JUDGMENT : Mrs Justice Gloster, DBE: Commercial Court. 4th April 2006.

1. This was originally an application by the defendant, New Century Shipbuilding Company Limited ("the Yard") for an order pursuant to CPR Part 11 that the order of Cresswell J dated 14 June 2005 (permitting service of the claim form out of the jurisdiction and service of the claim form) be set aside, alternatively that the action be stayed pursuant to section 9 of the Arbitration Act 1996.

2. The relevant facts may be briefly summarised as follows. The Yard is a Chinese shipyard. The claimant, Ravennavi SpA ("the Buyer"), is a shipowning company incorporated under the laws of Italy, and domiciled there. By Clause 1 of an option agreement dated 12 December 2003 ("the Option Agreement"), the Yard granted the Buyer or its nominee an option exercisable at any time up to 31 January 2004 to require the Yard to design, build, launch, equip and complete up to two 73,400 dwt crude and product oil tankers (therein defined, and referred to as "the Option Vessels") "on terms and conditions of the [shipbuilding] contracts dated 13 February 2003" and two addenda "as amended by the terms and conditions of this Option Agreement". The remainder of Clause 1 set out, in sub-clauses 1.1 to 1.3, amendments which were to be made to the original shipbuilding contract in relation to price, instalments and payment security (with which Clause 2 is also concerned). Clause 3 provided that the option could be exercised by the Buyer giving one or more notices to the Yard prior to 31 January 2004.

3. Clause 4 of the Option Agreement provided as follows:

   "(i) Delivery of the first vessel of Optional Vessels shall be on or before 31st October 2007. Delivery of the second vessel of Optional Vessels shall be on or before 31st December 2007.

   (ii) Should the Sellers [the Yard] could [sic] find any possibility to anticipate delivery of the optional vessel(s) (for instance a previously booked berth becomes free), then the Seller will grant the Buyer or its nominee the earlier delivery position for the optional vessel(s)."

4. Clause 5 set out the consequences of the exercise of the option, namely that a contract in relation to each vessel on these terms would automatically come into effect which, with a month, would then be replaced by a fresh contract substantially in those terms:

   "On receipt of BUYER'S notice referred to in Clause 3, a Shipbuilding Contract … shall be deemed signed and automatically in effect … on the terms of the Shipbuilding Contract dated 13th February 2003 [and its aforesaid addenda] duly amended as per Clause 1.3 here above. After declaring the OPTION and on or before 1 (one) month after such declaration, the BUYER shall procure that … itself executes formally the Option Shipbuilding Contract(s) as BUYER … substantially in the form of the Shipbuilding Contracts dated 13th February 2003 [and its aforesaid addenda] duly amended as per Clause 1.3 here above."

   The reference to amendment "as per Clause 1.3 here above" appears to have been erroneous and is inconsistent with the words in clause 1; in addition to that clause, clauses 1.1, 1.2, 2 and 4 also contained provisions which would or might have resulted in amendment of the original shipbuilding contract dated 13 February 2003.

5. Clause 6 provided for confidentiality to be observed by the parties "within the validity of this agreement".

6. Clause 7 of the Option Agreement contained an English choice of law clause and an exclusive English jurisdiction clause in the following terms:

   "7. Law and Jurisdiction

   7.1 This agreement shall be governed by and construed in accordance with English Law.

   7.2 In the event of any dispute or claim arising out of, or relating to or in connection with this Agreement, the same shall be determined only by the High Court of Justice in London to whose exclusive jurisdiction the parties hereby irrevocably agreement and submit."

7. The option was exercised by the Buyer on or about 28 January 2004 in respect of the two Optional Vessels. Pursuant to the exercise of the option two shipbuilding contracts dated 28 February 2004 were entered into between the Yard and the Buyer, being Contract No NCS-CT0307331 for the construction of Hull No 0307331, and Contract No NCS-CT0307332 for the construction of Hull No 0307332 ("the Shipbuilding Contracts").

8. Article XIII of the Shipbuilding Contracts provided: *"In the event of any dispute between the parties hereto as to any matter arising out of or relating to this Contract or any stipulation herein or with respect thereto which cannot be settled by the parties themselves, such dispute shall be resolved by arbitration in London, England in accordance with the Laws of England. Either party may demand arbitration of any such disputes by giving written notice to the other party."*

9. Article XIX.4 of the Shipbuilding Contracts contained an entire agreement clause in the following terms:

   "4 ENTIRE AGREEMENT

   This Contract contains the entire agreement and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of this Contract prior to signing of the Contract."

10. The Buyer now contends that the Yard is in breach of Clause 4(ii) of the Option Agreement. It contends that the Yard has contracted with third parties to deliver other 73,4000 dwt crude and product oil tankers on dates falling earlier than the dates for delivery of Hull Nos 0307331 and 0307332 as specified by Article VII,

paragraph 1 of the Shipbuilding Contracts, without first offering to the Buyer those (or any other) earlier dates. It is thus the Buyer's case that Clause 4(ii) survived the exercise of the option and the coming into force of the Shipbuilding Contracts and that it has a claim for damages in the region of US $ 20 million.

11. By fax dated 1 March 2005, the Buyer wrote to the Yard stating:

"[W]e understand from market sources (many international shipping brokers) that your are marketing for sister ships two available berths for delivery December 2006 and September 2007.

Should what above is correct, we would remind you that the 'Option Agreement no.3' dated 12 December 2003 and signed in Genoa provides on Art. 4, second paragraph, that earlier delivery dates must be granted to the above mentioned hull numbers.

Please check and confirm to us by return that you will granted the following new and anticipated delivery dates:

Hull No 0307331 December 2006

Hull No 0307332 September 2007

or whatever delivery dates which should be available in the meantime. Suitable addenda to the relevant contracts to be issued and signed."

The Buyer contends that there was no satisfactory response to their request.

12. For the purposes of this application only, the Yard accepted that it had indeed contracted with third parties to deliver other tankers on dates falling earlier than the contractual dates for the delivery of the Optional Vessels, and that from June 2004 it would have been possible for the Yard to have offered the Buyer earlier delivery dates.

13. As I have said, Cresswell J granted permission to serve the claim form out of the jurisdiction on 7 June 2005. The Buyer asserted that the basis of jurisdiction was Part 2.20, paragraphs 5(c) and/or 5(d) (viz. a claim made in respect of a contract which was governed by English Law or which contains a term to the effect that the Court shall have jurisdiction to determine any claim in respect of the contract). Service having been effected, on 23 September 2005 the Yard lodged an acknowledgement of service indicating an intention to contest the Court's jurisdiction. The application was then issued and served on 19 October and evidence from both sides followed.

14. At the oral hearing before me, Mr James Turner, for the Yard, argued that leave to serve out of the jurisdiction should be set aside on two main grounds:

i) The first ground was that the claim had no reasonable prospect of success. That, he argued, was because, on the true construction of the Option Agreement and the Shipbuilding Contracts (including, in particular, the entire agreement clause in the latter) the obligation imposed on the Yard in clause 4(ii) of the Option Agreement was co-terminous with the exercise or expiry of the Option. Since the Buyer was unable to advance any case that there was a breach of contract to offer an earlier delivery date before the Option's expiry, Mr Turner argued that the claim was bound to fail.

ii) The second ground was that the Shipbuilding Contracts contained an arbitration clause which meant that this was a dispute that the parties had agreed to arbitrate, or alternatively was one which could more appropriately be dealt with by arbitration. Therefore, he contended, the claim should be stayed pursuant to section 9 of the Arbitration Act 1996, so that an arbitration could take place. He also submitted that there had been a breach of the Buyer's obligation of full and frank disclosure on the application for permission to serve out, since it had failed to mention the existence of the entire agreement clause or the arbitration clause in the Shipbuilding Contracts, but this was not developed as a separate point.

15. Substantial and detailed argument took place before me, not only on the construction of the Option Agreement and the Shipbuilding Contracts, but also on the appropriate test to apply in relation to a claimant satisfying the court that it has a "reasonable prospect of success" to justify permission to serve out of the jurisdiction.

16. Following the oral hearing on 2 December 2005, I directed that the parties be at liberty to serve further written submissions on the applicable merits test in the context of this type of application and, in particular, in relation to the decision of Colman J in ***De Molestina v Ponton*** [2002] 1 Lloyds Rep 271. There then followed three further written skeleton arguments on behalf of the Yard, and two on behalf of the Buyer. In the first set of further submissions by the Buyer, Mr Richard Waller, counsel appearing on its behalf, raised for the first time the point that the claimant could have served the claim form on the Yard without obtaining the permission of the court pursuant to CPR Part 6.19(1A). In particular, Mr Waller referred to:

i) Article 23 of Council Regulation (EC) No 44/2001 which provides that where parties, one or more of whom is domiciled in a contracting state, have agreed that the courts of a contracting state are to have jurisdiction to settle disputes, the chosen court shall have exclusive jurisdiction in relation to those disputes;

ii) the fact that here, the claimant, i.e. the Buyer, is domiciled in a contracting state (Italy); and

iii) that the parties have agreed that a contracting state (England) is to have jurisdiction to settle the dispute

from which it follows that the claim falls with CPR Part 6.19(1A)(a) and (b) and that accordingly permission to serve out was not in fact required.

17. So, submitted Mr Waller, had the claim form been served as of right (pursuant to CPR Part 6.19), the only basis upon which the Yard could have challenged the jurisdiction was either to have contended that the Buyer had not established a good arguable case that there was a jurisdiction agreement, or alternatively that the matter should be stayed in favour of arbitration. The Yard has not sought to challenge jurisdiction on the former ground and, asserts Mr Waller, its challenge based on the arbitration clause is misconceived.

18. Mr Waller suggests that the fact that the Buyer obtained permission from the court to serve out should not put it is a worse position than if it had proceeded under CPR Part 6.19(1A). Had it proceeded on that basis, the Yard would not have been able to challenge jurisdiction by reference to the merits of the case. As such, the court should either allow the matter to proceed without requiring the Buyer to satisfy any merits test, or alternatively, as a matter of discretion, the court should allow the claim to proceed if satisfied that the Buyer's case has a reasonable prospect of success, i.e. that its chances are more than fanciful.

19. He also said, in paragraph 11 of his further submissions, that, unless the Yard consented to a preliminary issue on the true construction of the Option Agreement, the court should not determine that preliminary issue at the jurisdiction stage and, instead, should confine itself to considering whether the Buyer's interpretation of the Option Agreement has a realistic prospect of success. The Yard should not be permitted to refuse to submit to a determination of the preliminary issue and at the same time require the court to set aside service if the court takes the view, on the balance of probabilities, that the Yard's construction is right. That, he submitted, would be to allow the defendant to both have its cake and eat it, and make a mockery of the Yard's agreement to submit to the exclusive jurisdiction of the English High Court.

20. In response to the new argument based on Article 23, Mr Turner accepted that the point was a good one. Indeed, he went further than Mr Waller's suggestion that the Buyer "need" not have sought the court's permission for service out; Mr Turner submitted that it should not have done so. In short, submitted Mr Turner, by its incorrect choice of procedure the Buyer had set the parties on a procedural wild goose chase, since, had that been the case first advanced, the Yard could not, and would not, have challenged the jurisdiction and would have been very unlikely to have made its application under section 9 as a free standing application.

21. However, there was then something of a *volte-face* on the part of the Buyer. Having previously (apparently) extended an invitation to the Yard to agree to the determination of the construction issue as a preliminary issue, Mr Waller then, in a 4th round of further written submissions, backtracked and contended that it would be inappropriate for the court to determine the construction issue as a preliminary issue. Mr Waller submitted, first, that the Buyer did not address the court on the merits of the construction point with a preliminary issue in mind; rather the Buyer's arguments focussed on whether the Buyer's case had a real prospect of success, as opposed to whether its interpretation was right. Secondly, he argued, that before the court decided the issue of construction, the Buyer would like an opportunity to gather and adduce relevant factual matrix evidence. He suggested, for example, that the Buyer had in mind adducing expert evidence as to the commercial value of an earlier delivery date in December 2003, and, possibly, factual witness evidence relating to the prior course of dealing between the parties. So, submitted Mr Waller, the right course to take was for the court to give judgment dismissing the Yard's application challenging the jurisdiction and then to convene a short hearing to deal with costs and future directions. However, if the court were minded to determine the construction issue at this stage despite the points advanced above, then the Buyer would be content to adopt the formulation proposed by Mr Turner as to the preliminary issue.

22. In my judgment, I ought to determine certain construction issues as preliminary issues. I will define those issues below. They are in effect, although formulated in a slightly different manner than Mr Turner's preliminary issue, the issues upon which I heard argument. My reasons for adopting this course, (which to some extent reflect the further submissions made by Mr Turner in round 5 of the post-trial submissions), are the following:

    i) The fact that Mr Waller did not address the court on the construction issue "with a preliminary issue in mind" does not seem to me to be here or there. I heard extensive argument from him on the topic. Whether the construction issue arose in the context of a jurisdictional challenge, a preliminary issue, or at trial, in reality the issues and the argument would have been the same. I do not accept that his presentation would have varied according to the procedural context in which he was setting out his argument.

    ii) Nor do I accept that his arguments in relation to the construction issue were focussed on whether the Buyer's case had a real prospect of success or whether his interpretation was right. It was not as though any issues of fact arose which might have been developed more fully at trial. Certainly in his arguments on construction, Mr Waller did not suggest that his interpretation was in any way fact-sensitive or fact-dependent.

    iii) I do not accept that, realistically, there is any further factual matrix evidence that would assist in the construction of the relevant clauses in the Option Agreement or the Shipbuilding Contracts. Certainly Mr Waller did not identify any such evidence. The only examples that Mr Waller offered of the type of further evidence that the Buyer would wish to adduce was evidence relating to the value of an earlier delivery date, and "possibly" evidence relating to a prior course of dealing between the parties. However, it was common ground between the parties that the right to have an earlier delivery date had value. Had there been any legitimate factual matrix evidence to support the proposition that it was apparent, and common ground, that the purchase price of the vessels attributed a particular value to this alleged right, I would have expected some such evidence to have been raised or referred to by the Buyer. On the contrary, both during the course

of the proceedings in England, and in the attachment proceedings which took place before the Italian court in Genoa, the Buyer has maintained the position that it is unnecessary to look beyond the natural and ordinary meaning of the words used. Moreover, the Buyer has had full notice of the construction arguments that were going to be run by the Yard, since an opinion of Mr Turner's dated 22 September 2005 was filed as evidence in the Italian proceedings.

iv) Finally, I have, in reality, heard full argument on the construction issues in the context of the Part 11 application. In such circumstances, it would, in my judgment, be a waste of costs and of court time, and contrary to the overriding objective for me not to rule on the point as a preliminary issue, in the absence of any compelling reason put forward by the Buyer as to why this course would operate unfairly so far as it was concerned.

23. In my judgment, the issue or issues of construction, fall to be broken down into two separate sub-issues:
i) On the true interpretation of the Option Agreement, taken on its own, without reference to the later Shipbuilding Contracts actually entered into, is the Yard obliged to offer the Buyer an earlier delivery date, if the contingency "… should the Seller's find any possibility to anticipate delivery of the Optional Vessels …" is satisfied, after exercise/expiry of the option?
ii) If the answer to sub-issue (i) is "Yes", does the entire agreement clause and the other provisions of the Shipbuilding Contracts vary the parties' contractual rights and obligations under the Option Agreement, so as to preclude any reliance upon clause 4(ii) of the Option Agreement?

24. Accordingly, I turn to consider the respective construction arguments advanced on behalf of the parties. Both parties relied upon the well-known principles of construction articulated by the House of Lords in ***Investors Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 WLR 896, in particular per Lord Hoffmann at pp 912-913, and in ***BCCI v Ali*** [2002] 1 AC 269 at paragraph 39, also per Lord Hoffmann. The correct approach was common ground.

25. In support of his contention that the obligation in Clause 4 of the Option Agreement was co-terminous or co-extensive with the exercise or expiry of the option, Mr Turner submitted as follows:

i) Clause 6 provides for confidentially to be observed by the parties "within the validity of this agreement". Mr Turner submitted that those words can only be understood as requiring confidentiality to be observed for the duration of the agreement; a clear indicator that the Option Agreement would have a limited lifespan. This, he asserts, makes clear sense: whatever purpose might be served by keeping the "material terms and conditions" of the Option Agreement confidential before the exercise or expiry of the option would disappear with it.

ii) Clauses 1, 2 and 4 are concerned with the option and its substance; clauses 3 and 5 with the time for, manner of and consequence of its exercise; and clauses 6 and 7 are ancillary provisions. Leaving aside the ancillary provisions in clauses 6 and 7, if the Buyer's construction were correct, clause 4(ii) would be the only provision of the Option Agreement (a) not directly concerned with the Option and (ii) whose life purpose extended beyond the exercise or expiry of that option. The very fact that this construction of clause 4(ii) would set it apart from the remainder of the Option Agreement is, at its lowest, a reason to exercise caution before attributing to it the meaning for which the Buyer contends.

iii) If, by contrast, clause 4(ii) is construed as being co-terminous with the exercise or expiry of the option, any anomaly in its construction disappears. On the Yard's construction, it was obliged (in the event that during the lifetime of the option one or more earlier delivery dates became available) to "grant" that "earlier delivery position" to the Buyer. In those circumstances, the option granted would then be for a contract to deliver the Optional Vessel(s) on the earlier dates rather than 31st October or 31st December 2007. For its part, the Buyer would then have had no choice but to accept that earlier date or those earlier positions, although it could, of course, choose not to exercise the option.

iv) Such construction, submitted Mr Turner, gives meaning to the stipulations in clause 4(i) that delivery "shall be on or before" (emphasis added) the delivery dates. The significance of the words "or before" is, Mr Turner claims, to be found in clause VII.1 of the Shipbuilding Contracts:

"**1. TIME AND PLACE**

… the VESSEL shall be delivered safely afloat by the SELLER to the BUYER …. Delivery as aforesaid shall take place on [October/December] 31st, 2007 ….

… the BUILDER shall be entitled to deliver the VESSEL prior to the Delivery Date only with the prior written consent of the BUYER."

At first glance, he submitted, clause 4(i) contemplates that which the terms of the Shipbuilding Contracts would, after the exercise of the option, prohibit, namely delivery in advance of the agreed delivery dates. The solution to the conundrum, says Mr Turner, lies in clause 4(ii), which sets out the circumstances in which the delivery dates under the Shipbuilding Contracts might be "before" the delivery dates stipulated in clause 4(i). The Yard's construction also attributes the word "grant" its proper meaning. Whatever the linguistic shortcomings of the Option Agreement, there is no reason to suppose that the parties misunderstood that particular word, as it is used correctly in clause 1 in the context of the "grant" of the option itself.

v) The Buyer's construction, by contrast, attempts to finesse the problem that its construction of clause 4(ii) would require that which clause VII.1 of the Shipbuilding Contract prohibits by treating "grant" as being synonymous with "offer". That construction is flawed because:

a) "grant" and "offer" are not synonyms;

b) if "grant" did mean "offer" (and if the clause 4(ii) obligation to "offer" an earlier delivery date was indeed intended to survive the exercise of the option) then it is notable that no time is stipulated within which the "offer" by the Yard is to be accepted by the Buyer. It would make no commercial sense for the parties to have such an offer be open-ended, potentially disabling further commercial activity on the party of the Yard in relation to the slot offered until it was too late to market it elsewhere.

c) Whilst it might be possible to imply a term requiring an offer to be accepted within a reasonable period, not only is the notion of a reasonable period intrinsically uncertain (and thus commercially unattractive), but the very fact that no provision was made for a period within which such an "offer" must be accepted suggests that the parties intended that a "grant", and not an "offer" would be made, and that it would be made within the time limited for the exercise of the option.

vi) The Buyer's construction is further undermined when provisions of the Shipbuilding Contracts are taken into account. They are relevant to the construction of clause 4(ii) of the Option Agreement because:

a) Exercise of the Option by the Buyer would immediately bring into being one or two shipbuilding contracts on terms and conditions which had already been agreed between the parties;

b) Those terms and conditions make no mention of clause 4(ii) and contain no provision of equivalent effect. That itself is a telling omission;

c) The Shipbuilding Contracts include detailed stipulations in respect not just of the vessels' delivery dates, but also of the timing of payments of the purchase price instalments under Articles II.3 and II.4, and set out the potentially serious consequences if:

i) the vessels were not delivered on time (liquidated damages under Article III.1);

ii) instalments of the purchase price were not paid in accordance with those terms: in respect of the first instalment, nullity of the contract under Article XVIII; in respect of all pre-delivery instalments, cancellation of the contract under clause XI.4(b).

vii) In a commercial contract, dates whose passing will trigger such draconian remedies must be certain. A construction which detracts from that certainty is one which, says Mr Turner, the court should view with suspicion. The Buyer's is such a construction, in that it is not clear how clause 4(ii) is supposed to work with the detailed stipulations as to timing contained in, for example, Article II of the Shipbuilding Contracts, which provide as follows:

"**3. TERMS OF PAYMENT**

The Contract Price shall be paid by the BUYER to the SELLER in instalments as follows:

(b) 2nd instalment

The sum of … US$ 3,400,000.00 shall become due and payable within five (5) banking days from the (i) April 15th, 2006 or (ii) steel cutting of the vessel, whichever occurs later ….

(c) 3rd instalment

The sum of … US$ 3,400,000.00 shall become due and payable within five (5) banking days from (i) September 15th, 2006 (ii) keel-laying of the VESSEL, whichever occurs later ….

(d) 4th instalment

The sum of … US$ 3,440,000.00 shall become due and payable within five (5) banking days of the successful launching of the VESSEL ….

(e) 5th instalment (Payment upon Delivery of the VESSEL)

The sum of … US$ 20,640,000.00 … shall become due and payable and be paid … concurrently with the delivery of the VESSEL. …

4. METHOD OF PAYMENT

…

(b) 2nd instalment

… the date of such payment shall not be earlier than April 15th, 2006.

(c) 3rd instalment

… the date of such payment shall not be earlier than September 15th, 2006.

(d) 4th instalment

… the date of such payment shall not be earlier than March 15th, 2007."

viii) The provision of clause VII.1 which prevents delivery in advance of the delivery date has the same effect as those preventing payment in respect of other stages of construction before the identified date. It would thus be misconceived to see in clause VII.1 of the Shipbuilding Contracts the echo of clause 4(ii) of the Option Agreement. The two are not only in quite different terms, but are to contrary effect. Although there is scope under the Shipbuilding Contracts for the various stages for payments to be reached at later dates than those set out in Article II, there is no scope for accelerating the payment process. Whilst the payment process is not the same as the construction process, a construction of the contracts which would in certain circumstances require acceleration of construction but prohibit acceleration of payment is not one which could be said to

accord with commercial common sense. Yet that is what the Buyer's construction of the clause 4(ii) of the Option Agreement would require, unless the provisions of Article II are to be rewritten.

ix) The Entire Agreement clause in Article XIX.4 of the Shipbuilding Contracts provides an insuperable obstacle to the Buyer's construction:

"4 ENTIRE AGREEMENT

This Contract contains the entire agreement and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of this Contract prior to signing of the Contract."

Clause 4(ii) of the Option Agreement is an agreement "on any subject matter of" the Shipbuilding Contracts. Although it could, theoretically, be argued that precisely because those contracts make no mention of the clause 4(ii) obligation, that obligation is not an agreement "on any subject matter of" the Shipbuilding Contracts, that argument is wrong because:

a) it requires no effect to be given to the opening words of the Entire Agreement clause: *"This Contract contains the entire agreement and understanding between the parties hereto …"*. If clause 4(ii) were to continue to operate, then the Shipbuilding Contracts would not contain the parties' "entire agreement and understanding", because part of their agreement and understanding as to delivery dates would be contained within clause 4(ii).

b) Moreover, the argument requires the Entire Agreement clause to be read very narrowly, when there is no obvious reason why they should be so read. A less restrictive approach would be more in keeping with the tenor of the opening words of the clause and would have to acknowledge that: (i) the delivery dates of the vessels is a "subject matter of" the Shipbuilding Contracts; (ii) clause 4 also deals with that subject matter; and (iii) clause 4 cannot therefore continue to operate once the Shipbuilding Contracts have come into being.

Accordingly, the Entire Agreement clause is fatal to the Buyer's case.

x) Other provisions in the Shipbuilding Contracts which present difficulties for the Buyer's case include Articles XIV (assignment) and XVIII (nullity).

26. On the other hand, Mr Waller, for the Buyer submitted:

i) The golden rule is that words in commercial contracts should be given their natural and ordinary meaning. English Commercial law does not permit departure from this golden rule unless on the evidence before the court there are cogent grounds for concluding that something must have gone wrong with the language: see for example ***City Alliance –v- Oxford Forecasting Services Limited*** [2001] 1 All ER 233.

ii) The natural meaning of clause 4(ii) is that it means what it says: if early delivery becomes a possibility (regardless of when it becomes a possibility) then the Yard must offer such early delivery to the Buyer or its nominee. The words "any possibility" are inconsistent with excluding certain possibilities (viz. those that arose after the agreement was concluded). The obligation does not turn on when the possibility to grant an earlier delivery date occurs, but merely if it occurs.

iii) The relevant obligation is not limited to granting earlier delivery dates to the Buyer, but also to its nominee. The nominee in this context refers to the entity nominated by the Buyer to enter into the formal shipbuilding contract under clause 5. If, as the Yard suggests, the obligation to grant an earlier delivery date lapses when the option is exercised, then one would expect the obligation to talk in terms of offering or granting an earlier delivery date to the Buyer which, if accepted, would then form part of the shipbuilding contract concluded with the Buyer or its nominee. However, the obligation talks in terms of granting earlier delivery dates to the Buyer or its nominee. This is a clear indication that the grant may be made once the shipbuilding contract has been concluded with the Buyer or its nominee. The only occasion the Yard would grant an early delivery date to the nominee would be if a shipbuilding contract had been concluded with the nominee. This is necessarily after the exercise of the Option.

iv) The Yard's obligations with regard to the timing of delivery described in the Option Agreement had two parts to it: first, the obligation to deliver the vessels by the long-stop dates, i.e. 31 October 2007 and 31st December 2007 (the first limb of the clause) and secondly, the obligation, in the event that an earlier delivery position becomes possible, to give the Buyer (or its nominee) the option of taking earlier delivery position (the second limb of the clause). If the Yard's construction is right, the clause would have read delivery of the first vessel on 31 October 2007 unless if by the time the option is exercised the Yard can offer earlier delivery dates.

v) There are no words in clause 4 to support the limitation contended for by the Yard. Had the parties intended the obligation to lapse when the option was exercised, then they would have said so in terms. This was far too important a matter to be left to inference or implication.

vi) It is the Buyer's case that the natural and ordinary meaning of the words is clear and that there is no reason to infer that something must have gone wrong with the language. However, if it were necessary to have regard to the commercial effect of the rival constructions, it is the Yard's which produces the more commercially

unlikely result. The Yard's argument involves the obligation lasting for a maximum of six weeks in circumstances where earlier delivery remained a possibility for a further 2½ years.

vii) The points made by the Yard take the matter no further:

a) The fact that the Shipbuilding Contracts make no mention of the obligation does not mean that it was intended to lapse on the exercise or expiry of the option. Not only is the obligation more appropriately the subject matter of an option agreement, but it is not readily translated into an obligation in each separate shipbuilding contract. This is because is applies to both vessels jointly and not to each vessel separately. Thus, had the second limb of clause 4 been worked into each shipbuilding contract, it would have changed the nature of the obligation. For example, if the Yard found itself in a position to bring forward the delivery date for one of the vessels (but not both), then the Yard, by offering the earlier deliver date on Hull No 1 (and not Hull No 2) could have found itself in breach of the Hull No 2 contract (or *vice versa*). It was therefore more appropriate to leave the obligation to be enforced through the Option Agreement which straddled both vessels and both contracts, as opposed to making the contingent offer relating to earlier delivery dates the subject matter of either shipbuilding contract.

b) The fact that the change in the delivery date would necessitate consequential changes to other calendar dates in the Shipbuilding Contracts is nothing to the point. Indeed, the shipbuilding contract that was automatically formed on the exercise of the option did not contain any calendar dates. They were introduced when the contract was drawn up in February/ March 2004 (presumably based on the Yard's best estimate of the dates when the key stages would be reached).

c) The presence of the entire agreement clause discloses nothing about the parties' intentions with respect of the duration of clause 4. The Entire Agreement clause was not introduced with clause 4 in mind, but was one of the many standard terms that were incorporated by reference to the standard shipbuilding contract terms agreed in the past. Its role as part of the standard provisions of shipbuilding contracts is to preclude reliance on oral warranties alleged to have been made in negotiations. The Option Agreement, and in particularly the specifically negotiated second limb of clause 4, should be construed in accordance with the words chosen by the parties without attributing to the parties an unlikely apprehension of the existence of an entire agreement clause in the prospective shipbuilding contract (or, in any event, attaching undue weight to such a consideration).

d) In any event, the clause is confined to the parties' agreement and understanding as to the rights and obligations of the parties that are the subject matter of the shipbuilding contracts. A prior agreement to offer the Buyer the opportunity to bring forward the delivery dates of either one or both of the Optional Vessels which, if accepted, could lead to the variation of one or other shipbuilding contracts, is not the subject matter of either of the shipbuilding contracts. It is the subject matter of a separate formal agreement that applies to both vessels.

e) The words with the Option Agreement "within the validity of this agreement", in the confidentiality clause do not support the Yard's suggestion that these words demonstrate that the parties intended the "validity" of the Option Agreement to lapse once the option was exercised. The option was plainly intended to remain in effect following the exercise of the option. For example, by clause 5 the parties, by themselves or the Buyer's nominee, were obliged to formally execute the contracts and the Yard was obliged to select a method of payment security (pursuant to clause 1.3). These obligations were plainly not discharged once the option was exercised. Likewise, the obligation under the second limb of clause 4 was not discharged. The intention behind the words was presumably to release the parties from any duties of confidentiality once the option was exercised. The words used are inapposite whatever construction one places on this clause and as such it would be inappropriate to read too much into them.

f) None of the Yard's submissions have sufficient weight to undermine the natural meaning of the second limb of clause 4 or, more particularly, render it necessary or appropriate to read in to the clause a temporal limitation which is simply not there.

27. In my judgment, I do not think that one can read the provisions of the Option Agreement in too sophisticated or over-nice a fashion. The Option Agreement, and in particular clause 4(ii), are not expressed in very formal language. Its provisions (to be contrasted with the Shipbuilding Contracts) are not susceptible, in my judgment, to over-analytical semantic examination and analysis. The three gentlemen who respectively signed the Option Agreement on behalf of the Buyer, the brokers and the Yard are, it is to be assumed, Italian and Chinese Although their command of English may have been good, one would not necessarily impute to them a natural recognition of fine differences between implications to be derived from the use of the word "grant" rather than "offer". Moreover, the Option Agreement was clearly looking forward to, and providing for, the terms as to, e.g. payment, delivery and payment security that would be included as provisions in the Shipbuilding Contracts and envisaging that the terms of the previous 2003 Shipbuilding Contract would be amended as provided for in the Option Agreement.

28. In my judgment, there is therefore nothing in the points taken by Mr Turner as to:
i) the distinction between the use of the word "grant" as opposed to "offer";
ii) the confidentiality clause at clause 6; and
iii) the phrase "on or before" in clause 4(i), or indeed any of his other points on the Option Agreement itself;

that requires the implication into clause 4(ii) of a limitation that the Yard's obligation to offer earlier delivery dates upon the happening of the stated contingency is limited in time to the date of the exercise or expiry of the option, viz. at the latest 31 January 2004. The words do not, in my judgment, on their natural and ordinary meaning contain any such limitation.

29. Moreover, such a construction would, in my judgment, be somewhat surprising commercially since, as Mr Waller submitted, it involves the consequence that the Yard's obligation lasts for a maximum of six weeks when earlier delivery remained a possibility for a further 2½ years. I see the force of Mr Turner's point that it is commercially unsatisfactory that no time period is expressed for the Buyer's acceptance of such earlier delivery slot, but that is a gap that could easily be filled by the implication of a term that the Buyer had to respond to any such "grant" or "offer" within a reasonable time.

30. Accordingly, looking at the Option Agreement in isolation, I would hold that it did impose an obligation upon the Yard to offer earlier delivery dates upon the happening of the stated contingency at any time during the currency of the Shipbuilding Contract, if that was "possible". Such a provision was not, in my judgment, precluded by the terms of clause 5 of the Option Agreement. That clause provided for the Shipbuilding Contract to be *"substantially in the form of the Shipbuilding Contracts dated 13th February 2003 … duly amended as per Clause 1.3 above"*. I do not accept Mr Waller's submission that clause 1.3 was a mistake for clauses 2, 3 and 4, but nonetheless there was clearly room, in my judgment, for the argument based on the phrase "substantially in the form of …", that any contract that came into existence upon exercise of the option had to include the Yard's obligation to accelerate the delivery dates in the stated contingency.

31. However, when one comes to consider the second sub-issue, I conclude, contrary to the Buyer's contentions, that the effect of the entire agreement clause and the other terms of the Shipbuilding Contracts, was indeed to exclude any such obligation on the part of the Yard once the final contracts had been entered into, even though the Buyer may originally have had the contractual right under clause 4(ii) to be offered an earlier delivery date in certain circumstances.

32. A useful summary of the effect of entire agreement clauses is to be found in the decision of Lightman J in ***Inntrepreneur Pub Co –v- East Crown Ltd*** [2000] 2 Ch 611 at paragraph 7 et seq:

> ***"ENTIRE AGREEMENT CLAUSE***
>
> *7. The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence as is suggested in Chitty on Contract 28th ed. Vol 1 para 12-102: it is to denude what would otherwise constitute a collateral warranty of legal effect.*
>
> *8. Entire agreement clauses come in different forms. In the leading case of **Deepak v. ICI** [1998] 2 Lloyds Rep 140, 138, affirmed [1999] 1 Lloyds Rep 387 the clause read as follows:*
>
> *'10.16 Entirety of Agreement*
>
> *This contract comprises the entire agreement between the PARTIES. ... and there are not any agreements, understandings, promises or conditions, oral or written, express or implied, concerning the subject matter which are not merged into this CONTRACT and superseded thereby ...'*

Rix J and the Court of Appeal held in that case (in particular focusing on the words 'promises or conditions') that this language was apt to exclude all liability for a collateral warranty. In ***Alman & Benson v. Associated Newspapers Group Ltd*** 20 June 1980 (cited by Rix J at p.168), Browne-Wilkinson J reached the same conclusion where the clause provided that the written contract 'constituted the entire agreement and understanding between the parties with respect to all matters therein referred to' focusing on the word 'understanding'. In neither case was it necessary to decide whether the clause would have been sufficient if it had been worded merely to state that the agreement containing it comprised or constituted the entire agreement between the parties. That is the question raised in this case, where the formula of words used in the clause is abbreviated to an acknowledgement by the parties that the Agreement constitutes the entire agreement between them. In my judgment that formula is sufficient, for it constitutes an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the Agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect. That can be the only purpose of the provision. This view is entirely in accord with the judgment of John Chadwick QC (as he then was) sitting as a deputy High Court Judge in ***McGrath v. Shah*** (1987) 57 P&CR 452. An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force to a statement cannot affect the status of the statement as a misrepresentation. The same clause in an agreement may contain both an entire agreement provision and a further provision designed to exclude liability e.g. for misrepresentation or breach of duty. As an example Clause 14 in this case, after setting out in Clause 14.1 the Entire Agreement Clause, in Clause 14.2 sets out to exclude

liability for misrepresentation and breach of duty. Whether this latter provision is legally effective for this purpose may turn on the question of its reasonableness as required by Section 3 of the Misrepresentation Act 1967: see e.g. ***Inntrepreneur v. Worth*** [1996] 1 EGLR 84. But (contrary to the contentions of Crown) Section 3 has no application to an entire agreement clause provision defining where the contractual terms between the parties are to be found: see *McGrath v. Shah* supra. It seems to me therefore that Clause 14.1 of the Agreement provides in law a complete answer to any claim by Crown based on the alleged collateral warranty."

33. In my judgment the entire agreement clause, when read together with the express provisions relating to delivery and payment dates in the Shipbuilding Contracts, does have the effect of replacing the provisions of the Option Agreement or "*denuding them … of legal effect*". I accept Mr Turner's submissions on this point. I agree with him that the Yard's delivery obligations in relation to dates, which were the subject of Clause 4(ii) and other provisions of the Option Agreement, are clearly also the subject matter of the Shipbuilding Contracts. Thus the latter provisions have clearly replaced the former as a result of the operation of the entire agreement clause. I reject Mr Waller's submission that "*a prior agreement to offer the Buyer the opportunity to bring forward the delivery dates of either one or both of the Optional Vessels which, if accepted, could lead to the variation of one or other shipbuilding contracts, is not the subject matter of either of the shipbuilding contracts*" or "*that it is the subject matter of a separate formal agreement that applies to both vessels*" and survives the formal contracts. I consider that the survival of clause 4(ii) of the Option Agreement would be unworkable alongside the clear provisions for delivery dates, payment dates and provision of guarantee dates found in the Shipbuilding Contracts. As Mr Turner submitted, there is no provision for acceleration of the Buyer's payments. Nor do I consider that the provision in Article VII.1 that the Yard can only deliver prior to the delivery date, with the consent of the Buyer, supports any continuing obligation on the part of the Yard to offer earlier delivery dates.

34. Furthermore I can see every business justification for the provisions of clause 4(ii) of the Option Agreement lapsing under the entire agreements clause and not being replicated in the formal Shipbuilding Contracts. Its provisions were extremely vague as to when the defined circumstances would arise. There would have been room for considerable argument as to what was a "possibility". For example, if the Yard's financial budgeting or constraints, or its labour requirements, did not permit it to offer a recently "freed" slot to the Buyer, because it needed to offer such a slot to a new purchaser on more advantageous terms, or to keep the slot vacant, did that mean that it the Yard was entitled to say it had not "found" a "possibility"? The terms were arguably, in my judgment, so uncertain as to be unenforceable. Moreover, the actual implementation of any such offer by the Yard would have depended on further agreement between the parties as to the dates of payment instalments and delivery dates. In such circumstances I do not consider that one can dismiss the entire agreement clause as a mere standard provision that cannot be regarded as applying to the Option Agreement. All the remainder of its provisions were clearly superseded and there is no justification that I can see for the retention of that one clause when the later agreements provided comprehensively for the rights and obligations of the parties in relation to the two vessels.

35. Accordingly I determine the second preliminary issue against the Buyer. I will hear argument from the parties as to the form of the order and any consequential directions.

Richard Waller Esq (instructed by Messrs DLA) for the Claimant
James Turner Esq (instructed by Messrs Lane & Partners) for the Defendant