Sembawang Corp Ltd v Pacific Ocean Shipping Corp [2004] APP.L.R. 11/25

JUDGMENT : THE HONOURABLE MR JUSTICE GROSS. Commercial Court –25th November 2004

In the matter of an arbitration application under the Arbitration Acts 1950 & 1979
and in the matter of an arbitration claim.

INTRODUCTION

1. The Applicant *("the yard"*) appeals from the Tenth Interim Award of the arbitrators, dated 20th May, 2004 ("the award" and "the arbitrators" respectively), permission having been granted on the 15th October, 2004. In the arbitration, the yard is the Respondent and the present Respondents ("*owners*") are the Claimants.

2. In summary, the matter arises as follows. By an agreement dated 1st November, 1993 ("the contract"), the parties contracted for conversion by the yard in Singapore of the owners' bulk carrier, "SOLITAIRE" ("the vessel") into a dynamically-positioned pipelaying vessel for a sum of Singapore $230,870,220 (equivalent to some £98.1 million at the then current rates of exchange). On the 24th October, 1995, owners exercised their contractual right to terminate the contract, under Art. 37.1(e) thereof. Under Art. 37.2 of the contract, owners then became entitled to arrange for the conversion work required under the contract ("the Work") to be completed elsewhere at the yard's expense insofar as those costs exceeded the contract price. At the material time, there were two other substantial shipyards in Singapore, namely, Keppel Shipyard ("Keppel") and Jurong Shipyard ("Jurong"). In the events which happened, owners did not contract with either Keppel or Jurong for the completion of the Work. Instead, on the 29th February, 1996, owners contracted with a start-up British yard, Swan Hunter (Tyneside) Ltd ("SH"), for the completion works to be carried out in the United Kingdom, after drydocking in Portugal.

3. As will already be apparent, many disputes have arisen out of the contract, hence the long running arbitration which is indeed still continuing. The (tenth interim) award was concerned with (1) the true construction of the wording in Art. 37.2(b) of the contract, "*The OWNER has the duty to mitigate costs*" ("*the key wording*") and (2) in the light of that construction, whether owners were in breach of such "duty". The yard's case was that by contracting with SH owners had been in breach of duty and that, as a result, as much (it is said) as £150 million of completion costs were unnecessarily incurred. The arbitrators unanimously preferred owners' construction of the key wording; by a majority, the arbitrators went on to hold that owners had not been in breach of duty. From that award, the yard now appeals.

THE CONTRACT

4. Although, as foreshadowed, the point of construction is a short one concerning Art. 37, it is necessary to set out a number of provisions of the contract.

"SECTION 1 FORM OF AGREEMENT

1. The WORK shall mean all the work, supplies and services to be performed by the BUILDER in accordance with the CONTRACT and AMENDMENTS and VARIATION ORDERS thereto.

SECTION 2 TERMS AND CONDITIONS OF CONTRACT

Article 2 Interpretation

2.1 No index, title, subtitle, subheading, marginal note, singular or plural of the CONTRACT shall limit, alter or affect the meaning or operation of the CONTRACT.

Article 6 The WORK

6.1 The BUILDER shall perform the conversion of the bulkcarrier 'Solitaire' into a dynamically positioned pipelay VESSEL ….

6.2 Without limiting any other undertakings contained herein, the BUILDER shall:-

e) furnish efficient business administration, supervision and expertise and furnish an adequate supply of materials, parts, equipment and labour to perform the WORK in the most expeditious and economical manner consistent with the interests of the OWNERS; and

f) continuously and diligently perform or cause the performance of the WORK in accordance with the CONTRACT.

Article 7 BUILDER's Representation

7.1 The BUILDER represents and undertakes that it:-

- *shall perform the WORK to the highest professional standards with all due diligence, safeguards and care;*

Article 17 Work Schedule and Programme

17.1 PARTIES expressly agree that time is of the essence for the WORK.

17.2 The BUILDER shall be responsible for scheduling, progress reporting and for achieving performance of the WORK in accordance with the PROGRAMME…

Article 18 Suspension for OWNERS convenience

18.1 The OWNERS may at any time, at their absolute discretion, suspend the performance of all or part of the WORK…

18.2 The OWNERS shall compensate the BUILDER for such costs that are solely attributable to the suspension. "The BUILDER shall be obligated to mitigate its costs".

Article 19 Force Majeure

19.1 Notwithstanding anything else contained in this CONTRACT no PARTY …shall be held to be in breach of CONTRACT for any failure to perform its obligations to the extent that such failure is due to Force Majeure.

19.2 For the purposes of the CONTRACT, Force Majeure shall mean a circumstance or event beyond the reasonable control and contemplation of the PARTY affected and which affects the performance of the CONTRACT and which could not have been prevented or avoided by the exercise of due diligence or other prudent precautions.

19.5 The PARTY claiming Force Majeure shall notify the other PARTY promptly and in any event within 3 days of the occurrence and shall subsequently provide sufficient particulars thereof, including its intended actions to resolve the event. The PARTY shall be obligated to use its best endeavours to mitigate the effect of the Force Majeure event, at its own costs.

19.7 In the event of Force Majeure, an extension of time in the PROGRAMME equal to the length of delay caused to the DELIVERY DATE attributable to the Force Majeure event shall be given.

Article 23 GUARANTEE

23.1 The BUILDER shall provide a one year GUARANTEE….

23.3 The OWNERS may elect to have remedial work performed by others at the cost of the BUILDER. The OWNERS shall provide the BUILDER with full details of the costs and shall take all reasonable steps to mitigate such costs.

Article 36 Termination for OWNERS Convenience

36.1 The OWNERS shall have the right at any time and at its absolute discretion to terminate the CONTRACT by giving the BUILDER a NOTICE of termination. " [Italics added]

5. Article 37 itself was in the following terms:

" Article 37 Termination for BUILDER's Default

37.1 The OWNERS shall have the right, without prejudice to any of its other rights or remedies under, or in, or arising from, or in connection with the CONTRACT or at law, by giving NOTICE to the Builder to terminate the CONTRACT if the BUILDER:-

a) shall become insolvent….or any equivalent act or thing; or

b) without reasonable excuse has failed to commence the WORK on the date given in SECTION 5 – PROGRAMME or has failed to proceed diligently with the WORK 14 days after having received written NOTICE to proceed; or

c) has become liable for the full amount of any liquidated damages; or

d) remains in default of performance of an obligation or provision of the CONTRACT 14 days after receiving NOTICE from the OWNER that he is in default; or

e) fails, neglects, refuses or is unable during the course of the WORK to provide sufficient materials, equipment, services or labour to perform the WORK at the quality specified and at a progress rate deemed sufficient by the OWNERS to provide a reasonable assurance that the WORK shall be completed in accordance with the CONTRACT provisions.

37.2 In the event of termination under paragraph 1 above, the BUILDER and the OWNERS shall have the following rights, obligations and duties:-

a) the Owners shall have the right to complete the WORK itself or with the assistance of THIRD PARTIES….; and

b) the BUILDER shall be liable for the costs and expenses incurred by the OWNERS in the completion of the WORK. The OWNER has the duty to mitigate costs. The OWNERS shall be entitled to claim the performance bond. On completion of the WORK, the OWNERS shall deduct the aforesaid costs and expenses from the CONTRACT PRICE and, in the event of a surplus, effect payment to the BUILDER or, in the event of a deficit, the BUILDER shall reimburse the OWNERS…" [Italics added]

6. Finally here, reference should be made to Art. 40:

" Article 40 Consequential Damages and Exclusion of Liability

40.1 A PARTY shall not be held liable to the other, for indirect losses, loss of revenue, loss of use, loss of profit or anticipated profit except as expressly provided herein."

THE ARBITRATION

7. ***(1) The rival cases***: As recorded in the award, the yard's case was that owners' duty to mitigate under Art. 37.2 b) of the contract constituted a contractual obligation. Unlike the position under the general law in the case of a claim for damages (where there was in any event no true "duty" to mitigate), owners' duty here was not qualified by any obligation to act reasonably. Instead, owners were under an "absolute obligation" to mitigate the costs incurred in the completion of the Work. That absolute duty was subject to "practical limits" and owners were entitled to complete the Work to the standard required of the yard under the contract. But the omission of any reference to a standard of reasonableness was deliberate and was designed to render consideration of owners' commercial interests irrelevant; provided only that the costs of completion could be mitigated, it was no answer for owners to say that there was some collateral disadvantage to themselves, such as delayed completion. It was to be underlined that owners' right to terminate under Art. 37 of the contract did not depend on the yard being in breach, still less in repudiatory breach, of contract; accordingly, the cases in the law of damages which turned on the claimant being an unwilling victim of a breach of contract had no application. Owners had no claim in damages under Art. 37, only a claim in debt; the duty to mitigate was directed to and only to that claim in debt. Furthermore, if regard were to be had to owners' convenience, it would deprive of effect the express provision in Art. 40 of the contract excluding liability for consequential damages. As originally formulated, the yard's case was that *inter alia*, owners should have considered no fewer than 17 yards. Ultimately, however, the yard's

submissions boiled down to a complaint that SH was an unsuitable choice and that owners ought to have chosen either the Keppel or Jurong yard in Singapore for the completion of the Work.

8. Owners' case was that the duty to mitigate under Art. 37.2 b) was essentially the same as that which would arise under the general law in respect of a claim for damages. That duty was not a heavy or demanding one and owners had discharged it.

9. ***(2) The arbitrators' conclusion on construction***: As already foreshadowed, the arbitrators unanimously preferred owners' case to that of the yard on the question of the true construction of owners' duty to mitigate under Art. 37.2 b) of the contract. The essence of the arbitrators' reasoning was succinctly set out in the following passages in the award:

"16. Clearly the starting point is the ambit of the duty. ...we are unable to accept the Yard's contention that the contractual obligation imposed a higher standard than that imposed in a damages claim by law. An important aspect of this is the difficulty of spelling out precisely what might be involved in that higher duty.

19. ....we see real difficulties in identifying the practical limits which we have highlighted ...It cannot be the case...that the commercial men who negotiated this contract intended that the Owners should choose the cheapest possible alternative regardless of how long the work might take or without any consideration of whether, in due course, and assuming no settlement, it would be possible to pursue their claims in arbitration against the Yard.

20. Yet the Yard excludes these considerations, provided one has (otherwise) found practicable means to mitigate costs.

21. ...the flaw in the Yard's argument lies in seeking to extract from the concept of what is practicable these very considerations. We see the obligation on the Owners as one that requires them to mitigate costs within the limits of what is practicable, such limits <u>including</u> such matters as how long the work will take to complete (Fn. A fortiori where the contract excludes any claim for consequential damages) and whether it will be done in such a way as to enable the Owners to pursue their arbitration effectively.

22. The duty, with its familiar ring, is stated in the contract for an excellent reason. The termination provisions of Article 37...cover situations where there is no breach and therefore no claim to damages. It serves to import into a non damages claim the like constraint on the Owners that would apply in a damages claim.

23. And if that is right, then the contractual duty corresponds closely – indeed identically – to the obligation which would be imposed by the general law in any claim for damages..."

10. ***(3) The question of breach of duty to mitigate***: Again as foreshadowed, by a majority, the arbitrators concluded that owners had not been in breach of their duty to mitigate under Art. 37.2 b). On the facts, the arbitrators unanimously concluded that the project had been "*extremely difficult and demanding";* that the project had gone very seriously wrong; that owners had with "*very real reluctance*" terminated the contract and that the completion of a previously terminated construction project of any sort "*always involves a great increase in difficulty*". The arbitrators further noted that the parties had spent the four months following termination in litigation before the Singapore Court as to owners' entitlement to remove the vessel from the yard and as to financial guarantees for the yard. Against this background, the arbitrators, by a majority, made the following fact findings: *" ...Keppel was not seriously interested in completing Solitaire; and Jurong was not interested at all."*

The majority went on to conclude that the decision to complete the vessel in Northern Europe was unobjectionable and that owners had acted reasonably in going to SH.

11. By way of amplification as to Keppel and Jurong, the award said this:

"25.....

a. Keppel had been among the contractors who were originally invited to tender for the conversion job. Indeed Keppel had, in the end, come out the lowest tenderer.

b. Yet the Owners had not awarded the contract to Keppel; and by the end of the negotiations, Keppel believed that it had been used as a stalking horse and was so dissatisfied with the way that these had gone that it was no longer interested in doing the job. The unwillingness to contract was mutual.

c. When it came to the termination, Keppel was approached by one of the Owners' Singapore based executives.

d. Its reactions were lukewarm and slow.

g. ...it is clear that Keppel would not have been prepared to contract with the Owners until, at the very least, it was clear that the Owners would be at liberty to remove the vessel from the Yard.

h. That position was reached in February 1996 – but by then the Northern Europe die was cast.

i. But the precise reason or reasons for Keppel's less than enthusiastic reactions does not matter. What the Owners unquestionably needed, if the project was ever to be finished, and what the Owners were entitled to seek was a committed and enthusiastic contractor. Keppel came nowhere near filling the bill. (Fn.: We are very conscious that this is one of the points at which the majority is disagreeing with [..the dissenting arbitrator..], for whose expertise and highly relevant experience we have great respect. However, we note that the Owners had originally had tenders from two Singapore yards and had let the contract to one of them- with disastrous results. With such a history it does not seem surprising that the Owners should not have been enthusiastic to try Singapore again. If Keppel had wanted the job it should have made the running. It signally did not.)

j. Jurong exhibited no interest at all, so far as we are aware; and the Owners say that they did not approach it because of its close relationship with the Yard; and the possibility of a merger between the two. We consider that indeed there was some rumour to the latter effect (Fn. Borne out in the event by the subsequent merger of the

Yard and Jurong.); and we consider that, in all the circumstances, the Owners acted reasonably and within the ambit of their duty, in not seeking to have the work executed at Jurong. "

So far as it is at all relevant (see below), the dissenting arbitrator agreed with a, b, c and g above but dissented on d, h, i and j.

12. While many of the arbitrators' findings as to SH are not relevant to the appeal, it is appropriate to note the following:

"28.

q. When it comes to access to records, a relevant consideration when arbitration or litigation is in prospect, it is the case that a repair and conversion yard would be more reluctant to let an owner have detailed access to cost records, even in the context of a reimbursable contract.

r. For any yard there was going to be a steep learning curve; and we are not persuaded that the position at SH(T) was sufficiently different to and worse than the position elsewhere so as to render the choice objectionable by the standard of mitigation which we have concluded is the appropriate one.

CONCLUSION OF THE MAJORITY

29. In sum, there were risks going to SH(T); another Northern European choice might have been made which was unobjectionable. But in our view the Owners acted reasonably in going to SH(T) and did not breach their obligations."

Insofar as it is relevant, sub-paragraph 28q of the award was unanimously agreed by the arbitrators; however, the dissenting arbitrator expressed his strong disagreement with sub-paragraph 28r and paragraph 29 of the award.

THE APPEAL

13. ***(1) The ambit and the test***: A number of matters were common ground or not seriously in dispute:

i) The vintage of the arbitration was such that it fell under the Arbitration Acts 1950 – 1979, not the Arbitration Act 1996.

ii) The only issue for me to decide was (in summary and effect) whether the arbitrators had erred in law (1) as to the construction of the key wording in Art. 37.2 b) of the contract; or, (2) on the construction preferred by the arbitrators, in their conclusion that the owners had not been in breach of duty.

iii) In determining this issue, permission to appeal having been granted, the test on the appeal was simply whether the arbitrators' decision on any question(s) of law was wrong; the question of whether the arbitrators were "clearly" wrong was of no relevance.

iv) If I concluded that there had been any error of law, the matter was to be remitted to the arbitrators; owners did not (or not seriously) attempt to argue that any such remission would serve no useful purpose.

14. ***(2) The rival cases***: For the yard, Mr. Boyd QC contended, first, that the arbitrators had erred as to the true construction of Art. 37.2 b); on its true construction, the duty resting on owners to mitigate was an absolute duty, not qualified by any standard of reasonableness. The starting point was that owners' right to terminate the contract under Art. 37.1 did not depend on establishing a breach, let alone a repudiatory breach of contract on the part of the yard. Accordingly, the assumption underlying mitigation of damages in the general law – that the *"innocent"* party was or may have been embarrassed by the contract breaker's breach of contract – was inapplicable here. Moreover, under the general law there was no "*duty*" to mitigate damages; by contrast, the express words in Art. 37.2 b) of the contract spoke of a *"duty to mitigate costs*". Giving these key words their ordinary meaning, it would be wrong to read in a standard of reasonableness. In any event where the draftsman wished to do so (see Arts. 19.5 and 23.3), he had said so. Here in Art. 37, the words meant what they said; owners were under a *duty* to mitigate, that is lessen, *costs*. That duty was an absolute duty, albeit that owners were not simply bound to opt for the cheapest offer to complete the Work; owners were entitled to have the completion works performed to the same contractual standard and "at the same rate of progress" as that provided for under the contract. Moreover, while owners were under a duty to follow a course calculated to produce the least costly method of completing the work, the outcome was to be tested at the time of engaging the (other) yard rather than with regard to the ultimate cost of the work; a distinction was to be drawn between the "*standard of the duty to mitigate and the foreseeability of the outcome*". It followed that owners were not entitled to choose a more expensive yard in preference to a cheaper yard, simply because the more expensive yard was more likely to act in a way which improved owners' chances of success in the arbitration against the yard. Further, the duty excluded consideration of owners' commercial interests (save as to the cost of the work to the contractual standard). Just as Art. 37.1 permitted owners (possibly) to recover for damages irrecoverable at common law, so the duty to mitigate resting on owners was different from any *"duty*" at common law; while the common law "*duty*" was not "*heavy or demanding*", that was not the position here. Still further, had the arbitrators correctly construed the key words (in accordance with the yard's argument), they would or should have concluded that owners should have pursued the Jurong yard (and should not have been put off by a rumour of a merger between Jurong and the yard) and should not have been put off by Keppel's response. Overall, Art. 37 was a clause containing checks and balances, designed to achieve a fair outcome and to apportion loss upon a broadly equitable basis: ***BMBF v Harland & Wolff*** [2001] EWCA Civ 862; [2001] 2 Lloyd's Rep. 227. It would be wrong to be beguiled by "the familiarity of common law concepts", the more especially as the sole focus of the key words was on mitigating *"costs"* not *"damages"*. Finally, it was to be kept in mind that owners were precluded from recovering

consequential loss by Art. 40.1 of the contract; the considerations as to mitigation could not be of such breadth as to permit owners to circumvent this exclusion.

15. Secondly, Mr. Boyd developed his alternative case on the footing that the arbitrators were correct to conclude that the contractual duty resting on owners corresponded closely or identically with the general law. Even here, Mr. Boyd submitted that the duty was different from the *"duty"* of mitigating common law damages given the facts that owners' duty to mitigate costs (1) arose as a contractual obligation and (2) arose as a result of owners' decision to terminate the contract rather than by reason of any breach of contract on the part of the yard. As expressed in the yard's skeleton argument: *"The true question is whether the claimant acted reasonably as between himself and the defendant and in view of the claimant's duty to mitigate the damages."* Owners were in breach of duty in failing to take "positive steps" to encourage Jurong to take an interest in the work and in failing to *"make the running"* in respect of Keppel. Invited in argument to identify the error(s) of law made by the arbitrators, Mr. Boyd put it this way:

" The error of law is having regard to matters which are not relevant to the test of reasonableness….[1] The ability to pursue the arbitration, [2] the ability to further the Owners' commercial interests in other ways, [3] the finding that it was for Keppel to make the running…. " [Numbering added].

Additionally, Mr. Boyd submitted [4] that the arbitrators had erred by approaching the duty as one which was (as at common law) not heavy or demanding. Mr. Boyd added this observation:

" …the books are littered with cases which lay down, as a matter of law, what matters are and are not to be taken into account in applying the test of reasonableness. For example, the question of whether you are obliged to contract with the wrongdoer. "

16. For owners, Mr. Dennys QC submitted that the arbitrators had correctly construed Art. 37.2 b); the duty resting upon owners required them to take reasonable steps to mitigate the costs of completing the work outstanding on termination. Art. 37 was designed to legislate for certainty. Owners did not seek to read anything into the clause, though it was to be observed that the yard's construction did require qualifications to be attached to the suggested absolute duty. Owners' construction did no more than explain what the words "*duty to mitigate*" meant; those words had been used as a well-known legal term of art. Though here owners were under a contractual duty to mitigate whereas at common law the use of the word *"duty"* was a misnomer, nothing turned on that. To some extent the contract was loosely drafted and, with the exception of the wording in Art. 19.5 (where the wording *"best endeavours"* carried a different meaning), all the references to a duty to mitigate in the contract (Arts. 18.2, 23.3 and 37.2) were to be given the same meaning. The need to incorporate a duty to mitigate in Art. 37.2 arose *because* owners were entitled to recover costs, liquidated by the accounting procedure provided for by Art. 37; it was thus nothing to the point that owners' claim was in debt not damages and that owners were under a duty to mitigate costs (rather than damages). Art. 37 provided for termination for cause, whether breach by or the insolvency of the yard; whether or not repudiatory breach was involved was neither here nor there; no owner would undertake such termination lightly. While no doubt Art. 37 was intended to achieve a *"fair outcome"*, opinions could and did differ as to what outcome was fair. ***BMBF*** was an authority on a different clause and in any event was not concerned with mitigation. The yard's case was inherently uncertain; owners could not know at the time of entering into a reimbursable contract how much it would ultimately cost; moreover, given that the contractual milestones could not be met, there was no or little substance in the yard's concession that owners were entitled to have the work performed at the same rate of progress as that provided for in the contract. All these difficulties were accommodated or could be properly addressed if, as owners contended and as the arbitrators concluded, the standard of duty was one of reasonableness.

17. On the assumption that the arbitrators had correctly construed the contract, so that the standard was one of reasonableness, Mr. Dennys submitted that the yard's case was misconceived; it gave rise to no point of law and involved an attempt to go behind the arbitrators' findings of fact. If need be, as to Mr. Boyd's submissions to which I have earlier attached numbering, Mr. Dennys argued: [1] it could not be said that it was irrelevant to consider owners' position in the arbitration; moreover close attention needed to be paid to the actual findings of the arbitrators; [2] it was not irrelevant to consider owners' commercial interests but, in any event, this criticism advanced by the yard lacked content because it did not attach to any finding made by the arbitrators; [3] when fairly read, no proper criticism could be made of the arbitrators' finding as to Keppel; owners were plainly entitled to a committed and enthusiastic yard; [4] on the premise that the arbitrators were correct in their construction of the key words, then the duty was to act reasonably; this criticism fell away.

DISCUSSION

18. ***(1) The true construction of the key wording in Art. 347.2 b):*** With great respect to Mr. Boyd's submissions, I am wholly unable to accept that the arbitrators erred in their construction of the key words of Art. 37.2 b). In my judgment, the arbitrators were plainly right to conclude, as in this instance they did unanimously, that the duty resting on owners required them to take reasonable steps to mitigate the costs of completing the Work. My reasons follow.

19. *First*, as it seems to me, the intention of the parties to the contract was to use the words "*duty to mitigate*" as a legal term of art: see, ***Lewison on the Interpretation of Contracts*** (2004 ed.), at para. 5.08, though I would prefer to rest my conclusion on the parties' intentions, rather than on any presumption. In effect, the parties used a shorthand to incorporate that which is encompassed in the concept of mitigation under the general law. At one stage in his argument, Mr. Boyd said that the while the common law duty may be familiar, it was not at all easy;

if that be right, it tells, if anything, in favour of the parties having chosen for that very reason to settle on the familiar common law concept whatever precisely it entailed, rather than seeking to fashion a definition of their own – a point to which I shall return when considering the yard's suggested "*absolute duty*" in a little more detail. At all events, to my mind, the effect of the parties' wording was (as the arbitrators held – para. 23 of the award) to incorporate into the contract the essence of the "*three rules*" of mitigation comprising its "principal meaning" as set out in *McGregor on Damages* (17th ed.), at paras. 7-004 – 7-006; for present purposes, the first of those rules is most relevant and is stated (at para. 7-004) as follows:

" *(1) The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss."*

While some straightforward modification of the wording of the *McGregor* rules is required to cater for the fact that the parties are here concerned with the costs of completion work flowing from the exercise of an express right to terminate the contract (see below), the essence of the concept is unaltered; owners cannot recover for costs and expenses avoidable by the taking of reasonable steps in mitigation. For completeness, this construction does not involve any contractual implication or the need to read anything into Art. 37.2 b); instead, the true meaning of the words used ("duty to mitigate") expresses the standard of reasonableness required of owners.

20. ***Secondly***, any doubt which might have been entertained that this was the correct construction is, with respect, dispelled when the yard's proposed alternative is subjected to scrutiny.

21. As has been seen, the yard's case is that the duty resting on owners was an "absolute duty". But an absolute duty would involve owners being called upon to do the impossible, or taking the risk of not doing so. Understandably, Mr. Boyd does not argue for so absurd a result. So the "absolute duty" has immediately to be qualified in this respect.

22. Next, it might be thought that an *"absolute duty"* to lessen costs would be judged by reference to the actual cost of completion work incurred; but any such duty would be impractical, not least because owners would not be in a position to know whether they had successfully "*mitigated"* until the replacement yard had completed the work, perhaps months (or more) later. Accordingly and as already noted, Mr. Boyd accepted a further qualification; the question of whether owner had complied with their contractual duty would be tested at the time of engaging the replacement yard. At once, however, this concession illuminates how unpalatable and impractical is the notion of an absolute duty; moreover it imports a test that is difficult to distinguish from a standard of reasonableness; owners, said Mr. Boyd, are to pursue a course "*calculated to produce the least costly method of completing the work"*. Inescapably, the question arises as to the standard required of owners; how, at the stage of engaging the yard, is it to be determined, if not by the standard of reasonableness, whether owners had pursued a course "calculated" to produce the least costly outcome?

23. Matters do not end there. At first blush, an absolute duty might be expected to entail that owners were duty bound to opt for the cheapest offer to undertake the completion works; that, however, is not the yard's contention. Building upon the definition of *"Work"* in the contract, the argument is that owners were entitled to have the completion works performed to a contractual standard and at the contractual *"rate of progress"*. As Mr. Dennys submitted, it is not easy to give substance to the contractual "rate of progress" especially where (as here) the trigger for termination was Art. 37.1 e) of the contract.

24. By this time, the suggested *"absolute duty*" is very far removed from the natural meaning of the contractual wording in question. As the arbitrators correctly concluded (paras. 16 and 19 of the award), there are real difficulties in identifying the practical limits of the yard's suggested duty – limits which are essential if the duty is not to be rejected for absurdity or as absurdly uncommercial. The notion that the parties are to be taken as having agreed to embark on so uncertain a course, is one that I view as wholly implausible. Moreover, there is a real difficulty in discerning any principled basis for the qualifications for which the yard contends; the reality, I conclude, is that the yard is contending for what might be described as a "*reasonableness lite"* test, skilfully formulated and having the effect of excluding from the arbitrators' consideration of reasonableness any matters potentially unfavourable to the yard's position. In the result, the yard's case for an *"absolute duty"* is unpersuasive and my preference for a duty to mitigate, entailing the familiar standard of reasonableness, is reinforced.

25. ***Thirdly***, with respect to Mr. Boyd's submission to the contrary, nothing in the nature or scheme of Art. 37 supports the yard's case that the present duty must be distinguished from the familiar common law "*duty"*.

    i) Art. 37.1 contemplates owners terminating the contract for cause. Plainly, it is to be distinguished from Art. 36, which permits owners to terminate the contract at their "*absolute discretion"*. Much time could be taken seeking to analyse whether termination under Art. 37 depended on a breach of contract by the yard or whether the clause could be triggered by a frustrating event; I very much doubt the usefulness of the exercise. Manifestly, Art. 37.1 as a whole permits termination without the need for owners to establish repudiatory breach on the part of the yard. However, Art. 37.1 b), c), d) and e) are at least overwhelmingly likely to entail a breach of contract by the yard. While Art. 37.1 a) (insolvency and the like) may be triggered without a breach of contract on the part of the yard, an event within that sub-article would, at the lowest, raise grave doubts about the yard's continued ability to perform the contract. As it seems to me, for the possibility of termination under Art. 37 to arise, something "significant" must have gone wrong with the project, outside of owners'

sphere of responsibility; see too, the conclusions of Tuckey J. (as he then was) on Art. 37.1 e) in his judgment of 4th June, 1998, at an earlier stage in this dispute, at pp. 10-11 of the transcript.

ii) Against this background it is improbable (to put it no higher) that in practice rights under Art. 37 would be invoked lightly. It is noteworthy that in the present case the arbitrators concluded (as already recorded) that the project had gone very seriously wrong and that owners had terminated the contract with *"very real reluctance"*. In the circumstances, even insofar as termination under Art. 37 may not involve a breach of contract on the part of the yard, I am not persuaded that the context in which it will be invoked is so far removed from the "breach cases" such as to require the owners' duty to mitigate to be given a meaning different from that under the general law.

iii) As it seems to me, the intent of Art. 37 was (as Mr. Dennys submitted) to legislate for certainty (as already discussed, itself a pointer in favour of owners' construction). Furthermore, there is no reason to doubt that, as held in ***BMBF,*** termination clauses such as this strive to achieve fairness between the parties. Beyond this, ***BMBF*** cannot assist and it was not, of course, an authority dealing at all with the question of mitigation. Moreover, when considering "*fairness*", it is pertinent to have regard to the context (see above) in which termination for cause will arise. Weighing all these factors, I am unable to accept that they tell against the adoption of owners' construction.

iv) The yard's case sought to emphasise that under Art. 37.2 b), owners' duty was to mitigate *"costs"* not damages. For my part, I am unable to accept that this is a matter of significance. The subject-matter of Art. 37 concerns the costs and expenses incurred by owners in completing the Work (elsewhere than the yard). It is those costs and expenses which must be mitigated. The fact that Art. 37.2 provides for owners to claim in debt and furnishes its own accounting machinery seems to me to be neither here nor there; for present purposes, there can be no good reason for owners' standard of conduct to hinge on whether their claim lies in debt or damages .

v) Instead, as owners submitted, it is the fact that owners' claim for costs and expenses is brought under the express contractual provisions of Art. 37 that points to the need, in turn, for an express provision governing owners' duty to mitigate. Had Art. 37.2 b) not included the wording "*duty to mitigate costs*", it might have been said that there was no fetter on owners' entitlement to claim for relevant "costs and expenses", provided only that they had been incurred in the completion of the Work: see, para. 22 of the award. But the need for such a fetter, does not provide guidance as to its scope, nor, still less, any justification for a departure from the familiar common law standard.

26. ***Fourthly***, Mr. Boyd submitted that the duty in Art. 37.2 b) was contractual; a breach of that duty sounded in damages. Accordingly, it differed from the position at common law, where there was no such duty: ***The Solholt*** [1983] 1 Lloyd's Rep. 605, at p.608. As far as it goes, this submission is well-founded; Art. 37.2 b) does give rise to a contractual duty to mitigate, whereas there is no such duty, strictly so-called, at common law. It does not, however, follow that the meaning of the key wording in Art. 37.2 b) differs from the "*duty*" to mitigate under general law. The use of the expression "duty to mitigate" under general law simply involves a misnomer attributable to "*habitual use*" by lawyers: ***The Solholt,*** *ibid*.

27. ***Fifthly***, there is of course the need to read the contract as a whole. In this regard:

i) I have already underlined the fact that the various references to mitigation in the contract are couched in somewhat different terms; Art. 18.2 and Art. 37.2 b) differ only in Art. 18.2 using the word "*obligated*" instead of the word "duty" found in Art. 37.2 b). Art. 19.5 includes the wording *"best endeavours"* and Art. 23.3 the wording "*take all reasonable steps*". Basing himself on these differences, Mr. Boyd submitted that the absence of a reference to reasonableness in Art. 37.2 b) was deliberate; when the draftsman wished to incorporate a reasonableness standard, he knew how to do so. At first blush, there is some attraction in this submission; but the more the matter is considered, the less attractive it becomes. To begin with, it is not apparent why the yard should be under an absolute duty (Art. 18.2, if Mr. Boyd is right) to mitigate its costs when the Work has been suspended for owners' convenience. Nor is it apparent why a reasonableness standard should attach to remedial work under the yard's guarantee (Art. 23) but not to completion Work under Art. 37.2 b). Overall, it seems implausible that the commercial parties intended to provide for several different standards to govern mitigation when it arose. To my mind, the correct conclusion is that the contract was somewhat loosely drafted and that a reasonableness standard was intended to apply to all matters of mitigation of costs; the one possible exception (I put it no higher) may be Art. 19.5 where it is arguable that the words "*best endeavours*" may impose an additional duty – but, that is in the context of the party claiming Force Majeure coming under a duty to mitigate the *effect* of Force Majeure, not the *costs* it is seeking to recover from the other party.

ii) The exclusion of liability for consequential loss and the like contained in Art. 40.1 of the contract, does not assist on the question of whether the duty to mitigate involves a standard of reasonableness. Art. 40.1 is a constant, whatever the standard required of owners when performing their duty to mitigate. In my judgment, it certainly does not follow from the fact that owners are not entitled to recover damages for consequential loss that they are or ought to be obliged to ignore the risk of such losses when considering options for the completion of the Work; such a requirement would in any event be unrealistic. The arbitrators' observation to the contrary effect (para. 21 of the award), strikes me as soundly based. It is further to be underlined that an attempt by owners to "*manipulate*" the *"mitigation*" with a view to achieving a recovery not otherwise open under the contract

would always run the risk of the arbitrators disallowing costs thus incurred by the application of a standard of reasonableness.

28. ***(2) Breach of duty***: I turn to the question as to whether, assuming the correctness of the construction of Art. 37.2 b) of the contract adopted by the arbitrators, they erred in law in concluding that owners had not been in breach of the duty resting upon them.

29. ***The burden of the duty****:* Even here, the yard sought to argue that the nature of the duty resting on owners differed from that at common law. Essentially for the reasons already given, I do not think that the duty resting on owners to mitigate under Art. 37.2 b) differed in substance from the position under general law. I am unable to accept that there is room here for a duty to take reasonable steps to mitigate which is somehow heavier and more demanding than at common law. No doubt when considering the reasonableness of owners' actions the arbitrators must have regard to the context but there is nothing in the award to suggest that they did not: see paras. 21-23 and 24 and following of the award. Having reached this conclusion, it will be unnecessary to say more of Mr. Boyd's point which I have numbered [4].

30. ***A question of law?*** I have earlier highlighted a passage from Mr. Boyd's submissions in which the contention was advanced that the "*books are littered with cases which lay down … as a matter of law, what matters are and are not to be taken into account in applying the test of reasonableness*". With great respect, I am unable to accept a submission advanced in such terms; indeed, the true position can be illustrated by reference to the example offered by Mr. Boyd, namely, the "*obligation*" on the innocent party to enter into a fresh contract with the wrongdoer. That was the very point which arose in the leading case of ***Payzu v Saunders*** [1919] 2 KB 581. At first instance, McCardie J. held that the (innocent) plaintiff buyers had failed to mitigate their damages because they had not accepted an offer from the defendant sellers (who were in breach of contract) to supply goods on cash terms, the contract having originally provided for sales on credit. In the Court of Appeal, the plaintiffs submitted that as a matter of law they had not been bound to consider any offer made by the defendants because of their prior conduct. Bankes LJ (at pp. 588-9) said this: *" It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as [a] matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant….But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case…."*.

Scrutton LJ (at p.589) expressed the matter this way: *" Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same…. Mr. Matthews [for the plaintiff] has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience….in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty."*

Thus it was not the Court's conclusion that the innocent party was obliged to contract with the party in default as a matter of law; that is to stand ***Payzu v Saunders*** on its head; the correct position is that as a matter of fact it had been unreasonable for the plaintiffs to refuse to do so.

31. In ***The Solholt*** *(supra)*, Sir John Donaldson MR (as he then was) put the matter crisply (at p.608): *" Whether a loss is avoidable by reasonable action on the part of the plaintiff is a question of fact not law. This was decided in* ***Payzu v Saunders****…"*

32. ***McGregor (op. cit.)*** is to like effect, at para. 7-016, observing that "*it tends to be regarded as trite law*".

33. Against this background, while I would be reluctant to say that a question of law could *never* arise as to the matters taken into account or not taken into account when considering whether a party has acted reasonably to mitigate damages, any such questions must be rare. Essentially, the inquiry is one of fact. Nonetheless, I go on to consider numbered submissions [1] – [3] advanced by Mr. Boyd, on their individual merits.

34. ***[1] Owners' ability to pursue the arbitration****:* The starting point is to clarify what is meant in this regard. As it emerged in argument, this matter goes to access to records. The arbitrators unanimously (para. 28.q of the award) regarded this as a relevant consideration when an arbitration or litigation was in prospect. That was indeed the arbitrators' only finding in this regard; their observations in para. 19 of the award went only to testing the width of the rival submissions. For my part, once the matter is clarified, I could not begin to say that the arbitrators had erred in law as to its relevance.

35. ***[2] Owners' commercial interests:*** The short answer to this point is that, as Mr. Dennys submitted, the yard's complaint lacks content because it does not attach to any finding made by the arbitrators. In any event, I am amply satisfied that if and insofar as the arbitrators did have regard to owners' commercial interests, they were entitled as a matter of law to do so.

36. ***[3]The arbitrators' findings as to Keppel****:* The yard's criticism here focussed on the sentence in fn.9 to para.25i of the award, which read "If Keppel wanted the job it should have made the running. It signally did not." In effect, the yard's submission was that this finding reversed the "burden"; it was for owners, duty bound as they were to take reasonable steps in mitigation, to make the running. Whatever might have been the position had this sentence stood in isolation, it does not. Read fairly, in the context of paras. 24 and 25 of the award and as a whole, the

arbitrators' conclusion (by a majority) was that owners were entitled to a committed and enthusiastic contractor and that Keppel was not such. The failure by Keppel to "make the running" simply formed part of the evidence as to its lack of enthusiasm and commitment. No proper criticism can be made of that finding as a matter of law; whether the arbitrators' conclusions as to Keppel's lack of serious interest in the completion works was correct as a matter of fact is neither here nor there.

37. ***The position of Jurong***: Though criticism of the arbitrators' conclusion with regard to Jurong did not, as I understood it, form part of Mr. Boyd's numbered submissions as to errors of law, I will nonetheless deal with the position of Jurong. Given the arbitrators' fact finding that Jurong was not interested at all (paras. 24j and 25j of the award), it is difficult to see how any criticism could properly be made of the arbitrators in this regard. As a matter of common sense supply and demand, badgering an unwilling party to take on a contract is in any event only likely to raise the price. Insofar as the owners failed to approach Jurong because of a rumour (later borne out) of a merger between Jurong and the yard (para. 25j of the award), the arbitrators were entitled to conclude as a matter of fact that such conduct was not unreasonable. Nothing in ***Payzu v Saunders*** or ***The Solholt*** requires any contrary conclusion.

38. ***Overall conclusion:*** I can readily understand the yard's concern in the present context; owners' choice of a replacement yard could have a very substantial impact on the yard's exposure. But the question for me is not whether I would have reached the same conclusion as did the arbitrators (who of course heard the evidence); nor is it whether the conclusions of the arbitrators (the parties' chosen tribunal) were factually correct. The only issue before me at this stage of the argument is whether the arbitrators erred in law in deciding that owners had not been in breach of their duty to mitigate under Art. 37.2 b) of the contract. With respect to the yard's submissions, upon analysis, they betray, as Mr. Dennys characterised them, an attempt to go behind the arbitrators' findings of fact. Indeed, as it seems to me, the yard's true complaint is that the majority should have arrived at the same factual conclusions as the dissenting arbitrator. At all events, I am satisfied that the arbitrators' conclusion on this part of the case was one which they were entitled to reach and does not disclose any error of law.

39. In the event, this appeal must be dismissed. I shall be grateful for the assistance of counsel in drawing up the order and on all questions of costs.

40. ***Postscript:*** For completeness, I record the following:

i) Late in his oral submissions, Mr. Boyd canvassed the possibility of remitting the award to the arbitrators for further reasons. Given the view which I take of the matter, no such need arises.

ii) Much play was made by the yard of the reasons of the dissenting arbitrator set out in the award. I have taken those into account *de bene esse*; whether such reasons are strictly admissible is a matter on which I do not express a view and is best left for decision on another occasion.

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