follows:

(i) Was the vessel complete and/or in a deliverable state as at 1 August 2000?

(ii) Had the deadline for delivery of 31 July 2000 been extended by any period of Permissible Delay?

(iii) What was the extent of the losses (if any) as a result of its inability to deliver the vessel into a charterparty concluded with Exxon?

[It is the case for the owner that, if the vessel had been constructed by the builder in conformity with the Contract and Specifications it would have been delivered into Exxon's service on or after the Contract Delivery Date, 10 February 2000, and that the owner's inability to deliver the vessel to Exxon has caused loss at a rate of US$200,000 per day.]

(iv) Is the owner entitled to recover all or part of the £28,000,000 which it provided on a without prejudice basis pursuant to the November 1999 Contract Amendment No. 3 plus a further £3.9 million matched by an equivalent amount from FOE (see paragraphs 13 and 14 of the award above)?

(v) Is the builder entitled to recover all or any of the £130,000,000 which it has asserted in claims against the owner and the owner of Hull No. 1739?

**THE ARBITRATORS' DECISION**

17. The arbitrators concluded that, because the owner's right to take possession of the vessel in its unfinished state pursuant to Clause 15.2(ii) was subject to the obligation to complete the vessel in accordance with the Contract and Specifications, in exercising its right to take possession the owner remained liable to pay to the builder the instalment payable on Delivery pursuant to Clause 8.3.5 *'subject always to deduction of additional costs which the owner has incurred*' (see paragraph 45 of the award below) by which no doubt was meant the costs of completion in accordance with the contract incurred by the owner after taking possession. Having held that the final delivery instalment would become payable when the appropriate stage of completion was reached, they also held that, on the information before them at the time, the final instalment either was already, or would shortly become, due. However, since they recognised that they could not, in the light of the unresolved issues, award payment of the final instalment, they proceeded to exercise a discretionary power as to the terms on which the owner should be entitled to retain possession of the vessel, it having been a term of the order of the Commercial Court made on 11 August 2000 (see paragraph 18 of the award above) that the arbitrators should have power to vary that order in whole or in part. The arbitrators estimated the costs of completing the vessel in accordance with the Contract and Specifications and the existence of the owner's claims for liquidated and unliquidated damages and arrived at their conclusion that, on a provisional basis, the owner should pay to the builder the sums of US$27,000,000 and £3,300,000.

18. The key steps in the arbitrators' reasoning were as follows, as set out in their award:

> *40. .... When the Owner elects to take possession of the vessel under sub-clause (ii), it rejects the alternative right under sub-clause (i) to cancel the contract and recover the sums it has paid the Builder. The Vessel then remains with the Builder and becomes the property of the Builder. By way of contrast, Notice given under sub-clause (ii) does not cancel or terminate the contract, for the reasons we have indicated above, and the contract therefore remains in being. This being so, the Owner's obligation to pay the Contract sum against delivery of the completed Vessel remains in existence and binding upon the Owner.*
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> *41. The question thus arises whether "Delivery of the Vessel" which is the condition precedent to the payment obligation under Clause 8.3.5, can take place when the Owner takes the possession under Clause 15.2(ii). Mr Popplewell argues that the Owner is under no obligation to complete the Vessel either in accordance with the Contract and the Specification or at all, except possibly when the Vessel remains at the Builder's Yard, which it has not done here. The Owner, he submits, has liberty to complete there or elsewhere, but no obligation to do so. The concluding words of the first sentence of the sub-clause "at Owner's sole option", refer generally to the various alternatives open to the Owner (whether to exercise the right; whether to complete, or not; whether in accordance with the Contract and Specifications, or otherwise; whether at the Builder's Yard or elsewhere), not merely to the last of these, which is covered by the immediately preceding words "either at the Builder's Yard or elsewhere".*
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> *42. We accept Mr Popplewell's submission that the right to take possession may be exercised in appropriate circumstances at any stage of the life of the contract, and that regard must be had to its potential operation at each different stage.*
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> *43. We can express our conclusions shortly. Given that the contract remains in existence notwithstanding the Owner's exercise of the right to take possession of the unfinished Vessel, we do not see any insuperable difficulty either in principle or in practice in applying the contract terms to the period following the Notice when the contract work is being done by the Owner, its agents or sub-contractors, rather than by the Builder, whether at the Builder's Yard (using the Builder's plant etc) or elsewhere. We need not elaborate on this. The relevant question is whether "Delivery" can take place, as required by the Contract, when the Owner already has title (Clause 9.1) and Possession (Clause 15.2(ii) and in fact) of the Vessel. Delivery formalities remain (Clause 12.2) and there is no reason why these cannot be complied with when construction, trials, etc are complete.*
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> *44. In our view, Clause 15.2(ii) gives a limited right (to take possession of the Vessel in its unfinished state and complete [etc]), not the unqualified right, in effect to terminate the contract, for which the owner contends. If this is correct, then the Owner's obligation to pay the delivery instalment, and any other instalments as they become due under the contract remains. We therefore HOLD that if the owner gave a valid Notice under clause 15.2(ii), then its obligation to pay the delivery instalment in accordance with Clause 8.3.5 remains binding upon it.*
>
> *45. More difficult is the question as to the time when payment of further instalment becomes due. Many variables have to be considered in this context, particularly the stage at which the right to take possession is exercised and whether the Vessel is completed at the Builder's Yard or moved elsewhere. The correct answer in principle, in our view, is that the instalment payment becomes due to the Builder when the appropriate stage of completion is reached by the Owner subject always to deduction of additional costs which the Owner has incurred. But we are concerned with a case where (1) the Vessel has been removed, and (2) completion will not be limited to what is repaired by the Contract and Specification, but will incorporate additional items of work and equipment required by the Owners for the purposes of the Exxon charterparty ...*

19. The arbitrators then referred to the practical difficulties of estimating the likely time and costs involved in carrying out the completion works at another yard for the purposes of its discretionary award and went on:

> *50. We do not think that the Owner should be in a better position than if the Notice under Clause 15.2 (ii) was validly given. Yet that is the effect of the Deputy Judge's Order. The Owner has achieved possession as well as ownership of the vessel and in practical terms the ability to complete the Vessel otherwise than in accordance with the contract and specification. The Owner has not been required to pay the final instalment of the Contract Price, even after allowing for the estimated costs of completion at another Yard. That sum, in our view, either is already due or will shortly become due.*
>
> *51. The Builder's claim that [the final instalment] is already due gains formidable support from the principle applied in Mackay –v- Dick (1885) 7 App Cas 251. Where the Owner elects not to complete the Vessel "in accordance with the Contract and Specification" then it cannot rely upon its failure to do so as a defence to the Builder's claim for the delivery instalment of the Contract Price. But we need not form a concluded view, because the time difference is short and we may take account of pending as well as accrued obligations (which are assumed obligations, in any event).*

20. The basis and calculation of the Provisional Award totalling $27,000,000 and £3,300,000 were then set out.

**THE JUDGMENT OF TOMLINSON J**

21. The judge took a fundamentally different view of the scheme and effect of Clause 15.2. First, while he recognised that it was a question of construction, he stated that it would be unusual if a shipbuilding contract provided that, notwithstanding a builder's default relied on to effect a termination of the builder's entitlement to complete the contract work, the builder should be entitled to payment of such part of the contract price as remained unpaid at the time of the exercise of the owner's right. He said that if that were the result intended to be achieved, he

would have expected the parties to have spelled out in some detail the entitlement of the owner to recover the cost of completion from the builder. He found the single most telling point against the arbitrator's construction to be the absence of either express provision for payment by the builder to the owner of the cost of completion or, (which he said was really the same point) of any express provision entitling the owner to make an appropriate deduction from instalments as they fell due. Further, he said that if a further instalment of the contract price were intended to be payable notwithstanding service of a valid notice under Clause 15.2(ii), he would have expected this to be expressed in clear terms rather than left as an implication or conclusion to be spelled out of the survival of other contractual obligations.

22. Second, the judge said he found startling the notion that an entitlement in the owner, in the event of the builder's default, to take possession of a vessel to which the owner already had title, should carry with it any positive obligation to complete the vessel in accordance with the contract and specification. He said that if such a positive obligation existed, it would make the buyer's contractual remedies for the builder's default peculiarly unattractive.

23. Third, the judge found elusive the contractual analysis which could bring about the result achieved, given that the arbitrators had eschewed implied term as the source of the entitlement of the owner to deduct from the contractual instalments the costs of construction.

24. Fourth, he said he found the notion of completing the vessel in accordance with the Contract and Specifications elsewhere than at the Builder's Yard difficult to imagine. In this respect, while he recognised that in a matter of shipbuilding practicality it was important not to substitute his own views for those of experienced arbitrators, he doubted if any of the arbitrators was drawing upon experience in relation to the unusual situation and provisions in this case. He made the wider point that, given that Clause 15.2 was a clause designed to give rights to the owner in the event of the builder's default, he could not understand what commercial interest of the owner was served by compelling him, in the event he had no real option other than to take possession of the vessel in its unfinished state, nonetheless to complete it in accordance with the contract. The only interest thereby served would be the builder's interest in recovering the contract price, whereas in his view the purpose of the clause was to protect or assist the owner.

25. Fifth, and the 'short point' to the mind of the judge, was that, if Clause 8.3.5 was alone the source of the builder's entitlement to payment of the final instalment, such entitlement was contingent upon Delivery which was itself a defined term under Clause 12.1. That clause required delivery at the Builder's Yard on or before the contract Delivery Date, yet, in this case, the former would not take place and the latter would be impossible if the owner had justifiably invoked Clause 15.2(ii).

26. Sixth, in respect of the principal plank of the arbitrators' finding as to the effect of Clause 15.2(ii), namely the *express* obligation imposed upon the owner to complete the vessel in accordance with the contract and the specifications, the judge considered that the language of the sub-clause was the language of entitlement and not obligation. In that connection, he held that the words 'at Owner's sole option' meant that in the phrase 'to take possession .. *and* complete the vessel', the word 'and' should be read disjunctively rather than conjunctively As to the final words of sub-clause (ii), he stated: *"One cannot spell out of an express provision for recovery of the additional costs of construction, an implied provision for payment to the Builder of unpaid instalments or for a right of deduction therefrom in respect of the cost of construction."*

27. Seventh, the judge rejected the builder's argument that there was assistance to be derived from Clause 15.3(ii) which required the owner to account to the builder for any unutilised amounts demanded under the Letter of Credit for the purposes of completing the vessel. He stated that it was simply a provision dealing with short term funding and was not directed to the allocation of responsibility, or the imposition of any obligation, in relation to the payment of further instalments, or to the right of the owner to make deductions from such instalments in respect of his costs of construction.

28. Finally, the judge placed emphasis upon the builder's basic obligation described in the preamble to the contract as being to 'construct complete and deliver to the Owner the Vessel'. He said it was not sensible to think of that obligation continuing after service of a valid notice under Clause 15.2(ii). He said that inevitably, if that obligation went, then so went any 'correlative right' to payment under clause 8.3.5. He rejected the notion that, in completing the vessel, the owner should be regarded as acting 'qua builder' (as he put it) so as to discharge the builder's remaining obligation to build. He said that, even if such a notion were feasible, it could not overcome the difficulties inherent in attempting to envisage how Delivery could be given in a manner which satisfied clause 12, so as to trigger payment under clause 8.3.5.

29. Having dealt with a number of subsidiary arguments advanced by the parties, the judge stated that, in his view, the arbitrators' analysis was unsustainable and that he would set aside the award, substituting therefor a declaration that, on the assumption that the Owner has validly exercised its right to take possession of the Vessel in its unfinished state pursuant to Clause 15.2(ii) of the Contract and elect to remove it from the Builder's Yard: (i) there is no obligation on the part of the Owner to complete the Vessel 'in accordance with the Contract and the Specification', and (ii) the Owner is not liable and will not become liable at any time in the future to pay the Delivery Instalment, or any part thereof.

**THE GROUNDS OF APPEAL**

30. Mr Kendrick QC, who appears for the builders on this appeal, submits that the judge, in reversing the decision of the arbitrators, ignored the contractual scheme intended to apply, and effectively provided for, under Clause 15 of the contract; in particular he wrongly refused to recognise the effect of the express obligation of the owner, when exercising its right under Clause 15.2.(ii), to take possession *and complete the vessel in accordance with the contract*. Mr Kendrick adopts, and has elaborated, the reasoning of the arbitrators in an argument along the following lines.

31. (1) Clause 15 embodies a contractual scheme which aims at a fair and equitable financial result in a number of events or circumstances which may or may not involve blame or breach of contract on the part of the builder. The heading 'Default of the Builder' is a misnomer, or is at any rate one which, under Clause 1.4 of the contract, is 'for convenience only and should not affect its construction'. If and insofar as the wording of clause 15.2(ii) (which is expressed as *an alternative* to cancellation under Clause 15.2.(i)) raises any ambiguity in relation to the parties' rights to payment or set off under the terms of the contract which continue to govern their relationship following such notice, such ambiguity falls to be resolved on the basis of a fair allocation of the costs incurred in bringing the vessel to completion. This is not a startling proposition, as it was characterised by the judge. It is Mr Kendrick's submission (which he submits may well have governed the approach of the arbitrators) that shipbuilding contracts are not predatory trading contracts or charterparties, the terms of which are on a printed form designed to favour one party to the bargain against the other. As a class, they are frequently concerned with preserving a fair outcome through checks and balances and certainly should not readily be read as bestowing windfalls on either party. They are in any event the subject of careful individual negotiation and have no set form or structure. It is plain that this particular contract aims at the result where, even where one party is in default, the innocent party neither pays nor gets more than its original bargain. Clause 15 is effectively drawn as a mirror image to Clause 14, which deals with the situation where the owner is in default and, under which, if the owner defaults or becomes insolvent and the builder serves notice, the property vests in the builder. However, the builder must then complete the vessel for sale and, after deducting what is due to it under the terms of the contract, account to the owner for any surplus proceeds. Thus, if the competing construction favoured by the arbitrators and by the judge are placed in the landscape of the contract as a whole, the construction adopted by the arbitrators accords with the overall aim of the contract, rather than that adopted by the judge.

32. (2) When a Clause 15 event occurs, the owner has three alternative courses open to him. (a) If the event is in fact a breach of contract by the builder then, depending upon its nature, length and gravity, the owner may exercise his common law right to terminate for repudiatory breach and to remove the vessel of which it will be the absolute owner pursuant to the provisions of clause 9, and (subject to the obligation to mitigate its damage) free to abandon the construction of the vessel, lay it up in its uncompleted state, or complete it whether in accordance with the original specification or in an altered form. (b) The owner may exercise its contractual right to cancel the contract under Clause 15.2(i). In that event, it receives from the builder all instalments and other sums which it has previously paid to the builder or its (the owner's) sub-contractors and for OFE incorporated into the vessel, plus interest, in full discharge of all the owner's claims. It is to be noted that the owner does not receive any sums which might otherwise have accrued for liquidated damages or delay. (c) The owner may exercise his contractual right to take possession of the vessel in its unfinished state and complete it in accordance with the contract and specifications, either at the builder's yard or elsewhere.

33. (3) In doing so, the owner need not rely upon its own funds for the cost of completing the vessel, Clause 15(3)(ii) provides that the owner may at once make demand for the full amount of the Letter of Credit, accounting to the builder for any unutilised amounts following completion and/or may make demand under the parent company guarantee for the purposes of such completion.

34. (4) Thus, upon service by the owner of a notice under clause 15.2(ii), the builder's obligation to complete the vessel in accordance with the continuing contract becomes that of providing funding for completion and paying any excess costs involved. Since the contract is not terminated, the remaining obligations provided for in the contract continue save insofar as expressly or by necessary implication inapplicable to the changed situation and/or insofar as inconsistent with the financial scheme of the contract.

35. (5) That means that where, as in this case, the owner gives a section 15.2.(ii) notice shortly prior to completion, its obligation to pay the final instalment of the contract price against delivery of the completed vessel remains in existence, subject to the owner's right to bring into account any sums which the builder is liable to pay to the owner, including any sums for liquidated damages already accrued at the date of the notice (clause 15.7) and, in particular, the costs of completing the vessel under clause 15.2.(ii), if and insofar as the owner has not financed such completion by demand made under Letter of Credit and/or the parent company guarantee (Clause 15.3.(ii)), and subject to the further liability of the builder to pay to the owner on demand the excess of the owner's costs of completion over the amount of the outstanding (i.e. the final) instalment (Clause 15.2.(ii)).

36. (6) The argument that where, following service of a Clause 15.2(ii) notice the owner has elected to remove the vessel from the builder's yard for completion, there can be no Delivery of the vessel by the builder under Clause 12, and hence no 'trigger' of the owner's obligation under Clause 8.3.5 to pay the final instalment 'at Delivery of the vessel', is a bad argument for the following reasons. (a) 'Delivery' is a defined term under the contract which (under Clause 1.1.13) is defined exclusively by reference to the provisions of clause 12.2. The

wording of Clause 12.2 is apt to operate independently of any transfer of physical possession of the vessel. It simply states that, provided the vessel is in compliance with the requirements of the contract and specification and that the builder tenders to the owner the various certificates provided for, Delivery shall be forthwith effected by the concurrent signature of the owner and builder of a Certificate of Delivery acknowledging delivery by the builder and acceptance by the owner. (b) Although Clause 12.1 states that the vessel shall be delivered at the builder's yard on or before the Contract Delivery Date, it is a provision focused on the time and place for physical delivery of the ship rather than the definition of Delivery for the purposes of the final payment. It is not Clause 12.1, but Clause 12.2, which defines Delivery for the purpose of payment of the final instalment. The terms of Clause 12.2 contemplate a documentary transaction well capable of being effected elsewhere than at the builder's yard and in respect of which, as the arbitrators expressly found, 'there is no reason why these cannot be complied with when construction, trials etc are complete'. (c) The condition precedent to the Certificate of Delivery under clause 12.2 is that the vessel complies 'with the requirements of the Contract and Specification'. Those same words appear in three places in clause 15 itself (once in 15.2(ii) and twice in 15.3(iii)) in connection with the owner's obligation following service of a Clause 15.2(ii) notice, to complete the vessel either at the builder's yard or elsewhere. Such references constitute an acknowledgement that the vessel *can* be completed in accordance with the contract elsewhere than at the builder's yard, as the arbitrators found and as the owners themselves contend has occurred. In those circumstances, there is no obstacle to, or inherent difficulty in, construing Clause 8.3.5 as requiring payment of the final instalment of the contract price on Delivery subject to all rights of set off and/or deduction arising under, or in respect of any breach by the builder of, the terms of the contract. (d) Finally, Clause 16(1), which provides for the period nature and content of the builder's guarantee against defective design and workmanship states that the guarantee period shall run for twelve months 'from Delivery' and thus similarly anticipates and assumes that such Delivery may take place despite service of a notice under Clause 15.2.(ii) and completion by the builder 'either at the Builder's Yard *or elsewhere*'.

37. For those reasons, Mr Kendrick submits that the arbitrators were correct in their interpretation of the contract as set out in paragraphs 40-45 of their Award (see paragraph 18 above).

38. Mr Popplewell for the owners has largely been content to support the reasoning of the judge as expressed in his judgment.

39. (1) He relies heavily upon the absence of any express term entitling the builder to be paid any unearned instalments after the exercise of Clause 15.2.(ii) rights, adopting the reasoning of the judge that it would be unusual and surprising for a shipbuilding contract to provide that, notwithstanding the builder's default entitling the owner to terminate the builder's right to complete, the builder should yet be entitled to payment of an instalment of the contract price not yet due under the contract a the time the builder's right to complete was terminated (see paragraph 21 above). Mr Popplewell submits that, if such were intended, one would expect clear words setting out such a result in detail, including provision for deducting the costs of completion and a machinery governing the making of payments with permissible deductions. Yet there are no such words.

40. (2) Mr Popplewell submits that the judge was plainly right to hold (see paragraph 22 above) that the exercise by the owner of its Clause 15.2.(ii) rights imposed no obligation on the owner to complete the vessel in accordance with the contract and specification, pointing out that the introductory words of Clause 15.2 are that the owner shall be *entitled* by notice either to cancel under 15.2.(i) or to take possession under 15.2(ii). Thus, the language is permissive rather than obligatory in respect of the rights set out in 15.2. He also supports the judge's reasoning (see paragraph 26 above) that the word 'and' in the first line of 15.2.(ii) ('to take possession … *and* complete ..') should be read in a disjunctive and not a conjunctive sense, the alternatives of taking possession and completing being the subject of the later words 'at Owner's sole option'.

41. (3) Mr Popplewell submits in support of this construction that, where the contract provides for an *entitlement* in the owner to take possession of the vessel so as to protect the owner's commercial interests in the face of an event of default, it can make no commercial sense to impose an *obligation* upon the owner to complete the vessel in accordance with the contract specification simply in order to trigger an entitlement on the part of the builder to be paid for work it has not carried out. This is particularly so (see the judge's reasoning at paragraph 24 above) in respect of completion effected at a different yard. Not only might such an exercise require the owner to complete in conditions where the builder's delay had made the original specification obsolete; the limitations of a new yard might make it difficult to comply with a specification originally agreed on the basis of construction at the builder's yard; or, if the right were exercised earlier in the life of the contract than imminent completion, the owner might be obliged to continue to seek co-operation in respect of completion and certification over a substantial period from a builder who was by then insolvent.

42. (4) Mr Popplewell submits that the judge was correct (see paragraph 23 above) to stigmatise as 'elusive' the contractual analysis whereby the builder conceded and/or contended as part of its overall argument on construction that the owner's obligation to pay the final instalment permitted also the entitlement to deduct the costs of completion. Although Clause 15.2.(ii) provides for the right of the owner to payment of any costs of completion which *exceed* the amount of the outstanding instalments, it is silent as to the owner's right to deduct from the amount the outstanding instalments any sum which does not exceed that amount. He submitted, if that had been intended, then it would have been expressly provided for.

43. (5) In this connection Mr Popplewell submits that such right is not to be found in, or inferred from, the owner's liability to account for any unutilised amount following demand made under the Letter of Credit (Clause 15.3(ii)), adopting the view of the judge that that clause is directed only to the provision of short term funding for completion of the vessel rather than being directed to any overall accounting exercise involving the incidence of instalment payments and the owner's rights of deduction therefrom (see paragraph 27 above). Mr Popplewell observes that the Letter of Credit is in the nature of an on demand performance bond payable against a certificate by the owner and that the accounting provided for is implicit in such bonds in the absence of clear words to the contrary: see *Condel –v- Siporex* [1997] 1 Lloyd's 424(CA) at 431.

44. (6) Mr Popplewell submits that the judge was correct in holding (see paragraph 25 above) that the short point fatal to the builder's argument that the owner was obliged to pay and/or bring into account the final instalment was that the obligation of payment was contingent upon delivery at the builder's yard: see Clause 12.1. Thus the provision of Clause 12.2 could not in any circumstances be complied with.

45. (7) Finally, Mr Popplewell rejects in their entirety Mr Kendrick's submissions as to the contractual scheme envisaged under Clause 15 as involving a strained and unrealistic construction designed to avoid the plain intention of Clause 15.2(ii) that the exercise of the owner's right to give notice thereunder releases the builder from its obligation to build and deprives it of its correlative right to payment for such building work. He submits that the fact that clause 15(2)(i) provides for cancellation of the contract ab initio should not lead to the conclusion that the wording of 15(2)(ii) is designed to leave future rights and obligations in respect of payment intact. He argued that Clause 15.2(ii) is itself a termination clause at least in respect of the primary obligations of building and payment, as accepted by the judge (see paragraph 28 above).

**DISCUSSION AND CONCLUSION**

46. I consider that the submissions of Mr Kendrick are to be preferred and I would restore the decision of the arbitrators, at least two of whom had wide experience of shipbuilding contracts of this kind. The experience and reputation of Mr Ferryman (now tragically deceased) was as broad and highly regarded as any in the field of marine arbitration. That aspect deserves some emphasis in my view because, although the arguments advanced before us have been arguments of construction, a number of the points argued by Mr Popplewell and relied upon by the judge in support of the construction which he preferred have dwelt upon so-called *'commercial'* considerations and arguments of practicality in relation to matters such as completion at the builder's yard or elsewhere; the likelihood of a common intention that an equitable approach on the lines propounded by Mr Kendrick should be adopted in relation to diverse matters of *'default';* and the feasibility of *'Delivery'* under Clause 12.2 elsewhere than at the builder's yard. In relation to all these matters, it is plain that the arbitrators (as the parties' chosen adjudicators) took a different view from that of the judge.

47. The arguments advanced by each side fall broadly into two categories. On the one hand, there are arguments of broad principle going to the overall intention of the parties and the scheme of the contract and, on the other, arguments of detailed construction. The former concern the scheme and intended effect of Clause 15.2 as propounded by Mr Kendrick and accepted by the arbitrators as governing the overall approach to construction, as contrasted with the judge's starting point that the cessation of the builder's right/ability to complete the vessel following a 15.2(ii) notice must, in the absence of clear contrary words, result in forfeit of any correlative right to further payment under the contract. In that respect, the judge relied less upon the construction of express provisions in the contract than upon the absence of provisions one might expect to find if the arbitrators' conclusions were correct. The arguments of detailed construction relate to a number of individual provisions in the contract, principally relied upon by Mr Kendrick as supporting the arbitrators' overall approach and conclusion. Since the various arguments are largely intermingled, and having already stated that I prefer the submissions of Mr Kendrick already set out, I propose to deal with the owner's arguments very much in the order in which the judge considered the matter, as elaborated by Mr Popplewell in the numbered summary of his submissions which I have set out above.

48. (1) Albeit the dispute in this case arises in respect of an assumed failure by the builder which may properly be regarded as a default in the conventional sense, it falls to be construed as one of a number of events not involving such default, whether in the nature of frustration under Clause 15.1.1 and 15.1.2 or circumstances of Force Majeure under Clause 13.4. In those circumstances, there is no reason to regard as inherently incredible, as the judge appears to have done, a scheme and intention the effect of which would be to apportion loss under the contract upon a broadly equitable basis having regard to what the parties would have paid or been paid if the contract had been completed without the occurrence of the 'default' event. Thus if, in circumstances of default, the position is such that the owner, rather than exercising his common law rights to accept a repudiatory breach by the builder or his contractual right to cancel the contract under clause 15.1, elects to take over the vessel and complete it *in accordance with the contract,* there is no compelling reason to reject or strain against the natural construction or usual effect of such words, namely that the contract continues in being save insofar as the wording of its continuing provisions render them inapplicable to the altered situation. This includes the owner's obligations of payment and/or account, which on the face of it are payment of instalments as in Clause 8, less liquidated damages 'capped' under Clause 12 and netted off against the final 'Delivery' instalment (see Clause 8.8), bearing in mind that this is coupled with the obligation that the builder under Clause 15.2(ii) pay to the owner the cost of completing the vessel to the extent that it is more than the amount of the outstanding instalments. Since that was plainly the view of the arbitrators, it is one which should not be readily rejected on the ground that it is 'unusual'. While it is true that one might have

expected to see the ramifications of the position more specifically addressed, there are clear indications in other terms of the contract relied on by Mr Kendrick, and in particular clause 15.7, that such was the intention.

49. (2) The point central to the difference in the approach of the judge and the arbitrators was the force and effect of the words 'and complete the vessel in the Contract and the Specification' in Clause 15.2(ii), i.e. whether they are words integral to the exercise of the option under 15.2(ii), defining its purpose and governing its exercise, or whether the words are themselves merely words of further option which impose no obligation on the owner vis-à-vis the builder despite the owner's decision not to cancel the contract under 15.2(i), but to invoke the provisions of 15.2.(ii). Leaving aside for a moment the 'commercial' considerations and restricting oneself to the wording of the contract, it seems to me clear that, accorded their natural meaning and read in the context of the remedies provided by Clause 15, the former is the correct construction, as the arbitrators held. I accept the analysis of Mr Kendrick as to the alternative courses open to the owner as set out at paragraph 32 above. In my view, the *contractual* remedies provided for, as Clause 15.2 clearly states, contemplate alternative remedies of *EITHER* cancellation on the one hand, in which case, upon repayment in full of the owner's expenditure plus interest, the property in the uncompleted vessel, (previously in the owner), vests in the builder without any preservation of any right in the owner to liquidated damages (i.e. back to square one); *OR* completion in accordance with the contract save that the owner carries out the works necessary to complete the vessel in accordance with the contract. In that event the instalments provided for remain due, but subject to the right of the owner to set off liquidated damages already accrued (Clause 15.7), and subject to the builder being liable to pay on demand the excess of the costs of completion over the amount of the outstanding instalments, the owner meanwhile having the right to fund the works of completion from the proceeds of the Letter of Credit, accounting to the builder for any unutilised amounts following completion (15.3(ii)). Clause 15.2(ii) does not contemplate the owner taking possession, nor does it give him the right to do so, for a purpose other than completion of the vessel. On the other hand, there is no exclusion of the owner's right, in the event of repudiatory breach by a wilful refusal or the demonstrable inability of the builder to fulfil the contract, to accept such repudiation and sue for common law damages, whilst still enjoying the ability to remove the vessel (of which it remains owner), dealing with it as it wishes in its own commercial interests, whether by completion or otherwise. That is plainly a remedy which the owner will prefer to follow if the default of the builder occurs early in the contract.

50. That being so, whether or not it is unusual to encounter a provision in a shipbuilding contract which has the effect of entitling a builder to payment of part of the contract price falling due after the owner has exercised an option to complete the building, it seems to me clear that such is the intention and the effect of the wording in this contract. In that respect, I consider that the judge's observation that he would have expected the parties to spell out the entitlement of the owner to recover the costs of completion from the builder is largely met by the provision of Clause 15.3(ii). Although there is no express provision for the owner to make appropriate deductions from instalments as they fall due, it is clear from Clause 15.3(ii) that the source of funds was contemplated as being the Letter of Credit and demands made from time to time under the Parent Company Guarantee. It is also likely that, whereas the option under 15.2(ii) is exercisable at any stage of the contract, it was anticipated as being a viable or desirable option only at a late stage in the contract when the final or, at most, the last two instalments remained outstanding.

51. When the scheme of Clause 15 is considered, I do not find it startling, as the judge did, that the entitlement of the owner to take possession should carry with it a positive obligation to complete the vessel in accordance with the contract and specification, and I reject the textual basis on which the judge justified his conclusion that there was none. It is correct that clause 15.2 presents to the owner an option either to cancel under (i) or to take possession under (ii). However, it seems plain to me that, within (ii), the wording constitutes a package under which the owner, having decided to follow the procedure under (ii) in preference to cancellation of the contract, and having served notice of his intention to do so, is bound by all its provisions. I see no warrant for reading the word 'and' in the first line of (ii) as 'or'. Nor do I consider that the words 'at Owner's sole option' in the third line assists or supports that argument. It seems to me quite clear that those words relate to the immediately preceding words 'either at the Builder's Yard or elsewhere' (see the similar use of the words under Clause 15.3(i) following the words 'Letter of Credit and/or the Parent Company Guarantee').

52. (3) I do not find persuasive the argument that imposing an obligation of completion upon the owner as a condition of the exercise of its option under 15.2(ii) can make no commercial sense, on the basis that the purpose of the option is to protect the commercial interests of the owner in the event of default. It assumes that the wording of the option is designed *solely* for that purpose, whereas if, as I accept, the wording of 15.2 and 15.3 is designed (so far as remedies *under* the contract are concerned) to enable an accounting to take place at Completion/Delivery which broadly ensures that neither party pays more nor gets more than contemplated under the original bargain, it has regard also to the interests of the builder. Nor do the suggested practical difficulties of completing at a different yard alter my view. There is no evidence or suggestion that the contract or specification were peculiar, or tailored to or restrained by, the facilities at the builder's yard. If that was in fact the case, the possible effects could and should have been provided for in the contract at the time it was negotiated. The weight to be accorded to such a suggestion is in any event one which the arbitrators were better qualified to take into account than the judge or this court.

53. (4) There is some force in Mr Popplewell's point that Clause 15.2(ii) is silent as to the ownker's right to deduct from the amount of the outstanding instalment any cost incurred in completing the vessel which does not exceed that

amount. The judge commented that the arbitrators had eschewed an implied term in that respect. Whether or not that is so, it seems plain to me that such a term is indeed implied in the contract. As already pointed out, the contractual scheme provides primarily for the owner to obtain his funding for completion from the Letter of Credit and/or the Parent Company Guarantee rather than from its own pocket accounting for any sum not utilised. However, if the owner did not use those funds, its right of set off is in any event to be implied from the provision entitling it to make demand under the Parent Company Guarantee for the purpose of completing the vessel and/or to treat as deductible under Clause 8.3.5 any decrease occasioned in accordance with the provisions of the contract.

54. (5) I do not consider that the judge was right to reject the assistance afforded by Clause 15.3(ii) on the ground that the Clause was concerned *only* with the provision of short term funding and was not directed to any overall accounting exercise involving the incidence of instalment payments. While it is not in terms so directed, its importance lies in part in the overall scheme of the contract if Clause 15.2(ii) is invoked, namely to leave the framework of the contract intact (including the obligation of the owner to pay the contract price on Delivery) but to convert the obligation of the builder into that of funding rather than executing the completion of the building. It does not seem to me that the matter is advanced by reference to *Condel –v- Siporex*.

55. (6) I reject the 'short point' argument of Mr Popplewell, accepted by the judge, that, in the circumstances of completion by the owner pursuant to Clause 15.2(ii) elsewhere than at the builder's yard, Delivery (upon which the builder's right to payment of the final instalment depended) became impossible and/or would in any event not take place. Because of the wording of Clause 12 and the process of certification provided for, this was a question of mixed law and fact to be determined by the arbitrators. As for the law, I accept the submissions of Mr Kendrick set out at paragraph 36 above. Clause 12.1 does not define delivery for the purposes of Clause 8.3.5, which provides for payment on Delivery as defined in Clause 1.1.13 by reference to clause 12.2. In any event, clause 12.1 is concerned to provide for delivery *on or before the Contract Date* for the purposes of the bonus and liquidated damages provisions in Clause 12.4 which plainly contemplate Delivery (under Clause 12.2) up to at least ninety days after the delivery date, following which liquidated damages are capped under Clause 12.4.7. Clause 12.2 is, as Mr Kendrick submits, a provision which contains no requirement that signature or certification take place at the builder's yard. Whether or no there were matters of practice or other obstacles in the path of the certification process provided for in Clause 12.2 was essentially a matter for the expertise of the arbitrators (assuming, as it appears, that no evidence was addressed to the matter). In that respect they made a clear finding that there was no reason why the formalities required under Clause 12.2 could not be complied with when construction and trials were complete.

56. I have already dealt with Mr Popplewell's submission as to the overall scheme and purpose of Clause 15 in the course of my observations under (1)-(6) above. For the reasons I have stated, I would allow this appeal.

**SUBSIDIARY ISSUES**

57. It is the case for the owner that, in the event of the appeal being allowed, this court should remit to the arbitrators three subsidiary issues pursuant to s.69(7)(c) or s.70(4) of the Arbitration Act 1996.

**Clause 7.6**

58. Clause 7.6 of the contract provides that in relation to OFE delivered by the owner to the builder on or before the scheduled delivery date, where such item is not installed within sixty days following that date, the builder must pay to the owner interest at the rate provided and that: *"Owner shall be entitled to set-off all sums due to it pursuant to this clause against the installment of the Contract Price payable pursuant to Clause 8.3.5"*

59. According to the witness statement of the owner's solicitor, Mr Shepherd of Ince & Co, made in support of the application for permission to appeal to the judge, a sum of at least US$ 740,000 had fallen due under this clause as a result of delays of the builder. That evidence is uncontradicted. Mr Popplewell submits that, this being so, it should have been taken into account by the arbitrators when deciding what sum should be paid by the builder to the owner under the Second Award; yet it appears from their calculation of the sum to be paid that they overlooked it, despite having been addressed upon the question in oral submissions. This aspect is referred to at the end of the judgment of Tomlinson J where he observed that, in the light of his decision that the owner was not, and would never become, liable to pay the delivery instalment:

*"This renders it unnecessary to deal with the Owner's subsidiary arguments concerning its alleged ability to set-off against the Delivery Instalment sums due to it under Clause 7.6 of the Contract … These points no longer arise although had they fallen for consideration I would have been unable to resolve them without inviting the arbitrators to furnish further reasons. In that regard I should mention in all fairness that the Tribunal was plainly under great pressure to produce an early award and in such circumstances understandably directed only a small part of their reasons to these subsidiary issues."*

60. Mr Popplewell now submits that this court should invite the arbitrators to furnish their reasons for omitting to deduct the sum of US$ 740,000 from the sum the owners were ordered to pay.

61. Mr Kendrick submits that there is a short answer to this submission namely that by Clause 2.4(c) of Contract Amendment No 3 of November 1999 quoted in paragraph 14 of the award (see paragraph 15 of this judgment) it was expressly agreed that the owner would pay the delivery instalment in full without deduction in respect of liquidated damages for late delivery, though without prejudice to the right to bring the builder's liability for liquidated damages into account in arbitration proceedings. Mr Kendrick submits that Clause 7.6 is a form of

liquidated damages clause encompassed by the November 1999 amendment. Without deciding the point, I doubt if it is a good one in that, in this contractual context at least, it is doubtful if the phrase 'liquidated damages for late delivery' was intended to do other than refer to other clauses in the contract where the words 'liquidated damages' actually appear.

62. Whether or not that is so, Mr Kendrick points out that the claim under Clause 7.6 was and is resisted by the builder, who claims that the delay in delivery of the vessel and the delay (if any) in installation of OFE was cause by the fault of the owner. He submits that, by omitting reference to the claim in their reasons, the arbitrators presumably felt it was *not* suitable for determination or deduction at the time of the interim award. I agree. When considering the amount to be awarded, (see paragraph 53 et seq of the award), the arbitrators addressed the question of set-off of the owner's claims in very general terms and I do not think that the omission to mention this particular point should be taken as indicating that it was overlooked. Nor do I read the terms of the judge's judgment as indicating that he would necessarily have thought it right to remit the matter to the arbitrators.

63. The principal reason why the owner is anxious for the matter to be remitted although it is a small sum in the overall context of the case and will ultimately turn upon matters still to be determined in the main arbitration, is the owner's anxiety as to the solvency of the builders. That was an anxiety made clear to the arbitrators at the time of the interim award. However, the arbitrators stated (at paragraph 59 of the award) that they did not consider that the sum otherwise due from the owner should be reduced for that reason and there is certainly no evidence before us that the position of the owner has deteriorated yet further in the meantime. In those circumstances, I do not think that the matter should be referred back to the tribunal for further reasons as suggested.

**Set-off against Builder's Quarterly Invoices**

64. Clause 8.8 of the contract provided for builder's quarterly invoices to be submitted to the owner covering sums: *"For and including, but not limited to, additional services which are requested by Owner, but are not provided for in any Project Change Order and facilities usage for Owner's Subcontractors. Owner's Suppliers … "*

The owner was obliged to pay the undisputed portion within thirty days.

65. The builder claimed, and the arbitrators made an interim award in respect of, sums the subject of builder's quarterly invoices. The amount claimed for Change Orders and Quarterly Invoices was £3,758,378. The tribunal made a deduction of some £458,000 by awarding the interim sum of £3,300,000. Since there was no dispute about the amount of the Change Orders, nor that they would be due to the same extent as the Delivery Instalment, it appears that the deduction of £458,000 was in respect of the quarterly invoices claim which totalled £1,156,088. Accordingly, the amount which the arbitrators awarded in respect of the quarterly invoices is about £700,000. Mr Popplewell has submitted, as he apparently submitted before the arbitrators and the judge, that because the owner is pursuing a range of cross-claims, both liquidated and un-liquidated, which dwarfs the builder's claim in respect of quarterly invoices, it was and is inequitable to require the owner to make any further payment to the builder without taking into account its cross claims. While he acknowledges that payment of the Delivery instalment without deduction, whether by way of set-off or otherwise, is a requirement of paragraph 2.4(c) of the November 1999 amendment, no such provision was inserted relating to sums claimed under the builder's quarterly invoices. Again this submission finds no place in the arbitrators' reasons. Mr Popplewell submits that it is so obviously inequitable to require the owner to make any further payment to the builder without taking its cross-claims into account that it must again be inferred that the arbitrators overlooked the point. Again he asks that the matter be remitted to the arbitrators to furnish further reasons.

66. In opposition, Mr Kendrick's first submission is that quarterly invoices which remain unpaid at the time the Delivery instalment is due fall within the terms of Clause 8.3.5 which define the Delivery instalment as 20% of the contract price 'plus or minus any increases or decreases occasioned in accordance with the provisions this Contract …which have not previously been accounted for by a adjustment of this or any previous instalment'. That being so, the outstanding quarterly invoices (as part of the Delivery instalment) fall within the provisions of paragraph 2.4(c) of the November 1999 amendment and must be paid in full. Thus, he submits there is no contractual or equitable right of set-off and consequently no basis upon which to remit the matter to the tribunal. This does not seem to me to be a good point. The Contract Price which has to be paid in full is, as a matter of definition under Clause 1.1.12, 'the price stipulated in Clause 8.1 as amended by the provisions of this Contract or any Amendment thereof'. Clause 8 deals with 'Price and terms of payment' and sets out in 8.1 a specific figure which is subject to increase or decrease under a contractual regime, contained in Clause 6 and elsewhere, which does not include any reference to Builder's Quarterly Invoices. Further, by Clause 1.1.6 that expression means invoices '*other than* invoices for installment payments of the Contract Price referred to in Clause 8, submitted by the Builder to the Owner on a quarterly basis and in accordance with the provisions of Clause 8 ..'

67. Nonetheless, two further matters are relevant on the question of whether it is appropriate to remit the matter.

68. The first is that there seems to be some doubt about whether, before the arbitrators, the point was taken by the buyers that the right of set-off against the sums claimed under builder's quarterly invoices should be treated in any different manner from the right to set-off against the amount (if any) due as the final Delivery instalment. If the point was not argued, then in my view the case is not appropriate for remission in respect of what was an interim award involving a broad-brush approach pending adjudication of all the issues raised at a later stage. Even if it was raised, I do not consider that the question is appropriate for remission. Assuming that the arbitrators

accepted (and there is no indication that they did not) the owner's right of set-off against the builder's quarterly invoices in respect of the builder's own larger claims, it may well also be the case that they took the view at the stage of their interim award, and in the exercise of their discretionary powers as to the terms upon which the owner should be entitled to retain possession, that the bulk of the quarterly invoices should nonetheless be paid. It appears that a significant amount of the work undertaken and costed in the quarterly invoices related to work which the arbitrators had ordered to be undertaken at the owner's demand before delivery of the vessel, without prejudice to the parties respective positions as to whether or not the work was required by the specification, and for rig-up work which the owner had requested to be done by the builder in May and June 2000. In those circumstances the tribunal may well have thought it just that the cost of such work, for which the builder was entitled to charge under the contract, should be borne by the owner rather than the builder pending final arbitration of the disputes. In these circumstances, it seems to me that, in reality, the owners seek to challenge the exercise of a discretion by the arbitrators rather than demonstrating the likelihood that they made an error of law in construing the contract. I do not consider it appropriate to order remission for further reasons in this respect.

**Provisional Assessment of Costs of Completion**

69. The arbitrators' assessment on an interim basis of the owner's likely costs of completion, based on the estimates and evidence then available, was the round sum of US$ 3,400,000. The vessel has since been completed. The actual costs of completion are now said to be US$ 6,586,482, as set out in a schedule sent to the builder's solicitors on 14th March 2001, a copy of which has been placed before us but which is unattested by evidence. Mr Popplewell contends that, in the light of the builder's parlous financial position, which he says renders it unlikely that any money paid to the owner by the builder will be recoverable thereafter, we should order remission to permit the arbitrators to re-assess the cost of completion with the certainty of hindsight, in place of the uncertainty of future estimation which the arbitrators were obliged to adopt at the time of their Second Award.

70. In my view, the application for remission under this head is wholly misplaced. Mr Popplewell relies on the power of this court under s.69(7)(c) of the Arbitration Act 1996 which provides:

*"(7) On an appeal under this section the court may by order –*

*(a)* ….

*(b)* …..

*(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination .."*

71. While the language of sub-section (7) is wide on its face, it is constrained by the fact that s.69 is concerned with appeals to the court on a question of law. Nor can s.70(4) of the 1996 Act apply in a situation of this kind. Neither provision covers the position where, in relation to an interim award properly made on the basis of the evidence and/or arguments of the parties at the time, it is simply alleged that subsequent events or a change of circumstance have rendered the award unduly advantageous to one party or the other. In the instant case, the award was not (and was not intended to be) a final judgment upon, or disposition of, the claims of the parties. Insofar as it was other than an exercise of the arbitrators' discretion to vary the terms of the earlier order of the Commercial Court pursuant to paragraph 4 of that order, it was an exercise of the arbitrators' jurisdiction, under s.39 of the *Arbitration Act 1996*, to order on a provisional basis any relief they would have power to grant on a final award. That includes making a provisional order for the payment of money or disposition of property as between the parties (see s.39(1) and (2)), such provisional order being subject to adjustment as necessary when the arbitrators make their final award: see s.39(3). As stated by the arbitrators (at paragraph 25 of their award) the central issue they were asked to consider was the legal consequences of the owner's exercise or purported exercise of the right to take possession under Clause 15.2(ii), it being common ground that the arbitrators could not hear evidence to decide whether the vessel was in a deliverable state on or before 31 July 2000 but that they should make an interim award in the light of their decision.

72. In the event, the arbitrators followed the pattern of the form of the builder's claim i.e. for the delivery instalment less a deduction 'for the estimated cost of completing the vessel in accordance with the Contract and Specification' which the builders put 'without prejudice' at US$ 2,000,000, but which the owner claimed in its estimates at almost US$ 10,000,000, supported by statements from its project engineer, Mr Dawson. The owner's figures were in turn attacked by the builder's project manager, Mr Connery. The arbitrators found the evidence of Mr Dawson in a number of respects 'to be self-serving and to grossly exaggerate the position'. In the Annex to their award, the arbitrators set out the details underlying their conclusion that, on the basis of the estimates and other evidence before them, US$ 3,400,000 should be awarded to the owner by way of retention for the costs of completion.

73. It is not suggested that the arbitrators erred on any point of law or did other than reach a reasonable conclusion as to the likely quantum of the completion costs *on the evidence before them*. Mr Popplewell simply submits that it would now be appropriate to remit the award to the arbitrators to permit a re-assessment of the costs of completion with the certainty of hindsight on the basis of evidence not available at the time. His application is perforce one which was not made before the judge; nor does it find any place in the builder's respondent's notice on this appeal, which there has been no application to amend. Furthermore, the basis upon which Mr Popplewell argues for remission (in circumstances in which it seems to me he accepts by implication it would not otherwise be ordered) are those relating to the fear that there will be no chance of recovering sums paid pursuant to the interim award if the final award is in favour of the owner. In the face of a similar submission, the arbitrators expressly stated (at paragraph 59 of the Award):

*"We do not consider that the sum otherwise due from the Owner should be reduced for this reason, in the circumstances of the present case."*

74. We have received no submissions as to that financial position and, for the reasons I have stated, I do not consider it appropriate to remit the arbitrators' interim Second Award for re-consideration.

**CONCLUSION**

75. I would allow the appeal and restore the arbitrators' award of 14 September 2000.

**LORD JUSTICE CLARKE:**

76. I agree. I have had the benefit of reading the judgments of both Potter LJ and Sir Martin Nourse in draft and add a few words of my own only because we are differing from the judge and because his approach to the contract was so radically different from that of the arbitrators.

77. Put in simple terms, the steps which have led me to the same conclusion as Potter LJ and Sir Martin Nourse (which I recognize are essentially the same as theirs) may be summarised as follows:

i) Clause 15.2 is triggered in a number of different circumstances, not all of which involve actual default on the part of the builder. For example they include the force majeure circumstances set out in clause 13.4. They also include the "circumstances of Builder's default as described in Clause 15.1", not all of which involve actual default. Thus clause 15.2 may fairly be described as an events clause not confined to events of default. As I see it, its purpose is to provide for the consequences of such events in a way which is fair and equitable as between the parties.

ii) Once triggered, clause 15.2 gives the owner a right to give a notice under the clause. If the owner chooses to give such a notice it must "EITHER" cancel the contract under clause 15.2(i) "OR" take the steps expressly provided by clause 15.2(ii).

iii) The steps expressly provided by clause 15.2(ii) were:

"to take possession of the Vessel in its unfinished state and complete the Vessel in accordance with this Contract and the Specifications either at the Builder's Yard or elsewhere, at Owner's sole option …"

iv) I entirely agree with Potter LJ and Sir Martin Nourse that the plain meaning of that provision is that if the owner chooses to take the action open to him under clause 15.2(ii) it must take possession "*and* complete the vessel in accordance with the contract and the Specifications" (my emphasis). There is to my mind no warrant for construing the word "and" disjunctively or for construing that phrase as if it read "and (if the Owner wishes) complete the Vessel …".

v) The phrase "at Owner's sole option" is governed by the expression "either at the Builder's Yard or elsewhere". Thus the option conferred by the clause is not a choice whether to complete the vessel or not. It simply allows the owner to choose whether to complete it at the builder's yard or elsewhere.

vi) The remaining part of the clause 15.2(ii) expressly provides for what is to happen if the cost of completing the vessel is more than the outstanding instalments, which must mean the outstanding instalments set out in clause 8 including of course the delivery instalment. In that event the builder must reimburse the owner for the extra cost together with interest. That is on the footing that the outstanding instalments remain at least notionally due and that the builder is notionally entitled to them, but that the owner does not have to pay them if the cost of completing the vessel exceeds them.

vii) What then if the cost of completing the vessel is less than the outstanding instalments? It must follow that the owner must pay them, including the delivery instalment, but that the owner may deduct the cost of completing the vessel and pay the balance, if any. That seems to me to follow from clause 15.2(ii) as a matter of construction, but, if that is wrong, by necessary implication. If the officious bystander were asked whether the owner could deduct the cost from the outstanding instalments he would say "of course".

viii) That solution seems to me to represent a fair balance between the interests of the parties. The owner ends up with a vessel completed in accordance with the contract. It pays the contract price but no more than the contract price because, if the vessel costs more to complete, the builder must reimburse the extra cost plus interest. Any other view would provide the owner with an unwarranted windfall where (as here) the cost of completing the vessel is less than the outstanding instalments.

ix) I can see nothing in the terms of the contract or the surrounding circumstances to lead to a different view. For example, while I recognize that, where the owner exercises its rights under clause 15.2(ii), clause 12.1 must be read subject to clause 15.2(ii), there is nothing in either clause 12 or clause 15 to prevent the delivery instalment becoming due. The delivery instalment is payable "at Delivery of the Vessel" as provided by clause 8.3.5. By clause 12.2 "Delivery of the Vessel" is different from delivery in the sense of transfer of possession and there is nothing in clause 8 or clause 12 to prevent "Delivery" being effected so as to make the delivery instalment due.

x) In these circumstances there is no reason for giving the clause other than its ordinary and natural meaning. I agree with Sir Martin Nourse that there is no basis upon which it would be appropriate for the court to interfere with or contradict the views of the arbitrators in paragraph 43 of the award which he has quoted. It follows that there is no reason to hold that the clause is unworkable if it is given its ordinary and natural meaning.

78. In all the circumstances, for these reasons and those given by Potter LJ and Sir Martin Nourse, I prefer the construction of the contract adopted by the arbitrators to that adopted by the judge. I too would therefore allow this appeal and restore the award.

**SIR MARTIN NOURSE:**

79. I also agree.

80. The words on which a decision of the question of construction mainly depends are in clause 15.2 of the contract:

*"In circumstances of Builder's default . . . the Owner . . . shall be entitled by Notice to the Builder EITHER:*

*i) to cancel this Contract . . .OR*

*ii) to take possession of the Vessel in its unfinished state and complete the Vessel in accordance with this Contract and the Specifications either at the Builder's Yard or elsewhere, at Owner's sole option."*

81. The view of Mr Justice Tomlinson was that the words of clause 15.2 (ii) impose no obligation on the owner to complete the vessel. He said, in paragraph 32 of his judgment: *"The only sensible construction is in my view that the words 'at Owner's sole option' qualify or have as their subject matter the alternatives separated by the disjunctive 'and' as in 'to take possession of the Vessel in its unfinished state' and 'complete the Vessel in accordance with this Contract and the Specifications either at the Builder's Yard or elsewhere'. So understood, there is no obligation to complete the Vessel let alone to do so in accordance with the Contract and the Specifications. Indeed the language used is in any event the language of entitlement, not that of imposition of obligation."*

82. With respect to the judge, there are three errors in this reasoning. First, it is made clear both by the wording and by the presentation (sc. "EITHER" and "OR") of clause 15.2 that the owner's entitlement is to choose between the two courses set out in paragraphs (i) and (ii). There is no entitlement to choose between the constituent parts of either paragraph except as permitted by the internal language. Second, the judge assumed without explanation, that "and" can be read disjunctively. While there are occasions when that is necessary, there is no warrant for it here. Third, the words "at Owner's sole option" refer naturally to a choice between completing the vessel either at the builder's yard or elsewhere. Certainly, once "and" is read conjunctively, they cannot refer to a choice between taking possession of the vessel and completing it.

83. For myself, I am in no doubt that if the owner gives notice to the builder, pursuant to clause 15.2 (ii), to take possession of the vessel, the owner comes under an obligation to complete it in accordance with the contract, with the consequence (notwithstanding delivery elsewhere than at the builder's yard) that the owner remains liable to pay the delivery instalment in accordance with clause 8.3.5. Moreover, I see no difficulty in implying a term entitling the owner to deduct the cost incurred in completing the vessel. The judge's view was partly influenced by a priori considerations, in particular the notion, which he found quite startling, that an entitlement in the owner, in the event of the builder's default, to take possession of a vessel to which the owner already has title should carry with it a positive obligation on the owner to complete the vessel in accordance with the contract. Again with respect to the judge, it is not a permissible process of construction to invoke the aid of such considerations unless either the meaning of the words is doubtful or their plain meaning leads to absurdity.

84. Here the meaning of the words is plain and they do not lead to absurdity. That was the view of the arbitrators, who said, in paragraph 43 of their award: "Given that the contract remains in existence notwithstanding the Owner's exercise of the right to take possession of the unfinished Vessel, we do not see any insuperable difficulty either in principle or in practice in applying the contract terms to the period following the Notice when the contract work is being done by the Owner . . . rather than by the Builder, whether at the Builder's Yard . . . or elsewhere. We need not elaborate on this."

85. Clearly, that was a view they were entitled to take. It is not for the court to substitute its own view for that of experienced arbitrators on a question such as this.

86. For these reasons, as well as for those more fully explained by Lord Justice Potter, I would decide the question of construction in favour of the builder. I also agree with his reasoning in reference to the subsidiary issues.

87. I too would allow the appeal and restore the arbitrators' award.

**ORDER:** Appeal allowed with costs; award restored; application for permission to appeal to the House of Lords refused. (Order does not form part of approved Judgment)

Dominic Kendrick QC and Vernon Flynn Esquire (instructed by Sinclair Roche & Temperley, London, for the appellant)

Andrew Popplewell QC and Sean O'Sullivan Esquire (instructed by Ince & Co, London, for the respondent)